

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

DATE: January 27, 2020

TO: Jennifer A. Hadsall, Regional Director
Region 18

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: CRH Companies
Cases 18-CA-241804 & -243400
Teamsters Local 120
Cases 18-CB-241803 & -243453

512-5006-5091
536-2509-2500
506-6090-2000
512-5072-1400

The Region submitted these cases for advice on whether the Employer and Union violated the Act when, prior to the seven-day grace period or the commencement of the union-security clause, both told employees they would have to “join” the Union, and whether the Employer violated the Act when it told employees to turn in paperwork that included a dues-checkoff form. We conclude that under the circumstances present here, both statements were unlawful and thus the Employer violated Section 8(a)(1) and the Union violated Section 8(b)(1)(A). We also conclude the Union violated Section 8(b)(1)(A) when it did not include the financial dues breakdown in its *Beck & General Motors* notice, and when it linked dues-checkoff with the contract expiration date. Finally, we conclude that any ambiguity as to why the charging parties did not want to join the Union does not affect the remedy here. Thus, the Region should issue complaint, absent settlement.

FACTS

CRH Companies (“Employer”) is an Irish holding company that owns several road construction firms in Minnesota. The work is seasonal; the firms hire the bulk of their workers in the spring and lay them off in the fall. In preparation for the 2019¹ season, the Employer decided to combine several of its Minnesota firms into one company, effective March 31. The Employer also granted Section 8(f) recognition to Teamsters Local 120 (“Union”) for the new company, joined the local multiemployer

¹ All dates hereinafter are 2019.

bargaining association, and sat on the bargaining committee while it bargained a new multiemployer contract with the Union covering road work.

Prior to the formation of the new company and any hiring, the Employer held a series of meetings with employees who had previously worked for its Minnesota firms, which now comprised the newly formed entity. The employees of one of these companies, Chard, had not been unionized, so on March 28 the Employer called a special meeting with Chard employees and the Union's (b) (6), (b) (7)(C). At that meeting, the Employer told the Chard employees they would have to "join" the Union or "go Union" in order to be recalled to work that year, and that most of the work would be Union work. The Employer then introduced the Union's (b) (6), (b) (7)(C), who also informed the employees that they would have to "join" the Union or they would not have a job. A charging party objected, calling the (b) (6), (b) (7)(C) a "thug," but the (b) (6), (b) (7)(C) said it was the Employer's decision to make joining the Union a condition of employment. The (b) (6), (b) (7)(C) then passed out an introductory packet, including a Union membership application with an attached dues-checkoff form, insurance forms, and other documents. Employees then asked various questions manifesting skepticism of the Union, mostly focused on their concern that the Union contract wage was lower than what they had made previously, prompting them to ask why they should join the Union just to work for less. The meeting adjourned with no further discussion about Union membership. After the meeting, neither of the charging parties was interested in reading the Union's welcome packet.

The Union membership application handed out at the meeting included an explanation of employees' right to be "nonmember" dues payers and to be *Beck* objectors, but it did not provide a breakdown of the difference in dues amounts. The form also did not mention a seven-day grace period for paying dues. Attached to the membership application was a dues-checkoff form that included a fifteen-day revocation window period that could apply to contract expiration or the employee's anniversary date depending on the circumstances.

The merger creating the new company was formally completed March 31. On April 2, one of the charging parties emailed the Employer to ask if they could continue to drive without joining the Union, but the Employer replied that they would have to join. On April 26, the Employer emailed the Union to ask who among the Chard workers had not yet joined, and the Union provided the Employer with a list of six workers, including the two charging parties. There is no evidence the Union instigated the Employer's request for information or took any other action regarding those workers prior to their discharge. The Union and the employer association agreed to a contract effective May 1, 2019, which the Employer signed on June 13. The contract included a seven-day union-security clause and a recognition clause naming the Union.

On May 1, the Employer sent an email to the (b) (6), (b) (7)(C) identified by the Union as having not "completed paperwork to join," stating that "[w]e must have this

paperwork completed prior to starting work.” One charging party replied to the Employer to say that they would like to work but would not join the Union, to which the Employer replied on (b) (6), (b) (7)(C) that (b) (6) was being terminated “since you have chosen not to become a union member.” The second charging party also replied that (b) (6) did not want to join the union, and the Employer terminated (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C). Neither employee had begun working yet that season.²

The National Right to Work Foundation filed charges against both the Union and Employer over the employees’ terminations on May 20 and June 17. The charging parties state that they did not want to join the Union because they did not want to work for the lower wage, but also state that had they not been terminated they would have started working for the Employer at least at first.

