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

September 30, 2022

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

This case, on remand from the United States Court of Appeals for the Ninth Circuit, raises again a question that has divided the Board and troubled the court for two decades: whether, consistent with the duty to bargain established by Section 8(a)(5) of the National Labor Relations Act (the Act), an employer may unilaterally cease dues checkoff after the expiration of the collective-bargaining agreement that provides for it. That is, where a collective-bargaining agreement requires the employer, when authorized by an employee, to deduct union dues from the employee's wages and remit the dues to the union, is such dues checkoff, like most terms and conditions of employment, part of the status quo that the Act requires the employer to maintain—or bargain over changing—after the collective-bargaining agreement expires? See *NLRB v. Katz,* 369 U.S. 736, 743 (1962). Or, rather, is there reason for the Board to include dues checkoff among the relatively few terms that an employer may change unilaterally after contract expiration? For the reasons explained below, we find that dues checkoff should be treated as part of the status quo that cannot be changed unilaterally after contract expiration.[1]

The facts here are not in dispute: The Respondent unilaterally ceased dues checkoff over a year after its contract with the Charging Party Union expired, at a time when Board law required the Respondent to first provide the Union an opportunity to bargain. Although earlier, and indisputably longstanding, Board precedent would have permitted the Respondent's unilateral action, the Board has never persuasively explained *why* dues checkoff should be an exception to the *Katz* rule prohibiting unilateral changes to terms and conditions of employment that are mandatory subjects of bargaining. The Board's initial decision on the issue, *Bethlehem Steel*,[2] provided virtually no rationale for its view, essentially treating dues-checkoff provisions as functionally indistinguishable from union-security provisions.[3] And, in a series of subsequent decisions, including cases like *Tampa Sheet Metal*,[4] in which no union-security provision was present, the Board did not supply a satisfactory rationale for the *Bethlehem Steel* rule. Throughout the two-decade odyssey of *Hacienda Hotel*,[5] a case materially identical to this one, the Board repeatedly failed to provide the Ninth Circuit a persuasive rationale for the Board's *Bethlehem Steel* rule.

In 2015, the Board issued a thoughtful and well-reasoned decision overruling *Bethlehem Steel*. *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (holding

[1] On September 19, 2018, Administrative Law Judge Jeffrey D. Wedekind issued a decision dismissing the complaint. In its initial decision, the National Labor Relations Board adopted the judge's dismissal but on a different rationale. *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019) (*Valley Hospital I*), corrected February 4, 2020. On the Union's petition for review, the Ninth Circuit remanded the case to the Board. *Local Joint Executive Board of Las Vegas v. NLRB*, 840 Fed.Appx. 134 (9th Cir. Dec. 30, 2020) (unpublished decision), motion for panel rehearing denied Feb. 19, 2021 (*LJEB v. NLRB*). Upon accepting the court's remand, the Board solicited and received statements of position from the Respondent, the Union, and the General Counsel. The Board has considered the court's memorandum remanding, *Valley Hospital I*, and the record in light of the statements of positions and has decided to reverse *Valley Hospital I.*

[2] 136 NLRB 1500 (1962) (holding that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[3] After properly holding that the terms of Sec. 8(a)(3) mandated termination of union-security provisions upon expiration of a collective-bargaining agreement containing them, the Board summarily added:

> [s]imilar considerations prevail with respect to the Respondent's refusal to continue to checkoff [sic] dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force.

Id. at 1502. The Board offered no further explanation. Significantly, it entirely failed to address the absence of any basis in statutory text for declaring dues-checkoff provisions terminable upon contract expiration, in contrast to union-security provisions.

[4] *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988). There, the Board held, without explanation, that a dues-checkoff arrangement did not survive contract expiration, even though union security was prohibited under a State "right to work" law. Id. at 326 fn. 15.

[5] *Hacienda Hotel Inc. Gaming Corp. d/b/a Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (*Hacienda I*), review granted and case remanded by *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002) (*LJEB I*), supplemented on remand by 351 NLRB 504 (2007) (*Hacienda II*), review granted and decision vacated by *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008) (*LJEB II*), supplemented on remand by 355 NLRB 742 (2010) (*Hacienda III*), review granted and case remanded by *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011) (*LJEB III*), supplemented on remand by 363 NLRB 47 (2015) (*Hacienda IV*), motion for reconsideration denied (2016), review granted and order vacated by *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129 (9th Cir. 2018) (*LJEB IV*), supplemented on remand by 367 NLRB No. 101 (2019) (*Hacienda V*).

dues checkoff to be subject to *Katz*' rule prohibiting unilateral changes in most terms and conditions of employment after expiration of a collective-bargaining agreement that contains the checkoff obligation).[6] *Lincoln Lutheran* was the applicable law at the time of the Respondent's unilateral termination of dues checkoff, and it clearly called for a finding that the Respondent had violated the Act in this case. Nonetheless, the then-majority, in *Valley Hospital I*, overruled *Lincoln Lutheran* and again tried to construct a rationale for its desired rule. The majority there rested its treatment of dues checkoff as an exception to the general *Katz* rule on its view that these provisions are "uniquely of a contractual nature" and, for that reason, they do not survive the contract's expiration.

In its opinion remanding the case to us, however, the Ninth Circuit highlighted a half-dozen common contract provisions that are similarly "created by the contract" but that the Board has nonetheless found to survive contract expiration under *Katz*.[7] The court therefore found that the *Valley Hospital I* majority decision was arbitrary and instructed us to "grapple explicitly with" the cases that appear inconsistent with the "contract creation" justification. As discussed below, we find that those cases—which we reaffirm as correctly decided—cannot be reasonably harmonized with the *Valley Hospital I* majority decision.[8] They illustrate how the majority there erred in constructing a "created by the contract" category that, if adopted, would logically require the Board to create many additional exceptions to the status quo requirement, with the attendant risk of undermining the Act's foundational policy favoring collective bargaining.

We have carefully reexamined the question of whether an employer's statutory obligation to check off union dues terminates upon expiration of a collective-bargaining agreement, especially in light of the precedents that the Ninth Circuit instructed us to address. We are persuaded that the Board's well-supported analysis in *Lincoln Lutheran*, which more judiciously limits exceptions from the duty to maintain the status quo, better effectuates the Act's policy (as expressed in Sec. 1) to "encourag[e] the practice and procedure of collective bargaining" and protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. In short, we find that a dues-checkoff provision properly and reasonably belongs in the broad category of mandatory bargaining subjects that Section 8(a)(5) of the Act bars employers from changing unilaterally after the expiration of a contract, rather than in the small handful of exceptions to the rule. Thus, we again reject the *Bethlehem Steel* rule that *Valley Hospital I* improvidently reinstated.

Finally, we conclude that applying our holding retroactively in all pending cases, including this case, would not cause manifest injustice. When the Respondent unilaterally ceased its dues deductions, *Lincoln Lutheran* was the applicable law, and the Respondent was demonstrably aware that under existing law it was obligated to continue dues checkoff after the contract expired.[9] The Respondent can hardly be said to suffer injustice, let alone manifest injustice, by being held to the legal standard

---

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

[7] Those contract provisions involve such matters as seniority, grievance processing, and payments to union funds.

[8] Insofar as the dissent or the Respondent suggests that it is improper for the Board to change its approach on remand, rather than simply finding a way to harmonize the cases cited by the court (as the dissent seeks to do, but, in our view, without success), we note that, after recounting the Board's history of changes in its approach on this issue, "based on legitimate shifts in regulatory perspective," the court expressly stated, "The Board may change direction yet again." 840 Fed.Appx. at 137.

Further, we reject the dissent's contention that for us to rethink our approach in response to a court opinion is inconsistent with the Board's nonacquiescence policy. The nonacquiescence policy involves the Board's discretionary application of its expertise to adhere to its view on a matter *when it perceives that a contrary court ruling is inconsistent with the Act's policies*. See, e.g., *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007) (Board "is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision, but will instead respectfully regard such a ruling as the law of that particular case") (citing cases); *Neilsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1067 (7th Cir. 1988) (Board "is not obliged to accept [circuit court's] interpretation" and may "refus[e] to knuckle under to the first court of appeals (or the second, or even the twelfth) to rule adversely to the Board") (citing cases). Our nonacquiescence policy does not inhibit us from adopting a new approach pursuant to a court opinion if we think that opinion is correct. In this regard the dissent is simply wrong to suggest that we are changing our approach on this issue because we read the Ninth Circuit's opinions as telling us, procedurally, what we "should" do. Rather, we share the substantive concerns articulated by the Ninth Circuit, and we reconsider our approach based on our understanding and application of the Act's policies.

Nor are we persuaded that the Ninth Circuit is destined to remain "an outlier" among the courts, as the dissent claims. If no other courts have yet endorsed the approach we adopt (again) today, that is because the *Valley Hospital I* majority prematurely terminated *Lincoln Lutheran*'s application. Although the dissent charges us with changing Board law "based on pure speculation" about what other courts will, or may, do, again, this mischaracterizes our point. We are not changing Board law based on what other courts will or may do. We simply express our openness to seeing how the law develops when those courts belatedly have an opportunity to consider the issue in light of the rationale we provide.

[9] In addition, as we explain below, *Lincoln Lutheran*'s predecessor, *WKYC-TV*, above, expressed the Board's position on the relevant law at the time the parties entered into their collective-bargaining agreement in mid-April 2014, 2 months prior to the Supreme Court's decision in *NLRB v. Noel Canning*, above, which invalidated *WKYC-TV*.

that it knew applied at the time it acted. Accordingly, we reverse the dismissal of the complaint recommended by the judge and adopted on different grounds by the Board majority in *Valley Hospital I*,[10] we reinstate the holding of *Lincoln Lutheran*, and we find that the Respondent has violated Section 8(a)(5) and (1) of the Act as alleged.

Facts

The relevant facts of this case are undisputed and based on a stipulated record. In short, on February 1, 2018, about 13 months after the expiration of the parties' contract, which contained a dues-checkoff clause providing that the Respondent would deduct employees' authorized dues from their pay and remit those dues to the Union, the Respondent ceased its practice of dues checkoff. The Respondent did so after 5 days' notice and admittedly without providing the Union an opportunity to bargain. The Respondent's January 26, 2018 notice to the Union referenced a memorandum from the Board's then-General Counsel, GC Memo 18-02 (December 1, 2017), which signaled that the General Counsel might seek a change in Board law. The memo included *Lincoln Lutheran*'s holding that "the dues-checkoff obligation survives expiration of the collective bargaining agreement" among "'significant issues' that are mandated for submission to the Division of Advice" in the General Counsel's office before an unfair labor practice complaint was to issue.[11] Apparently in reliance on GC Memo 18-02, the Respondent's notice stated that the Respondent would "indefinitely suspend the dues check-off process for all bargaining unit members, effective February 1, 2018."

The parties' 2013–2016 contract, which had been agreed to in mid-April 2014, applied (retroactively) by its terms from January 1, 2013, through December 31, 2016, and the parties were still operating under the expired contract's terms at the time of the events giving rise to this case. The contract's Article 4, titled "Union Security," contained the relevant provisions.[12] Section 4.03, titled "Check-Off," stated:

> The Check-Off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made a part of this Agreement, shall be continued in effect for the term of the Agreement.

Exhibit 2, referenced in Section 4.03, is a Check-off Agreement containing the text of the Payroll Deduction Authorization form to be used by employees in requesting dues checkoff. The Check-off Agreement states that the Respondent agrees "during the term of the Agreement" to deduct union dues monthly from the pay of employees who have voluntarily submitted the Payroll Deduction Authorization form. In turn, the Payroll Deduction Authorization form states, inter alia, that the authorization will remain in effect and be irrevocable, regardless of whether the employee is a union member, unless the employee revokes it by sending written notice to the Respondent and the Union "by registered mail during a period of fifteen (15) days immediately succeeding any yearly period subsequent to the date of this authorization or subsequent to the date of termination of the contract between the [Respondent] and the Union, whichever occurs sooner."

Procedural History

After a hearing, the judge dismissed the complaint. Although *Lincoln Lutheran* was the applicable precedent at the time of the Respondent's termination of dues-checkoff, the judge correctly noted that this case is, in nearly all material respects, factually identical to *Hacienda Resort Hotel & Casino*, above at fn. 5. He applied *Bethlehem Steel*, as that precedent was applied by the Board in *Hacienda II*; he viewed *Hacienda II* as not having been overruled by the Board in subsequent *Hacienda* decisions or in *Lincoln Lutheran*. In *Hacienda II*, the Board held that the employer could unilaterally end dues checkoff after the contract's expiration, based on the provision's language stating that checkoff would remain in effect for the term of the contract. Because the contract provision in this case, too, stated that it "shall be continued in effect for the term of the Agreement," the judge found that the Respondent's dues-checkoff obligation terminated with the collective-bargaining agreement.

[10] The judge recommended dismissal of the complaint based on his interpretation of the contract's language addressing checkoff, rather than applying *Lincoln Lutheran*. We agree with the General Counsel and the Union that *Lincoln Lutheran* was the applicable precedent when this case arose in 2018 and that the Respondent's action would properly have been found unlawful under that precedent. As explained, we reverse *Valley Hospital I*'s overruling of *Lincoln Lutheran* today, and we apply today's holding retroactively.

[11] More recently, in GC Memo 21-04 (August 12, 2021), the current General Counsel included "cases involving the applicability of *Valley Hospital [I]*" among cases that the General Counsel thinks "compel centralized consideration" to "allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission." Id. at 1, 4.

