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Los Angeles Times Communications, LLC and Lee Carey, Petitioner and Graphic Communications Conference, International Brotherhood of Teamsters, Local 140N. Case 21–UD–415

August 25, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,
PEARCE, AND HAYES

On May 26, 2009, the Regional Director for Region 21 administratively dismissed the Petitioner’s deauthorization petition filed pursuant to Section 9(e)(1) of the Act. On August 14, 2009, the Board granted review.¹ The Petitioner and the Union filed briefs on review.² We find that the deauthorization petition must be processed, in light of the clear statutory language set forth in Section 8(a)(3) of the Act, which is expressly referenced in the deauthorization election provision set forth in Section 9(e)(1) of the Act. The language of the relevant statutory provisions compels reinstatement of the petition.

Section 9(e)(1) of the Act directs the Board to conduct elections upon the filing of petitions to rescind the authority of unions and employers to enter into union-security agreements “made pursuant to section 158(a)(3) [8(a)(3)]” of the Act.³ The union-security clause at issue here⁴ was “made pursuant to section 8(a)(3),” specifi-

¹ The grant of review was by a two-member Board. On August 27, 2010, a three-member panel affirmed the earlier decision to grant the request for review.

² The Petitioner filed a motion to recuse Member Becker, and the Union filed an opposition. Consistent with *Pomona Valley Hospital Medical Center*, 355 NLRB No. 40 (2010), the Petitioner’s request is denied.

³ Sec. 9(e)(1) provides: (e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

29 U.S.C. 159(e)(1) (emphasis added).

⁴ The parties’ union-security clause provides in part: Section 15.1 Union Security. *The requirement that employees become members of the Union and remain in the Union in good standing, as condition of employment [sic]*, shall be deemed satisfied so long as a non-member of the Union pays to the Union an amount equivalent to the Union’s regular dues and initiation fees, or such amounts reduced by the portion thereof, if any, not germane to collec-

tively, the first proviso to Section 8(a)(3). Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage . . . membership in any labor organization.” The first proviso to this section provides, in relevant part, that nothing in the Act “shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . .”⁵

Absent the first proviso to Section 8(a)(3), the union-security clause here would be unlawful, whether as prohibited discrimination to encourage union membership or as interfering with employees’ right under Section 8(a)(1) to refrain from assisting a labor organization. Because the clause would be unlawful but for the first proviso of Section 8(a)(3), the clause necessarily was an “agreement . . . made pursuant to section 8(a)(3),” in the words of Section 9(e)(1).

Moreover, the union-security clause, by its terms, falls within the Section 8(a)(3) proviso. It expressly refers to a “requirement that employees become members of the Union and remain in the Union in good standing, as a condition of employment.” Under the clause, the obligation to be a union member—or at least to bear the financial incidents of union membership—attaches to employment, without more. All bargaining unit employees are subjected to this requirement by virtue of their employment. It is plainly a “condition of employment” within the meaning of Section 8(a)(3). Our construction of that term is consistent with the similar term “conditions of employment” in Section 8(d), which defines the subjects over which parties must bargain under Sections 8(a)(5) and 8(b)(3). A union-security clause long has been held to be a mandatory subject of bargaining. See *NLRB v. General Motors Corp.*, supra.

The Union’s argument is that the second part of the union-security clause here takes it outside the ambit of Section 9(e)(1). That part provides:

Section 15.2 Notwithstanding the above paragraph [see fn. 4, supra], the language “as a condition of employment” shall not be construed under any circumstances as the Union having the right to request the termination of an employee or the Employer having an obligation to terminate an employee for the failure to pay union

tive-bargaining, contract administration or grievance adjustment. . . . [Emphasis supplied.]

⁵ The Supreme Court has interpreted Sec. 8(a)(3) “to mean that the only ‘membership’ that a union can require is the payment of fees and dues.” *NLRB v. General Motors Corp.*, 373 U.S. 734,742 (1963) (“‘Membership’ as a condition of employment is whittled down to its financial core.”).

dues or Agency fees, or otherwise remain in good standing.

