

**United Steelworkers of America, AFL-CIO, CLC, and United Steelworkers of America, AFL-CIO, CLC, Local No. 72 (Asarco, Inc.) and Timothy R. Emineth.** Case 19-CB-6798

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY, OVIATT, AND RAUDABAUGH

This case presents the issue of whether an employee with union financial obligations pursuant to a maintenance-of-membership contract clause has a means of escaping such financial obligations where the successor contract contains the same maintenance-of-membership provision and there is no hiatus between contracts. Specifically, may a union continue to impose union financial obligations, during the term of a successor contract, on an employee who resigned his union membership during the term of the preceding contract? For the reasons stated below, we find that, at least absent clear and unmistakable language in the initial contract informing employees of the possibility that, in the absence of a contract hiatus, they will have a continuing union financial obligation, an employee who resigns his union membership during the term of the initial contract has no financial obligations to the union under a successor contract regardless of any maintenance-of-membership clause in the successor agreement.

Because the Charging Party employee in this case lacked such notice, we find, as explained below, that the Respondent Unions violated Section 8(b)(1)(A) of the Act by demanding that, notwithstanding his resignation during the predecessor agreement, he continue to satisfy a union financial obligation as a condition of retaining his job under the maintenance-of-membership clause.

On October 1, 1990,<sup>1</sup> Timothy R. Emineth (Emineth or the Charging Party) filed an unfair labor practice charge against United Steelworkers of America, AFL-CIO, CLC (Respondent International) and United Steelworkers of America, AFL-CIO, CLC, Local No. 72 (Respondent Local). The Charging Party filed amended charges on February 28, 1991, and on June 5, 1991. On June 7, 1991, the Regional Director for Region 19 issued an amended complaint against the Respondents, alleging that the Respondents engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the amended complaint and notice of hearing were served on the Respondents and the Charging Party. The Respondents filed a timely answer denying the commission of any unfair labor practices.

<sup>1</sup> All subsequent dates refer to 1990 unless specified otherwise.

On July 10, 1991, on the basis of an all-party stipulation, the parties filed with the Board a motion to transfer the instant proceeding to the Board without a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On August 28, 1991, the Deputy Executive Secretary of the Board, by direction of the Board, issued an Order approving the stipulation, granting the motion, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondents filed briefs.<sup>2</sup>

The Board has considered the stipulation, the briefs, and the entire record in this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

Asarco, Inc. (Asarco or the Employer), a New Jersey corporation, is engaged in metal smelting and fabrication at its office and place of business in Helena, Montana, where it annually has gross sales of goods and services valued at in excess of \$500,000. The Employer annually sells and ships goods or provides services valued at in excess of \$50,000 from its facilities within the State of Montana to customers outside Montana, or to customers within Montana that are themselves engaged in interstate commerce by other than indirect means; and it annually purchases and causes to be transferred to its facilities within the State of Montana goods and materials valued at in excess of \$50,000 directly from sources outside Montana, or from suppliers within Montana that obtain such goods and materials directly from sources outside Montana. We find that the Employer is an employer within the meaning of Section 2(6) and (7) of the Act and that the Respondents are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondents violated Section 8(b)(1)(A) of the Act by failing to honor the Charging Party's resignation of membership, by requesting the Charging Party to pay past dues after he resigned his membership, and by threatening to seek termination of the Charging Party's employment for

<sup>2</sup> The Respondents subsequently filed a reply brief and a motion to file a reply brief. The General Counsel filed a motion to strike the Respondents' reply brief. We deny the Respondents' motion, grant the General Counsel's motion, and strike the reply brief because the Board's Rules do not provide for the filing of reply briefs in cases transferred directly to the Board on stipulated facts.

The Charging Party subsequently filed two "additional documents" with the Board, one of which is part of the stipulated record. We have not considered the previously unsubmitted document in reaching our decision.

failure to pay dues, where successive contracts between the Respondents and the Employer contain a maintenance-of-membership clause and there has been no hiatus between contracts to serve as an escape period. We find that the Respondents violated the Act for the reasons that follow.

