

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

DATE: May 22, 2014

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: International Association of Machinists and 536-2581-3370-7900
IAM District Lodge 751 (Boeing Co.) 712-5014-0140
Cases 19-CB-119612, -121375 *et al*

These Section 8(b)(1)(A) cases were submitted for advice on whether the Union's ratification vote on a proposed contract was an internal Union matter or whether it affected employee terms and conditions of employment, in which case the Union owed a duty of fair representation in its conduct of the vote. We conclude that ratification was not a condition precedent to the formation of an agreement, and that the Union retained authority at all times to accept or reject the Employer's offer. Accordingly, the ratification vote was a purely internal matter, and the Union owed no duty of fair representation with respect to the manner in which the vote was conducted.

FACTS

The Boeing Company ("Employer") is an aerospace manufacturer with a long-standing collective-bargaining relationship with the International Association of Machinists & Aerospace Workers. The International, IAM District Lodge 751, IAM District Lodge 70, and IAM District Lodge W24 (collectively "Union") represent about 31,000 of Boeing's commercial aircraft employees. The vast majority of these employees work in the Puget Sound area in the bargaining unit covered by District Lodge 751.¹ The parties' current collective-bargaining agreement covers all three units. The current contract expires in 2016.

In 2013, the Employer announced it would be producing a new airplane, the 777X, and the Union and Employer began negotiations about locating production of the 777X in Puget Sound. Specifically, the Union and Employer began negotiating a

¹ District Lodge 70 represents about two hundred employees in the Wichita, Kansas bargaining unit, which the Employer is currently winding down. District Lodge W24 represents a small bargaining unit of Boeing employees in Oregon.

contract extension to last from 2016 to 2024, along with several Letters of Understanding about work placement. After some months of bargaining, the Employer made its final offer, which called for significant concessions from the Union, including, among other things, the end of pension accruals for employees and a transition to a defined contribution plan upon expiration of the current contract in 2016, in exchange for the Employer's commitment to locate the 777X work in Puget Sound if the contract extension "is approved by the bargaining unit on or before November 8, 2013."² The offer also included a \$10,000 lump-sum signing bonus for all employees except the Wichita unit, to be "paid within thirty (30) days of ratification date." Although the Union's constitution and bylaws do not provide for contract ratification, the Union traditionally puts proposed contracts to a vote of its members before signing. Upon receiving the Employer's final offer, the Union presented it to the membership, which rejected the proposal by a two-to-one margin in a vote on November 13. The more senior unit employees in particular strongly objected to the Employer's proposal to cease pension accruals and transition to a defined contribution plan.

On December 4, the International president wrote a letter to the membership to address widespread confusion about why the Union was bargaining and voting on Employer proposals two years before the expiration of the current contract. In the letter, the president noted that,

I have always practiced the rule that dictates the membership deserves the facts and truth and that when so presented, the members will make the decisions that best serve their interests. It has been the policy and practice of the IAM for 125 years to put any and all contract proposals directly to the membership affected whenever a significant matter needs to be decided.

The president went on to discuss how although the Union bargaining committee originally had not felt the Employer's final offer to be worthy of a vote, the District Lodge 751 president finally agreed to put the matter to the members. The International president concluded the letter by stating that when the Employer brings a proposal to the Union, the Union is duty bound to negotiate the best terms possible, and that,

[t]he members should understand it is they who decide if those terms are acceptable. DL 751 Pres./DBR Tom Wroblewski did the "right thing" asking the members to decide such a crucial matter for so many people. It took courage and faith in the membership to make the decision to take the

² All dates are in 2013 unless otherwise noted.

vote to the membership even when there were those who indicated the membership could not be trusted with this responsibility.

The IAM has trusted its membership for 125 years. As IAM International President, I make no apology for trusting the membership and for supporting a vote by the membership on such a significant matter that can have very far reaching effects.

A summary of the proposal that had been rejected was attached to this letter.

In early December the Employer requested additional negotiations, and the Union agreed to meet. At a meeting on December 12, the Employer presented an “enhanced best and final offer” that still included the transition to a defined contribution plan in 2016, but also included a larger bonus, improved dental coverage, and a recommitment to keeping the 737MAX in production. The new offer also included a “Letter of Understanding” confirming 777X work would be performed in Puget Sound. Specifically, the LOU stated that “[i]f a second contract extension is approved by the bargaining unit on or before (insert contract ratification date), the Company agrees to locate the 777X wing fabrication and assembly, final assembly, and major components . . . of the 777X in the Puget Sound.” The LOU also noted that it “will become effective on the date that the second contract extension has been ratified by the bargaining unit.” Finally, the new offer noted that several changes would be “effective date of ratification,” and included a “\$10,000 signing bonus paid within 30 days of ratification.”