The Union, then, would have us read Section 8(a)(3)'s reference to a "condition of employment" narrowly, as reaching only union-security clauses enforceable by termination of the noncomplying employee.⁶ We reject that interpretation, for the reasons already explained. The Union does not argue that the union-security clause, by its terms, cannot be enforced against individual employees. Indeed, its position is that the clause provides the basis for court collection proceedings, and it has threatened to sue employees (including the Petitioner) for failing to pay the agency fees required under the clause. That, by virtue of the clause, all employees purportedly are subject to legal action for failure to pay fees surely is enough to make the clause a condition of employment for purposes of Section 8(a)(3) and Section 9(e)(1).⁷ The Regional Director therefore erred by finding that the method of enforcement placed the union-security clause outside of Section 8(a)(3).

We find that the union-security clause here constitutes an agreement made pursuant to Section 8(a)(3), and thus that Section 9(e)(1) directing the Board to process a petition to deauthorize the union-security clause is properly invoked here. Given the statutory language, a contrary ruling would require compelling contrary legislative history or a compelling argument that permitting the petition to proceed is contrary to the policy underlying Section 9(e)(1). The Union presents neither.

Nor are we persuaded by the view of our dissenting colleague. Our interpretation of what constitutes a condition of employment comes easily within the dictionary definition he cites. Because it is impossible for the employees here to be employed without being subject to the contractual union-security clause, the obligation to financially support the Union is "something established . . . as a requisite to the doing . . . of something else,"⁸ i.e., being employed. Our colleague also argues that the clause does not implicate Section 8(a)(3) because its obligations are not enforceable by the employer, through termination. But it is clear (1) that the clause encourages union membership (as that term in Section 8(a)(3) had been construed by the Board), by purporting to impose an enforceable legal obligation on employees to financially support the Union; and (2) that the enforceability of the

obligation is attributable to the employer, whose agreement to the clause is the predicate for any lawsuit brought by the Union against an employee. Finally, our colleague's policy arguments prove too much. The dissent is correct that processing the deauthorization petition here threatens to deprive the Union of the benefit of its bargain, as well as to permit employees to get the benefits of union representation without paying for them. But those are consequences inherent in the operation of Section 9(e)(1) of the Act, and we are not free to revisit policy choices that Congress has already made.

ORDER

The Regional Director's administrative dismissal is reversed. This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 25, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting.

This case presents the novel issue of whether, pursuant to Section 9(e)(1) of the Act, the Board should process a petition to rescind the authority of an employer and union to enter into an agreement requiring unit employees to pay agency fees to the union, even if loss of employment is not a possible sanction for the employees' non-payment.

Contrary to the majority, I find that the statute does not compel the Board to process the petition. Rather, the plain language of the statute, Board rules and regulations, and relevant case law support the Regional Director's decision to dismiss the petition. Further, dismissal, in my view, better effectuates the policies of the Act. Accordingly, I respectfully dissent from my colleagues' decision to reinstate the petition.

I.

Initially, I disagree with my colleagues' conclusion that Section 9(e)(1) of the Act "compels" the Board to process the petition. Although the collective-bargaining agreement between the Employer and the Union contains a union-security clause requiring unit employees, including the Petitioner, to pay fees to the Union, Section

⁶ No party disputes that the union-security clause precludes the Union from requesting that the Employer terminate employees who fail or refuse to pay agency fees to the Union.

⁷ We need not decide whether the clause, in fact, creates a cause of action or whether a suit to enforce the clause would be permitted by the Act.

⁸ Webster's Third New International Dictionary 473 (1981) ("condition").

9(e)(1) does not generally state that the Board must process petitions to rescind the authority of employers and unions to enter into union-security agreements. Indeed, Section 9(e)(1) neither uses the term “union-security agreement” nor states that the Board must process petitions to invalidate contract clauses requiring employees to financially support a union. Instead, Section 9(e)(1) merely requires the Board to conduct elections upon the filing of appropriately supported petitions to rescind the authority of unions and employers to enter into agreements made pursuant to Section 8(a)(3).¹

Accordingly, the dispositive issue is whether the union-security agreement in this case can be said to be “an agreement . . . made pursuant to [S]ection [8](a)(3).” For the following reasons, I find that article XV,² the parties’ union security agreement, does not constitute such an agreement.

