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NLRB Ruling Ends Dues Checkoff As Employer Bargaining Tool

By **Abigail Rubenstein**

Law360, New York (December 20, 2012, 4:39 PM ET) -- In a decision that overruled 50 years of labor law precedent, the National Labor Relations Board held last week that employers must continue to honor arrangements to deduct union dues from paychecks even after a collective bargaining agreement expires, removing one weapon employers had in their arsenal at the bargaining table.

Considering a challenge to Gannett Co. Inc.'s television station WKYC-TV's decision to stop taking dues out of worker paychecks when its collective bargaining agreement with the National Association of Broadcast Employees and Technicians Local 42 expired, the labor board issued a 3-1 decision on Dec. 12 that reversed Bethlehem Steel, a board precedent from 1962 that permitted employers to cease dues checkoff once the contract that provided for it ran out.

Instead, the majority concluded that following the expiration of a contract that establishes a dues-checkoff arrangement, the employer must continue dues deductions until the parties have reached agreement or a valid impasse permits unilateral action by the employer. The ruling means employers can no longer halt dues deductions when an existing collective bargaining agreement expires during negotiations for a new deal.

"The decision removes a weapon from employers that could be very helpful in certain situations," Doreen Davis of Jones Day told Law360.

"Especially in these times when most negotiations for renewal contracts are concessionary, it is not atypical for the union to try to drag the negotiation out for as long as possible to stave off those concessions," Davis said. "One weapon that employers sometimes used to stop the unions from stalling was to stop the dues checkoff, but now that is not going to be an option."

And taking that bargaining chip away from employers could give unions a new incentive to hold out during collective bargaining, attorneys say.

"It eliminates one factor of pressure on a union to work toward a deal quickly," David P. Phippen of Constangy Brooks & Smith LLP said. "[Ending dues checkoff] tends to pressure unions to get an agreement without having the pressure of a lockout, which is the employer's other type of weapon."

Management-side lawyers also told Law360 they weren't surprised by the board's decision, as previous cases had hinted that the board was looking for a vehicle to overturn Bethlehem Steel, but said that the reversal of such a long-lived precedent nonetheless highlights the current board's pro-union bent.

"The fact that this had been established board precedent for 50 years is not insignificant," Ross Friedman of Morgan Lewis & Bockius LLP said. "It is not often that an administrative agency or court overrules something that has been around for that long, and it points to the aggressiveness with which this board is willing to put their thumb on the scale."

The decision stands as one of a series of recent decisions that revolve long-standing issues in favor of unions, lawyers say.

"If this were the only radical or very different or groundbreaking decision from this board, then you could say, 'Well, they had a right to go back and look at this,'" Denise M. Keyser of Ballard Spahr LLP said. "But this of a piece with what the board has been doing, and it says, 'We are really going to re-examine the law and change it where we think it is wrong, no matter what.'"

The majority acknowledged in the decision that it was taking aim at a long-standing precedent, but said a coherent explanation had never been provided for the Bethlehem Steel rule and that the rule's antiquity didn't change the fact that it was difficult to reconcile with the language and policies of federal labor law.

“Unlike a good wine, a mistake does not get better with age,” the majority opinion stated.

The majority determined that federal labor law supports a finding that dues-checkoff arrangements should be included among the terms and conditions of employment that remain in effect even after the contract containing them expires and that the Bethlehem Steel decision failed to acknowledge the dissimilarities between union-security agreements, which require workers to pay certain union fees, and dues-checkoff provisions, which provide an administrative convenience.

The majority also said that the Bethlehem Steel decision improperly ignored provisions of federal labor law that deal directly with dues-checkoff arrangements.

"[W]e decline to keep following a course that has never been cogently explained — and, in our view, cannot be," the majority opinion said.

The NLRB's sole Republican board member Brian Hayes, whose term has since expired, dissented from his colleagues, saying the majority had not adequately justified the disruption to settled law. The dissent maintained that the Bethlehem Steel decision was consistent with the common-sense recognition that a union security clause operates as a powerful inducement for employees to authorize dues checkoff, and noted that both employers and unions had operated within the rules laid out in that decision for 50 years.

Under the new standard, dues checkoff — once agreed to — will continue indefinitely unless the union agrees to end it, Hayes' dissent said.

"The bargaining process is better protected by preserving the settled rules with respect to both management rights and dues checkoff," the dissent said. "It hardly advances collective bargaining to require that some portions of negotiated agreements — i.e., those favorable to the union — survive contract expiration, while others — those favorable to the employer — do not."

Though the majority's ruling is likely to impact employers' bargaining position in future negotiations, the majority held that the new standard wouldn't be retroactive to unfair labor practice cases that are currently pending.

As such, the board dismissed the underlying complaint against WKYC-TV, saying the employer didn't have adequate warning that the board was about to change the law.

The union local's attorney told Law360 that although the decision did not result in a win for his client in the case or for a few other unions involved in pending cases, the decision to overturn Bethlehem Steel represents an important overall gain for organized labor.

"While it doesn't do the local much good in this case, it certainly changes face of dues checkoff from what it has been for the past 50 years, so that is very, very significant and we are very, very pleased with the outcome," DeGross said.

An attorney for Gannett declined to comment on the matter Wednesday, and an NLRB spokeswoman did not immediately respond to a request for comment.

The company is represented by in-house attorney William A. Behan.

NABET Local 42 is represented by in-house attorney Charles M. DeGross.

The case is WKYC-TV, Gannet Co. Inc., case number 08-CA-039190, before the National Labor Relations Board.

--Editing by Elizabeth Bowen and Katherine Rautenberg.

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