Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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UNION DUES CHECKOFF PROVISIONS SURVIVE CONTACT EXPIRATION

On September 30, 2022, the National Labor Relations Board ("NLRB" or "Board") issued a supplemental decision and order in *Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160 ("*Valley Hospital II*") determining that this employer violated the National Labor Relations Act of 1935 ("NLRA" or "Act") § 8(a)(5) when it unilaterally ceased remitting union dues to the Local Joint Executive Board of Las Vegas ("Union"), pursuant to the union dues check-off provision contained in the expired collective bargaining agreement by and between the Valley Hospital Medical Center, Inc. ("Employer") and Union. Under *Valley Hospital II*, the Board determined that union dues check-off provisions, "like most terms and conditions of employment" must be maintained during the subsequent negotiations for a successor collective bargaining agreement. *Id.*, p. 1.

The instant question involving the Employer's activity first came to the Board's attention when, in 2018, the Employer ceased remitting union dues to the Union nearly 13 months after the expiration of the Union's contract. The impetus for the Employer's actions complained of herein was the issuance of a memorandum issued by the then-General Counsel for the Board that indicated that the NLRB would be revisiting the holding in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), which stood for the proposition that union dues checkoffs are subject to the rule prohibiting unilateral changes to most terms and conditions of employment after expiration of a collective bargaining agreement. *See NLRB v. Katz*, 369 U.S. 736, 143 (1962). Under *Katz*, a unilateral change to terms and conditions of employment for represented workers after the expiration of a collective bargaining agreement "amounts to a refusal to negotiate about affected conditions of employment." *Id.*, at 747. By maintaining the *status quo* after a collective bargaining agreement has expired, there is a promotion of industrial labor peace and a fostering of a non-coercive atmosphere that is conducive to serious negotiations on a new contract. *See Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 (1988). In applying this rationale to the dispute between the Employer and Union, the Board determined that the Employer is obligated to "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." *Valley Hospital II*, p. 6. Further, the Board reiterated that a union dues check-off provision is "without dispute a mandatory subject of bargaining, and, once implemented under an agreement, it becomes part of employees' terms and conditions of employment . . . [that] may not be changed unilaterally." *Id.*, p. 8.

In rejecting the arguments presented by the Employer, the Board found that an "employer's unilateral cancellation of dues check-off 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." *Id.* Also in rejecting the arguments presented by the Employer, the NLRB herein rejected earlier, contrary decisions from previous Boards that determined otherwise. *In contrast, Bethlehem Steel*, 136 NLRB 1500 (1962); *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019) ("*Valley Hospital I*"). According to the NLRB Chair Lauren McFerran, who along with NLRB Members Gwynne Wilcox and David Prouty ruled in favor of the Union in *Valley Hospital II*: "Today the Board definitively resolves this issue by confirming that it is a violation of the Act to unilaterally stop dues checkoff when a contract expires."

SPLIT BOARD ORDERS EMPLOYER TO PRODUCE SOME BUT NOT ALL SCHEDULES TO ASSET SALE AGREEMENT

Illustrating the shift of the Democratic controlled National Labor Relations Board ("NLRB" or "Board"), NLRB Chair Lauren McFerran and Member David Prouty, both Democratic appointees, ordered a hospital to produce schedules to its Asset Sale Agreement ("ASA") that they deemed either presumptively relevant or proven relevant by the union. *Delaware County Memorial Hospital, A Division of Crozer-Keystone Health System, etc*., 371 NLRB No. 129 (Aug. 23, 2022). Republican Member Ring dissented from production of any schedules.

In 2016, Delaware County Memorial Hospital, a Division of Crozer-Keystone Health System ("Crozer"), was about to be purchased and the Pennsylvania Association of Staff Nurses and Allied Professionals' ("Union") requested the full ASA from Crozer for effects bargaining. Crozer declined claiming confidentiality, but the Union eventually obtained a copy of the ASA from court filings concerning the sale. However, the schedules appended to the ASA were not included and Crozer continued to refuse. As remedy to the Union-filed refusal to bargain charges, the Board ordered Crozer to produce the entire ASA and all schedules. Crozer appealed and the United States Court of Appeals for the Third Circuit ("Court") agreed with the Board that some portions of the ASA should be produced as relevant, but not all, and remanded the case to the NLRB for further determination of relevant portions.