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

Accordingly, he dismissed the complaint without applying *Lincoln Lutheran*.

The Board majority, in *Valley Hospital I*, acknowledged that *Lincoln Lutheran* was the applicable precedent at the time the Respondent terminated dues checkoff and that the judge had erred in relying on *Hacienda II*. But the majority, too, declined to apply *Lincoln Lutheran*. Instead, without any party having asked it to do so, the majority overruled *Lincoln Lutheran* and applied its decision retroactively. The core rationale of the majority was that

> [A] dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the Act only for the duration of the contractual obligation created by the parties. There is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement. This holding and rationale apply even in the absence of a union-security provision in the same contract.

Valley Hospital I, above, slip op. at 1. Accordingly, the majority dismissed the complaint.

On review, the Ninth Circuit expressed concerns about the majority's rationale in *Valley Hospital I*, particularly its failure to address a number of "apparently contrary precedents" and held that, without such analysis, the decision was not a reasoned one.[13] As the court explained:

> In particular, the Board has concluded in prior decisions that, under *Katz*, each of the following obligations contained in a collective bargaining agreement survived the expiration of that agreement: requiring an employer to process grievances short of arbitration, *Am. Gypsum Co.*, 285 N.L.R.B. 100, 100 (1987); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962); granting union representatives leave or time off for official union business, *Am. Gypsum*, 285 N.L.R.B. at 102; requiring an employer to hire workers through a union hiring hall, *Sage Dev. Co.*, 301 N.L.R.B. 1173, 1179 (1991); permitting union access to the employer's property, *Frontier Hotel & Casino*, 309 N.L.R.B. 761, 766 (1992); recognizing stewards designated by a union at the employer's workplace, *Frankline, Inc.*, 287 N.L.R.B. 263, 263–64 (1987); granting seniority rights to union officials, *id.* at 264; *Bethlehem Steel*, 136 N.L.R.B. at 1503; contributing to collectively bargained multiemployer trust funds, such as health and welfare funds, pension funds, vacation funds, and apprenticeship funds, *PRC Recording Co.*, 280 N.L.R.B. 615, 618 (1986); *KBMS, Inc.*, 278 N.L.R.B. 826, 849 (1986); *Vin James Plastering Co.*, 226 N.L.R.B. 125, 132 (1976); and, abiding by seniority provisions when recalling workers from layoffs, *Am. Gypsum Co.*, 285 N.L.R.B. at 102 & n.6, *PRC Recording*, 280 N.L.R.B at 636.
>
> The Board was required to grapple explicitly with these apparently contrary precedents in its decision, but it failed do so. *See Altera [Corp. & Subsidiaries v. Comm'r of Internal Revenue]*, 926 F.3d [1061,] 1085 [(9th Cir. 2019)]; *Modesto [Irrigation Dist. v. Gutierrez]*, 619 F.3d [1024,] 1034 [(9th Cir. 2010)]. For the Board's decision to be a reasoned one, the Board must recognize and explain any departure from precedent. It may not simply ignore inconvenient precedents or dispense with them "*sub silentio.*" *Altera*, 926 F.3d at 1085. The Board must explicitly address the prior decisions identified by the Union and provide a coherent account of the relationship between such precedents and the "contract creation" rationale employed in this case.

LJEB v. NLRB, 840 Fed.Appx. at 137. The court accordingly remanded the case to the Board to "so that it may have an opportunity to provide an adequate explanation for its approach to dues checkoff by explicitly addressing the precedents cited by the Union that appear to contradict the 'contract-creation' rationale used in this case." Id. at 138. For reasons that included "the disruptive consequences of vacatur," especially in light of the Board's *Hacienda* history of repeated changes of approach to this issue, the court chose not to vacate *Valley Hospital I* pending further consideration by the Board. Id. The court did, however, retain jurisdiction over any subsequent petition for review in this case. Id. Later, the court unanimously denied the Union's February 10, 2021 request for panel rehearing of the court's choice not to vacate *Valley Hospital I*. Order dated February 19, 2021 (Case No. 19-73322). On March 23, 2021, the Board accepted the court's remand and solicited the parties' positions.

Positions of the Parties

The General Counsel, on remand, takes the position that "dues checkoff is of the same nature as the rights and benefits, whether contractually created or not, that survive expiration of a collective-bargaining agreement

[13] On the same day, the Ninth Circuit also issued a summary remand of the Board's decision in *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020). *Valley Health* involves additional issues, but it turns, in part, on the Board's resolution of the dues-checkoff issue in this case. *Valley Health* remains pending before the Board and will be resolved in a separate decision.

and is different in nature from the very limited set of waivers of rights elemental to the collective-bargaining process that do not survive." Neither the *Valley Hospital I* Board's "contract creation" rationale nor any other basis consistent with the purposes of the Act justifies treating dues checkoff as unilaterally terminable after contract expiration, the General Counsel argues. Further, like other contractually created rights that survive expiration, dues checkoff "relate[s] to facilitation of effective union representation and access to benefits available because of union representation." The *Valley Hospital I* Board acted arbitrarily, the General Counsel contends, in distinguishing dues checkoff from other employee payroll deductions simply because dues are paid to a union and regulated by Section 302(c)(4) of the Taft-Hartley Act. Further, dues checkoff is an employee benefit, akin to other contractual benefits that may not be changed unilaterally, the General Counsel argues; it is not a waiver of rights attendant to bargaining like no-strike and no-lockout provisions, and it is therefore not a lawful economic weapon but a term and condition of employment that may not be weaponized by unilateral action. Thus, the General Counsel "respectfully urges the Board to reverse its holding in these matters and to return to the holding of *Lincoln Lutheran of Racine*, that, 'like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.' 362 NLRB 1655, 1655 (2015)."[14] Applying a reinstated *Lincoln Lutheran* and the "clear and unmistakable waiver" test that applies when no collective-bargaining agreement is in effect, the General Counsel argues, the Board should find that the Respondent's admittedly unilateral termination of dues checkoff violated Section 8(a)(5).

The Union agrees with the General Counsel that the Board should reverse its decision in *Valley Hospital I*, arguing that the logic of the *Bethlehem Steel* rule reinstated by the *Valley Hospital I* Board does not apply to "right to work" states, including Nevada, where this case arises. That is, dues-checkoff provisions cannot be enforcement mechanisms for union-security arrangements, as *Bethlehem Steel* described them, where union-security arrangements are prohibited. Few states had "right to work" laws when *Bethlehem Steel* was decided, the Union notes, and the Board at that time did not consider its rule's relevance to "right to work" states. And the *Valley Hospital I* Board's reliance on a "contract creation" theory to explain *Bethlehem Steel* cannot be squared with *Bethlehem Steel* itself, the Union contends, because, in that very same decision, the Board held that permitting the employer to unilaterally change contract provisions would be "in derogation of the Union's representative status and a violation of Section 8(a)(5)." *Bethlehem Steel*, 136 NLRB at 1503. Nor can the "contract creation" theory be squared with *Bethlehem Steel*'s progeny, the Union argues. Rather, dues checkoff should be subject to *Katz*' rule against unilateral changes, as other payroll deductions and most contractual terms are. *Lincoln Lutheran* was a well-reasoned Board decision grounded in the Act's principles, the Union asserts, and the Board should apply it here and find the violation as alleged.

The Respondent, in contrast, contends that the *Valley Hospital I* Board correctly reinstituted the longstanding rule of *Bethlehem Steel* and acted neither irrationally nor arbitrarily in holding that dues checkoff is uniquely rooted in the contract, and thus an employer's obligation to deduct employees' union dues and remit them to the union ends when the contract expires. The *Valley Hospital I* Board did not contravene the Ninth Circuit's previously expressed concerns about *Bethlehem Steel*'s applicability in the absence of a union-security provision, the Respondent argues, because the Board met the court's requirement, as explained in *Hacienda*, that the Board's rule be supported by reasoned analysis. Nor does the Respondent concede that the cases that the court instructed the Board to grapple with on remand undermine the "contract creation" rationale: according to the Respondent, those cases can be reconciled with *Valley Hospital I*, which addressed only dues checkoff, not the issues raised by the cited cases, and which was rational and consistent with the Act. Detailing the facts of the cases cited by the court, the Respondent argues that each is distinguishable or otherwise irrelevant; however, even if they are not, the Respondent contends that the *Valley Hospital I* Board expressly recognized the "unique" nature of dues-checkoff provisions. Moreover, the Board there expressly rejected *Lincoln Lutheran*'s rationale, which described the exceptions to *Katz* as involving statutory waivers. In sum, the Respondent argues, the *Valley Hospital I* rule allowing postcontract cessation of dues checkoff is neither irrational nor inconsistent with the Act, and the Board's explanation in support of that rule is neither irrational nor arbitrary.

---

[14] Acknowledging that this position differs from that taken by the former General Counsel in earlier proceedings in this case, the General Counsel contends that the change of position is warranted by the fundamental purposes of the Act: to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Discussion

I. LEGAL BACKGROUND

The declared policy of the Act, as stated in Section 1, is to "encourag[e] the practice and procedure of collective bargaining" and protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). As the Supreme Court explained in *Katz*, such unilateral action "amount[s] to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." Id. at 747. Further, an employer's *unilateral* action regarding its employees' terms and conditions of employment, by definition, frustrates the statutory objective of establishing terms and conditions of employment through *collective* bargaining and interferes with employees' Section 7 rights by emphasizing to employees that there is no need for a bargaining agent. Id. at 744; *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

Under the *Katz* rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies not only where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, but also where the parties' existing agreement has expired, and negotiations have yet to result in a subsequent agreement. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198, 206 (1991) ("Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them."); *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988) (explaining that "[f]reezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract."). Where the agreement has expired, as here, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining until the parties either negotiate a new agreement or bargain to a lawful impasse. *Litton*, 501 U.S. at 198–199. That general legal framework, and its applicability to this case, is firmly established and not in dispute here. Further, under settled Board law, widely accepted by reviewing courts,[15] dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) of the Act and is therefore a mandatory subject of bargaining. See, e.g., *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009).[16]

What is in dispute is much more limited: whether dues-checkoff arrangements, after having become established as the unit employees' terms and conditions of employment, are subject to the status-quo obligation, like nearly all terms and conditions of employment, or whether they instead should be treated as an exception to the *Katz* rule. In finding exceptions to the duty to bargain only where clearly warranted, the Board has normally been careful to ensure that the exceptions do not swallow the *Katz* rule and so undermine the Act's policy in favor of collective bargaining. *Bethlehem Steel* wedged dues-checkoff provisions into an existing exception to the *Katz* rule applicable to union-security provisions, but it provided virtually no rationale for treating the two terms similarly.[17] As the Board and courts have recognized, the issue demanded a more thorough analysis.

II. THE GROUNDWORK LAID BY *HACIENDA* AND *LINCOLN LUTHERAN*

We pause here to briefly recount the two-decade history of Board and Ninth Circuit proceedings in *Hacienda* and the overlapping, but prematurely terminated, era of *Lincoln Lutheran*. In *Hacienda*, above at fn. 5, the Ninth Circuit repeatedly took issue with the *Bethlehem Steel*

[15] See *Steelworkers v. NLRB*, 390 F.2d 846, 849 (D.C. Cir. 1967), cert. denied 391 U.S. 904 (1968); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953); *Caroline Farms Division of Textron, Inc. v. NLRB*, 401 F.2d 205, 210 (4th Cir. 1968); *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976); *Operating Engineers Local 571 v. Hawkins Construction Co.*, 929 F.2d 1346, 1350 (8th Cir. 1991).

[16] Mandatory subjects of bargaining contained in a collective-bargaining agreement that survive contract expiration include a wide range of terms and conditions of employment, e.g., union bulletin boards, hiring halls, work rules, and seniority in assignments. *Beverly Health & Rehabilitation Services v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003); *NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332, 1334, 1337–1338 (9th Cir. 1984), cert denied 470 U.S. 1087 (1985); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1439 (9th Cir. 1995); *L & L Wine & Liquor Corp.*, 323 NLRB 848, 852–853 (1997).

[17] The Ninth Circuit, addressing the Board's traditional approach to the issue presented here, observed in the *Hacienda* series of decisions that, "[w]here the Board breaches its duty to provide any rational and logical explanation for its rules, 'the consistent repetition of that breach can hardly mend it.'" *LJEB III*, 657 F.3d at 872 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

precedent, particularly the Board's application of it in the absence of union-security provisions. The court issued three successive opinions granting review of the Board's *Hacienda* decisions, repeatedly finding that the Board had failed to provide a reasoned explanation for holding that an employer's postexpiration dues-checkoff obligation in "right to work" states was not subject to the duty to bargain under the *Katz* doctrine. As noted, *Hacienda*, which arose out of that employer's 1995 termination of dues checkoff, is identical to this case in all respects other than the Board's 2015 issuance of *Lincoln Lutheran* during *Hacienda's* pendency.[18] Those proceedings lay groundwork relevant to this case, over which the Ninth Circuit retains jurisdiction.

In *LJEB I*, the Ninth Circuit's review of *Hacienda I*, the court was particularly troubled by the ambiguity created by the Board's finding in *Bethlehem Steel* that the dues-checkoff arrangement "implemented" the union-security provision, a finding that would have no applicability to the rationale for finding that an employer had no postexpiration obligation to continue checkoff in the absence of a union-security provision. *LJEB I*, 309 F.3d 578, vacating *Hacienda I*, 331 NLRB 665. Consequently, the court remanded the case to the Board to provide a reasoned explanation for its rule or to adopt a different rule with a reasoned explanation to support it.