#### A. Facts

The Respondents and the Employer executed a collective-bargaining agreement, effective February 1, 1987, through January 31, 1990, containing the following clause:

All employees who at the date of the signing of this agreement are members of the Union shall, as a term and condition of employment, be required to remain members of the Union for the duration of this agreement; and all employees who become members of the Union during the life of this agreement shall be required to remain members of the Union as a term and condition of employment for the duration of this agreement.

On February 10, 1987, Emineth wrote to Asarco and the Respondent Local, "please stop withholding union dues from my paycheck." On February 11, 1988, the Respondent International requested Asarco to discharge Emineth for failure to pay dues. When Asarco refused, the Respondent Local filed a grievance against Asarco. On January 9, 1989, an arbitrator ruled that Asarco must discharge Emineth unless he paid his dues within 45 days. On February 22, 1989, Emineth submitted his past dues to the Respondent Local, indicating that it was done under protest. Emineth stated, "I am declining . . . to go back into checkoff, any dues . . . I will pay myself. I am asking the union to accept this letter as revocation and to be equivalent [sic] of membership." On February 26, 1989, the Respondent Local sent Emineth a letter stating that it did not accept his letter as revocation of membership. Emineth continued making payments.

On January 31, the contract expiration date, the Respondents and Asarco signed a contract extension agreement providing that there would be no hiatus between contracts if a new contract was ratified on February 6. The new contract, effective February 1 through January 31, 1993, was ratified.<sup>3</sup> It contains the same maintenance-of-membership clause quoted above.

On January 31 and February 12, Emineth sent the Respondent Local letters revoking his union membership. On June 15, the Respondent Local wrote Emineth advising that it would seek termination of his employment if he did not meet his "union obligations" by paying his union dues for March through May. The letter cites the contract as "requir[ing] you to remain a [Union] member for the term of the agreement." The

letter also advises that "to keep your job under Article III of the current agreement, you must remain a [Union] member which means only that you must make prompt payment of the equivalent of union dues each month."

On July 13, Emineth wrote the Respondent Local that "you are making me be a member and pay my dues against my will and I do protest this action." On October 22, the Respondent International sent Emineth a letter stating that the June 15 letter was in error to the extent that it advised Emineth he must remain a union member. The letter further stated that although Emineth had resigned his membership, he was still obligated to pay the equivalent of union dues each month. On November 8, the Respondent Local wrote Emineth advising that it would seek termination of his employment if, by November 30, he did not pay the equivalent of union dues for August through October. The June 15 and November 8 letters are the same except for references to the months and amounts involved.

The General Counsel alleges that by the actions taken in their June 15 and October 22 letters, the Respondents violated Section 8(b)(1)(A) by failing to honor Emineth's resignation from the Respondents, by rendering "Emineth's earlier resignation from the Respondents a nullity at a time when there was no obligation for Emineth to be a member as a condition of employment," and by impairing "Emineth's employment status . . . when there is no contractual agreement compelling membership obligations."<sup>4</sup>

#### B. Positions of the Parties

The General Counsel acknowledges Board precedent which holds that maintenance-of-membership contracts may lawfully require employees to remain financial core members where there is no escape period within any one contract and contracts follow one another without hiatus. *Lodge No. 1129, IAM (Sunbeam Appliance Co.)*, 219 NLRB 1019 (1975), petition for review denied sub nom. *Horwath v. NLRB*, 539 F.2d 1093 (7th Cir. 1976). The General Counsel argues, however, that the Board should reconsider the issue in light of *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), and *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991).

The Respondents contend that this case falls within the *Sunbeam* ruling and that there is no violation. The Respondents note that under the first proviso to Section 8(a)(3) of the Act, a union can negotiate a union-

<sup>3</sup>The parties stipulated that there was no contractual hiatus.