On remand, Chair McFerran and Member Prouty reasserted the Board's broad production standard that information pertaining to the bargaining unit is presumptively relevant while non-unit information is subject to a liberal "discovery-type standard." Applying this standard to the Court's order, the Board found the following schedules presumptively relevant: "Prepaid Expenses" to determine whether benefit fund contributions were prepaid; WARN Act; Material contracts, such as labor contracts involving unit employees; Closed Hospital Departments; and schedules addressing employee benefit plans. In addition, Chair McFerran and Member Prouty found the following Schedules proven by the Union to be, at least, potentially relevant and so subject to production: Real Property; Contracts; Grants, Affiliates; Exchanged Assets; Excluded Contracts; Leases; Litigation; and Employee Claims/Complaints to agencies. The Union claimed that financial schedules should also have been produced as relevant to Crozer's

ability to pay but, following the Court's remand and with no evidence of Crozer inability to pay, the Board declined to order such production.

Dissenting Member Ring argued that the majority and the Court abandoned NLRB precedent that an asset sale agreement pertains to matters outside the bargaining unit, and so is presumptively not relevant.

AFTER OVER HALF A CENTURY, MLBPA JOINS UP WITH AFL-CIO

Since forming in the early 1960s, the Major League Baseball Players Association ("MLBPA") has been a singularly successful union, as well as a singularly independent one, steering clear of AFL-CIO membership - until now. In the aftermath of the unique negotiations the MLBPA experienced in 2020, the lockout which delayed the Major League Baseball ("MLB") 2022 season, and its ongoing interest in organizing minor league baseball, the MLBPA is joining the AFL-CIO. MLBPA Executive Director (and former New York Yankee player) Tony Clark announced the affiliation on September 7, 2022.

"Over the past couple of years, our experiences have suggested now is the right time to have that conversation," Clark said. "We are in a world now where strengthening our organization, strengthening our player fraternity by bringing the minor leaguers under our umbrella, as well as joining the AFL-CIO and doing so alongside our brothers and sisters that are part of the labor movement, together we're going to navigate that chaos, and together we're going to work through it." AFL-CIO President Liz Shuler added that this is "an incredible moment for the labor movement."

The AFL-CIO's Sports Council now includes players' associations from the National Football League, National Women's Soccer League, United Soccer League, and U.S. Women's National Team. The International Alliance of Theatrical and Stage Employees, whose members are involved in broadcasting and staging MLB games, indicated its support for the move. "Today's announcement was a winning play by the players' association," IATSE President Matthew D. Loeb said. In a related move, on September 6, 2022, MLBPA asked MLB to voluntarily recognize the union as the bargaining agent for minor leaguers based on 5,400 authorization cards, and MLB on September 9, 2022 accepted that proposal, with MLB Commissioner Rob Manfred saying that the sport is "prepared to execute an agreement" to recognize such a union.

PITTA LLP ANNOUNCES EXPANSION OF WASHINGTON DC OFFICE

Pitta LLP is pleased to announce the expansion of the firm's Washington, D. C. office with the addition of James (Jim) Wallington, Esq., who has decades of experience in representing labor unions in our nation's capital and throughout the United States. Mr. Wallington will be resident in the firm's Washington, D.C. office located at 1220 19th Street NW, Suite 600, Washington, D.C. 20036.

James (Jim) Wallington, Esq.

James (Jim) Wallington recently joined Pitta LLP as a Partner, helping to expand our firm's practice group in the nation's capital. Mr. Wallington joins us after spending three successful decades as an attorney at Baptiste & Wilder, P.C. where he was Partner and lead counsel for OPEIU Local 2 in Washington, D.C.

Mr. Wallington brings a wealth of expertise to Pitta LLP, with extensive experience in complex civil litigation, motions practice, and discovery in federal and state courts, administrative proceedings, and alternative dispute resolution. He frequently served as a legal advisor to union negotiators during collective bargaining negotiations, as well as advising labor organizations on federal reporting and compliance from industries that range from trucking and construction to coal mining and gas production.

Prior to his work at Baptiste & Wilder, Mr. Wallington worked as a Staff Attorney for the International Brotherhood of Teamsters; spent several years at the law firm of Hostler & Segal; and held a number of legal positions for the Government of the State of West Virginia, including Assistant Attorney General.

Mr. Wallington earned his J.D. and B.A. from West Virginia University's College of Law and College of Arts & Sciences, respectively.

Welcome Jim!