The text of the Act and Board rules and regulations demonstrate that an agreement made pursuant to Section 8(a)(3) is one that requires union membership as a condition of employment. Thus, although Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment (or any term or condition of employment) to encourage membership in a union, it also contains a proviso which explicitly permits an employer to make an agreement with a union that requires union membership as “a condition of employment.” Further, 8(a)(3) references Section 9(e) and provides that an employer is not precluded from making an agreement with a union to require union membership *as a condition of employment* unless the employees have voted—in an election conducted pursuant to Section 9(e)—to rescind the authority of their union to make just such an agreement. Given that statutory

language, it is not surprising that the Board’s rules and regulations presuppose that an agreement made pursuant to Section 8(a)(3) is one that requires membership as a condition of employment. Thus, Section 101.27(a)(2) of the Board’s Rules and Regulations requires regional staff in 9(e)(1) cases to ascertain “[w]hether there is in effect an agreement requiring as a condition of employment membership in a labor organization.” 29 CFR §101.27(a)(2) (2010). Similarly, Section 102.83 of the Board’s Rules and Regulations provides, “A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement.” 29 CFR §102.83 (2010). In short, an agreement that is made pursuant to Section 8(a)(3)—and which can be subject to a petition under Section 9(e)(1)—is one that requires union membership *as a condition of employment*, rather than union membership generally.³

Because the Act does not define “condition of employment,” it is necessary to resort to settled principles of statutory construction to determine whether article XV requires membership as a condition of employment. As in all cases of statutory construction, the appropriate “starting point ‘must be the language employed by Congress,’”⁴ given its common meaning, absent a clearly expressed legislative intention to the contrary.⁵ Further, “‘effect must be given, if possible, to every word, clause and sentence of a statute,’”⁶ with due consideration to the dictionary definitions of the statutory terms.⁷

The common meaning of the statutory term, “condition of employment,” is something that is required or necessary for employment.⁸ Article XV clearly does not re-

¹ Thus, Sec. 9(e)(1) provides:

Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

² Art. XV provides, in relevant part:

Section 15.1 The requirement that employees become members of the Union and remain in the Union in good standing, as a condition of employment, shall be deemed satisfied so long as a non-member of the Union pays to the Union an amount equivalent to the Union’s regular dues and initiation fees...

Section 15.2 Notwithstanding the above paragraph, the language “as a condition of employment” shall not be construed under any circumstances as the Union having the right to request termination of an employee or the Employer having an obligation to terminate an employee for the failure to pay union dues or agency fees, or otherwise remain in good standing.

³ As the majority notes, the Supreme Court has put a gloss on the term “membership,” and has held that the only membership that a union can require is the payment of dues and fees.

⁴ *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citation omitted).

⁵ 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.28 p. 248 (5th ed. 1992) (“*Statutory Construction*”).

⁶ 2A *Statutory Construction* § 46.06 p. 119 (citation omitted).

⁷ See 2A *Statutory Construction*, § 47.28 p. 248 (“It is not unusual to find cases which indicate that the approved usage of words can be established by the definition of a recognized dictionary.”). Cf. *Allentown Mack Sales & Service . v. NLRB*, 522 U.S. 359, 367 (1998) (Supreme Court consults dictionary for definition of terms used in Board’s legal standard governing polling and withdrawal of recognition).

⁸ Webster’s Third New International Dictionary (1981) at 473 defines “condition” as “something established or agreed upon as a requisite to the doing or taking effect of something else; 2. a circumstance that is essential to the appearance or occurrence of something else; prerequisite.” The word “requisite” in turn is defined as “something

quire union membership as a “condition of employment,” and accordingly does not qualify as an “agreement . . . made pursuant to” Section 8(a)(3). Put simply, the clause’s requirement that employees pay agency fees to the Union does not constitute “a condition” of employment because loss of employment is not a possible sanction for failing to pay agency fees under article XV.⁹