ACTION

We conclude the Union violated Section 8(b)(1)(A) and the Employer violated Section 8(a)(1) when:

- They gave employees the impression that they had to become full members of the Union;
- They informed employees Union membership was a condition of employment prior to the effective date of their union-security clause; and
- The employer and union both gave employees the impression they had to join the Union prior to being recalled to work. The Employer further violated Section 8(a)(1) when it later said so explicitly.

We further conclude that:

- The Employer violated Section 8(a)(1) when it gave employees the impression they had to complete a dues-checkoff form as a condition of employment;
- The Union violated Section 8(b)(1)(A) when it did not inform employees of the amount of dues chargeable to members and *Beck* objectors pursuant to GC 19-04;
- The Union violated Section 8(b)(1)(A) when it did not allow for revocation of a dues-checkoff authorization after the expiration of the contract.

² The Region has already determined that these terminations violated Section 8(a)(3) but not Section 8(b)(2) and did not submit those issues to Advice.

Finally, we conclude that the employees' reasons for not joining the Union are irrelevant to the remedy in the circumstances of this case.

Section 7 protects employees' right to refrain from joining a union. Thus, a union violates Section 8(b)(1)(A) by failing to affirmatively advise employees subject to a union-security clause of their right to be and remain nonmembers.³ Indeed, where a union demands some union-imposed obligation other than required dues and fees, such as a membership oath or application, it will likewise violate Section 8(b)(1)(A).⁴ Similarly, it is a violation of Section 8(a)(1) for an employer to mislead employees into thinking that full membership is a condition of employment, though employers have no affirmative duty to explain to employees their *General Motors* rights.⁵

It is also long settled that an employer or union violates the Act if, in the absence of a valid union-security clause, they inform employees that any level of union membership is a condition of employment.⁶ In addition, regardless of the presence of a union-security clause, it is a violation of the Act to direct or even imply that employees must join the union prior to, or during, the applicable post-hire grace period.⁷ In determining whether statements reasonably lead employees to believe

³ *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 349–50 (1995), *reversed on other grounds sub nom. Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *vacated by* 525 U.S. 979 (1998); *California Saw & Knife Works*, 320 NLRB 224, 235 n.57 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (1998).

⁴ *United Stanford Employees, Local 680 (Leland Stanford Junior University)*, 232 NLRB 326, 326, 328–29 (1977). *See also Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 738, 749 (1999) (holding unlawful welcome letter that mandated “membership application” without mentioning alternatives to full membership), *enforced in relevant part*, 249 F.3d 1115 (9th Cir. 2001).

⁵ *Compare Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997) (finding lawful employer statement to employees that “membership” and payment of “dues” to union could be a condition of employment), *enforced mem. sub nom. Cecil v. NLRB*, 194 F.3d 1311 (6th Cir. 1999), *with Yellow Freight System of Indiana*, 327 NLRB 996, 997 n.6, 1005–06, 1010 (1999) (finding unlawful employer’s statement that employee had to become a “member in good standing” with the union or be terminated without explaining what that meant).

⁶ *See Fountainview Care Center*, 317 NLRB 1286, 1290 (1995), *enforced mem.*, 88 F.3d 1278 (D.C. Cir. 1996); *Paperworkers Local 710 (Stone Container)*, 308 NLRB 95, 96–97 (1992).

⁷ *Acme Tile & Terrazzo Co.*, 318 NLRB 425, 427–28 (1995), *enforced*, 87 F.3d 558 (1st Cir. 1996).

that they must join the union, the Board applies an objective test.⁸ Furthermore, it is unlawful for an employer to give employees the impression that they must execute a dues check-off form as a condition of employment.⁹

Here, the statements of both the Union and Employer at the March 28 meeting violated the Act in several regards. Initially, the statements by the Union and the Employer reasonably and foreseeably gave employees the impression that they would have to become full members of the Union as a condition of employment. Employees were told multiple times by both parties that they would have to “join the Union” or “go Union” to work, and, even in the face of hostile audience members, neither the Employer nor the Union clarified that their duty could be fulfilled by becoming “nonmember” dues payers. This is similar to the employer’s actions in *Yellow Freight*, where a supervisor told an employee who was reluctant to join the union that it was “unfortunate that it has to be like this but . . . you have to join the [u]nion,” where neither the union nor the employer had explained to him his *General Motors* rights.¹⁰ While in the present case the Union did hand out a packet including information about becoming nonmembers, anti-Union employees were not interested in reading the Union’s welcome packet, nor would they have necessarily understood the packet’s language as prevailing over the Employer’s statements that they had to join the Union.