In *LJEB II*, the court rejected the Board's new rationale in the decision on remand: that, apart from the *Bethlehem Steel* rule, the specific contract language at issue in the case waived the union's right to postexpiration continuation of dues checkoff. *LJEB II*, 540 F.3d at 1075, vacating *Hacienda II*, 351 NLRB at 505. The court once again remanded the case for a reasoned explanation from the Board in support of the rule adopted in *Hacienda I* or a reasoned explanation for an alternative rule.

Finally, in *LJEB III*, the court rejected the procedural rationale of an otherwise deadlocked 4-member Board in *Hacienda III*, 355 NLRB 742, to apply the *Bethlehem Steel* rule as extant law in the absence of a majority vote to explain or depart from that rule. *LJEB III*, 657 F.3d 865. The Board's *Hacienda III* decision included separate concurring opinions, each supported by two Board members. In one opinion, then-Chairman Liebman and then-Member Pearce expressed "substantial doubts about the validity of *Bethlehem Steel* . . . particularly as applied in right-to-work states." 355 NLRB at 742. In the other opinion, then-Members Schaumber and Hayes argued in support of applying the *Bethlehem Steel* rule even in the absence of union security, contending that the recognized exceptions to the *Katz* unilateral change doctrine, including dues checkoff, were all "uniquely of a contractual nature." Id. at 745. The Schaumber/Hayes opinion largely previewed the analysis, nearly a decade later, of the *Valley Hospital I* majority and of the current dissent. The Ninth Circuit did not address the merits of either concurring opinion. It expressly rejected the Board's argument that deference was warranted on procedural grounds. Rather than remand the case again, however, the court decided for itself that there was no justification for carving out an exception to the unilateral change doctrine for dues checkoff in the absence of union security, and it applied that doctrine to find a violation. *LJEB III*, 657 F.3d at 874–875. The court recognized that "the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA."[19] Id. at 876.

In 2015, the Board issued *Lincoln Lutheran of Racine*, which held that, "like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement."[20] 362 NLRB at 1655. *Lincoln Lutheran* drew significantly from the Liebman/Pearce concurrence in *Hacienda III* and distinguished dues checkoff from contractual provisions that do not survive contract expiration because they involve the waiver of statutory rights, such as mandatory arbitration, no-strike, and management-rights provisions. Because the Board concluded that its decision "definitively changes longstanding substantive Board law governing parties' conduct, rather than merely changing a remedial matter," and in deference to longstanding employer reliance on *Bethlehem Steel*, the Board held that *Lincoln Lutheran* would apply prospectively only. Id. at 1663.

Lincoln Lutheran's prospective-only adoption delayed its application in subsequent cases. Nonetheless, it was indisputably binding Board law when the Respondent here unilaterally terminated its employees' dues checkoff after the applicable collective-bargaining agreement expired, bringing the issue before the Board, and then the Ninth Circuit, yet again.

[18] Because *Lincoln Lutheran* applied prospectively only, it did not apply to the proceedings in *Hacienda*, even those that occurred after *Lincoln Lutheran* issued.

[19] The *Valley Hospital I* majority relied on the Ninth Circuit's openness to a different rule, if it were rational and consistent with the Act; however, as explained, the court found the *Valley Hospital I* rule irrational because it failed to explain apparent inconsistencies with the Act and existing precedents. As discussed below, we are not persuaded by the dissent's attempt to reconcile the cited precedents.

[20] As noted in footnote 6, above, *Lincoln Lutheran* was preceded by the Board's announcement of a similar rule and rationale in *WKYC-TV*, 359 NLRB 286, invalidated on quorum grounds by *Noel Canning*, above.

III. THE ACT AND ITS UNDERLYING POLICIES SUPPORT TREATING DUES CHECKOFF AS A TYPICAL TERM OR CONDITION OF EMPLOYMENT THAT SURVIVES CONTRACT EXPIRATION

To reiterate, dues checkoff is without dispute a mandatory subject of bargaining, and, once implemented under an agreement, it becomes part of employees' terms and conditions of employment, *most* of which, pursuant to the *Katz* doctrine, may not be changed unilaterally. In our view, the *Lincoln Lutheran* rule—which puts dues checkoff in this category—is not only rational and consistent with the Act, but also best furthers the Act's policies while maintaining consistency with Board precedent applying the *Katz* doctrine. The *Lincoln Lutheran* rule is superior, in other words, to the *Bethlehem Steel* rule, which treats dues checkoff as an exception—and this is true regardless of which prior justification for the *Bethlehem Steel* rule is considered, including the rationale offered most recently in this case. Here, we explain our choice between the two rules.[21]

Over time, a number of Boards and Board Members have attempted to offer a persuasive justification for the *Bethlehem Steel* rule, including the *Valley Hospital I* majority. Notwithstanding their repeated efforts, however, we are not convinced that they have demonstrated that treating dues checkoff differently from most terms and conditions of employment with respect to the *Katz* status-quo doctrine is a better interpretation of the Act or a better way to advance its policies. In our view, the better choice is for the Board to give greater weight to the argument that an employer's decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired agreement obstructs collective bargaining just as other prohibited unilateral changes do. The Act, as the Supreme Court has made clear in *Katz*, strongly disfavors unilateral employer action. 369 U.S. at 747. Further, as the Board explained in *Lincoln Lutheran of Racine*, unilateral termination of employees' dues checkoff affirmatively obstructs their statutorily protected choice of union representation:

> An 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. Cancellation of dues checkoff eliminates the employees' existing, voluntarily-chosen mechanism for providing financial support to the union. By definition, it creates a new obstacle to employees who wish to maintain their union membership in good standing. This is significant, because employees who fail to take proactive steps to maintain their membership in the face of this new administrative hurdle lose their right to participate in the union's internal affairs, including matters directly related to the negotiations, such as the choice of a bargaining team, setting bargaining goals, and strike-authorization and contract-ratification votes. [FN4] Such a change also interferes with the union's ability to focus on bargaining, by forcing it to expend time and resources creating and implementing an alternate mechanism for dues collection during a critical bargaining period. Finally, an employer that unilaterally cancels dues checkoff sends a powerful message to employees: namely, that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them.
>
> [FN4] As the Supreme Court has observed:
>
> > [A] union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives.
> >
> > . . . .
> >
> > [T]he [National Labor Relations] Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union."
>
> *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192, 205 (1986) (reversing Board decision requiring that nonmembers be permitted to vote in union's affiliation election).

Lincoln Lutheran, 362 NLRB at 1657. As the Board further explained, "[b]ecause unilateral changes to dues checkoff undermine collective bargaining no less than other unilateral changes, the status quo rule should apply, unless there is

[21] The Ninth Circuit remanded this case to us with clear instructions to grapple explicitly with precedents that appear to conflict with the *Valley Hospital I* majority's decision. The Respondent, aiming at a straw man, argues that "[t]he Ninth Circuit appears to reason that, because 'terms pertaining to mandatory bargaining subjects that are contained in a collective bargaining agreement *are typically* continued in effect by operation of law beyond the contract's expiration,' that any decision to the contrary must be irreconcilable with *Katz*. *Local Joint Exec. Bd. of Las Vegas*, 840 Fed.Appx. at 136." Respondent Statement of Position at 10 (emphasis in original). We do not read the court's decision to suggest that any exception to *Katz* created by the Board is illegitimate, only that such an exception must be rational, consistent with precedent, and explained as such.

some overriding ground for an exception. As the *Katz* Court observed, an employer's unilateral change 'will rarely be justified by any reason of substance.' 369 U.S. at 747." *Lincoln Lutheran*, 362 NLRB at 1657. It found no such reason in the case before it. Nor do we see a persuasive reason here to choose the rule advocated by the *Valley Hospital I* majority and today's dissenters.

Rather, we conclude that, largely for the reasons thoroughly and persuasively explained in *Lincoln Lutheran*, dues-checkoff provisions should be held to survive contract expiration as typical terms and conditions of employment covered by the statutory obligation to bargain. Further, we reject the "contract creation" rationale posited by the *Valley Hospital I* majority and reiterated by the dissent today, which does not advance the Act's fundamental policy in favor of collective bargaining, is unsupported by statutory provisions regarding dues checkoff, and is inconsistent with Board precedents, including those cited by the court's opinion remanding the case. For all these reasons, we reverse *Valley Hospital I* and return to the *Lincoln Lutheran* rule.

A. Lincoln Lutheran's Rationale is Consistent with the Act and Precedent and Reflects Reasoned Decisionmaking

As discussed above, and as no party could reasonably dispute, as a statutory matter most contractually established terms and conditions of employment survive contract expiration and cannot be changed without notice and an opportunity to bargain. To be sure, a few contractually established terms and conditions of employment do *not* survive contract expiration, even though they are mandatory subjects of bargaining. But, putting dues checkoff aside, those exceptions to the rule have been narrow and justified by specific considerations that distinguish the contract terms at issue from most other contractually established terms and conditions of employment. *Lincoln Lutheran* persuasively explained how dues checkoff materially differs from the handful of terms that are exceptions to the *Katz* rule. Most notable among such terms, in addition to the union-security provisions relied on in *Bethlehem Steel*, are arbitration provisions, no-strike clauses, and management-rights clauses.

First, regarding union-security provisions, we have already discussed *Bethlehem Steel*'s failure to adequately articulate a sufficient interdependence or similarity between union-security provisions and dues-checkoff provisions.[22] Among other gaps in the analysis, no case has explained why union-security provisions' statutorily mandated termination upon contract expiration would dictate that dues-checkoff provisions should be unilaterally terminable (but, to be clear, not required to terminate) at any time after contract expiration.[23] For this reason and others, dues-checkoff provisions are both materially distinguishable from and independent of union-security provisions. As no party currently argues otherwise, we need not belabor this issue. Put simply, we fully agree with and adopt the comprehensive and persuasive rationale provided by *Lincoln Lutheran*, 362 NLRB at 1660–1661, and we find, for the reasons stated there, that the postcontract survival of dues-checkoff provisions does not track that of union-security provisions.[24]

Second, regarding arbitration provisions, no-strike clauses, and management-rights clauses, the Board explained in *Lincoln Lutheran* that they materially differ from other terms and conditions of employment, and merit an exception from the *Katz* bargaining obligation, because, "in agreeing to each of these terms, parties have waived rights that they otherwise would enjoy in the in-

[22] The independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in "right to work" states, including Nevada, where this case arises. "Right to work" states bar union-security agreements, as permitted by Sec. 14(b) of the Act, but dues-checkoff arrangements can and do exist in these states, as this case illustrates. The collective-bargaining agreement at issue contains provisions relating to both union security and dues checkoff, but the union-security provision is expressly effective only if state law permits, which it does not here. Thus, only the dues-checkoff provision has been in effect.

[23] Union-security clauses do not survive contract expiration because the proviso to Sec. 8(a)(3) of the Act limits such provisions to the term of the contracts containing them. *Bethlehem Steel*, above. In contrast, the Board long has held that an employer lawfully may *continue* dues checkoff after the expiration of a collective-bargaining agreement, even if not required to do so. See, e.g., *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969), enfd. 431 F.2d 1196 (1st Cir. 1970). And, in fact, the Respondent here lawfully continued dues checkoff for 13 months after its collective-bargaining agreement with the Union expired.

Our dissenting colleagues claim that *Litton Financial Printing*, 501 U.S. at 199, cites Sec. 302(c)(4) for the proposition that "dues checkoff [is] valid only until termination date of agreement." But Sec. 302(c)(4) addresses only whether dues checkoff may be *irrevocable*, not whether it is valid after contract expiration. The *Litton* case involved the postcontract expiration status of arbitration, not of dues checkoff, and the Court cited dues checkoff only as an example of a term and condition of employment that, in "the Board's view" was not subject to the *Katz* rule. Id. At the time, that was the Board's view. Notwithstanding the dissent's comment that the Court recognized the Board's view "without criticism," the Court never stated, or in any way implied, that that was its own view. Neither the Board nor the courts have held that dues checkoff is invalid after the contract's expiration.

[24] Because the statutorily mandated termination of union-security provisions provides no analogy on which to base an assessment of whether dues-checkoff provisions may be unilaterally terminated at an employer's choice, our analysis, as was the case in *Lincoln Lutheran*, is not affected by the presence of a union-security provision in the same contract or of state law permitting or prohibiting such provisions.

terest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract." *Lincoln Lutheran*, 362 NLRB at 1657. Significantly, decisions addressing those exceptions expressly identified the "waiver of rights" rationale as support for treating those terms and conditions of employment differently from most.[25] The Supreme Court, in *Litton Financial Printing*, discussed both no-strike clauses and arbitration provisions. As to the former, the Court explained that "in recognition of the statutory right to strike, no-strike clauses are excluded from the unilateral change doctrine."[26] *Litton*, 501 U.S. at 199. And, in approving the Board's decision to exempt arbitration agreements from *Katz*, the Court agreed that the exemption "is grounded in the strong *statutory* principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration." Id. at 200 (emphasis added).