Again, the District Lodge 751 bargaining team did not want to present the Employer’s proposal to the membership for a vote, but the International requested that a vote be conducted. Although the International initially desired the vote be held prior to the Christmas holidays, District Lodge 751 refused, and scheduled it for January 3, 2014, the day after the end of the holiday shutdown. District Lodge 751’s leadership strongly urged its membership to vote against the proposal.

On December 26, the International president sent another letter out to the affected members, informing them that members had “overwhelmingly” asked for a new vote on the revised proposal, and that in response he had directed that a new vote be run. After explaining that he thought this would be the Employer’s last offer to the Union, the president responded to some unspecified “misinformation” by stating that he “cannot conceive of a rationale for determining the membership doesn’t deserve a right to vote on a contract proposal.” The letter concluded as follows:

In the IAM, the membership deserves the final say and it is incumbent upon IAM leadership at all levels . . . to assist and assure that it is the members who will make the critical decisions in their Union. I ask each

member receiving this letter to help assure the proposal that is now before you for your vote on January 3 is given your fullest consideration.

Attached to the letter was a summary of the Employer's proposal, including the provision that each employee would receive \$10,000 "upon ratification."

On December 27, the Employer sent a letter to all unit members urging them to vote for the proposal. The letter noted that a "ratified agreement will commit Boeing to build the 777X . . . in the Puget Sound area."

On January 3, 2014, a vote was conducted on the Employer's enhanced final offer. The vote was organized by District Lodge 751, but members in all three affected district lodges participated. Nonmember unit employees were not permitted to vote. Because of the unusual circumstances, the Union for the first time provided for absentee ballots in a ratification vote. The membership ratified the contract extension by a vote of 12,263 in favor to 11,649 against. Upon final tabulation of the vote later that day, the Union's chief negotiator contacted the Employer and informed it that the contract had been ratified. The following day the Employer issued a press release announcing that agreement had been reached and the 777X work would not leave Puget Sound.

In the days leading up to and following the ratification vote, at least thirty-six charges were filed alleging the Union violated its duty of fair representation in the conduct of the vote, by, among other things, directing a vote occur over District Lodge 751's objection, misleading members about contract provisions, scheduling the vote when many employees were on vacation, and through a significant number of alleged voting irregularities.

ACTION

We conclude that ratification was not a condition precedent to the formation of an agreement, and that the Union retained authority at all times to accept or reject the Employer's offer. Therefore, the ratification vote was a purely internal Union matter and the Union owed no duty of fair representation in its conduct of the vote.

Application of the Duty of Fair Representation to Contract Ratification Votes

A union that is an exclusive bargaining representative is obligated to serve the interests of the employees it represents without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.³ However, this duty of fair representation is confined to matters of

³ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

employment and its terms and conditions.⁴ Thus, the duty of fair representation does not apply to union conduct that does not impact the employment relationship, such as “the purely internal enforcement of union rules” not relating to the employer-employee relationship, or relating only tangentially.⁵ 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 “matters . . . exclusively within the internal domain of the Union.”⁶

It is also well established under the Act that the designated collective-bargaining representative is free to negotiate and make binding agreements with an employer, with or without the formal consent or ratification of the unit employees.⁷ A union does not lose its plenary authority to make agreements when it puts a proposal to its members for ratification. Unless the union surrenders its exclusive domain and control over contract acceptance, any ratification vote is “purely advisory,”⁸ and it is for the union to construe and apply its internal regulations regarding what constitutes ratification.⁹ Accordingly, absent the union’s surrender of its authority

⁴ *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB 1336, 1336 (2000) (citing *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962)). See, e.g., *Loc. 222, United Food and Commercial Workers (Iowa Beef Processors)*, 245 NLRB 1035, 1039 (1979) (finding union owed no duty of fair representation when it denied striker strike benefits).

⁵ See *Office Employees Local 251 (Sandia Nat’l Laboratories)*, 331 NLRB 1417, 1422, 1424–25 (2000) (finding no violation where intraunion discipline of officers for misuse of funds had speculative impact on the employer-employee relationship).

⁶ *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB at 1336 (quoting *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967)).

⁷ *Id.* (citing *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964)).

⁸ *Id.* (citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958)).

