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

Advice Memorandum

DATE: May 29, 2009

TO : Joseph P. Norelli
Regional Director, Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: DBI Beverage San Francisco
Case 20-CA-34166 & 34189

Retail Delivery, Driver-Salesmen
and Helpers Local 278 IBT,
Cases 20-CB-13175 & 13210

512-5072-9200
530-6067-2040-1000
530-6067-2040-4000
530-6067-2040-8012
530-6067-2040-8029
536-2581-3370-7900
554-1433-9100
554-1467-7200

These companion cases were submitted for advice as to: (1) whether the local Union violated Section 8(b)(3) and 8(b)(1)(A) of the Act by misstating the Employer's final contract proposal at a contract ratification meeting; (2) whether it subsequently violated Section 8(b)((3) by failing to execute an agreed upon contract; (3) whether the Employer violated Section 8(a)(1) and (5) of the Act by directly dealing with employees and/or interfering with the ratification process; (4)whether the Employer subsequently violated Section 8(a)(5) of the Act by implementing both its Last and Final contract proposal and its Supplemental Settlement Proposal; and (5) whether the Employer violated Section 8(a)(1), (3), and (5) of the Act by advancing employees money for union initiation fees so they would be eligible to vote in the contract ratification election.

We conclude that the Union did not violate either Section 8(b)(3) or 8(b)(1)(A) by misstating the Employer's final contract proposal at the ratification meeting because that vote was wholly an internal union matter, nor did it violate Section 8(b)(3) by failing to execute the proposed final agreement because the contract proposed by the Employer differed from the contract ratified by the employees. We further conclude that Employer, by merely explaining its proposals to employees, did not violate Section 8(a)(1) and (5) of the Act by either directly dealing with the employees or interfering with the contract ratification vote. Consequently, the Employer did not violate Section 8(a)(1) and (5) of the Act by implementing its Last and Final proposal because that proposal was ratified and accepted by the Union. Although the Supplemental Settlement proposal was not ratified and accepted by the Union, we conclude that it would not effectuate the purposes of the Act to issue a complaint regarding the implementation of that proposal, where the

Employer may have honestly believed that both proposals were ratified and where all the supplemental terms were favorable to the unit employees. Finally, we conclude the Employer did not violate Section 8(a)(1),(3), or (5) of the Act by advancing Union initiation fees to all delinquent members so that they could participate in the ratification vote.

FACTS

The Union and the Employer have been parties to a collective-bargaining agreement for many years. The parties' most recent collective-bargaining agreement covering drivers, salespersons, merchandisers, helpers, warehousemen, and lead men was to expire on March 31,[1] but was extended by the parties. The Union terminated it on about June 16 after the employees rejected the Employer's June 14 offer. The key dispute was over the Employer's proposal to substitute a 401(k) plan for the Western Conference of Teamsters Pension Trust ("WCT Pension Trust"), a defined benefit pension plan, which the Union vehemently opposed.

The parties' final negotiating session was on July 8. At that meeting, the Employer offered its Last & Final proposal, which among, other things eliminated the WCT Pension Trust. In an effort to make the elimination of the Pension Trust more palatable to the employees, the Employer also offered a Supplemental Settlement proposal which included four add-ons or "sweeteners": (1) to make the wage increases retroactive to April 1; (2) to pay a lump sum payment of $500; (3) to pay nearly double the amounts proposed in its final offer either as a onetime tax-deferred contribution to the employees' 401 (K) accounts or as a direct payment to the employees; and (4) to change the length of employment required for employees to earn four weeks of vacation from 13 years to 10 years.

The Employer's Supplemental Settlement proposal stated in the first paragraph: "The Company is prepared to extend the following add-ons to the attached proposal provided there is contract ratification on or before July 13, 2008 and contingent on employees working all scheduled work days through July 13. 2008." It stated at the end that "THIS LAST & FINAL SUPPLEMENTAL SETTLEMENT PROPOSAL WILL EXPIRE AT MIDNIGHT JULY 13,2008."

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[1] All dates are 2008.

While both parties were aware that the Employer's July 8 contract proposal was to be subjected to a membership ratification vote - i.e., the Union's Constitution requires ratification, the Union told the Employer it would be taking the proposal to a ratification vote, and the parties' past practice was that contracts were ratified by the Union membership - neither the Employer nor the Union recall reaching any express agreement that contract ratification would be necessary in order to reach a contract.