Board decisions also rely on the waiver rationale to justify the departure from the *Katz* unilateral-change doctrine as to these contract terms. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 & 636 fn. 6 (2001) ("[T]he 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."), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003);[27] *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987) ("because an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes . . . the duty to arbitrate . . . cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*"); *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970) (no postexpiration duty to honor contractual agreement to arbitrate because agreement "is a voluntary surrender of the right of final decision which Congress has reserved to the[ ] parties," characterizing arbitration as "a consensual surrender of the economic power which the parties are otherwise free to utilize").

[25] The *Valley Hospital I* majority, therefore, erred in describing the "waiver of rights" distinction articulated in *Lincoln Lutheran* and in the *Valley Hospital I* dissent as "an after-the-fact recharacterization of Board precedent," *Valley Hospital I*, above, slip op. at 5.

[26] In marked contrast to the Court's reference to dues-checkoff as "the Board's view," see fn. 23 above, the Court stated the status of no-strike clauses, in no uncertain terms, as the law.

[27] In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Board overruled *Beverly's* holding as to the application of the past practice doctrine to alleged unilateral changes but went out of its way to note that the issue in *Beverly* concerning "a management right's clause surviv[ing] expiration . . . is not at issue here and . . . we would not dispute [it] if it were." Supra, slip op. at 9 fn. 41.

Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff provision in a collective-bargaining agreement does not involve the contractual surrender of any statutory or nonstatutory right by a party to the agreement. Rather, such a provision simply reflects the employer's agreement to establish a system, as a matter of administrative convenience to a union and employees, for employees who choose to pay their union dues through automatic payroll deduction.[28] Common payroll deductions which may not be unilaterally changed after contract expiration include savings bonds[29] and insurance policy premiums,[30] as well as employee savings accounts and charitable contributions, which the Board has recognized also create "administrative convenience" and, notably, survive the contracts that establish them. *Quality House of Graphics*, 336 NLRB 497, 497 fn. 3 (2001). Payments via a dues-checkoff arrangement are similar to these other voluntary checkoff arrangements, and dues-checkoff arrangements should survive contract expiration just as other voluntary checkoff arrangements do.[31]

[28] As the U.S. Court of Appeals for the Fifth Circuit has explained, "dues checkoff . . . far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues." *NLRB v. Atlanta Printing Specialties & Paper Products Union,* 523 F.2d 783, 786 (5th Cir. 1975). See *Food & Commercial Workers District Union Local One v. NLRB,* 975 F.2d 40, 44 (2d Cir. 1992); *Anheuser-Busch, Inc. v. Teamsters Local 822,* 584 F.2d 41, 43 (4th Cir. 1978); *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund,* 700 F.2d 1269, 1277 (9th Cir. 1983), cert. denied 464 U.S. 825 (1983).

[29] *King Radio Corp*., 166 NLRB 649, 653 (1967), enfd., 398 F.2d 14 (10th Cir. 1968) (employer violated Sec. 8(a)(5) where, following union's election win, it unilaterally canceled its practice of permitting employees to purchase savings bonds through payroll deductions).

[30] *Wyndham Int'l, Inc*., 330 NLRB 691, 692-693 (2000) (employer violated Sec. 8(a)(5) by unilaterally ceasing payroll deductions for employees' group life and cancer insurance policy premiums, even where employer made no financial contribution toward insurance but merely deducted premiums from employees' pay and remitted collected payments to insurer).

[31] Payroll deductions for dues checkoff are also like other voluntary payroll deductions in that they are subject to an individual employee's authorization, which is revocable at the employee's option (generally subject to collectively bargained rules). For this reason, among others, we reject the dissent's claim that "there is no other term and condition of employment with respect to which employers are required to change individual employees' terms and conditions of employment postcontract expiration on a case-by-case basis *upon their individual request*."

It is therefore perplexing that the dissent contends that an employer's obligation to start or stop deductions at an individual employee's request somehow conflicts with the employer's collective bargaining obligation, and that it does so in a manner unique to dues deductions. An employer's compliance with an employee's individual request as to his or her own dues deduction is not direct dealing or otherwise in derogation of the collective-bargaining relationship. Rather, as the case record here demonstrates, the parties' collective bargaining established *both* the terms for employees' authorization (and revocation) of dues-checkoff payroll deductions *and* the terms for the Respondent's remit-

The *Lincoln Lutheran* Board noted, as well, that dues-checkoff arrangements "directly assist employees in their voluntary efforts to support their designated bargaining representatives financially." 362 NLRB at 1658. That is, "an employee's voluntary execution of a dues-checkoff authorization is an exercise of Sec. 7 rights." Id. at fn. 12 (emphasis removed). The Board correctly described it as "anomalous" that these checkoff arrangements would be unilaterally terminable when other checkoff arrangements are not. Id. at 1658. As the Board explained, "nothing in Federal labor law or policy . . . suggests that dues-checkoff arrangements should be treated less favorably than other terms and conditions of employment for purposes of the status quo rule." *Lincoln Lutheran*, 362 NLRB at 1658. We agree.[32]

B. Valley Hospital I's "Contract Creation" Rationale Does Not Further the Policies of the Act and is Not Supported by Relevant Statutory Text or Board Precedent

In *Valley Hospital I*, the majority and the dissent each cited the Act's fundamental policy of collective bargaining as support for their own position; each took a position for or against *Lincoln Lutheran* based on their perception of its impact on the policy of collective bargaining; and each criticized the other's position for purportedly undermining that important policy. But the two sides proceeded from materially different perceptions of what collective bargaining is or should be. We agree with the *Valley Hospital I* dissent's straightforward view of the issue: the Act's policy and purpose of promoting collective bargaining are better served by a rule holding that dues checkoff cannot be changed without bargaining after contract expiration, rather than by a rule permitting employers to terminate dues checkoff unilaterally. That is, we encourage collective bargaining, as statutorily mandated, by requiring parties to engage in collective bargaining, not by creating exceptions to the collective-bargaining obligation (absent a strong justification). Similarly, we conclude that the *Valley Hospital I* dissent more logically and persuasively interpreted Section 302 of the Taft-Hartley Act, the only relevant statutory provision that discusses dues checkoff. Finally, the *Valley Hospital I* dissent's approach is also more consistent with well-reasoned Board precedents, both those discussed in *Valley Hospital I* and those that the Ninth Circuit instructed us to grapple with on remand.

First, and what should be foremost, is the issue of how best to advance the fundamental policy of "encouraging the practice and procedure of collective bargaining," as set forth in Section 1 of the Act. We note that the *Valley Hospital I* majority quoted Section 1 language about "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions," 368 NLRB No. 139, slip op. at 6–7, and focused on "the long-established Board policy of promoting stability in labor relations," id., slip op. at 7 (quoting *Red Coats, Inc.*, 328 NLRB 205, 207 (1999)). The *Valley Hospital I* majority asserted that *Lincoln Lutheran* undermined that policy both procedurally, in its change to longstanding law as set forth in *Bethlehem Steel*,[33] and substantively, in its requirement that employers bargain before ending dues checkoff, which the *Valley Hospital I* majority viewed as complicating negotiations.[34] We disagree.

To be sure, any change in the law may affect existing bargaining relationships – as illustrated by decisions in which the *Valley Hospital I* majority reversed precedent, including this case and many others.[35] But it is long settled that the Board's approach to the Act can and should

---

tance of the deducted dues to the Union. Complying with an employee's individual request to start or end dues deductions, made in accordance with the collectively bargained framework, is thus neither in conflict with the employer's bargaining obligations nor unique to dues deductions.

We explain below, in our detailed discussion of Sec. 302(c)(4) of the Taft-Hartley Act, why we are unpersuaded by the dissent's reliance on that provision to distinguish dues checkoff from other voluntary payroll deductions.

[32] We discuss in the next section our disagreement with the *Valley Hospital I* majority's, and now the dissent's, argument that Sec. 302(c)(4) of the Taft-Hartley Act supports a conclusion that dues checkoff is unilaterally terminable after contract expiration. For the moment, it is enough to say that we agree with *Lincoln Lutheran*'s interpretation of this and other provisions of Sec. 302.

[33] See id., slip op. at 7 ("A rule prohibiting employers from unilaterally discontinuing dues checkoff after contract expiration frustrates this essential policy [of stability in labor relations] by undermining established bargaining practices and relationships that ordinarily promote labor relations stability. Having negotiated under the *Bethlehem Steel* regime for over five decades, parties after *Lincoln Lutheran* were suddenly confronted with a paradigm shift in the established ground rules of the collective-bargaining relationship.").

[34] Id. ("[I]t seems likely that under *Lincoln Lutheran* dues checkoff would become a considerably more divisive bargaining subject with the potential to frustrate efforts to reach collective-bargaining agreements in both the successor and initial contract bargaining situations.").

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

evolve. In this particular area of Board doctrine, the law has been in flux for many years. The overruling of *Lincoln Lutheran* and return to *Bethlehem Steel* in *Valley Hospital I* raises substantial doubt about whether parties could reasonably have had settled expectations to rely on. Stability alone cannot justify leaving in place a legal rule that undermines the Act's other policies.

That brings us to the *Valley Hospital I* majority's other concern, that including dues-checkoff among the many other terms and conditions of employment that parties must bargain over before changing after a contract's expiration may make the process of bargaining more challenging or "divisive." On that point, we cannot do better than the *Valley Hospital I* dissent's succinct explanation that it amounted to an "ironic and completely irrational" view that "to save collective bargaining, the Board must undermine it." Id., slip op. at 14 (dissenting opinion). In general, and specifically with regard to dues checkoff, our view is that adhering to the *Katz* unilateral change rule advances the policies of the Act and should not be resisted on grounds that bargaining over dues checkoff, or collective bargaining generally, is "divisive." Ultimately, as then-Member McFerran explained in her *Valley Hospital I* dissent, "The majority's so-called 'contract creation' rationale is contrary to the policy of the Act, which (as the Supreme Court has made clear) strongly disfavors unilateral employer action.[36]

Regarding Section 302 of the Taft-Hartley Act, we are not persuaded by the *Valley Hospital I* majority's contention, echoed now by our dissenting colleagues, that dues checkoff is materially unlike other voluntary payroll deduction arrangements because "[n]one of those arrangements involve direct payments by an employer to a union, as does a dues-checkoff arrangement, which is subject to the limits of Section 302(c)(4) and cannot exist at the beginning of a collective-bargaining relationship" and because "neither the Board nor any court has held that an employer has a statutory duty to process an employee's valid checkoff authorization unless the employer first agrees to do so in a collective-bargaining agreement." *Valley Hospital I*, above, slip op. at 6.

In taking that position, the *Valley Hospital I* majority piled more weight on Section 302(c)(4) than its text can bear. Both the *Lincoln Lutheran* Board and the *Valley Hospital I* dissent convincingly refuted contentions that Section 302(c)(4) – the only provision in the Taft-Hartley Act that regulates dues checkoff[37]—somehow tethers dues checkoff to a current collective-bargaining agreement. As the *Lincoln Lutheran* Board explained:

> Section 302(c)(4), an exception to the prohibition on employer payments to unions in Section 302(a) of the Act, specifically permits dues checkoff and further states, "Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner."

362 NLRB at 1658 (emphasis removed). That is, the provision's primary focus is on allowing, not restricting, dues-checkoff provisions, and the only restriction stated is that each *employee* whose dues are to be deducted from payroll must have provided a written authorization.[38] It is entirely understandable, of course, that Congress would specify that an employer may deduct from an employee's wages payments to be remitted to a union only with *the employee's* express, written permission and an opportunity for the employee to revoke that permission.[39] But none of that establishes any restrictions on the existence or form of an agreement between the employer and the union.

Relying on the reference to "the applicable collective agreement," however, the *Valley Hospital I* majority stated that "Sec[tion] 302(c)(4) clearly means that an employer has no statutory dues-checkoff obligation unless it agrees to one in a collective-bargaining agreement." *Valley Hospital I*, above, slip op. at 6 fn. 18.

[36] *Valley Hospital I*, above, slip op. at 9 (dissenting opinion) (citing *NLRB v. Katz*, 369 U.S. at 747).

[37] See *Lincoln Lutheran*, 362 NLRB at 1658.

[38] *Lincoln Lutheran*, 362 NLRB at 1658–59 (Sec. 302 "contains no language making dues-checkoff arrangements dependent on the existence of a collective-bargaining agreement. Rather, the only document necessary for a legitimate dues-checkoff arrangement, under the unambiguous language of Section 302(c)(4), is a "written assignment" *from the employee* authorizing deductions.")

[39] The dissent argues that Sec. 302(c)(4)'s proviso regarding employee revocation of dues deduction authorizations "hardly indicates an intention to require employers to continue it. To the contrary, it suggests that Congress was concerned about the continuation of dues checkoff postcontract expiration." The dissent conflates individual employees' dues-deduction authorizations (agreements between the employee and the employer) with the broader dues-checkoff agreement between the employer and the union. By conflating these separate agreements, the dissent contorts Sec. 302(c)(4)'s explicit statutory protection of the *employee's* control over deductions from his or her wages into an implicit *employer* right to unilaterally override the employee's choice by terminating dues checkoff even when the employee wishes to continue having dues deducted, contrary to the language of Sec. 302(c)(4).

The dissent contends that Sec. 302(c)(4)'s provision regarding employees' withdrawal of their dues authorizations cannot be read as a protection for employees, because "Sec. 302 is not about *employee* rights. It is about the relationship between employers and unions." But the Sec. 302(c)(4) text in question is easily understood as intended to protect employees within Sec. 302's larger context of the relationship between their employer and their union. Indeed, it seems illogical to read the text in any other way.