<sup>4</sup>This case does not involve any allegations that, in disregard of an appropriate objection, the Respondents were seeking payment of agency fees beyond those germane to collective bargaining, contract administration, and grievance adjustment. Accordingly, this case does not touch on issues raised by *Communications Workers v. Beck*, 128 LRRM 2729 (1988).

security agreement requiring all employees, not just union members, to pay a fee equal to dues. Had the contract in this case contained such a union-shop clause, Emineth would have union financial obligations under the 1990–1993 contract despite his resignation from union membership at the end of the 1987–1990 contract.<sup>5</sup> Therefore, the Respondents argue, there is no basis for finding a violation when a less compulsory form of union security requires the same outcome. The Respondents contend that the legislative history of the proviso to Section 8(a)(3) reveals that Congress intended to allow for the elimination of “free riders” (i.e., employees who enjoy the benefits of collective-bargaining representation without paying any union dues) and that among the maintenance-of-membership provisions brought to Congress’ attention during its consideration of the “free rider” issue were provisions that omitted escape periods. Because even maintenance-of-membership provisions without escape periods are less onerous than full union-security clauses, and because it is indisputable that the latter are permitted by the proviso, the Respondents argue that their enforcement against Emineth of the maintenance-of-membership clause at issue here should be deemed lawful.

### C. Analysis

As noted by the parties, the Board has held that, in the absence of a hiatus, successive contracts containing the same maintenance-of-membership clause serve to require an employee/member to continue payments to the union even if the employee resigned his union membership during the term of the first contract. *Sunbeam*, supra. In the instant case, Emineth was a full member of the Union at the commencement of the 1987–1990 contract. He was therefore obligated to pay dues and fees for the life of that contract. However, it is clear that he could not be obligated to retain full union membership during that contract. See *NLRB v. General Motors*, 373 U.S. 734 (1963). Accordingly, he exercised his right to resign his full membership during that contract. As noted above, he remained financially obligated to the Union for the life of that contract, notwithstanding this resignation. The issue is whether, notwithstanding that resignation, Respondents can bind him to financial obligations beyond the term of that contract. The Respondents, using rules of construction followed in *Sunbeam*, argue that Emineth’s obligations continue because the 1990–1993 contract contains the same maintenance-of-membership language and there was no hiatus between contracts.

In our view, subsequent Supreme Court and Board decisions have eroded the *Sunbeam* holding insofar as

<sup>5</sup>The Respondents acknowledge that Emineth effectively resigned his membership prior to the current contract and are seeking payment of financial core obligations.

they have identified an interest—voluntary unionism—which, given the origins of the *Sunbeam* rule, was not adequately considered in its formulation. The *Sunbeam* rule can be traced through a series of decisions, including *Auto Workers Local 899 (John I. Paulding Co.)*, 142 NLRB 296 (1963), back to *National Lead Co.*, 106 NLRB 545 (1953). In *National Lead*, the Board was confronted with a union’s attempt to seek the discharge of employees under a contractual union-security provision, when the dues delinquencies for which discharge was sought had accrued during the term of the union’s *preceding* contract. The General Counsel in effect argued that expiration of the first contract wiped the slate clean as to the dues delinquencies so far as the use of the union-security provision was concerned. Pointing out that there was no hiatus between the two contracts, the Board held that “the second contract was, in effect, a continuation” of the first. 106 NLRB at 548. It reasoned that to “find that these employees are relieved from the payment of dues owing at the conclusion of the first in a series of uninterrupted contract terms would, we believe, place undue emphasis upon the form of the contractual arrangement.” *Id.*

In *Auto Workers Local 899*, supra, the Board extended the contract-continuation theory to deal with a distinctly different problem. There, an employee had been a union member under the maintenance-of-membership provisions of a predecessor contract, but tendered his resignation just prior to the expiration of the contract. The Board refused to recognize the effectiveness of the resignation even after the first contract had expired. Applying the reasoning of *National Lead*, it held that “where there is no time lapse between the terms of the successive agreements, and union-security clauses thus have unmarred continuity, at least as to union security, the second contract is to be treated as a continuation of the previous one.” *Id.*, 142 NLRB at 301. But, as indicated above, no question of employee freedom to resign membership had been raised in *National Lead*; it was just a matter of employees trying to use a technicality to avoid payment of accrued obligations.<sup>6</sup> Thus, although there is a certain theoretical consistency between the two cases, the difference in the interests involved would seem to call for some rationale for extending the doctrine. None was supplied, and the holding of *Auto Workers Local 899* became what is now applied as the *Sunbeam* precedent without the benefit of any further discussion of the underlying theoretical justification.