At the ratification meeting on July 12, the Union recommended against the Employer's proposals because of the proposed discontinuation of the WCT Pension Trust. The ratification vote was a 35 to 35 tie.

On July 14, knowing that the Union would conduct a rerun vote in about two weeks, the Employer sent the Union a letter in which it stated that "[w]e are prepared to extend the Last and Final Supplemental incentives [sweeteners] as proposed by the Company until the next vote provided it can be done by midnight July 28, 2008. If there is no ratification by the specified date the Last and Final Supplemental Proposal by the Company will be withdrawn." The Employer posted a copy of this letter along with a notice to employees that stated that "[o]nly because the vote ended in a tie will the Company agree to extend the date for ratification [of the Supplemental Settlement proposal] on a one-time basis." The Union did not respond to the Employer's letter.

The following weekend, the Union sent employees a memo stating that it was "attempting to schedule a meeting to conduct a second vote on the employers [sic] Last & Final Supplemental Proposal." Shortly thereafter, the Union issued a memo to employees stating that, because the July 13 ratification vote had resulted in a tie, the "International Constitution requires the Union to re-vote the employers [sic] offer", and that the Union has scheduled a meeting on August 2 "to re-vote on the employers [sic] Last & Final offer[.]"

On July 28, the Employer sent the Union a second letter stating that "[I]f the re-vote of the Company's July 8, 2008, proposal results in ratification, the Company will agree to extend the deadline and provide all of the Last and Final Supplemental benefits previously proposed." The Union did not respond to the Employer's letter.

The Union asserts that, after consultation with its attorney, it concluded that the re-vote had to be on the "same" offer as the original vote (i.e., on the Last and

Final proposal without the sweeteners, since they expired on July 13), notwithstanding the Employer's extension of the deadline for ratifying the final proposal with the sweeteners. According to the Union, the Employer's July 28 extension of the sweeteners to August 2 constituted a "new offer" that it had not agreed to submit to the membership for ratification.

Prior to the ratification re-vote, the Employer paid the initiation fees of some employees who could not vote in the initial election because of such delinquency.[2] Under the Union's International Constitution, only members in good standing who have paid initiation fees in full may vote on contract ratification. In order to ensure that all employees would be able to vote when the Union conducted the ratification re-vote, the Employer pre-paid the balance of initiation fees for ten employees who owed such fees by sending the Union a check, which the Union cashed. The amount per employee ranged from $47 to $200. The Employer explained to the employees that they were now eligible to vote in the ratification re-vote, but did not say anything about how they should vote. The employees were also told that they were responsible for the amounts that the employer had advanced, which would be deducted from their paychecks in increments. The Employer eventually recouped all of the initiation fees that it had advanced to the Union on the employees' behalf.

Union business agent Terry McHugh conducted the August 2 meeting and rerun ratification vote, and Union Secretary-Treasurer Jack Bookter and Union Business Agent Joe Cilia also were present. McHugh told employees that they were voting on the *same exact offer* that had resulted in a tie on July 12, and that this did not include the sweeteners because they had expired. When some of the members asked why, McHugh and Bookter said that, because there was a tie, the Union's Constitution required that they re-vote the *same exact offer.* Various members asked if the Employer had extended the deadline on the sweeteners. McHugh said that the Employer had sent the Union faxes but the Union had not agreed because, under the Constitution, the Union had to re-vote the same offer, so that was what they were going to do. McHugh held up the Employer's final offer,

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[2] It appears the Union had consented to such a procedure before. In fact, on a prior occasion, the Union refused to return such funds to the Employer for employees who left employment before completing the corresponding payroll deductions.

which had as its cover sheet the sweeteners, and said that a YES vote meant agreeing to the Employer's final offer without the cover sheet (i.e., without the sweeteners). He said a NO vote would reject the complete offer.