But, responding directly to the *Valley Hospital I* majority, then-Member McFerran explained:

> nothing in Section 8(a)(3) of the National Labor Relations Act, and nothing in Section 302 of the Taft-Hartley Act, requires that dues checkoff (in contrast to a union-security provision) ever be embodied in a collective-bargaining agreement to be lawful. An employer and a certified union could lawfully agree to set up voluntary dues checkoff prior to the negotiation of a collective-bargaining agreement."

Valley Hospital I, above, slip op. at 12 (dissenting opinion) (footnotes omitted) (citing *Lincoln Lutheran*, 362 NLRB at 1662 & fn. 26; *Hacienda I*, 331 NLRB at 670 (Members Fox and Liebman, dissenting); and *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330, 1335 (D.C. Cir. 2009) ("Section 302 does not require a written collective bargaining agreement.")).[40] *Lincoln Lutheran* acknowledged that "dues checkoff *normally* is an arrangement created by contract," but added, first, that that is not always the case[41] and, second, that the fact that it is normally created by a contract "simply does not compel the conclusion that checkoff expires with the contract that created it." 362 NLRB at 1662 (emphasis added). Similarly, then-Member McFerran reminded us in *Valley Hospital I* that "even if a dues-checkoff obligation necessarily *originates* with a collective-bargaining agreement, that fact does not meaningfully distinguish it from other terms and conditions that are embodied in the contract and that must be honored even after the agreement expires (absent a Board-recognized exception)." 368 NLRB No. 139, slip op. at 12 (dissenting opinion) (footnote omitted). For the reasons carefully and comprehensively articulated by the *Lincoln Lutheran* Board and the *Valley Hospital I* dissent, we see nothing in the text of Section 302 or any reasonable inferences drawn from it that suggests that dues-checkoff provisions are any more dependent on the existence of a current collective-bargaining agreement than any other terms and conditions that may be set forth initially in such an agreement.[42]

Indeed, the language of Section 302 leads to the opposite conclusion. As the *Lincoln Lutheran* Board explained, Section 302's articulation of the circumstances in which an employee's own authorization of dues checkoff must be revocable "beyond the termination date of the applicable collective agreement" would be unnecessary if dues-checkoff arrangements did not survive the contract. 362 NLRB at 1659 ("Had Congress intended for dues-checkoff arrangements to automatically expire upon contract expiration, there would have been no need to say that employees can revoke their checkoff authorizations at contract expiration because there would be nothing left thereafter for an employee to revoke.") (footnote omitted).[43] In short, contrary to the views of the *Valley Hospital I* majority, and now the dissent, Section 302 does not clearly establish that dues checkoff is dependent on a collective-bargaining agreement (much less on a current agreement)—that is, that it is *uniquely* of a contractual nature—in any way that makes dues checkoff legally distinct from other contractually established terms and conditions of employment that are subject to *Katz*' prohibition on unilateral changes after the collective-bargaining agreement's expiration.

Finally, we consider what Board and court decisions indicate about the status of dues-checkoff provisions after contract expiration. Initially, we acknowledge the existence, but not the persuasiveness, of *Bethlehem Steel* and its progeny; for the reasons enumerated above, un-

[40] It is no surprise that Congress would expect some type of agreement to be "applicable." As a practical matter, employees' dues, deducted from their pay, could not be remitted to the union without a shared understanding between the employer and union about when and how those remittances would occur. And it follows logically that an employee who discovers that the employer and union are no longer in agreement on those expectations, and who thus may reasonably question whether his or her dues will reach the union as intended, should have an opportunity to revoke the dues-deduction authorization. This in no way establishes that dues checkoff can arise *only* out of the execution of a collective-bargaining agreement, let alone that an employer should be permitted to unilaterally terminate dues deductions when a collective-bargaining agreement expires.

[41] 362 NLRB at 1662 fn. 26 (citing *Tribune Publishing Co. v. NLRB*, 564 F.3d at 1335); see also *Valley Hospital I*, above, slip op. at 12 fn. 32 (dissenting opinion) ("Dues-checkoff arrangements need not be embodied in collective-bargaining agreements to be valid under Sec. 302(c)(4)."). We understand *Lincoln Lutheran*'s reference to dues checkoff normally, but not necessarily, being created "by contract" to refer to a complete collective-bargaining agreement. As explained above, other kinds of agreements between the parties may properly create dues-checkoff obligations.

[42] Further, the dissent's contention that Sec. 302(c)(4) makes dues deductions materially different from other employee-chosen payroll deductions is perplexing for several reasons. First, in our view, the dissent's argument highlights that various kinds of payroll-deduction obligations, including dues deductions, are similarly created, and that they may be similarly discontinued by individual employees. It is obviously true, but irrelevant, that Sec. 302(c)(4) delineates employees' right to discontinue their individual dues authorizations without addressing employees' discontinuance of other types of payroll deductions. But other statutes protect employees—and obligate their employers to respond to individual requests for changes—in other contexts (e.g., based on qualifying medical conditions, family structures, benefit-modification windows, etc.), even where neither the collective-bargaining agreement nor past practice establishes such a right. In short, dues deductions appear "unique," as the dissent seeks to portray them, only if viewed through a lens so unreasonably narrow that nothing else is visible.

[43] As the *Lincoln Lutheran* Board further noted, in *LJEB III*, the Ninth Circuit held that there is "nothing in the NLRA that limits the duration of dues-checkoffs to the duration of a CBA." 657 F.3d at 875. The court described Sec. 302(c)(4) as "surplusage" if Congress intended dues checkoff to terminate upon the expiration of a contract. Id.

explained applications of an unexplained rule fail to provide helpful guidance about what the rule should be and why. As discussed above, we find that dues-checkoff provisions are not analogous to union-security provisions, whose status after contract expiration is established by statute, nor to arbitration provisions, management rights clauses, or no-strike clauses, which cannot be enforced after contract expiration because they are waivers of statutory or nonstatutory rights. We do find dues-checkoff provisions materially similar to other types of payroll deductions established for the administrative convenience of employees, as discussed above, and we see no support for finding that their connection to union dues makes them *less* protected from unilateral changes than other types of deductions.

The Ninth Circuit's *LJEB v. NLRB* opinion remanding this case presents us with an additional group of cases to consider, involving provisions that the court views as sufficiently similar to dues-checkoff provisions to require explicit consideration and, if distinguished from dues checkoff, a reasoned explanation for that view. Having carefully considered those cases and the kinds of provisions they cover, we conclude that they are not meaningfully distinguishable from dues-checkoff provisions with regard to their enforceability after contract expiration.[44] As the court apparently did, we see commonalities between the dues-checkoff provisions at issue here and other kinds of provisions that also formalize or document administrative aspects of the relationships among the employer, employees, and unions.[45] Such provisions include requiring an employer to process grievances short of arbitration,[46] granting union representatives leave or time off for official union business,[47] requiring an employer to hire workers through a union hiring hall,[48] permitting union access to an employer's property,[49] recognizing stewards designated by a union at an employer's workplace,[50] granting seniority rights to union officials,[51] and abiding by seniority provisions when recalling workers from layoffs.[52] That those provisions remain insulated from unilateral changes after contract termination counsels for similar treatment of dues-checkoff provisions, absent a compelling reason for different treatment.

Having already clarified why Section 302 provides no statutory rationale for treating dues-checkoff as uniquely "created by the contract," we see no reasoned, let alone compelling, basis for treating dues checkoff differently from these other provisions that are also normally created, or at least formalized, by the contract.[53] The *Valley Hospital I* majority's repeated characterization of dues checkoff as "unique" does not amount to a reasoned explanation for creating an exception to the *Katz* status-quo obligation. Indeed, dues checkoff is hardly sui generis. Contributions to collectively bargained multiemployer trust funds, such as health and welfare funds, pension funds, vacation funds, and apprenticeship funds,[54] are more substantive and traditional employee benefits, but they are also related to the relationship among the employer, employees, and union in a bargaining relationship. In particular, they establish an employer's obligation to facilitate beneficial relationships between the union funds and the employees, similarly to the way in which a dues-checkoff provision establishes an employer's obligation to facilitate employees' financial relationship with their union. Further, these arrangements, like dues checkoff, are addressed in Section 302(c) of the Taft-Hartley Act. See *Lincoln Lutheran*, 362 NLRB at 1659 (discussing benefit funds, Sec. 302(c)(5)-(8), and why these provisions also support dues checkoff's post-

[44] The Ninth Circuit stated: "In multiple prior cases, the Board has determined that the *Katz* doctrine applies to terms and conditions of employment that are contained in a collective-bargaining agreement and that *indisputably* could not have existed until they were 'created' by such an agreement." *LJEB v. NLRB*, 840 Fed.Appx. at 136–137 (emphasis added). The court then enumerated the cases that the Board had failed to address in *Valley Hospital I*. The dissent disregards the court's unequivocal statement, arguing, to the contrary, that many of the terms and conditions of employment at issue in the cited cases *could* have existed prior to their inclusion in a collective-bargaining agreement; the dissent claims that some terms and conditions arise out of the bargaining relationship, rather than the collective-bargaining agreement, and that others may precede even the existence of the bargaining relationship. But we need not debate with our colleagues about whether each of the identified terms and conditions of employment is "created by the contract" for the purpose of determining whether dues checkoff is unique in that regard. For all the reasons we have explained, creation by a collective-bargaining agreement is not a necessary, let alone unique, feature of dues checkoff.

[45] We agree with the General Counsel that, "[b]roadly speaking, the rights and benefits identified by the Ninth Circuit in *Local Joint Executive Board of Las Vegas* relate to facilitation of effective union representation and access to benefits available because of union representation. Dues checkoff shares these characteristics." GC Statement of Position at 8.

[46] *American Gypsum Co.*, 285 NLRB 100, 100 (1987); *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1962).

[47] *American Gypsum Co.*, 285 NLRB at 102.

[48] *Sage Development Co.*, 301 NLRB 1173, 1179 (1991).

[49] *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992).

[50] *Frankline, Inc.*, 287 NLRB 263, 263–264 (1987).

[51] Id. at 264; *Bethlehem Steel*, 136 NLRB at 1503.

[52] *American Gypsum Co.*, 285 NLRB at 102 & fn. 6; *PRC Recording Co.*, 280 NLRB 615, 636 (1986).

[53] We also observe that several of these provisions could arguably be characterized as providing benefits to the union, a consideration that the *Valley Hospital I* majority, and now the dissent, have found significant in justifying different treatment of dues-checkoff.

[54] *PRC Recording Co.*, 280 NLRB at 618; *KBMS, Inc.*, 278 NLRB 826, 849 (1986); *Vin James Plastering Co.*, 226 NLRB 125, 132 (1976).

contract survival and enforceability). Thus, following the court's instruction on remand that we "grapple explicitly with" the identified cases that the *Valley Hospital I* majority had not addressed bolsters our confidence in the conclusion that dues checkoff cannot be meaningfully distinguished from other contractual provisions that could similarly be said to be "created by the contract" in some senses, but which nonetheless survive the contract's expiration and cannot be changed unilaterally after expiration.

For all the foregoing reasons, we are persuaded that dues-checkoff provisions are not "uniquely created by the contract," and therefore should not be included among the few existing exceptions to *Katz*' broad rule against unilateral changes. Rather, dues-checkoff provisions are properly understood to survive the expiration of the contract that contains them, and to be enforceable under Section 8(a)(5) pursuant to *Katz*' rule, as the Board held in *Lincoln Lutheran*.

C. Retroactive Application of Today's Decision

In determining whether to apply a change in law retroactively (i.e., in all pending cases, including this one), the Board must balance any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, 329 NLRB 673, 673 (2005) (quoting *Securities & Exchange Commission v. Chenery Corp*., 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" Id. In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

We find that any ill effects resulting from retroactive application of the legal standard we reinstate today do not outweigh the important policy considerations served by reinstating the *Lincoln Lutheran* standard, which effectuates the Act and preserves the integrity of the Supreme Court's longstanding *Katz* decision. We note that *Lincoln Lutheran* was Board law when the Respondent ceased dues checkoff, and the Respondent's notification to the Union of its intent to do so—which expressly cited *Lincoln Lutheran* and its holding that "the dues-checkoff obligation survives expiration of the collective bargaining agreement"—makes clear that the Respondent was aware of that precedent and its obligations under it. The Respondent, in acting unilaterally, definitively did not rely on any law that made its action lawful, or even arguably lawful.

We observe, as well, that *Lincoln Lutheran*'s predecessor, *WKYC-TV*, expressed the Board's position on the relevant law when the parties entered into their contract in early 2014 and applied it retroactively to 2013.[55] Thus, the standard we reinstate today was applied when the agreement was negotiated and executed, when the agreement expired, and when the Respondent took action 13 months after the agreement's expiration. As then-Member McFerran explained in her dissent in *Valley Hospital I*:

> For more than 4 years, parties have entered collective-bargaining agreements with the expectation that dues-checkoff provisions would continue after contract expiration, unless the agreement itself specified otherwise. "[A] principal purpose of the Act is to promote collective bargaining, which necessarily involves giving effect to the bargains the parties have struck in concluding their collective-bargaining agreements." Thus, retroactive application of today's decision will cause manifest injustice to unions that relied on *Lincoln Lutheran* in negotiating their collective-bargaining agreements.

