

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

DATE: October 5, 2012

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: United Nurses Associations of California/ 536-2509-9300
Union of Health Care Professionals 536-2507
(Sharp Grossmont Hospital)
Case 21-CB-15107

The Region submitted this Section 8(b)(1)(A) case requesting advice regarding the lawfulness of a union security clause that provides for enforcement by the Union through a civil lawsuit against delinquent employees rather than by those employees' discharge.

We conclude that the union security clause here is lawful under the Board's decision in *Los Angeles Times*,¹ where the Board held that a virtually identical provision was a valid union security clause. Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Union violated Section 8(b)(1)(A) by maintaining this clause.

FACTS

Grossmont Hospital Corporation ("Employer"), which operates an acute care hospital facility with its principal offices in La Mesa, California, and United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("Union") are parties to a collective-bargaining agreement covering a unit of Registered Nurses. That agreement contains a union security clause that provides in relevant part:

Section 501. Membership: . . . [A]ll employees, whether Association members or not, may be responsible to pay monies to the Association as required by Section 503 below.

¹ 357 NLRB No. 66 (Aug. 25, 2011).

Section 502. Exercise of Rights: . . . nothing in this Section shall prevent the Association from lawfully enforcing any valid union security clause or from taking any action permitted or authorized under this Agreement.

Section 503. Maintenance of Membership: Each employee in this Bargaining Unit who is or becomes a member of the Association shall, as a condition of continued employment, either remain a member of the Association or satisfy the following financial obligations: (1) payment of periodic dues and initiation fees, or (2) payment of service fees which shall be the proportion of the Associations' total expenditures that support representational activities.

Section 504. Enforcement. The Association and not the Employer shall be responsible for enforcing the requirement that employees fulfill their duties or service fee obligations. Among the Association's enforcement options is the filing of a civil suit against the delinquent employees. However, it is understood that the Association will make all reasonable efforts to correct the situation before the commencement of litigation. The Employer shall not be required to discharge or otherwise discipline employees who fail or refuse to meet their financial obligations under this Article.

The Charging Party alleges that this clause is unlawful because it provides for a penalty less than discharge and it allows the Union to enforce the clause by civil suit.

ACTION

We conclude that the Union's security clause does not violate Section 8(b)(1)(A) of the Act even though it does not provide for enforcement by discharge.

The first proviso to Section 8(a)(3) 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..." In *Los Angeles Times Communications, LLC*, the Board concluded that the proviso protects a union security clause enforceable by a union civil action rather than termination of employment.² In *Los Angeles Times*, the Board reinstated a deauthorization petition filed pursuant to Section 9(e)(1), finding that the union security clause at issue was "made pursuant to section 8(a)(3)."³ The parties' union security clause provided that

² *Id.*

³ *Id.*, slip op. at 1.

employees must either join the union or pay dues and initiation fees “as a condition of employment.”⁴ The union security clause went on to say:

... 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 dues or Agency fees, or otherwise remain in good standing.⁵

When employees became delinquent in paying their agency fees, the union threatened to sue the employees for their overdue fees.⁶ The Board found that the fact that the employees were subject to legal action by virtue of the clause’s language requiring them to pay agency fees made the clause a condition of employment for purposes of Section 8(a)(3), even though the clause’s obligations were not enforceable by the employer through termination.⁷ The Board found enforceability of the clause was attributable to the employer because its agreement to the clause was a predicate for any lawsuit.⁸

In the present case, the union security clause is nearly identical to the clause at issue in *Los Angeles Times*. The clause states that the employer will not be required to discharge or otherwise discipline employees for failing to pay their agency fees and explicitly authorizes the Union to file a civil lawsuit against any delinquent employees. Based on the Board’s analysis in *Los Angeles Times*, the clause in the present case is valid under Section 8(a)(3).

The Charging Party relies upon the Board’s decision in *Krambo Food Stores*⁹ and its progeny to argue that a union security clause is not protected under the proviso unless the penalty against employees who fail to pay agency fees is termination from employment. However, while the Board has consistently held that employers and

⁴ *Id.*, slip op. at 1 n.4.

⁵ *Id.*, slip op. at 1-2.

⁶ *Id.*, slip op. at 2.

⁷ *Id.* The Board, however, reserved the question of whether such a lawsuit would be permitted by the Act. *Id.*, slip op. at n.7.

⁸ *Id.*, slip op. at 2.