A second violation by both the Employer and Union at the March 28 meeting occurred when they informed employees that joining the Union was a condition of employment prior to the effective date of any union-security clause. While the parties may have fully expected that their eventual collective-bargaining agreement would contain a union-security clause, and while they may have expected to arrive at an agreement soon, informing employees beforehand that Union membership was mandatory was premature. For instance, in *Paperworkers Local 710*, the union violated the Act when, just prior to a state-run union-security election, it told employees they would soon have to join the union.¹¹ The Board found that such a statement would reasonably tend to have a coercive effect on listeners, even if they doubted the union’s claims.¹² Here, the Union and Employer did not qualify their

⁸ *Id.* at 427 n.7.

⁹ *Yellow Freight System of Indiana*, 327 NLRB at 1004; *Mode O’Day Co.*, 280 NLRB 253, 255 (1986), *modified in other regards*, 290 NLRB 1234 (1990).

¹⁰ *Yellow Freight*, 327 NLRB at 1005–06.

¹¹ 308 NLRB at 96, 99.

¹² *Id.* at 98.

statements that membership was a condition of employment, and thus reasonably tended to coerce employees into joining at a time when the union-security clause was not yet in effect.¹³

In a third set of violations at the March 28 meeting, both the Union and Employer strongly implied that employees had to join the Union *prior* to beginning work, such as through statements that Union membership was required or these seasonal workers “won’t have a job” this year. Such statements are coercive, interfering with the right to a seven-day grace period guaranteed by Section 8(f)(2).¹⁴ These statements were reinforced days later when the Employer told employees that they could not drive without joining the Union and subsequently stated that employees must have the paperwork to join “completed prior to starting work.” The ultimate reinforcement of the Employer’s message occurred when the two charging parties were discharged for not joining the Union prior to ever being recalled to work that season.¹⁵

¹³ Because the Employer appeared at the negotiating table during multi-employer bargaining for a Section 8(f) agreement that became effective on May 1, we are not convinced the date of formal signature to the agreement, June 13, is significant. Rather, it was clear that the Employer would be bound to any resulting collective-bargaining agreement as early as the March negotiating sessions. *See James Luterbach Construction Co.*, 315 NLRB 976, 981 (1994) (finding that an 8(f) employer may obligate itself to be bound by the results of multiemployer bargaining by joining multi-employer bargaining association and serving on bargaining committee). Nor does a union-security clause require a written agreement to be valid. *See Aluminum Wkrs Trades Council*, 185 NLRB 69, 73 (1970). Accordingly, (b) (5)

¹⁴ *Acme Tile*, 318 NLRB at 427–28 (finding unlawful statements by construction-industry employer that employees needed union “referral” to continue working the next day, though seven days had not yet elapsed since their hire).

¹⁵ While the employees were “terminated” by the Employer, since the employees had never worked for the newly formed Employer and never worked under a union contract before, the difference between termination and unlawful refusal to hire is irrelevant.

The Employer's May 1 pronouncement that the employees who had not yet joined the Union must complete the paperwork violated the Act in a different way as well. Since the membership application provided by the Union at the meeting had a checkoff authorization attached across a dotted line, the Employer's mandate to complete the "paperwork" would reasonably lead employees to understand that completing the entire sheet of paper, including the dues-checkoff form, was part of the mandate. In *Mode O'Day*, the Board observed that a checkoff authorization included among the forms furnished employees during the hiring process may justify a finding that employees were led to believe that the execution of such authorization was a condition of employment.¹⁶ Here, while the checkoff authorization noted that it was "voluntary and is not conditioned on my present or future membership in the Union," it said nothing about whether it was optional or a condition of employment. Accordingly, the Employer's statement that employees must complete the paperwork prior to working violated the Act.

We also find that the Union's membership application and dues-checkoff forms as written violated Section 8(b)(1)(A). As explained in GC Memorandum 19-04,¹⁷ the General Counsel agrees with the D.C. Circuit that an initial *Beck* notice must apprise potential objectors of the percentage of union dues chargeable to them.¹⁸ Moreover, the General Counsel believes that any dues-checkoff authorization that restricts the statutory right of employees to revoke their authorizations at expiration of a current contract or during a period in which no contract is in effect is improper and unlawful.¹⁹ Thus, any authorization that requires revocation requests be submitted prior to the contract expiration is inconsistent with an employee's right to revoke upon contract expiration and is unlawful under Section 302(c)(4) of the LMRA.²⁰ Here, the packet provided by the Union did not include any summary of the dues

¹⁶ 280 NLRB at 255 (citing *Scottex Corp.*, 200 NLRB 446 (1972); *Western Building Maintenance Co.*, 162 NLRB 778 (1967), *enforced per curiam*, 402 F.2d 775 (9th Cir. 1968); *Campbell Soup Co.*, 152 NLRB 1645 (1965), *enforced*, 378 F.2d 259 (9th Cir. 1967)).