---

[55] *WKYC-TV, Inc.*, 359 NLRB 286 (2012). As noted in footnote 6, above, *WKYC-TV* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (finding Board lacked a valid quorum, due to improper appointment of Board Members during brief congressional recess, and effectively invalidating decisions issued by those Board Members). The *Noel Canning* decision issued in June 2014, about two months after the parties' mid-April execution of the 2013-2016 collective-bargaining agreement. Thus, throughout most, if not all, of the parties' contract negotiations and at the time they executed their agreement, the Board's stated rule was that dues checkoff could not be terminated unilaterally after the contract's expiration. Then-Member McFerran made this point in response to the *Valley Hospital I* majority's retroactive application of its reinstated *Bethlehem Steel* rule, explaining that "the parties entered their collective-bargaining agreement in mid-April 2014, when the *Bethlehem Steel* rule was not in effect." 368 NLRB No. 139, slip op. at 13 fn. 47 (dissenting opinion). Importantly, during that time, when parties challenged the validity of the Board's quorum based on *Noel Canning*, the Board consistently stated that "[t]his question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See, e.g., *Bloomingdale's, Inc.*, 359 NLRB 1015 (2013) (citing *Sub-Acute Rehabilitation Center at Kearny d/b/a Belgrove Post Acute Care Center*, 359 NLRB 633, 633 fn. 1 (2013)). And, even more significantly, the Board, in a May 2014 decision, *Healthbridge Management, LLC*, discussed *WKYC-TV* as then-current and valid law, although *WKYC-TV*'s prospective-only application made it inapplicable in *Healthbridge* itself. 360 NLRB 937, 939 (2014). Regardless of *Noel Canning*'s subsequent invalidation of *WKYC-TV* and any questions that invalidation might raise about *WKYC-TV*'s viability in retrospect (which we need not decide), we have no difficulty in concluding that the parties here would have acted reasonably in relying on it as establishing their obligations under the 2013-2016 contract when they negotiated it. We therefore reject the *Valley Hospital I* majority's contrary position, which today's dissent does not adopt.

Valley Hospital I, 368 NLRB No. 139, slip op. at 13–14 (dissenting opinion) (quoting *Babcock & Wilcox*, 361 NLRB 1127, 1140 (2014)) (footnotes omitted). The reliance factor strongly favors retroactive application here.

Regarding the effect of retroactivity on accomplishment of the purposes of the Act, we have explained above how today's decision supports the Act's fundamental encouragement of collective bargaining, and we have rejected the *Valley Hospital I* majority's perplexing view that *not* requiring bargaining over this issue somehow better promotes the practice of collective bargaining. We also emphasize the longstanding, well established, and important policy strongly disfavoring unilateral changes that the *Katz* rule advances and the importance of ensuring the consistent implementation of that policy. Retroactivity here thus promotes accomplishment of the purposes of the Act.

Finally, we find that retroactive application of this decision imposes no particular injustice on the Respondent.[56] In notifying the Union of its intent to cease dues checkoff, the Respondent cited not only *Lincoln Lutheran* and its holding but also GC Memo 18-02 (December 1, 2017), which included *Lincoln Lutheran* among "'significant issues' that are mandated for submission to the Division of Advice." Thus, the Respondent apparently perceived that the bargaining obligation might be reconsidered, and presumably it hoped for that outcome. But the mere possibility of a hoped-for change in the law creates no injustice—let alone manifest injustice—in applying the then-binding rule of *Lincoln Lutheran* to the Respondent.

For similar reasons, we find that applying the approach that we reinstate today retroactively in all pending cases, including those where a respondent acted while *Valley Hospital I* was in effect, will not work a "manifest injustice," *SNE Enterprises*, 344 NLRB at 673. First, as discussed above, the Ninth Circuit rejected the application of the *Bethlehem Steel* rule in the *Hacienda* series of cases beginning 20 years ago, and the Board followed suit by overruling *Bethlehem Steel* a decade ago in *WKYC-TV, Inc.* The Board again reaffirmed that view several years later in *Lincoln Lutheran*. The Board has now repeatedly held that dues-checkoff provisions, like most other contract terms, survive contract expiration, and the contrary rule reinstituted in *Valley Hospital I* has been subjected to sustained judicial criticism. Against this backdrop of legal uncertainty, we find that any reliance interests related to the rule announced in *Valley Hospital I* are sufficiently weak that they cannot justify applying today's holding prospectively only.[57] Further, we conclude, for the reasons set forth extensively above, that because today's approach better advances the policies of the Act, applying it retroactively will facilitate the "accomplishment of the purposes of the Act." *SNE Enterprises*, 344 NLRB at 673. Accordingly, when balancing "any ill effects of retroactivity" against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles,'" id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. at 203), we find that applying our holding retroactively will avoid the potential for inconsistency in pending cases, more efficiently restore clarity to this area of law, and more effectively ensure that today's holding serves its intended goal of promoting stability in labor relations (consistent with the design of the statute). Accordingly, we find that application of our new standard in this and

[56] Indeed, the absence of injustice in applying today's decision to the Respondent is so clear that the dissent agrees.

Contrary to the dissent's argument, we do not rely on the dissent's agreement with retroactive application to the Respondent—and to other employers whose cessation of dues deduction was unlawful when done—as support for retroactive application more broadly. Rather, as clearly explained above and below, we rely on the Board's longstanding, multi-pronged standard to assess whether retroactive application would work a manifest injustice. See *SNE Enterprises*, 329 NLRB at 673. Applying that standard, we find that it would not.

[57] Cf. *Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters v. NLRB*, 45 F.4th 38, (D.C. Cir. 2022), denying enf. to *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 369 NLRB No. 139 (2020) (*BFI II*). There, the United States Court of Appeals for the District of Columbia Circuit rejected the Board's refusal in *BFI II* to retroactively apply *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*BFI I*). The Board had contended that *BFI I* constituted such a "sea change" in the applicable, longstanding law that retroactive application of it would be manifestly unjust. *Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters v. NLRB*, 45 F.4th at 44. Finding, among other considerations, that "the Board's precedent on the [standard at issue] was anything but static," the court held that "the Board failed to establish that [*BFI I*] represented the kind of clear departure from longstanding and settled law that the Board said justified its retroactivity conclusion." Id. Here, as described, the applicable law has been in flux for a decade before the Board and over two decades before the relevant court of appeals, undermining the reasonableness of any current reliance on *Bethlehem Steel*. Although the dissent opines that, after *Valley Hospital I*'s issuance, "it follows that parties would reasonably assume that the longstanding practice was again in effect and would act accordingly," in our view it is much more likely that parties would reasonably see continued uncertainty. In asserting that the *Bethlehem Steel* standard was longstanding and settled law, the dissent minimizes the effect of decades of serious Board and court doubts about the validity of the standard, especially in the "right to work" context at issue here. We agree that the standard, though inadequately supported, was of longstanding; however, for at least the past 20 years, it has been anything but settled.

Further, bargaining parties have had ample time to resolve the uncertainty by negotiating language, in contract renewals and new agreements, addressing dues checkoff's status after contract expiration. Applying a rule that bargaining parties could have anticipated and could have contracted out of is not, in our view, manifest injustice.

other pending cases will not work a "manifest injustice." *SNE Enterprises*, 344 NLRB at 673.

Conclusion

Based on the foregoing, we find that the rule of *Lincoln Lutheran* represents the better view of an employer's statutory dues-checkoff obligation after contract expiration. As explained in that decision and here, treating contractual dues-deduction provisions comparably with nearly all contractual provisions, which establish terms and conditions of employment that cannot be changed unilaterally after contract expiration, implements the Act's policy goals of both encouraging the practice and procedure of collective bargaining and of safeguarding employees' free choice in the exercise of their Section 7 rights. As then-Member McFerran's *Valley Hospital I* dissent stated, "the *Lincoln Lutheran* Board offered a clear, careful, and coherent explanation for taking [its] approach, which actually furthered statutory policy and which eliminated an anomaly in Board doctrine."[58] We recognize that today's decision represents a change in Board policy that has oscillated repeatedly in recent years, and we do not take this action lightly. But we decline to keep following a course that has never been cogently explained, and we see no reason not to adopt what we believe is the better interpretation of the Act and its policies. Accordingly, for all the reasons we have explained, we now reverse the majority decision in *Valley Hospital I* and adopt again the rule of *Lincoln Lutheran*: that an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until either the parties have reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer. This rule applied to the Respondent when it unilaterally ceased dues deduction, and we apply it today. We therefore find that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) by unilaterally ceasing dues checkoff after the expiration of the parties' collective-bargaining agreement, we shall order the Respondent to make the Union whole for any dues it would have received but for the Respondent's failure to comply with its obligation to provide notice and an opportunity to bargain before changing terms and conditions of employment.[59] See, e.g., *W.J. Holloway & Son*, 307 NLRB 487 (1992); *West Coast Cintas Corp*., 291 NLRB at 156; *Creutz Plating Corp*., 172 NLRB 1 (1968). This order requires only that the Respondent make the Union whole for dues it would have received from employees who have individually signed dues-checkoff authorizations. See, e.g., *W.J. Holloway*, 307 NLRB at 487 fn. 3; *Creutz Plating Corp*., 172 NLRB at 1. The make-whole remedy shall be remitted to the Union with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as

[58] *Valley Hospital I*, above, slip op. at 14.

[59] To prevent double recovery by the Union, payment by the Respondent to the Union shall be offset by any dues the Union collected during the relevant period on behalf of employees covered by the dues payment order. See *A.W. Farrell & Sons, Inc*., 361 NLRB 1487, 1487 fn. 3 (2014).

In addition, in ordering this remedy, we make clear that the Respondent is prohibited from seeking to recoup from the employees any dues amounts the Respondent is required to reimburse to the Union. See *Alamo Rent-A-Car*, 362 NLRB 1091, 1091 fn. 1 (2015), enfd. 831 F.3d 534 (D.C. Cir. 2016), quoting *West Coast Cintas Corp*., 291 NLRB 152, 156 fn. 6 (1988) ("the financial liability for making the Union whole for dues it would have received but for [r]espondent's unlawful conduct rests entirely on the [r]espondent and not the employees."). We reject the dissent's characterization of this aspect of the remedy as punitive and contrary to law. As the Supreme Court has stated, "[w]e have accorded the Board considerable authority to structure its remedial orders to effect the purposes of the NLRA and to order the relief it deems appropriate." *Litton Financial Services*, 501 U.S. at 202 (citing cases). The Court added, "we give the greatest latitude to the Board when its decision reflects its 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management." Id. at 201-202 (quoting *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 267 (1975)). Here, what the dissent disapprovingly implies is a windfall for employees merely reflects a reasonable choice as to which party bears the uncertain costs of the unlawful conduct, and we follow our established practice of assessing them on the wrongdoer. See *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *United Aircraft Corp*., 204 NLRB 1068, 1068 (1973) ("[T]he backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved."). Here, the Respondent's unilateral cessation of dues deductions improperly burdened employees in their Sec. 7-protected support for the Union; remedying the unlawful conduct should not burden them further. The dissent, attempting to distinguish *Alamo Rent-A-Car*, above, declares that the Respondent's conduct was not a "wholesale repudiation of the bargaining relationship"; however, there is no dispute that the Respondent was fully aware when it unilaterally terminated dues checkoff that then-current law did not permit it to repudiate its obligations toward both the employees and the Union in that manner. The dissent's assertion that the Respondent "did not owe [employees' dues] to the Union as a *financial* obligation in the first place" is plainly contrary to our conclusion that the Respondent had a continuing statutory duty to remit employees' dues to the Union. Having chosen not to do so in the face of clear law requiring it, the Respondent must now be ordered to remit the sums to the Union. Nor are we persuaded by the dissent's contention that the remedy may violate Sec. 302 of the Taft-Hartley Act. See *Alamo Rent-A-Car*, 362 NLRB at 1091–1092 fn. 1.

prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Space Needle, LLC*, 362 NLRB 35, 39 (2015), enf. on other grounds 692 Fed.Appx. 462 (9th Cir. 2017); *W.J. Holloway*, 307 NLRB at 491.

ORDER

The National Labor Relations Board orders that the Respondent, Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally ceasing dues checkoff without first bargaining to impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreement for employees who executed checkoff authorizations prior to and during the period of the Respondent's unlawful conduct, as described in the remedy section of this decision.

(b) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(c) Post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall, at its own expense, duplicate the notice and mail copies to all current and former employees employed by the Respondent at any time since February 1, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN and RING, dissenting.

In 1962, the National Labor Relations Board established that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires. *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). For more than the next half-century, the *Bethlehem Steel* rule was consistently applied by the

[60] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Board and enforced in the United States Courts of Appeals.[1]

In the initial decision in this case,[2] the Board recognized that the reasoning behind the holding in *Bethlehem Steel* had not been fully explored. Accordingly, the Board explained that dues-checkoff, like other provisions found to be exceptions to *Katz*—such as management-rights clauses, no-strike clauses, and arbitration clauses—cannot exist in a bargaining relationship unless the parties affirmatively contract to be so bound.