Nor do the Petitioner or my colleagues point to anything in the legislative history that suggests that it was the intent of Congress to require the Board to process petitions to invalidate contract provisions that cannot impact an employee’s tenure of employment. Rather, the legislative history demonstrates that Congress was concerned with union-security agreements that compel individuals—on pain of forfeiting their jobs—to become and remain union members. In describing what was to become Section 9(e)(1), the House Report stated that the proposed amendment “dispense[s] with the requirement of existing law that an election be held before a labor organization and an employer may make a union-shop agreement,” yet “continues to safeguard employees against subjection to union-shop agreements which a majority disapproves,” and accomplishes this by “provid[ing] that the Board shall conduct elections . . . to determine whether the union’s authority to enter into a union-shop arrangement shall be rescinded.” H.R. Rep. 82–082, 82 Cong., 1st Session at 2–3 (1951). The House Report’s use of the phrase “union shop agreement” instead of union-security agreement is significant. A union shop agreement requires union membership as a condition of employment, something the union-security clause in this case simply does not do.¹⁰

that is required or necessary.” *Id.* at 1929. And, “prerequisite” is defined as “something that is required beforehand.” *Id.* at 1791.

⁹ The majority notes that the phrase “condition of employment” appears in one portion of art. XV of the parties’ collective-bargaining agreement. However, just as job titles are not controlling in determining supervisory status under Sec. 2(11) of the Act, nor should contract language necessarily control whether something is a condition of employment within the meaning of Sec. 8(a)(3). This is particularly true here where the remainder of art. XV makes clear that the Union lacks the right to request termination of an employee who fails to pay the agency fees, and the Petitioner concedes that loss of employment is not a possible sanction for employee nonpayment.

¹⁰ That Congress’ focus was on union-security clauses requiring union membership as a condition of employment is demonstrated by language in the House Conference Report on the 1947 predecessor version of the statute that: “Under the provisions of the conference agreement an employer is permitted to enter into an agreement with a labor organization . . . , whereby the employer agrees that he will employ only employees who . . . are members of the labor organization concerned. . . . This permission, however, is granted only if . . . a majority of the employees in the bargaining unit in question eligible to vote have authorized the union to make such an agreement.” H.R. Conf. Rep. 80–510 at 41, reprinted in *1 NLRB, Legislative History of the LMRA, 1947* at 545 (1947). (emphasis added).

Case law interpreting Section 8(a)(3) likewise supports the conclusion that an agreement that requires union membership as a “condition of employment” means an agreement that conditions job retention on an employee’s satisfying his or her financial obligations under the clause. For example, in *Aerospace Workers v. NLRB*, 133 F.3d 1012, 1014–1015 (7th Cir. 1998), Judge Posner noted that Section 8(a)(3)’s proviso forces an employee to financially support the union’s collective bargaining activities “as a condition of keeping his job.” And, in *California Saw & Knife Works*, 320 NLRB 224, 225, 232–233, 235 fn. 57 (1995), the Board observed that the issue of employees’ rights under *General Motors and Communications Workers of America v. Beck*, 487 U.S.735 (1988) (“*Beck*”) does not arise absent a contractual union-security clause entitling a union to compel an employer to discharge noncompliant employees.

My colleagues reason that article XV “necessarily” was an agreement made pursuant to Section 8(a)(3) because, but for the first proviso to Section 8(a)(3), the clause would violate Section 8(a)(3) (and derivatively Section 8(a)(1)). However, Section 8(a)(3) does not per se prohibit actions which encourage union membership; it only prohibits the encouragement of union membership that is accomplished by employer discrimination. *See Radio Officers’ Union v. NLRB*, 347 U.S. 17, 42–43 (1954).¹¹

Indeed, the overall structure of Section 8(a)(3) speaks in terms of employer actions against employees. The first sentence makes it unlawful for an employer to discriminate against employees to encourage or discourage union membership, while the provisos, on the other hand, permit the employer to enter into an agreement with a union that entitles the employer to discriminate against employees—by discharging them—for failing to pay dues and fees to the Union. In contrast, article XV neither requires nor contemplates any employer action against employees who fail to pay agency fees. Instead, as the Petitioner notes, the Union attempts to enforce the clause merely by threatening civil collection lawsuits in state court.¹²

¹¹ I also find unpersuasive my colleagues’ reliance on Sec. 8(d) to support their position as the language of 8(d) is broader than the relevant language in Sec. 8(a)(3). Although the phrase “terms and conditions of employment” appears in Sec. 8(d), it does not appear in the relevant portion of Sec. 8(a)(3).