<sup>6</sup>In fact, it may well be unnecessary to employ a contract-continuation theory in order to permit enforcement of a union-security clause as to obligations accrued under a prior contract. Cf. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987) (postexpiration obligation to arbitrate grievances that arose under the expired contract).

In the cursory extension of the *National Lead* theory to cases such as *Auto Workers Local 899* and *Sunbeam*, the Board plainly ignored an important statutory interest identified in *Pattern Makers League v. NLRB*, supra, 473 U.S. 95 (1985), and *Lockheed*, supra, 302 NLRB 322 (1991). In *Pattern Makers League v. NLRB*, supra, the Supreme Court agreed with the Board that a union violated Section 8(b)(1)(A) by fining employees who, contrary to a rule in the union's constitution, tendered resignations during a strike and returned to work. The Court found that "[t]he Board reasonably has concluded that [the union constitutional restriction] 'restrains or coerces' employees, see § 8(b)(1)(A), and is inconsistent with the congressional policy of voluntary unionism." *Pattern Makers*, supra, 473 U.S. at 114.<sup>7</sup>

The Board has employed the Court's voluntary unionism concept in construing employee agreements to financially assist a union, i.e., dues-checkoff authorizations. In *Lockheed*, supra, a union member resigned from the union and sought to cancel dues deductions from his paycheck during the term of a contract and less than 1 year after signing a checkoff authorization. The union admitted that there was no membership obligation but insisted that the employee had a continuing obligation to pay dues based on the checkoff authorization that was "irrevocable for . . . one year or until the [current contract expired] whichever [was] shorter."

The Board held that it was necessary to consider *Pattern Makers'* voluntary unionism concept in construing the authorization language. *Lockheed*, supra at 327. The Board concluded that the voluntary unionism principle could best be effectuated by extending the *Metropolitan Edison*<sup>8</sup> test for waivers of statutory rights to the right to refrain from assisting a union. *Lockheed*, supra at 327 fn. 18. Thus, the Board held that when a union dues obligation is predicated on the checkoff authorization alone and the authorization does not clearly and unmistakably require the payment of dues when the signer was no longer a union member, a union would violate Section 8(b)(1)(A) of the Act by seeking to compel dues payments after the authorization-signer has resigned his or her union membership.

The present case differs from *Lockheed*, supra, in that here there is a provision in the collective-bargaining agreement mandating the payment of dues even apart from any employee checkoff authorization. Because it is a maintenance-of-membership clause and not a standard union-security clause, however, it allows some degree of employee choice with regard to

the decision to support the Union. Only those employees who have chosen to become full union members and who either occupy that status on the day when the contract containing the clause commences or who join during its term are obligated to provide financial support. Guided by the principles applied in *Pattern Makers League*, supra, and *Lockheed*, supra, we will not, in the absence of language clearly and unmistakably requiring such a result, construe a maintenance-of-membership clause as binding an employee to the payment of union financial obligations under a future collective-bargaining agreement notwithstanding his resignation of union membership during the prior agreement.

Turning to the facts of this case, we cannot find that the maintenance-of-membership clause at issue here justifies holding a former member to financial obligations to the Union under a successor agreement. An employee who had become a member prior to the commencement of the 1987–1990 contract and retained that status on its effective date, or who joined the union during the term of the agreement, was certainly on notice that he was thereby accepting union financial obligations that would continue until the end of the contract term. There is nothing in the contract, however, that would alert an employee that, in the absence of a contract hiatus, the maintenance-of-membership clause and the financial obligation that the employee was undertaking voluntarily would continue beyond the contract's expiration, even though the employee resigned his membership before the contract's stated term expired. In fact, the contract suggests to a reasonable person that the financial obligation would terminate at the end of the contract term it set forth if an employee resigned: The maintenance-of-membership clause requires an employee who is or becomes a member to remain a member "for the duration of this agreement."