Upon review, the United States Court of Appeals for the Ninth Circuit issued an unpublished decision that remanded the case to the Board. *Local Joint Executive Board of Las Vegas v. NLRB*, 840 Fed.Appx. 134, 136-137 (9th Cir. 2020). Importantly, the court did not reject the Board's decision that the longstanding holding of *Bethlehem Steel* is the proper standard to apply in determining whether employers are required to continue making dues checkoff payments following the expiration of the parties' agreement. To the contrary, the court signaled its view that the Board would be able to "cure the identified flaw in its decisionmaking process." Id. at 137. Accordingly, the court remanded the case simply to allow the Board to "supplement[] its reasoning." Id. at 138.[3]

Nevertheless, our colleagues have improvidently decided to use this case as a vehicle to abandon *Bethlehem Steel* in order to resurrect in substance the previous unnecessary, and short-lived, jettisoning of this law in *Lincoln Lutheran of Racine*.[4] Although our colleagues find today that *Bethlehem Steel* is inconsistent with the Supreme Court's holding in *NLRB v. Katz,* 369 U.S. 736, 743 (1962), it is difficult to reconcile that finding with the many decades of United States Courts of Appeals decisions that have enforced Board decisions relying on *Bethlehem Steel*, not to mention with the Supreme Court's recognition, without criticism, that the Board had found dues checkoff to be an exception to *Katz*.[5]

Furthermore, the majority doubles down on its decision by making its change in law retroactively applicable to all pending cases, upsetting employers' reasonable reliance on their ability to cease dues checkoff. And, in fact, our colleagues go even further: today's decision punitively orders the Respondent to pay the Union from its own pocket dues owed by employees without allowing the Respondent to seek reimbursement from those employees who failed to make required payments to the Union. We strongly disagree on each of these points and dissent.

I. DUES CHECKOFF SHOULD REMAIN TERMINABLE WHEN CONTRACTS EXPIRE

A. Bethlehem Steel Established Dues Checkoff Obligation Ends at Contract Termination

As the Board explained in its initial decision in this case, Section 8(d) of the Act establishes the general statutory duty to "bargain collectively," defining the duty as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." In 1962, the Supreme Court expressly affirmed that this statutory duty includes the requirement that an employer refrain from unilaterally changing bargaining unit em-

[1] See, e.g., *Wilkes Telephone Membership Corp.*, 331 NLRB 823, 823 (2000); *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988); see also *Office Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 317 (7th Cir. 2005) (citing *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869–870 (7th Cir. 1993)); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *Sullivan Bros. Printers v. NLRB*, 99 F.3d 1217, 1231 (1st Cir. 1996); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254–255 (D.C. Cir. 1991) (citing *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986)).

[2] *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019) ("*Valley Hospital I*").

[3] Our colleagues note that the U.S. Court of Appeals for the Ninth Circuit has voiced concerns about *Bethlehem Steel* for the past two decades. Again, it is important to recognize that, in reviewing this case, the Ninth Circuit did not hold that *Bethlehem Steel* must be reversed because it is inconsistent with *Katz*. Furthermore, our colleagues conveniently ignore the fact that, despite any concerns voiced by the Ninth Circuit, the other 11 federal courts of appeals that hear Board cases have routinely and consistently enforced cases applying *Bethlehem Steel* over a much longer period of time.

Moreover, our colleagues attempt to justify using this case to overturn the *Bethlehem Steel* standard based on concerns that the Ninth Circuit has voiced. While we respect the views of the courts of appeals, this justification is inconsistent with the Board's longstanding policy of "non-acquiescence," which establishes that the Board does not base national labor law upon the views of one outlying circuit court. See, e.g., *CVS RX Services*, 363 NLRB 1757, 1763 (2016) ("Although Respondent cites to decisions of the Fifth and Ninth Circuits at odds with the Board's position, it is well settled that the Board generally applies a 'non-acquiescence policy' with respect to contrary views of the Federal Courts of Appeal."). That policy is particularly applicable here, where the contrary views of the Ninth Circuit make it an outlier. Contrary to the majority, we are not asserting that the majority *cannot* jettison longstanding Board law based on the contrary views of one court. We simply point out that the Board's policy of non-acquiescence undermines the majority's argument that the Ninth Circuit's concerns provide a compelling reason that the Board *should* do so.

Furthermore, the majority's mere speculation that other courts could also raise the same concerns as the Ninth Circuit is just that, mere speculation. And it is counterintuitive, given that other courts of appeals have been enforcing Board cases applying *Bethlehem Steel* for decades without raising any concerns. But even assuming their speculation might prove prophetic someday, we reject the idea that significant changes in Board law should be based upon pure speculation.

[4] *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015).

[5] *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

ployees' terms and conditions of employment from the commencement of a bargaining relationship until the parties have first reached a lawful impasse in good-faith attempts to negotiate a collective-bargaining agreement. See *Katz*, 369 U.S. at 743. This has become known as the *Katz* unilateral change doctrine. In *Litton*, the Supreme Court affirmed that the statutory obligation imposed by the *Katz* doctrine applies not only from the commencement of a bargaining relationship but also upon expiration of any subsequent collective-bargaining agreement.

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

As stated above, the Board first expressly recognized the exception for dues checkoff in *Bethlehem Steel*, which issued a month before the Supreme Court decided *Katz*. In *Bethlehem Steel*, the Board addressed the legality of several unilateral changes made by the employer after expiration of a collective-bargaining agreement. Of relevance here is the Board's discussion of union-security and dues-checkoff provisions in the expired agreement. The Board found not only that unilateral termination of union-security requirements in that agreement was lawful, but that termination was mandatory pursuant to the terms of Section 8(a)(3). Id. at 1502.

The Board then found that

> [s]imilar considerations prevail with respect to the Respondent's refusal to continue to checkoff dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force.

Id. The Board also noted that "[t]he very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts." Id.

For 60 years, cases applying *Bethlehem Steel* have been routinely approved by the federal courts of appeals. And even in this instant case, as discussed above, the reviewing court has neither held nor suggested that *Bethlehem Steel* must be overruled because it conflicts with *Katz*.

B. The Taft-Hartley Act Establishes that Dues Checkoff Is Different from Other Terms and Conditions of Employment that Are Covered by Katz

In 1947, Congress enacted the Labor Management Relations Act (LMRA), also known as the "Taft-Hartley Act." Section 302 of the LMRA broadly prohibits employers from making payments to unions, with certain exceptions. One of the exceptions is set forth in Section 302(c)(4) of the LMRA, which provides employers cannot "deduct[] from the wages of employees in payment of membership dues in a labor organization" unless "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."

In *Valley Hospital I*, the majority found it unnecessary to pass on whether Section 302 of the Labor Management Relations Act "must be construed to prohibit dues checkoff upon expiration of the collective-bargaining agreement providing for checkoff, as some courts have held." 368 NLRB No. 139, slip op. at 6 fn. 18. We remain of that view. However, in light of the court's remand, we will explain why the statutory commands of Section 302 and Section 8(a)(5) as construed in *Katz* and *Litton* pull in opposite directions and further support the Board's decision in *Valley Hospital I*.

Section 302(c)(4) of the Labor Management Relations Act (LMRA) reinforces that dues checkoff is unique and cannot exist either before the commencement of a bargaining relationship or prior to the existence of a written agreement. Employers cannot "deduct[] from the wages of employees in payment of membership dues in a labor organization" unless "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." As explained in *Valley Hospital I*, the reference to "the applicable collective agreement" indicates that an employer has no statutory dues-checkoff obligation unless it agrees to one in a collective-bargaining agreement. Id. This statutory mandate—

and the logical implication that employers may terminate dues-checkoff provisions upon the expiration of the agreement containing such provisions[6]—gives dues checkoff a special status separate from other terms and conditions of employment not covered by such statutory language.

Another way in which dues checkoff differs from other terms and conditions of employment that remain in place following contract expiration is that Section 302(c)(4) mandates that employees must be able to revoke their dues-checkoff arrangements at any time postcontract expiration.[7] If an employee makes such a choice, employers are bound by the LMRA to cease making dues-checkoff payments on their behalf. This is so even if the employee's option to revoke was never agreed to during bargaining or if it is inconsistent with any past practice.

This clear congressional mandate, however, runs up against the established rule that, following the expiration of a collective-bargaining agreement, employers are statutorily required to maintain the status quo. This statutory requirement is entirely separate from any contractual obligation that existed under the contract. Rather, the status quo requires employers to "maintain" or "bargain over changing" mandatory subjects of bargaining in place at the time the contract terminates. With regard to dues checkoff, however, this presents a dilemma.

During the term of the contract, the parties have established a *contractual* duty for the employer to offer dues checkoff to employees who request that arrangement. That contractual duty, however, does not survive contract expiration. Rather, at the time of contract termination, the employer's statutory duty under the status quo becomes to continue in effect dues-checkoff arrangements in place at the time the contract expired. But the employer *cannot* continue to checkoff dues for any employee who, after the contract expires, exercises his or her right under Section 302(c)(4) to revoke his or her checkoff authorization. And when an employee does so and the employer honors that request, which it must do, the employer has discontinued a dues-checkoff arrangement that was in place when the contract expired and has done so without bargaining with the union, which it must not do.

Simply put, there is no other term and condition of employment with respect to which employers are required to change, even in the absence of an agreement or a past practice, individual employees' terms and conditions of employment postcontract expiration on a case-by-case basis *upon their individual request*.[8] This conflict between the mandates of the Act with regard to maintaining the status quo postcontract expiration and the mandate of Section 302(c)(4) to cease dues checkoff for any individual employee upon their request is another reason why, contrary to the assertions of our colleagues, dues-checkoff provisions are not "typical terms and conditions of employment covered by the statutory obligation to bargain." Unlike the other contractually created provisions cited by the majority,[9] employers are required to allow individual employees to "opt out" of the status quo on an ongoing basis after the contract expires.

Our colleagues do not dispute that the LMRA contains this provision specifically requiring employers to honor employees' dues-checkoff revocations at any time following contract expiration. They do, however, deny that this statutory mandate gives dues checkoff a special sta-

[6] In fact, the Supreme Court's decision in *Litton* cited Sec. 302(c)(4) as support for the Board's determination that dues checkoff is an exception to *Katz* because "dues check-off [is] valid only until termination date of agreement." *Litton*, 501 U.S. at 199.

[7] Quoting the dissent in *Valley Hospital I*, the majority refuses to even recognize that the express language of Sec. 302(c)(4) establishes that, upon the expiration of the agreement pursuant to which the employer agreed to dues checkoff, employees must be able to revoke their dues-checkoff agreements at will. This interpretation of the LMRA as meaning something other than what its express language states has been met with criticism in the courts, as noted by Member Kaplan in his dissent in *AT&T Services*, 371 NLRB No. 82 (2022). See *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43–44 (4th Cir. 1978) (holding that Sec. 302(c)(4) "guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus between collective bargaining agreements," and that "revocations tendered during the period between the expiration of one bargaining contract and the execution of the next one were effective"); *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 788 (5th Cir. 1975) ("[W]hen there is no collective bargaining agreement in effect, dues checkoff authorizations are revocable at will."); *Murtha v. Pet Dairy Products Co.*, 44 Tenn. App. 460, 314 S.W.2d 185, 190 (1957) (cited with approval by *Anheuser-Busch*, 584 F.2d at 44, and *Atlanta Printing*, 523 F.2d at 588); see also *Stewart v. NLRB*, 851 F.3d 21, 35 (D.C. Cir. 2017) (Silberman, J., dissenting) (concluding that "the Board's interpretation of [Sec.] 302 is flatly wrong . . . . The Board has engaged in a blatant attempt to rewrite a statute in which Congress spoke plainly—at least on the crucial issue").

[8] Other voluntary payments that employees may individually authorize employers to make through payroll deduction and that employees may revoke at their own option are not similar. Such deduction arrangements must have been created through past practice, bargaining with the union, or giving the union an option to bargain that it did not take. Under those circumstances, those payroll deductions and the built-in option to revoke them would be part of the status quo that survives contract expiration. Under Sec. 302(c)(4), in contrast, employers must cease dues checkoff at an individual employee's election after contract expiration even if there was no past practice or any bargain struck with the union that allowed individual employees to revoke it.

[9] Specifically, our colleagues cite "requiring an employer to process grievances short of arbitration, granting union representatives leave or time off for official union business, and requiring an employer to hire workers through a union hiring hall, permitting union access to an employer's property, recognizing stewards designated by a union at an employer's workplace, granting seniority rights to union officials, and abiding by seniority provisions when recalling workers from layoffs." (Internal footnotes omitted).

tus separate from other terms and conditions of employment not covered by such statutory language. First, they find that because dues checkoff need not be created by contract, the fact that it is normally created by a contract "simply does not compel the conclusion that checkoff expires with the contract that created it." This does not follow. Dues checkoff cannot exist without an agreement between the parties. If that agreement does not include a termination date, then the issue of what happens after the agreement expires would be moot.

Our colleagues also contend that "the language of Section 302 leads to the opposite conclusion" because "Section 302's articulation of the circumstances in which an employee's own authorization of dues checkoff must be revocable 'beyond the termination date of the applicable collective agreement' would be unnecessary if dues-checkoff arrangements did not survive the contract." This argument elides an important distinction between permissible and mandatory postcontract survival of dues checkoff. The majority's argument at most shows that Congress contemplated that dues checkoff could *permissibly* continue after a collective-bargaining agreement expires. But our colleagues hold that postcontract continuation of dues checkoff is *mandatory* absent bargaining, which is a different matter altogether.

