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

Advice Memorandum

DATE: September 17, 1996

TO : John D. Nelson, Regional Director
Region 19

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

SUBJECT: S.L. Start & Associates
Case 19-CA-24614 530-6067-4077
530-6050-5000

This Section 8(a)(5) and (1) case is submitted for advice as to: (1) whether an employer's refusal to discharge employees for nonpayment of dues pursuant to the union security provision in the collective bargaining agreement must be deferred to the contractual grievance arbitration procedure; and (2) whether an employer may lawfully tell employees that if it discharges many employees pursuant to the union security clause, its major contract would be severely jeopardized and it would have to close its offices and lay off all its employees.

FACTS

S.L. Start & Associates (Employer) and Office and Professional Employees Union, Local 8 (Union) are parties to a collective bargaining agreement effective November 1995 through June 1997. The Employer provides assisted living services to people who are developmentally disabled. The Employer states that, during negotiations for a contract, the Union proposed a union security clause that required only suspension if the employees failed to pay their dues. The Union's proposal requiring suspension for nonpayment of dues was dropped during negotiations. The Employer claims that during negotiations the Union stated that it would never ask that an employee be terminated for nonpayment of dues.

Section 1.3 of the agreement, entitled "Union Membership/Contract Administration Fees", provides inter alia:

> However, because the Union will represent each employee regardless of membership, the terms of this

> Agreement have been made for all employees who choose to join the Union. Accordingly, it is fair and equitable that each employee in the bargaining unit pay their own way and assume their fair share of the obligation along with the grant of equal benefit contained in this Agreement.
>
> Therefore, each employee who does not voluntarily acquire and maintain membership in the Union shall be required, as a condition of employment, within thirty-one (31) days from the date of employment, to pay for the administration of the agreement and the representation of such employees...(emphasis added)

Section 1.3 is silent concerning the Employer's obligation to terminate an employee for failure to pay the fee required by Section 1.3. The Union claims that during negotiations the Union explained to the Employer that Section 1.3 requires the termination of an employee for failure to pay the fee.

After the collective bargaining agreement went into effect, the Employer and the Union held joint meetings to explain the agreement to the employees. During these meetings, the Union explained to the employees that an employee could be terminated for failure to pay the dues or fees required by Section 1.3. The Employer did not dispute the Union's explanation of Section 1.3 during these meetings.

In December 1995, the Union sent employees "welcome" packets which included a section explaining their right to join or not join the Union, but informing them of their obligation to pay a service fee if they decided not to join the Union. In January and February, the Union sent follow-up notices to employees reminding them of their obligation to pay, the monthly amount that they owed, and the amount that was already owed. For those employees who did not respond, the Union sent an additional notice in late March reminding the employees of their obligation and the amount owed, and warning them that failure to pay in April would result in a letter to Respondent requesting that Respondent terminate them.

On May 14, 1995, the Union sent a letter to the Employer requesting that the Employer discharge 20 listed

employees for failure to pay dues pursuant to Section 1.3 of the Agreement. On May 17, 1995, employees filed a petition with Region 19 seeking an election to deauthorize the Union in Case 19-UD-514. A mail ballot election was scheduled for June 10, 1995. When the Union did not receive a response to its letter requesting the discharges, it sent another letter to the employer, dated May 31, 1995, demanding that the Employer terminate the employees. Meanwhile, the Employer sent a letter to the employees stating that the Union had insisted that the Employer terminate 20 employees for failure to pay their Union dues. The letter explained that the Union was insisting that the Employer enforce the collective bargaining agreement's union security clause, which says that the company must terminate people identified by the union when they do not pay their dues on time, even if the person chooses not to be a union member.

On June 7, 1995, the Employer's president sent employees a letter encouraging them to vote in the deauthorization election, and stating that the election would permit them to withdraw the union's authority to force employees to pay dues and to demand that the Employer terminate employees for failure to pay dues or fees in a timely fashion. The letter noted that the Employer had received a second letter from the Union requesting the termination of dues delinquent employees, but stated that the Employer "refused to comply with this demand until we hear clearly from you through this election how you feel on this issue." The letter further stated that if employees failed to vote or voted no, they would in effect be voting to fire their fellow employees and give the Union the authority to require all current and future employees to pay dues or be fired. The letter then stated that if the Employer

> is forced to terminate a large number of employees there are several consequences: . . . 3. Our contract with DDD in Bothell will be severely jeopardized and could easily be pulled from the company. If that happens, we would have to close our office and lay off all our employees.