While that meeting was underway, Employer VP/General Manager Buskey received a telephone call from an employee who was upset that the Union was saying that if the employees voted to ratify, they would not get the sweeteners. Buskey told the employee that this was not what the Employer had proposed. Buskey said that the Employer had communicated to the Union in writing that the Employer had extended the sweeteners, and stated that if the contract were ratified that day, the Employer intended to honor the proposed sweeteners. Buskey said he was at a loss as to why the Union was saying otherwise at the meeting. Another employee reported this conversation to all those in attendance at the meeting, accused the Union of lying, and stated his view that the Employer would pay all the sweeteners with a yes vote. In response, McHugh again held up both the final offer and the sweeteners and said that the sweeteners were not part of this re-vote, and that, if there were a yes vote, employees would not get the sweeteners. He also said that the Union was recommending against the proposal. The result of the ratification re-vote was 55 yes to 25 no.

Later that afternoon, McHugh returned a call to Buskey and said there had been a yes vote on the contract proposal, but that the vote did not include the sweeteners. Buskey said the Company intended to pay the sweeteners, and the Union threatened to file an unfair labor practice charge if they did.

In a letter dated August 8, Union Secretary-Treasurer Jack Bookter, responding to a prior Employer letter, stated:

> [The Union] re-voted the Company's July 8, 2008 proposal. That was the only thing that was voted on August 2, 2008. We made it plain to you that under the Constitution we have to re-vote the proposal because there had been a tie vote. We were very careful in advising the membership that they were voting on the July 8, 2008 proposal and nothing else. Your letter of August 6, 2008, is therefore incorrect in suggesting that the Union has ratified any other agreement.

Shortly thereafter, the Employer implemented its July 8 Last and Final offer and the sweeteners. The significant changes resulting from the implementation are:

- Cessation of contributions to the Pension Trust since about August 2
- Employees given 401 (k) Plan contributions and/or lump sum payments since August 15
- Increased wages, retroactive wage increase, and ratification bonus of $500 given to employees starting around August 4
- Eligibility for four weeks of vacation after 10 rather than 13 years of employment

On September 5, Buskey sent McHugh, for signature, a copy of what the Employer considered to be a final draft of the agreement, which was the Employer's final offer with the sweeteners. The Union neither signed the agreement nor responded to the Employer's letter, and asserts that it will not execute the proferred agreement because it was not ratified by the members.

ACTION

We conclude that the Union did not violate either Section 8(b)(3) or 8(b)(1)(A) by misstating the Employer's proposals at the ratification meeting because such processes are internal union matters and are not subject to question by the Employer. Nor did the Union subsequently violate Section 8(b)(3) of the Act by refusing to sign the contract proffered to it by the Employer because that contract was not the one that was ratified by the employees. On the other hand, the Employer did not violate Section 8(a)(5) of the Act by directly dealing with employees, nor did it violate section 8(a)(1) of the Act by interfering in the ratification process when it simply explained its bargaining proposals to employees. Nor did the Employer violate Section 8(a)(5) of the Act by implementing its Last and Final contract proposal because that proposal was ratified by the employees. While its further implementation of the Supplemental Settlement proposal was not authorized by the ratification vote, we conclude it would not effectuate the purposes of the Act to issue a complaint in that regard, since the Employer may honestly have believed that both of its proposals had been ratified and the terms of the Supplemental Settlement proposal were favorable to the employees. Finally, we conclude that Employer did not violate Section 8(a)(1), (3), or (5) of the Act by paying the Union initiation fees of all the employees who were delinquent, where such payment did not interfere with the ratification process, was not otherwise coercive, was not made in a discriminatory manner, and the Union apparently consented to this procedure.

1. The Union did not violate Section 8(b)(3) or 8(b)(1)(A) by misstating the Employer's proposals at the ratification meeting

The Board has long distinguished between a Union's expressed intent to take a contact to ratification, which a union may modify or disregard entirely, and an actual bilateral agreement between the Union and the Employer making employee ratification a condition precedent to the acceptance of the Employer's offer.[3] In the latter scenario, ratification is "a condition tantamount to acceptance that must occur before a binding contract is created."[4] Because the parties have reached an agreement that ratification is required, the Union has a duty to deal fairly with the Employer regarding ratification, as with any other proposed contract term.[5] Where a union has merely expressed a unilateral intent to take an agreement to ratification, on the other hand, the Union can reach agreement without ratification but may decide to suspend execution of the agreement unless it is ratified by the employees.[6] In that scenario, i.e., absent an explicit bilateral agreement, "ratification is an internal union matter which is not subject to question by an employer."[7]

The Board holds that any agreement between the parties making employee ratification a condition precedent must be

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[3] New Process Steel, 353 NLRB No. 13, slip op. at 4 (2008).