The majority's argument also misses a key point: *Katz* was not decided until some 20 years after the enactment of Section 302 as part of the Taft-Hartley Act. Accordingly, Congress was not legislating against a background assumption that contractual terms and conditions of employment, including, potentially, dues-checkoff arrangements, survive contract expiration as a statutory matter. While Section 302 does not prohibit employers from continuing dues checkoff after contract expiration, Congress' insistence that employees should be able to revoke their dues-checkoff authorization at periodic intervals, and at any time after the agreement expires, hardly indicates an intention to require employers to continue it. To the contrary, it suggests that Congress was concerned about the continuation of dues checkoff postcontract expiration.[10]

[10] Our colleagues portray Sec. 302(c)(4) as protecting employees' control over dues being deducted from their wages, but Sec. 302 is not about *employee* rights. It is about the relationship between employers and unions, specifically the general ban on employers paying money to unions unless the payment fits an enumerated exception. Sec. 302(c)(4) is the exception for dues checkoff, and its wording supports a finding that Congress would not expect employers to be required to continue dues checkoff after contract expiration.

C. Further Response to the Majority's Criticism of the "Contract Creation" Analysis and the Reviewing Court's Remand

In addition to disagreeing that the congressional mandate set forth in Section 302(c)(4) differentiates dues checkoff from other provisions that are covered by *Katz*, our colleagues further deny that the *Katz* exceptions arise from the unique contractual nature of such provisions and conclude that the Board erred in finding that dues checkoff belongs among the exceptions for this reason. In this regard, they assert that the cases the Ninth Circuit faulted us for not addressing in our initial decision are inconsistent with our rationale. We acknowledge that several Board cases, as identified by the Ninth Circuit and our colleagues, have held that terms and conditions of employment that were first specified by collective-bargaining agreements survive their expiration. There is no tension, however, between these decisions and the rationale that the well-established exceptions to the *Katz* doctrine—including dues checkoff—are uniquely rooted in contract.

The crucial distinction is that the terms and conditions at issue in the cases cited by the court and relied upon by our colleagues[11] are all based in bargaining obligations or terms and conditions that can, and often do, exist at the commencement of the bargaining relationship. For example, provisions recognizing designated union stewards, granting representatives leave for union business, and permitting union access are all directly related to employers' statutory bargaining obligation that commences at the point of the unions' certification or the employers' voluntary recognition of a union. See *Dish Network Service Corp.*, 339 NLRB 1126, 1126–1128 (2003); *Circuit-Wise, Inc.*, 306 NLRB 766, 767 (1992). Similarly, employers may have preexisting hiring, seniority, and recall policies,[12] and employers may already have been contributing to benefit funds for their employees.[13] Contractual provisions about processing grievanc-

[11] The provisions at issue include: recognizing stewards designated by a union at the employer's workplace, granting union representatives leave or time off for official union business, permitting union access to the employer's property, processing grievances short of arbitration, requiring an employer to hire workers through a union hiring hall, granting seniority rights to union officials, abiding by seniority provisions when recalling workers from layoffs, and contributing to collectively bargained multiemployer benefit funds.

[12] See, e.g., *Schnadig Corp.*, 265 NLRB 147, 147–148, 170–171 (1982) (finding employer violated Sec. 8(a)(5) and (1) by unilaterally changing its seniority, layoff, and recall policies that predated the bargaining relationship).

[13] See, e.g., *HTH Corp.*, 361 NLRB 709 (2014) (finding employer violated Sec. 8(a)(5) and (1) by unilaterally suspending its matching contributions to employees' 401(k) accounts during bargaining for a first contract), enfd. in relevant part 823 F.3d 668 (D.C. Cir. 2016).

es short of arbitration, requiring an employer to hire workers through a union hiring hall, granting seniority rights to union officials, abiding by seniority provisions when recalling workers from layoffs, and contributing to collectively bargained multiemployer benefit funds all are contractual refinements of terms and conditions that can exist before a collective-bargaining agreement.

By contrast, dues checkoff and the other established *Katz* exceptions are not terms and conditions that can exist from the beginning of the bargaining relationship. They are exclusively creatures of contract, and only a mutual agreement gives rise to any obligation to maintain them. As the Board stated in the initial decision in this case:

> The parties may contract to change the terms and conditions that existed when their bargaining relationship commenced, and those changes reflect the status quo that must then be maintained upon the expiration of the contract. In contrast, the statutory obligation does not arise as to dues checkoff or any other mandatory bargaining subjects excepted from *Katz* until established in a bargaining agreement. That statutory obligation is rooted in the contract and endures only for its term, unless the parties specifically agreed to extend it.

Valley Hospital I, 368 NLRB No. 139, slip op. at 6. We continue to view this similar, and distinct, nature of dues-checkoff provisions as well as the other established exceptions to *Katz* as clear and convincing evidence that *Bethlehem Steel* was correctly decided.

Finally, we note that our colleagues' determination to undermine *Bethlehem Steel* has a noteworthy effect. Ultimately, by finding a violation of Section 8(a)(5) and (1) when employers cease dues-checkoff arrangements after the expiration of the contracts that created them, our colleagues are impermissibly interfering with the statutory bargaining process by eliminating one of employers' legitimate economic weapons. As the Supreme Court has confirmed, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Act have recognized." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960). Our statute protects the availability of economic weapons on both sides as the mechanism to persuade parties to bridge their differences to reach collective-bargaining agreements and bring about industrial peace. The Board may not function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands," id. at 497, and it has no "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of the party's bargaining power." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). The termination of dues-checkoff provisions, for most of the Act's history, has been a legitimate economic weapon that can facilitate parties reaching a successor collective-bargaining agreement. Our colleagues, in improperly overreaching to disrupt this status quo, have in effect made the statutory goal of parties reaching an agreement through collective bargaining more challenging.

II. THIS DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO ALL PENDING CASES

Our colleagues compound their error by making their change in law—namely, that postexpiration cessation of dues checkoff now violates the Act—applicable retroactively to all pending cases. When the Board made a similar change in *Lincoln Lutheran*, the Board properly concluded that retroactive application of that same change in law would be improper:

> [A] violation under a retroactive application of this rule would work a manifest injustice. Today's ruling definitively changes longstanding substantive Board law governing parties' conduct, rather than merely changing a remedial matter. See *SNE Enterprises*, [344 NLRB 673, 673 (2005)]; cf. *Kentucky River Medical Center*, 356 NLRB [6, 10] (2010). Employers relied upon *Bethlehem Steel* for 50 years when considering whether to cease honoring dues-checkoff arrangements following contract expiration. As the Board has done in other cases involving departures from longstanding precedent, we conclude that this reliance interest warrants prospective application only of today's decision.

Lincoln Lutheran of Racine, 362 NLRB 1655, 1663 (2015) (citing *Piedmont Gardens*, 362 NLRB 1135, 1140 (2015); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001)).

We agree with our colleagues that it makes sense to apply this decision retroactively to the instant case as well as any other currently pending cases in which the employer's action—the cessation of payments pursuant to dues-checkoff provisions in expired contracts—occurred when *Lincoln Lutheran* was in effect.[14] In those circumstances, there is no peril of manifest injustice because the employers' actions were not at odds with

[14] The majority seems to suggest that our finding that there is no manifest injustice in cases where the employers' actions were inconsistent with the law at the time they acted (in other words, where the actions were *unlawful at the time*) somehow supports their finding that there is no manifest injustice when employers' actions were consistent with the applicable law (in other words, *lawful at the time*). We fail to see the logic in this suggestion.

then-extant Board law. But we disagree with our colleagues that the retroactivity concerns that were present, and recognized as important, in *Lincoln Lutheran* no longer exist for employers who relied upon our initial decision in this matter. By applying their decision retroactively against *these* employers, the majority retroactively makes unlawful acts that were lawful at the time they were undertaken. That is plainly manifestly unjust.

As the United States Court of Appeals for the D.C. Circuit recently noted, an important consideration in whether a change in law should be applied retroactively is "how far [the new decision] departs (or does not) from reasonable, settled expectations." *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1222 (D.C. Cir. 2018). As we have indicated above, for several *decades* Board law was clear: under *Bethlehem Steel*, an employer could legally cease dues checkoff upon the expiration of the contract that had contained that requirement.[15] When *Valley Hospital* issued, returning to the law under *Bethlehem Steel*, it follows that parties would reasonably assume that the longstanding practice was again in effect and would act accordingly. Therefore, because the majority's decision here is disrupting the "reasonable, settled expectations" of employers who were acting not only pursuant to current Board law but also a practice that had been settled law for decades, it would constitute a manifest injustice to apply this decision retroactively as to them.

III. PROHIBITING DUES RECOUPMENT IS PUNITIVE

In ordering the Respondent to make the Union whole for dues the Respondent did not deduct and remit to the Union, the majority prohibits the Respondent from recouping the funds that it had already paid out to employees in lieu of remitting to the Union.[16] In other words, where employees had not already paid their dues to the Union outside the dues-checkoff provision, the Respondent must pay that money twice, resulting in the Respondent directly funding the Union from its own coffers. As our colleagues themselves describe them, dues-checkoff arrangements "establish a system, as a matter of administrative convenience to a union and employees, for employees who choose to pay their union dues through automatic payroll deduction." For failing to fulfill its administrative role, in other words, the Respondent is on the hook for the full dues amounts that the Union did not otherwise collect from employees—not that the Union would have much incentive to mitigate its damages under this system—and employees get to keep the money that they should have paid the Union.

The Board's remedial powers set forth in Section 10(c) of the Act are remedial, not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938). "[I]n exercising its remedial discretion, the Board is obligated to ensure that its remedies are compensatory and not punitive, and to guard against windfall awards that bear no reasonable relation to the injury sustained." *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348, 1353 (2007), pet. for review dismissed 561 F.3d 497 (D.C. Cir. 2009). Remedies need to restore "the situation, as nearly as possible, to that which would have obtained but for" the violation. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The majority's remedy here bears no reasonable relation to the Respondent's having failed to perform its administrative service of convenience to facilitate the Union's dues collection. The dues money was the employees to pay, not the Respondent. Making the Respondent pay the full value of the money it should have transmitted to the Union is out of proportion to its failure. Further, barring the Respondent from seeking recoupment from employees to whom it had already paid the dues money is clearly punitive. Although our colleagues assert that they are merely resolving remedial uncertainty against the wrongdoer, it is worth remembering that this is not a circumstance where the majority's

[15] The majority's claim that the *Bethlehem Steel* rule was not longstanding, settled law but rather existed under a cloud of two decades of uncertainty is not true. For 60 years, with the exception of the few years that *Lincoln Lutheran* was in place, it has been established Board law that employers can cease dues checkoff after contract expiration; the fact that Board members had dissented in the past does not change that fact. Further, none of the Ninth Circuit decisions cited by our colleagues in support of their assertion that parties should not have relied on *Bethlehem Steel* held that *Bethlehem Steel* must be overruled. Our colleagues' position that parties who entered into agreements when *Lincoln Lutheran* was not in place nevertheless should have taken into account the *possibility* that it might be resurrected is not reasonable.

[16] The dues-recoupment bar was only first clearly articulated in *Alamo Rent-a-Car*, 362 NLRB 1091, 1091 fn. 1 (2015), enfd. on this point only on procedural grounds 831 F.3d 534 (D.C. Cir. 2016). This was over Member Miscimarra's cogent dissent. Id. at 1097–1098 (Member Miscimarra, dissenting). In support of their position that the punitive remedy ordered here is appropriate, our colleagues reference *Alamo* as well as *West Coast Cintas Corp*., 291 NLRB 152, 156 fn. 6 (1988). First, we note that *West Coast Cintas* is not particularly relevant to this discussion. The Board in that case did not prohibit the employer from attempting to recoup funds that it erroneously paid employees when it should have sent that portion of the employees' earnings to the Union instead. Furthermore, we note that both cases relied upon by the majority involve instances in which the employer ceased making payments in accordance with dues-checkoff provisions—contained in unexpired contracts—as a result of an unlawful withdrawal of recognition of the Union. Here, there was no commensurate wholesale repudiation of the bargaining relationship on the part of the Respondent but rather simply the cessation of a purely administrative function. We believe that to impose such a clearly punitive remedy under these circumstances is not only beyond the Board's remedial purview, as discussed infra, but also constitutes an unwarranted extension of *Alamo*.

decision is making any *employees*, whose protection is the purpose of the Act, whole. Rather, by requiring the Respondent to pay funds to the Union that it had already paid out to the employees and that it did not owe to the Union as a *financial* obligation in the first place, our colleagues have exceeded the bounds of the Board's remedial authority.

Moreover, the Respondent directly funding the Union conflicts with Section 302 of the LMRA's prohibition on employer payments to unions. Under the limited exceptions to this prohibition, an employer may only remit their employees' dues to a union if the dues have been deducted from their pay. See Section 302(c)(4) (excepting "money *deducted from the wages of employees* in payment of membership dues in a labor organization." (Emphasis added)). The Section 302(c)(2) exception allowing employers to submit payments to unions to satisfy court judgments, which would include judicially enforced Board orders, cannot swallow Congress's clear intention to permit employers to remit union dues only when "deducted from the wages of employees." The Board does not have the freedom to fashion remedies that are punitive and against more specific limitations. The Respondent must be permitted to recoup the dues amounts it remits to the Union under the Order.

IV. CONCLUSION

For all these reasons, we respectfully dissent.

Dated, Washington, D.C. September 30, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally cease dues checkoff.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreement for employees who executed checkoff authorizations prior to and during the period of our unlawful conduct, plus interest.

VALLEY HOSPITAL MEDICAL CENTER, INC.
D/B/A VALLEY HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/28-CA-213783 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.