¹⁷ Memorandum GC 19-04, Unions' Duty to Properly Notify Employees of their *General Motors/Beck* Rights and to Accept Dues Checkoff Revocations after Contract Expiration (Feb. 22, 2019).

¹⁸ *See, e.g., Penrod v. NLRB*, 203 F.3d 41, 47 (D.C. Cir. 2000) (finding potential objectors must be told the percentage of dues chargeable to them, "for how else could they gauge the propriety of the union's fee") (citations omitted).

¹⁹ Memorandum GC 19-04 at 7.

²⁰ *Id.*

chargeable to them. Furthermore, the dues-checkoff authorization did not allow for revocation after the expiration of a contract. Both deficiencies violated the Act.²¹

Finally, although the charging parties' stated that they did not wish to join the Union because they did not want the Union contract's lower compensation rate, those statements are not relevant to allegations nor the remedies here. In *Columbia Transit Corp.*, the Board found that a union's failure to notify employees of their obligation to pay dues under a union-security clause did not render the employees' discharges for nonpayment unlawful, since the employees had expressed their unwillingness to join the union under any circumstances due to their unwillingness to work at the union wage.²² The Board held that no amount of explanation would have changed the employees' decision not to work under the union, so the union's failure did not violate the Act. However, *Columbia Transit* is distinguishable from the present case in several ways. First, in that case the employees in question had worked for months while technically under the union contract; it was only when the union demanded that their elite position be dissolved and they rejoin the broader bargaining unit pursuant to the contract that the parties attempted to enforce the union-security clause. Second, in that case the employees in question refused to work in any positions other than their old ones, refused to join the union, and had no interest in returning to the employer after their discharges. Here, the charging parties had not yet begun to work for the Employer when they were "terminated," and thus the seven-day grace period still applied to them. Additionally, while the charging parties have made some contradictory statements, at least one of them states that he would have continued to work for the Employer until he found a better alternative.

The present case is more analogous to *Acme Tile & Terrazzo Co.*²³ In that case, United Brotherhood of Carpenters members were told they had to immediately join the Bricklayers Union pursuant to an 8(f) union-security clause even though the seven-day grace period had not yet elapsed, resulting in the Carpenters not appearing for work the next day.²⁴ In rejecting the argument that these employees would never have left the Carpenters for the Bricklayers, the Board noted that had the employees

²¹ Given that the dues checkoff authorization violates Section 8(b)(1)(A) for the reasons explained herein, we do not reach whether its inclusion of a fifteen-day revocation window tied to employees' anniversary dates also violates the Act. Such a finding would be cumulative. (b) (5)

²² 246 NLRB 483, 488–89 (1979).

²³ 318 NLRB at 428.

²⁴ *Id.*

believed they had the full seven-day grace period “they might well have worked at least 8 days while remaining members of the Carpenters Union,” and indeed, some of the employees may well have joined the Bricklayers within the grace period if they had been allotted that period in which to decide how to proceed.²⁵ However, since the employees were unlawfully advised by their employers that they had to join the Bricklayers immediately, “any ambiguity regarding what actions the employees might have undertaken must be resolved against the offending [e]mployers.”²⁶ The Board also summarily rejected the ALJ’s reliance on employee testimony about their reasons for acting the way they did, since “in a context free of unfair labor practices” they “might have thought and acted differently. The burden of resolving any uncertainty rests on the wrongdoer.”²⁷ Accordingly, the Board found the employers had violated the Act.

Here, the Employer’s statements that joining the Union was a precondition to work, and its termination of the employees before their seven-day grace period even started, preclude any argument that the employees would never have joined the Union. Had they been hired and received the allotted time to determine how to proceed they may well have fulfilled their obligation and stayed on, as was suggested by at least one of the charging parties. In addition, any statements about why they did not wish to join the Union are irrelevant due to the effects of the Union’s and Employer’s unfair labor practices. It is the Employer’s burden to prove that, absent its statements and terminations, the employees would have never accepted employment.²⁸ Thus, the charging parties’ statements do not affect the Employer’s violation of the Act or the remedy.

Based on the foregoing, the Region should issue complaint, absent settlement.

/s/
R.A.B.

H: ADV.18-CA-241804.Response.CRH (b) (6), (b) (7)(C)

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 428 n.10.

²⁸ *See id.*