

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: April 1, 2019

TO: Timothy L. Watson  
Regional Director, Region 16

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Vistra Energy 530-6067-4077  
Case 16-CA-231249 530-8050-0000  
536-2571-0000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to deduct and remit dues to the Union following the original local's amalgamation into another local. We conclude that because the employees' dues-checkoff authorization forms specifically authorized payments to the original local, and contained no provision for payments to "successors and assigns," the Employer was under no obligation to withhold and remit dues to the amalgamated Union, notwithstanding "substantial continuity" of the 9(a) representative. The Region should therefore dismiss the charge, absent withdrawal.

### FACTS

Vistra Energy ("Employer") is an energy company operating coal mines and coal power plants in Texas. Workers at some of its power plants were represented by International Brotherhood of Electrical Workers Local 2078 ("Local 2078"). The Employer and Local 2078 are parties to a collective-bargaining agreement effective from November 2017 through November 2021. The CBA contains a "Dues Check Off" provision. Unit employees had signed dues-authorization cards that stated, *inter alia*:

I, \_\_\_\_\_ hereby authorize and direct [Employer] to deduct from my pay, Union Membership initiation fee, dues and assessments in the amount fixed in accordance with Bylaws of Local Union 2078 and the Constitution of the International Brotherhood of Electrical Workers and to pay same to said Local Union in accordance with the terms of the bargaining agreement or the TSP Memorandum between the Employer and the Union.

In January 2018,<sup>1</sup> the Employer closed one of the plants represented by Local 2078, reducing the size of the bargaining unit to such an extent that Local 2078 was unable to support its union hall and paid staff. Subsequently, the international decided that Local 2078 should be amalgamated into IBEW Local 2337, which represented the Employer's employees at about a dozen other sites.

Pursuant to the amalgamation, on October 15, Local 2078's union hall was closed, its charter returned to the international, its bank account closed, and its assets transferred to Local 2337. Local 2078 essentially became a chapter of Local 2337, with the former Local 2078 president becoming the chapter's representative on Local 2337's board. On October 26, the Employer attempted to deposit the month's dues to Local 2078's bank account, but the funds were rejected due to the account's closure. On October 30, Local 2337 informed the Employer that Local 2078 had completed its merger into Local 2337, and that the October deposit had been rejected for that reason. Local 2337 requested the Employer to send the October dues to it by mail.

The Employer recognized Local 2337 as Local 2078's lawful successor and continued to honor the CBA. However, on November 2, the Employer informed Local 2337 that before deducting and remitting dues to it, the Employer would require new dues-authorization cards that name Local 2337.

### ACTION

We conclude that the Employer was under no obligation to continue honoring the dues-authorization forms naming Local 2078 after the amalgamation. Accordingly, the Region should dismiss the charge, absent withdrawal.

A dues-checkoff authorization is a contract between an employee and an employer, authorizing the employer to withhold dues from the employee's wages.<sup>2</sup> The Board has long recognized that, apart from the requirement for periodic revocability set forth in Section 302(c)(4) of the LMRA,<sup>3</sup> disputes involving dues-checkoff provisions

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<sup>1</sup> All dates hereinafter are in 2018.

<sup>2</sup> *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991) (citing *Cameron Iron Works*, 235 NLRB 286, 289 (1978), *enforcement denied*, 591 F.2d 1 (5th Cir. 1979)).

<sup>3</sup> 29 U.S.C. § 186(c)(4) ("money deducted from the wages of employees in payment of membership dues in a labor organization . . . 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").

essentially involve interpretation of a contract.<sup>4</sup> As the Board explained in *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*:<sup>5</sup>

A check-off authorization is that special form of contract defined in the Restatement 2d, *Contracts* Section 317 (1981), as an “assignment of a right.” More specifically, a checkoff authorization is a partial assignment of a future right, that is, an employee (the assignor) assigns to his union (the assignee) a designated part of the wages he will have a right to receive from his employer (the obligor) in the future, so long as he continues his employment. The employer is thereby authorized to pay the specified amounts to the union when the employee’s right to wage payments accrues.

However, the Board does not conduct traditional contractual analysis of the assignment. Rather, the Board applies contract-law principles in light of the statutory provisions and policies of the Act.<sup>6</sup> In the case of an employee’s assignment of future wages in lieu of dues, any waiver of the employee’s Section 7 right to refrain from assisting a union through dues checkoff must be “clear and unmistakable.”<sup>7</sup> The Board has found that a union’s reasonable interpretation of language in a dues checkoff authorization does not meet the “clear and unmistakable” standard unless the checkoff includes “language that specifically address[es] the situation implicated.”<sup>8</sup>

Here, we conclude that the dues-authorization forms naming Local 2078 did not, under “clear and unmistakable” waiver principles, allow the Employer to deduct dues and remit them to Local 2078’s successors and assigns. Thus, while Local 2337’s position that it inherited Local 2078’s right to dues checkoff, as its lawful successor, is not unreasonable, the checkoff forms authorized remittance only to Local 2078 and lacked any language specifically addressing a successorship situation. Absent such

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<sup>4</sup> *Kroger Co.*, 334 NLRB 847, 849 (2001) (citations omitted).

<sup>5</sup> 302 NLRB at 327 (citations omitted).

<sup>6</sup> *Id.* at 328 (citing *Pen Cork & Closures, Inc.* 156 NLRB 411 (1965), *enforced*, 376 F.2d 52 (2d Cir. 1967)).

<sup>7</sup> *Id.*

<sup>8</sup> *Kroger*, 334 NLRB at 849 (finding that a dues checkoff that authorized transfer of the obligation if the employee left and went to any other employer under contract with the union did not authorize checkoff when the employee left and then returned to the *same* employer).

language, the Employer was under no obligation to continue deducting and remitting dues to Local 2337, regardless of Local 2337's status as a successor under the NLRA.

Based on the foregoing, the Region should dismiss the charge, absent withdrawal.<sup>9</sup>

/s/  
J.L.S.

ADV.16-CA-231249.Response.Vistra. (b) (6), (b) (7)

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<sup>9</sup> In addition, in order to ensure that any revised checkoff authorization forms will be found lawful, the Region should advise Local 2337 of the policy articulated in GC Memorandum 19-04, *Union's Duty to Properly Notify Employees of their General Motors/Beck Rights and to Accept Dues Checkoff Revocations after Contract Expiration* (Feb. 22, 2019) regarding language concerning the revocability of dues checkoff at the expiration of a contract.