⁹ *Id.* See also *North Country Motors, Ltd.*, 146 NLRB at 672 (holding employer unlawfully refused to execute agreement on ground that only one employee voted for ratification).

over contract acceptance, the Board will not find a breach of the duty of fair representation no matter how flawed such a ratification vote is.¹⁰

If, though, the vote is not advisory, but rather the union has surrendered its authority to accept an employer's offer, making ratification a condition precedent to any binding agreement, the Board will conduct a duty of fair representation analysis.¹¹ Although we have been unable to find a case where the Board, applying such an analysis, has held that a union violated its duty of fair representation in its conduct of a ratification of a contract,¹² the Board has found such violations with respect to votes conducted by unions to set isolated terms and conditions.¹³

¹⁰ See *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB at 1336 (finding no duty of fair representation attached and dismissing Section 8(b)(1)(A) complaint where union counted employees opposed to agreement as being in favor of agreement); *Manufacturing, Maintenance, Industrial & General Constr. Wkrs. (Leisure World)*, 237 NLRB 442, 442 n.2 (1978) (finding no breach of the duty of fair representation where union allegedly disenfranchised vocal opponents of contract offer because vote was strictly an internal union matter); *Steelworkers, Local 196, 6850, 7508, etc.*, 226 NLRB 772, 775 (1976) (“[i]nasmuch as ratification was not necessary to the validation of the contract there was no violation of the duty of fair representation in Respondents’ method of counting votes for and against ratification”), *remanded sub nom. IBT Local No. 310 v. NLRB*, 587 F.2d 1176 (D.C. Cir. 1978), *on remand*, 243 NLRB 1157 (1979).

¹¹ See *Western Conference of Teamsters (California Cartage Co.)*, 251 NLRB 331, 338 n.30, 339–40 (1980) (conducting duty of fair representation analysis where all parties treated employee ratification as a condition precedent to the execution of a valid agreement but finding no breach of the duty where the union representatives did not willfully attempt to mislead employees at the ratification meeting).

¹² Cf. *United Steelworkers of America, AFL-CIO*, 243 NLRB 1157, 1157 (1979) (accepting as law of the case D.C. Circuit’s finding that union breached the duty of fair representation by denying employees represented by another union an opportunity to ratify a joint contract).

¹³ See *Boilermakers Local 202 (Henders Boiler)*, 300 NLRB 28, 28 n.1, 32 (1990) (holding union breached its duty of fair representation by excluding nonmembers from poll that set a floating holiday, since the union had delegated its responsibilities to employees); *Branch 6000 (USPS)*, 232 NLRB 263, 263 n.1 (1977) (finding union violated Section 8(b)(1)(A) by only allowing union members to vote on question of whether employees would have fixed or rotating days off where union substituted vote for negotiations), *enforced*, 595 F.2d 808 (D.C. Cir. 1979).

Determining When a Union Has Ceded Its Authority to Reach an Agreement

Board law on when a union has ceded its authority to reach an agreement and made employee ratification a condition precedent to an agreement has developed almost entirely in Sections 8(a)(5) and 8(b)(3) cases involving disputes between employers and unions about whether the parties had reached a binding contract. The focus in those cases is on whether there was meeting of the minds between the union and employer with respect to ratification, or on the employer's view of the union's apparent authority to accept the employer's offer.¹⁴ While all the same considerations are not necessarily appropriate in the Section 8(b)(1)(A) context, particularly the employer's view of the union's apparent authority, we nonetheless conclude that the same standards should apply to determine whether ratification is a condition precedent in the context of an alleged breach of the duty of fair representation. In fact, in Section 8(b)(1)(A) cases the Board has cited to these Sections 8(a)(5) and 8(b)(3) cases' discussions of ratification as a condition precedent.¹⁵ Moreover, if the test of whether the union ceded its authority to the employees was different in the duty of fair representation context than in the context of a Section 8(b)(3) charge, a union could potentially face conflicting Board remedies.¹⁶

Even in the Sections 8(a)(5) and 8(b)(3) cases, "some of the Board precedents . . . seem to be in tension with one another."¹⁷ Yet, although there may not be a clear "uniform standard as to how the Board will assess the facts" in these cases,¹⁸ some conclusions can be drawn from existing Board precedent. Essentially, the Board recognizes two ways a union can cede its authority to reach an agreement and make

¹⁴ See *Observer-Dispatch*, 334 NLRB 1067, 1072 (2001).

¹⁵ See, e.g., *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB at 1336.

¹⁶ Thus, if a union lacked authority to sign a contract under the DFR standard, but had apparent authority in the view of the employer, employees could file a Section 8(b)(1)(A) charge to annul the contract, while the employer could simultaneously file a Section 8(b)(3) charge to enforce the contract.

¹⁷ *Williamhouse-Regency of Delaware*, 297 NLRB 199, 200 (1989) (Chairman Stephens, concurring), *enforced*, 915 F.2d 631 (11th Cir. 1996).

