

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

# Advice Memorandum

DATE: May 16, 2002

TO : Ralph R. Tremain, Regional Director  
Leo D. Dollard, Regional Attorney  
Karen L. Rengstorf, Assistant to Regional Director  
Region 14

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

SUBJECT: Teamsters Local 525 536-2509-5000  
(Fischer Lumber Co.) 536-2530  
Case 14-CB-9494 554-1467-7500

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) and (3) of the Act by failing to remit a unit employee's self-payment to the contractual health and welfare fund because he had resigned his Union membership and crossed the picket line.

We conclude that the Union violated Section 8(b)(1)(A) by failing to forward the employee's self-payment to the contractual health and welfare fund, thereby denying him health insurance coverage, because of his non-membership in the Union. [FOIA Exemption 5  
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## FACTS

Teamsters Local 525 (the Union) represented two units of employees working for Fischer Lumber Company (the Employer), the truss division unit and the drivers and warehousemen unit. Charging Party Kelly worked as a sawyer in the truss division and was a member of the Union.

The collective bargaining agreement covering the truss division employees was in effect from July 1, 1998 to June 30, 2001.<sup>1</sup> The contract's health and welfare provision requires the Employer to contribute \$101 per week to the Teamsters and Employers Welfare Trust of Illinois (the Fund) on behalf of eligible employees.<sup>2</sup>

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<sup>1</sup> All dates are in 2001 unless otherwise noted.

<sup>2</sup> The Employer is required to make contributions for employees who are covered by the contract, have completed a 500-hour probationary period, are classified as "regular" or "regular-extra" employees, and have worked at least 16 hours of straight time in the payroll week. If an

The Fund's summary plan description (the Plan) states that coverage is available to employees who work for an employer required to make weekly contributions to the Fund pursuant to a collective bargaining agreement. Such employees become initially eligible for benefits after their employer has contributed to the Fund for four consecutive weeks. Once an employee has satisfied the initial eligibility requirements, he remains eligible for benefits for any week in which contributions to the Fund have been made on his behalf. If the Fund does not receive employer contributions for any week, employees may maintain their eligibility for benefits by making self-payments at the same rate and time required of their employer, but self-payments must be remitted to the Fund through the Union.<sup>3</sup> The Plan's delinquency provision states that if an employer fails to make timely contributions, an employee's health benefit claims will be paid as long as contributions are received within 60 days. An employee's coverage terminates if the employee is no longer eligible under the Plan's eligibility rules, if the Plan terminates, or if the employee stops making self-payments.

On May 1, the contract covering the drivers and warehousemen expired and those employees went on strike. On June 18, Kelly and the other truss division employees went on strike, at the Union's request, in support of the drivers and warehousemen. Kelly's wife gave birth to a child on June 23, incurring \$15,000 in medical expenses. On June 28, two days before the truss division contract was to expire, Kelly called the Union regarding his health insurance coverage. A Union clerical employee informed Kelly that his self-payment was due on July 15 and that it would cover the period from June 15 to July 15.<sup>4</sup> On June 30, the truss division contract expired.

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otherwise eligible employee works less than 16 hours of straight time in a week, the Employer must continue contributions if the employee was absent because of an illness or an on-the-job injury.

<sup>3</sup> The Plan specifically states, apparently by way of example, that self-pay is available if an employee is discharged, laid off, disabled, or quits.

<sup>4</sup> Although the Plan, by its terms, requires weekly contributions, it appears that the Employer routinely made monthly payments for the prior month's insurance coverage.

On July 2, the Fund sent Kelly and the other striking truss division employees a letter stating that the Employer's last contribution was made on June 7 and provided coverage for the month of May. The letter stated that in order to be covered during June and July, employees would have to make self-payments of \$101 per week for each week that no contributions were received from the Employer, and that all affected weeks must be self-paid in order for coverage to remain in effect. The letter also instructed employees to contact either the Fund or the Union if they had questions or needed assistance.