[4] Sacramemento Union, 296 NLRB 477, 479 (1989) (Chairman Stephens' concurrence).

[5] See, Teamsters Local 287 (Granite Rock Co.), 347 NLRB 339, 344 (2006) (Section 8(b)(3) and 8(d) obligations triggered when parties agree to make ratification a condition precedent).

[6] See, Teamsters Local 662 (W.S. Darley & Co.), 339 NLRB 893, 899 (2003). In effect, such an agreement is comparable to a commercial option contract, making the offer irrevocable for a specified term or until it is rejected. See, Sacramemento Union, 296 NLRB at 481.

[7] Martin J. Barry Co., 241 NLRB 1011, 1013 (1979).

express.[8] Union statements or unilateral actions do not establish an express agreement.[9] The fact that a union's constitution imposes a ratification requirement does not establish an express agreement.[10] And, a history of the union's taking contract proposals to a ratification vote does not establish an express agreement.[11]

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[8] See Valley Central Emergency Veterinary Hospital, 349 NLRB 1126 (2007). The cases cited by the Region to support the proposition of an implied condition precedent are either distinguishable or outside the mainstream of Board law in this area. See, e.g., Teamsters Local 589 (Jennings Distribution Inc.), 349 NLRB 124, 128 fn. 11 (2007) (ALJ noted that the employer by its actions in negotiations appeared to expressly agree that employee ratification was a condition precedent); American Protective Services, 319 NLRB 902, 902-904 & fn. 5 (1995) (parties had stipulated that they understood employee ratification would create a binding contract). The great weight of Board authority, as discussed below, requires that for ratification to constitute a "condition precedent," there must be an express written or oral agreement between the parties.

[9] See Valley Central Emergency Veterinary Hospital, 349 NLRB 1126, 1132 (2007) (condition precedent of employee ratification not created by union negotiator stating at the first bargaining session that "both sides would take any agreement back for ratification" and by union telling mediator that union would recommend employee ratification if employer agreed to union security clause (which it later did)); Personal Optics, 342 NLRB 958, 962 (2004), enfd. 165 Fed. Appx. 1 (D.C. Cir. 2005) ("Even if the Union's prior statements arguably may have led the Respondent to believe that the Union would conduct a vote of the bargaining unit, there was never any such agreement between the parties."); See, also, Consumat Systems, 273 NLRB 410, 413 (1984); Seneca Enviormental Products, 243 NLRB 628-629, 631 (1979), enfd. 646 F.2d 1170 (6th Cir. 1981); and C&W Lektra Bat Co., 209 NLRB 1038, 1039 (1974).

[10] See Newtown Corp., 280 NLRB 350, 351 (1986)

[11] See, Sacramemento Union, 296 NLRB 477 (1989); and Auciello Iron Works, 303 NLRB 562 (1991).

Here, there is no evidence of an express agreement that employee ratification would be a condition precedent to the formation of a contract. While the Union's Constitution requires member ratification, the Union stated to the Employer that it intended to take the agreement to ratification, and the Union had a past practice of taking contract proposals to ratification, these facts are insufficient to establish an express agreement that ratification was a condition precedent to contract formation. In fact, both the Union's and Employer's negotiators have stated that there was no bilateral agreement establishing member ratification as a condition precedent. In these circumstances, employee ratification was purely an internal matter not subject to the good faith requirement of Section 8(b)(3).[12]

Similiarly, with regard to the Section 8(b)(1)(A) allegation, the Board has held that no DFR duty attaches to internal Union ratification procedures:

> Procedures relating to the adoption, ratification or acceptance of collective-bargaining agreements have long been recognized as not falling within the scope of Section 8(d)'s 'wages, hours and other terms and conditions of employment,' but as 'matter[s]. . . exclusively within the internal domain of the Union.'
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> Although the manner in which the Union conducted the ratification vote does not garner our sympathy, nonetheless as a matter of law that conduct, being

[12] Even were we to conclude that a condition precedent could be found here, it seems likely that the Employer's challenge to the ratification procedure would fail. Thus, the Union's position that it was required to put the same contract back to its membership, which on the second ratification vote would not include the expired "sweeteners," is not a wholly unreasonable position, and the Employer would have no standing to challenge these procedures in any case. As the Board noted recently, "even if such ratification were a condition precedent, Board law is clear that Respondent does not have standing to challenge the Union's ratification process." Valley Central Emergency Veterinary Hospital, 349 NLRB at 1127.