The Employer stated that it was already short 9 staff members. If it lost 20 employees, as requested by the Union, the Employer would be down to 50% of the number of

employees required under its service contract. The Employer stated that if care of the clients was jeopardized, the contractor would terminate the contract. The mail ballot election was held and the results were blocked by the instant charge.

Article 5 of the contract states that

> [i]n the event of a controversy or dispute arising out of either the interpretation or the application of this Agreement...the following grievance procedure shall be used to resolve the dispute.

Article 5 provides for a four step grievance procedure leading to arbitration if the grievance is not resolved. The Union has not filed a grievance over this dispute. The Employer indicated to the Region that it is willing to arbitrate the dispute and will waive any time limits to permit the Union to file a grievance.

ACTION

We conclude that a Section 8(a)(5), (1) and 8(d) complaint should issue, absent settlement, for the reasons set forth below.

First, we conclude that the Employer violated Section 8(a)(5), (1) and 8(d) of the Act by refusing to discharge employees for nonpayment of dues pursuant to the union security provision in the collective bargaining agreement and that the instant case should not be deferred to arbitration. It is well settled that an employer's refusal to accede to a union's request to discharge employees for failure to pay dues pursuant to a valid union security clause constitutes a violation of Section 8(a)(5), (1) and 8(d) of the Act.[1] Here, the text of the contract appears to be clear and unambiguous. Section 1.3 of the collective bargaining agreement states that each employee in the bargaining unit, regardless of membership in the Union, shall be obligated to pay for the administration of the agreement and representation expenses "as a condition of employment." Thus, conditioning employment upon the

[1] American Commercial Lines, Inc., 296 NLRB 622 (1989); McIntyre Engineering Co., Inc., 293 NLRB 716 (1989); Spear Meat Co., 256 NLRB 117 (1981).

payment of dues and fees requires all bargaining unit employees to meet their union security obligations or be discharged. Therefore, the Employer violated Section 8(a)(5), (1) and 8(d) of the Act by refusing to accede to the Union's valid request to discharge employees for nonpayment of dues.

Further, since the language of the union security clause is clear and unambiguous, there is no issue of contract interpretation for an arbitrator to resolve. Therefore, we conclude that the instant case should not be deferred to the parties grievance/arbitration procedure.

In its defense the Employer argues that the Union agreed orally during bargaining that the union security provision did not require termination for nonpayment of dues. However, the Board abides by general contract principles, which state that a contract agreement is viewed as the best evidence and the final expression of the parties' understanding.[2] Other extrinsic evidence, oral or written, is admitted only in cases where the contract itself is ambiguous.[3] We conclude that oral evidence is inadmissible here in that the contract language is clear and ambiguous, because it expressly conditions continued employment on the payment of dues and fees.

In addition, the Employer was not privileged to deny the Union's request to enforce the union security clause because of the pending deauthorization petition. In King Electrical Manufacturing Company,[4] the Board held that a pending deauthorization petition does not relieve an employer of its obligation to accede to a union's request to enforce a valid union security clause. Therefore, we conclude that, in the instant case, the Employer was not privileged to deny the Union's request to enforce the union security clause because of the pending deauthorization petition.

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[2] Prestige Bedding Co., 212 NLRB 690, 700 (1974); Electrical Workers IBEW Local 11 (Los Angeles NECA), 270 NLRB 424, 425-426 (1984); See Jamar Coal Co., 293 NLRB 1009, 1010, n. 7 (1989).

[3] Id.

[4] 229 NLRB 615 (1977).

Second, we conclude that the Employer violated Section 8(a)(1) of the Act by threatening the employees with loss of employment if the Union succeeded in enforcing the union security clause. In Reeve Brothers, Inc.,[5] the Board held that an employer violated Section 8(a)(1) of the Act by threatening employees with loss of work, layoffs and plant closure if the employees supported the union. There the employer stated that if the employees supported the union, the employer's customers would remove their business.

Similarly, in the instant case, we conclude that the Employer violated Section 8(a)(1) of the Act by threatening the employees with loss of employment if they supported the Union. Here, the Employer sent a letter to its employees stating that if the employees supported the Union and the Union, as a consequence, terminated a large number of employees for nonpayment of dues, the Employer's contract with its customer would be "severely jeopardized," the contract with the customer "could easily be pulled from the company," and the Employer "would have to close our office and lay off all our employees."

Accordingly, a Section 8(a)(5), (1) and 8(d) complaint should issue, absent settlement, for the reasons set forth above.

B.J.K.

[5] 320 NLRB No. 133 (1996).