¹⁸ See *Sacramento Union*, 296 NLRB 477, 479 (1989) (Chairman Stephens concurring).

employee ratification a necessary condition to a binding contract.¹⁹ First, the union and employer may agree to make employee ratification a condition precedent to the acceptance of an offer. Second, the union may unilaterally cede its authority to the membership, but in such instances the employer must be given clear and timely notice that the union lacks the authority to accept an offer, and that only the membership has such authority.²⁰

Although ratification is normally an internal union matter, parties are free to bargain and reach agreement on such permissive subjects.²¹ Thus, a union and an employer are free to agree that employee ratification is a necessary precondition to a collective-bargaining agreement.²² However, because employee ratification devolves the authority to accept an offer from the exclusive bargaining representative to the employees, the Board insists on “clear evidence” that a union has agreed as a contractual matter to surrender a degree of its prerogatives.²³

Thus, union statements that it intends to seek ratification are not evidence of an express agreement. The Board “distinguishes between a union’s expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract.”²⁴ Unions can urge concessions to

¹⁹ *See id.* (distinguishing purely advisory ratification votes from ratification votes that are tantamount to acceptance of the employer’s offer, and must occur before a binding contract is created).

²⁰ *Id.* at 478 (noting that when a bargaining agent states that any agreement reached must be ratified by his principal, that announcement may effectively limit the agent’s authority to accept the offer himself).

²¹ *New Process Steel, LP*, 353 NLRB 111, 114 (2008) (holding that employer violated Section 8(a)(5) by repudiating the contract based on the ratification procedure; although union and employer had bilateral agreement to submit proposal to ratification, the union retained exclusive control over method of ratification), *incorporated by reference*, 355 NLRB 586 (2010).

²² *Id.*

²³ *See id.* (citing *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991)).

²⁴ *Id.*

ease the prospect of ratification,²⁵ note that any agreement will have to be acceptable to employees,²⁶ and even “demand” ratification,²⁷ without the Board finding an express agreement to make ratification a condition precedent. The Board is generally “unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment.”²⁸

The Board will not necessarily find an express agreement on employee ratification even where the proposed collective-bargaining agreement expressly refers to ratification. In *Personal Optics*, the proposed contract included a ratification bonus and fifteen-cent raise “upon ratification.”²⁹ However, the Board affirmed the Administrative Law Judge’s determination that the contract references, as well as the union’s stated intention of holding a ratification vote, did not evidence a bilateral agreement to require ratification for a binding agreement.³⁰ Even if the union’s statements led the employer to think the union would conduct a ratification vote, that is not the same thing as an agreement between the parties.³¹ Without an offer and acceptance, meeting of the minds, or some other evidence of an express agreement on ratification, all it showed was that the union had a self-imposed internal ratification requirement.³²

²⁵ *Personal Optics*, 342 NLRB 958, 962 (2004) (finding no evidence that ratification was a condition precedent to an agreement, even though union stated its intention to take agreement to membership and urged the employer to accept some proposals because of the union’s need to satisfy ratifying employees), *enforced mem.*, 165 F. App’x 1 (D.C. Cir. 2005).

²⁶ *Seneca Environmental Products*, 243 NLRB 624, 626–27 (1979) (finding no express agreement even though employer believed in good faith that union would take any agreement to employees and employees would have to find it acceptable), *enforced*, 646 F.2d 1170 (6th Cir. 1981).

²⁷ *C & W Lektra Bat Co.*, 209 NLRB 1038, 1038–39 (1974), *enforced*, 513 F.2d 200 (6th Cir. 1975).

²⁸ *Id.*

²⁹ 342 NLRB at 959.

³⁰ *Id.* at 962.

³¹ *Id.* at 958 n.2.

³² *See id.* at 962.

The other manner by which a union can surrender to its members its authority to accept an offer is by creating an express understanding that the union negotiators lack the authority to bind the union to a contract.³³ For example, in *Sunderland's Inc.*, the employer specifically sought to ascertain if the union negotiators had final authority to accept or reject a contract, and learned that the union had only been given authority by the membership to submit the employer's best offer for ratification.³⁴ Since the negotiators did not have final authority to accept or reject, ratification was a precondition.³⁵ Similarly, in *Teledyne Specialty Equipment Landis Machine Co.*, the Board found that where the employer was aware that ratification was required by the union's constitution, where the union's bargaining representatives repeatedly refused to agree to a no-strike clause because he "did not have the authority to grant such a pledge, that the authority to do so rested with the employees," and where the parties came to a "tentative agreement" that included a no-strike pledge, employee ratification was a condition precedent to an agreement.³⁶ As in the context of express agreements, the Board is careful not to confuse a union's self-imposed ratification requirement with a union's lack of authority.³⁷ Normally, in order to rebut the presumption that a bargaining agent has authority to accept an offer, the other party must have affirmative, clear, and timely notice that such is not the case.³⁸

³³ *Observer-Dispatch*, 334 NLRB at 1072 (agreeing that employer did not violate Section 8(a)(5) by refusing to execute otherwise agreed-upon contract because union bargaining agent explicitly deferred final acceptance until ratification by the employees).