> purely an internal union affair, does not come within the duty of fair representation.[13]

As noted above, the Union's ratification process here was a completely internal matter, and therefore this charge allegation should be dismissed, absent withdrawal.

2. The Union did not violate Section 8(b)(3) by refusing to sign the contract proferred to it by the Employer

Section 8(d) of the Act requires only that parties who have reached agreement on the terms of a collective-bargaining agreement must execute that agreement upon the request of the other party.[14] When "a labor organization gives notice to the Employer that their agreement has been ratified by the employees… the statutory obligation arises to execute a written contract."[15]

Here, the Union unambiguously put the Employer's Last and Final Offer to the membership at the August 2nd meeting and repeatedly stated that the "sweeteners" were not part of the contract proposal being voted. The employees ratified that proposal, and that result was communicated to the Employer later that afternoon, resulting in a binding contract between the parties. While the employees may have believed that the Employer would implement the sweeteners, the contract that was ratified, as a matter of fact, was unambiguously the Employer's Last and Final Offer, without the sweeteners. Consequently, when the Employer requested that the Union sign the proposal which included the sweeteners, the Union was under no obligation to execute a contract that differed from the contract ratified by the employees. Accordingly, that charge allegation should be dismissed, absent withdrawal.

3. The Employer did not violate Section 8(a)(5) or (1) by explaining its bargaining proposals to employees

Under Section 8(c) of the Act, an employer is entitled to communicate noncoercively with its unit employees, even

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[13] Longshoremen ILA Local 1575 (Navieras, NPR), 332 NLRB 1336 (2000).

[14] See, e.g., International Brotherhood of Electrical Workers, Local 2326, AFL-CIO, 348 NLRB 1278, 1280 (2006) citing H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[15] Teamsters Local 662 (W.S. Darley & Co.), 339 NLRB at 899.

during collective-bargaining negotiations.[16] Nonetheless, violations of Section 8(a)(5) will be found if employer communications with represented employees are either coercive or invite direct dealing as to the terms or conditions of employment.[17] The Employer is, however, privileged under Section 8(c) to explain its bargaining proposals to employees as long as it submitted those proposals to the Union and it has not otherwise invited or coerced the employees to deal directly with it.[18]

Here, upon being informed of the July 12 tied contract ratification vote, the Employer sent the Union a letter proposing that it would extend its Supplemental Settlement incentives until the next vote, provided that the next vote was held by midnight July 28. The Employer posted a copy of this letter along with a notice to employees noting that it was prepared to extend the incentives until another vote could be arranged. When the vote was finally arranged for August 2, the Employer further notified the Union that it would provide the incentives if the contract was ratified. The Union never responded to the Employer's letters, and did not inform the employees until the August 2 ratification meeting that the contract being offered for ratification would not include the sweeteners. Indeed, the Union's first notice to employees indicated that the vote would be on the Employer's "Last & Final Supplemental Proposal," which would appear to include the sweeteners. Confused by the fact that the Employer was prepared to extend the sweeteners, and yet the ratification vote would not include them, employee James Brown called the Employer's VP/General Manager who told Brown that this was not what the Employer had proposed and that if the contract were ratified the Company was planning to implement all the sweeteners.

In posting its letter to the Union, and by responding to an employee query about its most recent proposal, the Employer was merely explaining its most recent proposal, one which was previously proposed to the Union, and was not

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[16] See, e.g., Putnam Buick, Inc., 280 NLRB 868, 869 (1986), enfd. 827 F.2d 557 (9th Cir. 1987).

[17] See, e.g., Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1948); Putnam Buick, supra.