On July 11, Kelly and the other truss division employees resigned their Union memberships. On July 13, Kelly crossed the drivers and warehousemen picket line and returned to work. Kelly's wife went to the Union hall on Monday, July 16, to make a self-payment of \$404 in order to obtain health insurance benefits for the prior month.<sup>5</sup> The secretary refused to accept the self-payment, informing Kelly's wife that Kelly no longer had health insurance because he was no longer a Union member. Kelly was the only truss division employee who attempted to make a self-payment.

Kelly filed a decertification petition on July 20, which was withdrawn on July 25 after the Union disclaimed interest in representing the truss division employees.<sup>6</sup>

The Union asserts that Kelly was not eligible for self-pay under the provisions of the Plan, because the Plan expressly provides for self-payment only where employees quit, or are either discharged, laid off, or disabled. In a letter to the Region dated December 14, the Union stated that it "was faced with the decision whether to accept monies (to forward to the Fund) from a person who had resigned from the Union, who continued to be employed, whose employer repudiated any association with the Union and whose employer no longer was a party to a collective bargaining agreement with the Union."

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<sup>5</sup> The Union had informed Kelly to make his self-payment on July 15; that was a Sunday and we do not know whether the Union conducted business that day.

<sup>6</sup> Kelly filed a charge on October 18 alleging that the Union violated Section 8(b)(1)(A). Kelly did not file a Section 8(b)(3) charge.

**ACTION**

We conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by failing to forward Kelly's self-payment to the Fund, thereby denying him health insurance coverage, because he resigned from the Union and/or crossed the picket line. [FOIA Exemption 5

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A union violates Section 8(b)(1)(A) if it determines a unit employee's eligibility for contractually-established employee benefits based on union membership considerations, because it tends to restrain and coerce employees in the exercise of their Section 7 right to refrain from joining or remaining a member of a union.<sup>7</sup> The Board fashions a make-whole remedy for such violations.<sup>8</sup>

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<sup>7</sup> See Indiana Gas & Chemical Corp., 130 NLRB 1488, 1498-99 (1961) (union maintained and enforced contract provision granting health insurance coverage for members only and denied benefits to an employee because he was not a union member); Exxon Company, U.S.A., 253 NLRB 213, 217-218 (1980) (union required only nonmembers to pay service fee in order to participate in health plan); Jacobs Transfer, Inc., 227 NLRB 1231, 1232 (1977) (union caused trusts to reject employer's benefit plan contributions on behalf of employee who had opposed union's leadership); Bay Cities Metal Trades Council (Southwest Marine), 306 NLRB 983, 985-86 (1992), enfd. mem. 15 F.3d 1088 (9<sup>th</sup> Cir. 1993) (violation where union threatened that employees who resigned membership and crossed picket line would lose their health benefits, even though it qualified its threat by stating that eligibility depended on employer's actions and terms of benefit programs).

<sup>8</sup> See, e.g., Sheet Metal Workers Local 418 (Young Plumbing), 249 NLRB 898, 907-08 (1980) (employee reimbursed for cost of obtaining substitute health insurance and expenses personally incurred for medical services that his private insurance did not cover but which would have been covered by the union's plan had his coverage been maintained); Indiana Gas & Chemical Corp., 130 NLRB at 1500 (employee to be paid sum equal to amount of benefits employee would have received but for the discriminatory denial of health insurance coverage); Peabody Coal Co., 180 NLRB 263, 265

Here, the Union refused to forward Kelly's self-payment to the Fund because Kelly resigned from the Union and/or crossed the picket line. The Union's secretary told Kelly's wife that he was no longer eligible for health insurance benefits because he had resigned from the Union.<sup>9</sup> Further, the Union admitted in its December 14 correspondence with the Region that Kelly's resignation from the Union prompted its refusal to forward his self-payment to the Fund.

The Union contends that Kelly was no longer covered by the Plan and/or was ineligible to make self-payments because: the collective bargaining agreement covering the truss division employees had expired; the Employer "repudiated any association with the Union"; and Kelly had not been "laid off or terminated." We find the Union's explanations unpersuasive.