¹² In any event, this is not an unfair labor practice proceeding, and my colleagues’ point proves too much. A collective-bargaining agreement may contain various clauses which could be said to encourage union activity. For example, a clause bestowing superseniority on union stewards plainly encourages union activity, because an employee can obtain the valuable benefit of superseniority only by becoming a steward. Notwithstanding that fact, we do not permit employees to

Finally, I disagree with the Petitioner's argument that *Andor Co.*, 119 NLRB 925 (1957), and *Covenant Aviation Security, LLC*, 349 NLRB 699 (2007), mandate processing of the petition. Neither decision addresses the applicability of "condition of employment" in the Section 8(a)(3) proviso to a union-security clause that does not even purport to authorize any adverse employment action. In *Andor*, the union sought dismissal of a deauthorization petition, arguing in effect that because the union-security clause violated Section 8(a)(3) by authorizing the employer to discharge employees who were in arrears in union assessments,¹³ it was not "made pursuant to section 8(a)(3)" and therefore was not subject to deauthorization under Section 9(e)(1). 119 NLRB at 926-28. The Board rejected the argument and directed that the deauthorization vote proceed. No party contended that the payment obligation was not a condition of employment; in fact, the union-security provision explicitly authorized the employer to discharge employees who refused to pay dues. *Id.* at 926.

Covenant Aviation merely addressed whether the showing of interest supporting a deauthorization petition may predate the execution of a contract. 349 NLRB at 699. The meaning of "condition of employment" in the Section 8(a)(3) proviso was not addressed in any manner. Indeed, the Petitioner concedes that the Board has "never opined" on the specific issue presented here. My colleagues, therefore, quite properly do not even seek to rely on that case.

In sum, the plain language of the statute, the relevant case law, and our own rules and regulations lead me to conclude that the petition should be dismissed because article XV does not require membership as a condition of employment and therefore does not constitute an agreement made pursuant to Section 8(a)(3) of the Act.

II.

I also believe that dismissal of this deauthorization petition will better serve the policies of the Act than will the majority's decision to reinstate the petition.

First, dismissal of the petition leaves in place the union-security clause that the parties negotiated, thereby furthering the Act's policy of freedom of contract. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). The majority's decision to process the petition potentially

vote to rescind the authority of their employer and union to negotiate superseniority provisions because such provisions are not made pursuant to Sec. 8(a)(3) as they do not require membership as a condition of employment. So too, the art. XV union-security clause is not an agreement made pursuant to Sec. 8(a)(3).

¹³ The 8(a)(3) proviso permits the discharge of employees only for nonpayment of dues and initiation fees, not for nonpayment of assessments or other charges.

deprives the Union of the benefit of its bargain while leaving the employer free to enjoy the price it presumably exacted in exchange for its agreeing to the clause.

In addition, the Regional Director's dismissal of the petition—which leaves the union-security clause in effect—takes into account Congress' concern that "parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Beck*, 487 U.S. at 750 (citation omitted). While the closed shop and the abuses associated with it were the principal target of the Taft-Hartley amendments of Section 8(a)(3), Congress was "equally concerned" that the employees who pay for the benefits of union representation through their dues be permitted to prevent other employees who enjoy those benefits from "rid[ing] along freely." *Id.* at 748 (citation omitted). Permitting invalidation through the Board's processes of a union-security clause that cannot affect any employee's employment fails to give appropriate weight to all of the policy considerations underlying the operative statutory provisions.

Moreover, dismissal of the petition does not run afoul of the Act's policy of insulating employees' jobs from their organizational rights (*Radio Officers' Union v. NLRB*, 347 U.S. at 40), because loss of employment is not a possible sanction for unpaid agency fees. While the clause obligates employees to pay agency fees to the Union, it does not provide for the employment of any employee to be terminated or otherwise affected by his or her failure to pay those agency fees.

At bottom, I conclude that the harms of impairing the parties' freedom of contract and discounting the congressional concern about free riders outweigh the fact that dismissal of the petition forecloses one avenue whereby employees can rid themselves of the unwanted obligation to support a union. I note that employees would remain free to petition to decertify the Union at an appropriate time.

For all these reasons, I would affirm the Regional Director's dismissal of the petition.

Dated, Washington, D.C. August 25, 2011

Mark Gaston Pearce,

Member

NATIONAL LABOR RELATIONS BOARD