[18] See, e.g., United Technologies, 274 NLRB 609 (1985), enfd. sub nom. NLRB v. Pratt & Whiney Air Craft Division, 789 F.2d 121 (2d Cir. 1986).

otherwise coercing employees or inviting them to deal directly to deal with it. Indeed, the fact the Employer posted its letter to the Union implicitly recognizes the authority of the Union as the employees exclusive bargaining representative. [19] Furthermore, we conclude that the Employer response to an employee while that employee was attending the ratification meeting, in which the Employer attempted to clear-up an alleged misunderstanding regarding the Employer's proposal, did not constitute an interference with the ratification vote. In this regard, the Union was at least partially responsible for the confusion at the ratification meeting, owing to its failure prior to the meeting to clearly identify what proposals were going to be voted on, and the Employer was merely responding to an employee's question about its proposal.[20] Accordingly, the Section 8(a)(5) and (1)charge against the Employer for direct dealing, and for interference with the ratification process, should be dismissed absent withdrawal.

4. The Employer did not violate Section 8(a)(5) by implementing its Last and Final contract proposal; the Employer's unilateral implementation of the sweeteners was arguably unlawful but it would not effectuate the Act to issue complaint on that allegation

As discussed above, the employees ratified the Employer's Last and Final proposal and, when the Union informed the Employer of that fact, a binding contract was created. Indeed, the Union's August 8 letter to the Employer, stating that it had ratified the Employer's Last and Final proposal without the sweeteners, constitutes an admission of that fact. Thus, the Employer was privileged

[19] See, e.g., American Pine Lodge Nursing & Rehabilitation Center v. NLRB, 164 F.3d 867, 877 (4th Cir. 1999)(letters posted to employees containing bargaining proposals were free of coercion and protected under Section 8(c), in part because letters were clearly addressed to the Union and requested a response from it).

[20] Cf. Armored Transport, Inc., 339 NLRB 374, 378 (2003) (employer found to have interfered with ratification process where it sent "Don't Blame Us" letter to employees suggesting, among other things, that employees mount a decertification effort, demand that union sign the contract, and insist they be allowed to vote on the proposal enclosed).

to implement the terms of that agreement and did not violate Section 8(a)(5) of the Act by doing so. Accordingly, the charge allegation regarding the implementation of those terms and condition of employment should be dismissed, absent withdrawal.

While the Employer arguably violated Section 8(a)(5) by implementing the sweeteners, which were not authorized by the employees' ratification vote, we conclude it would not effectuate the purpose of the Act to issue a complaint with regard to that conduct. Because of the confusion at the ratification meeting, at least partially caused by the Union's conduct, the Employer may honestly have believed that both proposals were ratified. Moreover, the sweeteners were all favorable to the employees. The Union seeks to require the Employer to reinstate the defined benefit plan and other pre-contract terms and conditions of employment; if it cannot accomplish that, it has no interest in requiring the employees to give up the sweeteners. In all these circumstances, it would not effectuate the purposes of the Act to issue a complaint on this allegation.

5. The Employer did not violate the Act by advancing the Union initiation fees of all the employees who were delinquent so that they could vote in the ratification election

Finally, we conclude that the Employer did not violate Sections 8(a)(1), (3), or (5) by advancing initiation fees to 10 employees so that they could vote in the August 2 contract ratification election. The money was advanced for all employees who had not paid their full initiation fees, the payments were not contingent on whether the employees would vote for or against the contract, and the Employer continued to deduct the money from the employees' paychecks until they repaid the money that was advanced.[21] The

[21] See, Greyhound Lines, 275 NLRB 1167, 1170-71 (1985) (no interference with Section 7 rights and no violation found where employer promised to pay union initiation fees for crossover employees who believed that the employer had misled them that they would not have to pay initiation fees or rejoin the union after the strike ended); See also, Dean Foods Co., 266 NLRB 1069, 1071 (1983) (Board affirmed ALJ's finding that an employer did not violate Section 8(a)(1) by offering to pay fines levied by a union against crossover employees who refused to honor a sister local's picket line, where employer assured employees of their right to

payments were consistent with the Employer's prior practice, to which the Union had consented, and the Union cashed the Employer's check.

Accordingly, the Region should dismiss all charges, absent withdrawal.

B.J.K.

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honor or not honor a picket line free from employer or union reprisal).