³⁴ 194 NLRB 118, 118 n.1 (1971).

³⁵ *Id.* (dismissing Section 8(a)(5) complaint based on employer's withdrawal of assent to contract terms in the absence of ratification).

³⁶ 327 NLRB 928, 929–30 (1999) (affirming ALJ's determination that employer lawfully withdrew from tentative agreement prior to union ratification).

³⁷ *See Williamhouse-Regency of Delaware*, 297 NLRB at 199 n.5 (holding that no condition precedent to an agreement had been created even though the union notified the employer at the outset of negotiations, both in writing and orally, that any agreement would have to be ratified by the membership). *See also id.* at 200 (Chairman Stephens, concurring) (noting that employer had not argued there was an express agreement on ratification and that confusion about what constitutes a condition precedent to an agreement ought to be resolved).

³⁸ *University of Bridgeport*, 229 NLRB 1074, 1082 (1977).

The Instant Cases

Here, the Union neither expressly agreed with the Employer to make ratification a condition precedent to a final agreement, nor unilaterally surrendered its bargaining authority to the bargaining unit. Although Union officials emphatically expressed their intention to seek ratification, and all parties acted under the assumption that the Union would seek ratification of any proposal, there is no evidence of an express bilateral agreement requiring ratification. Like in *Personal Optics*, the Union's forceful assertions and the parties' contract references to ratification are perfectly consistent with an internal, self-imposed ratification requirement.³⁹ Barring any evidence there was an offer and acceptance at the bargaining table specifically about employee ratification, no express agreement between the Employer and the Union can be found.

Similarly, the Union at no point ceded to the unit its Section 9(a) authority to enter into a collective-bargaining agreement with the Employer. Although Union officials stated that they strongly support seeking member approval of all contracts, and all past contracts have been put to a vote, more is required before the Board will find that the Union affirmatively and clearly gave up its power to accept the Employer's offer.⁴⁰ Most importantly, there is no Union constitutional provision or other governing document that requires ratification. Further, the Union did not go beyond statements of intention to explicitly say it lacked authority to accept the Employer's final offer and enter into a binding agreement.⁴¹ In his letters to the membership, the International's president discussed ratification as good policy, the right thing to do, and proof of how much the Union trusts the membership. Those letters, however, must be read in the context of a division in the bargaining unit over the difficult question of what concessions were reasonable for the Union to make to insure that production of the 777X was located in Puget Sound. In touting the Union's policy of putting the Employer's proposal to the membership, the president also underscored that in the end it was the Union's decision whether a vote was held at all. We conclude that in light of all of these circumstances, there is insufficient evidence that the Union surrendered to the membership its authority to enter into a binding contract with the Employer.

³⁹ See 342 NLRB at 959.

⁴⁰ See *University of Bridgeport*, 229 NLRB at 1082.

⁴¹ See *Teledyne*, 327 NLRB at 929; *Sunderland's Inc.*, 194 NLRB at 118 n.1.

Because the Union had not ceded to its members the authority to accept or reject the Employer's offer, the ratification vote was a purely internal matter, and the Union owed no duty of fair representation in its conduct of the vote.⁴² Accordingly, the Region should dismiss the instant charges, absent withdrawal.

/s/
B.J.K.

The alleged irregularities here might be appropriately resolved in another forum, however. A private right of action may be available in certain circumstances under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 et seq. (LMRDA). See *Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 296 (1971) (noting that purely internal union affairs are a subject that the NLRA leaves principally to other processes of law); *APWU Headquarters Local 6885 v. APWU*, 665 F.2d 1096, 1101-05 (D.C. Cir. 1981) (ruling that national union's refusal to submit collective-bargaining agreement to local union for ratification, while giving other union members the right to ratify their contracts, was inconsistent with the equal rights provision of the LMRDA); *Bauman v. Presser*, No. 84-2699, 1984 WL 3255, 117 LRRM 2393 (D.D.C. Sept. 19, 1984) (granting injunctive relief sought by union members to enjoin the counting of ballots in contract ratification because balloting procedures employed by union violated LMRDA).