⁹ 106 NLRB 870 (1953).

unions may not impose lesser forms of discipline on employees who have failed to pay agency fees while also reserving the union's right to demand the employee's discharge,¹⁰ the Board has never held that termination from employment is the only means by which a valid union security clause may be enforced.

Thus, in *Krambo Food Stores*, the Board held that the union and employer violated the Act by causing and effecting the withholding of vacation pay from employees who were delinquent paying their union dues where the union had not abandoned its right to demand their discharge.¹¹ The Board declared that: "Nothing in the Act or its legislative history persuades us that the union-shop provisos to Section 8(a)(3) and 8(b)(2) were designed to give employers and unions a license to use various discriminatory devices, short of discharge, to coerce an employee to join the union *while still holding over his head the alternative threat of discharge* which the statute sanctions."¹² The Board did not in that case hold that "devices, short of discharge" were impermissible means of enforcement in the absence of a reservation of the right to demand discharge. Instead, the Board found the withholding of vacation benefits constituted "an additional discrimination, over and above the threat of discharge, and not a lesser one"¹³ and expressly did not pass on the question of whether a lesser penalty alone would be permissible.¹⁴

The other cases on which the Charging Party relies similarly do not hold that enforcement devices other than discharge standing alone are impermissible and instead merely apply the holding in *Krambo*. These cases, which all involve "additional discrimination, over and above the threat of discharge," include: *Local*

¹⁰ See, e.g., *Krambo Food Stores*, 106 NLRB at 877 (holding union-shop provisos to Sections 8(a)(3) and 8(b)(2) do not give employers and unions a license to use various discriminatory devices, short of discharge, while maintaining the alternate threat of discharge); *Bartenders Union Local 332*, 259 NLRB 252, 255 (1981) (applying *Krambo* to find a union unlawfully sought to reduce an employee's seniority for failure to pay union dues). See also *Pittsburgh Press Co.*, 241 NLRB 666, 667 (1979) (finding the union could only request a delinquent employee's discharge when the employee was delinquent in paying his union dues and the union also took the unlawful action of assessing a fine against the employee and removing his name from the work schedule).

¹¹ 106 NLRB at 877-78.

¹² *Id.* at 877 (emphasis added).

¹³ *Id.* at 878 (emphasis in original).

¹⁴ *Id.* at 877 n.10.

908, *Plasters' Association*, where a union violated Section 8(b)(2) by causing the employer to deny a promotion to an employee who was delinquent in paying union dues under a union security clause;¹⁵ *Marcus Trucking Co.*, where the Board found a union unlawfully sought a reduction in the seniority of a delinquent employee even though the union could have lawfully requested the delinquent employee's discharge;¹⁶ *Reading Tube Corp.*, where the Board found that a union security clause was invalid as written because it allowed both discharge and additionally the loss of the benefits of the collective-bargaining agreement as a sanction against delinquent employees;¹⁷ and *Kisco Co.*, where an employer violated 8(a)(3) by withholding delinquent employees' vacation benefits while the union retained the right to request the employees' discharge under a valid union security clause.¹⁸

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

¹⁵ 185 NLRB 879 n.5, 880 (1970), *enforced*, 454 F.2d 285 (8th Cir. 1972).

¹⁶ 126 NLRB 1080, 1081, 1103 (1960), *enforced as modified on other grounds*, 286 F.2d 583 (2d Cir. 1961). The Board also found the union security clause violated Section 8(a)(3) because the union was not the employees' statutory representative. *Id.* at 1081, 1103.

¹⁷ 120 NLRB 1604, 1605-1606 (1958).

¹⁸ 192 NLRB 899, 900-01, 905 (1971). The Charging Party also cites dicta from cases that are clearly inapplicable here. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 41-42 (1954) (in the absence of a lawful union security clause, the employer unlawfully discriminated against an employee for failure to pay dues); *Gaynor News Co., Inc.*, 197 F.2d 719, 723 (2d Cir. 1952), (Section 8(a)(3) proviso does not allow an employer to pay lower wages and benefits to non-union members), *aff'd sub nom. Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *Association of Western Pulp & Paper Workers*, 170 NLRB 49, 51-52 (1968) (union unlawfully conditioned continued employment of delinquent employees upon payment of union fine rather than payment of "periodic dues and initiation fees"); *Local 140, Furniture Workers*, 109 NLRB 326, 328 (1954) (union unlawfully requested discharge of employees for failure to pay union dues for a period prior to the effective date of a union security clause).