The contract's expiration is no defense to the Union's conduct. The Employer's contractually-established obligations regarding health benefits survived the expiration of the contract,<sup>10</sup> and the Plan states that employees are eligible for health benefits as long as their employer is obligated to contribute to the Fund. Further undercutting the Union's argument, the Fund provided the truss division employees with information on how to make self-payments in a letter dated July 2, several days after the contract had expired. Accordingly, the fact that the contract expired did not eliminate Kelly's eligibility for health benefits.

Further, the Union was Kelly's collective bargaining representative during all relevant times. Contrary to the Union's assertions, there is no evidence that the Employer

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(1969) (fund allocation for employee to be restored with interest minus amount for service fees).

<sup>9</sup> See Laborers Local 304 (George D. Willis), 191 NLRB 764, 766-68 (1971) (union violated 8(b)(1)(A) because clerical employee, acting under apparent authority, stated that union membership was required for referral from union's exclusive hiring hall); Carpenters District Council of Denver (Hensel Phelps), 222 NLRB 551, 552 & n.2 (1976); Teamsters Local 70 (Lucky Stores), 226 NLRB 205, 209-10 (1976).

<sup>10</sup> Mac Plastics, 314 NLRB 163 (1994).

repudiated association with, or withdrew recognition from, the Union.<sup>11</sup> Rather, the reason the Union no longer represents the truss division employees is its disclaimer of interest, which occurred well after it refused to forward Kelly's self-payment to the Fund.

We also reject the Union's argument that Kelly was ineligible to make self-payments because he "continued to be employed" by the Employer. The Plan states that self-payments may be made for any week in which funds are not received. And while the Plan also states that self-payments are permitted if an employee either quits, is discharged, is laid off, or is disabled, it does not foreclose other scenarios under which self-payments would be permitted. Here again, the Fund's actions contradict the Union's interpretation of the Plan. The Fund's July 2 letter informed the truss division employees that they could make self-payments, even though they had not been laid off, discharged, disabled, or quit. In fact, the Fund's July 2 correspondence specifically stated that self-payments were required because the employees "are currently not working due to a strike...."<sup>12</sup>

Finally, we would reject any argument that the Union was excused from forwarding Kelly's self-payment to the Fund because Kelly's wife attempted to give the Union the self-payment the day after the Union told Kelly the payment was due.<sup>13</sup> The Plan does not set deadlines for self-

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<sup>11</sup> Compare Dominick's Finer Foods, 308 NLRB 935, 948 (1992) (union did not violate 8(b)(1)(A) by requiring union membership as a prerequisite for participation in its jointly administered medical benefit trust fund, because it was improperly denied representational rights and not recognized as the exclusive bargaining agent of the employees).

<sup>12</sup> Correspondingly, while the collective bargaining agreement arguably required the Employer to contribute to the Fund on behalf of Kelly once he returned to work, there is no evidence that the Employer did so. As long as the Fund did not receive a contribution on Kelly's behalf, it appears that, under either the Plan's self-payment or delinquency provisions, Kelly could still obtain health insurance coverage by making self-payments through the Union.

<sup>13</sup> Compare Electrical Workers IBEW Local 58 (NECA), 306 NLRB 252, 254-55 (1992) (union's refusal to accept and process

payment. Rather, the date on which self-payments are made appears to determine the earlier corresponding date when coverage begins. Accordingly, Kelly's \$404 self-payment would provide health benefits for the preceding four weeks. Even if Kelly had made his self-payment on July 23 - a week after the Union-imposed due date - his wife's childbirth expenses incurred during the preceding four weeks should have been covered by the Plan.

But for the Union's unlawful failure to forward Kelly's self-payment to the Fund, Kelly would have been eligible for health benefits. [FOIA Exemption 5  
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[FOIA Exemption 5

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nonmember employee's application for supplemental unemployment benefits did not violate 8(b)(1)(A) where there was no evidence that the union's decision was based on the employee's membership status and the employee would have been ineligible for benefits even if the union had processed his application).

14 [FOIA Exemption 5

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[*FOIA Exemption 5*

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<sup>15</sup> [*FOIA Exemption 5*

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<sup>16</sup> [*FOIA Exemption 5*

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