In other words, an employee who either chose to remain a union member on the first day of the contract or chose to become one during the contract term did not, by virtue of doing so under the ambit of this clause, clearly and unmistakably waive his Section 7 rights to resign from the union and to cease providing financial support to the union beyond the term of the contract. We find, instead, that the 1987–1990 maintenance-of-membership clause is at best ambiguous as to whether financial obligations would continue beyond the contract's expiration if there was no contractual hiatus. Thus the clause does not satisfy the proviso to Section 8(a)(3) as an agreement requiring "membership" in this circumstance. Accordingly, we find that the Unions could not lawfully use the clause to require the payment of dues by Emineth under the 1990–1993 contract; his resignation became effective before that

<sup>7</sup>The Court declined to pass on whether a union violated the Act by attempting to have employees who resigned before returning to work discharged pursuant to a union-security agreement. *Pattern Makers*, id. at 98 fn. 3.

<sup>8</sup>*Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983).

contract commenced and nothing in the old agreement carried over to bind him to the clause.<sup>9</sup>

As noted above, the Respondents point out that if the contracts had contained full union-security clauses, the Union could require Emineth to pay dues under the 1990–1993 contract despite his resignation during the term of the 1987–1990 agreement. Thus, they argue, it is not unfair to apply the same rule when a less restrictive form of union security is involved, i.e., a maintenance-of-membership clause.

The argument misses the mark. We acknowledge that this form of compulsory dues payment was authorized by Congress as a means of addressing the “free rider” issue. But as the Supreme Court noted in *Pattern Makers League*, supra, 473 U.S. 95 (1988), Congress had a competing concern for maximizing employee free choice. Thus, when a union employs a contractual dues-and-fees payment clause allowing some degree of employee choice—i.e., the initial choice whether to become and remain a union member and incur the financial obligation by that means—we believe that it is consistent with congressional intent to seek to ensure that the consequences of the employee’s choice are knowingly accepted. That can best be assured by declining to read such clauses as imposing union financial obligations that extend beyond what is clearly and unmistakably required by their language.

In sum, we find that the maintenance-of-membership clause did not clearly and unmistakably advise employees that, absent a contractual hiatus, their financial obligations would continue under a new contract. Accordingly, given Emineth’s resignation from union membership before the 1987–1990 contract expired, we find that his financial obligation continued until the expiration of that contract, and no further. We conclude, therefore, that the Respondents’ June 15 and October 22 letters insisting that Emineth had a financial obligation continuing beyond the 1987–1990 contract term to the Respondents violated Section 8(b)(1)(A) of the Act.<sup>10</sup>

#### CONCLUSIONS OF LAW

1. By advising Timothy R. Emineth that failure to honor financial obligations to the Respondents would result in the termination of his employment pursuant to a contractual maintenance-of-membership clause, where Emineth tendered a valid resignation of union membership during the term of the predecessor contract, and where the maintenance-of-membership clause

<sup>9</sup> We overrule *Sunbeam* to the extent it is inconsistent with this decision.

<sup>10</sup> We do not pass on the result that would be reached if the Union had language in the predecessor contract which clearly and unmistakably advised employees that they would have financial obligations to the Union under a new contract which succeeded the initial one without hiatus, even if they resigned their membership during the first contract.

in the predecessor contract did not clearly and unmistakably advise employees of the potential, in the absence of a contractual hiatus, for perpetual financial obligations following membership resignation, the Respondents have violated Section 8(b)(1)(A) of the Act.

2. By failing to honor the consequences of Timothy R. Emineth’s resignation from union membership during the term of the 1987–1990 contract with the Employer by demanding, receiving, accepting, and retaining financial core payments from Emineth during the term of the 1990–1993 contract, the Respondents have violated Section 8(b)(1)(A) of the Act.

#### REMEDY

Having found the Respondents have engaged in the unfair labor practices described above, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents must give full force and effect to the Charging Party’s resignation and make him whole for all moneys paid to the Respondents following the expiration of the 1987–1990 contract, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondents, United Steelworkers of America, AFL–CIO, CLC, Pittsburgh, Pennsylvania, and United Steelworkers of America, AFL–CIO, CLC, Local No. 72, East Helena, Montana, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Advising an employee that failure to honor financial obligations to the Respondents would result in the termination of employment pursuant to a contractual maintenance-of-membership clause, where the employee tendered a valid resignation of union membership during the term of the predecessor contract, and where the maintenance-of-membership clause in the predecessor contract did not clearly and unmistakably advise employees of the potential, in the absence of a contractual hiatus, for perpetual financial obligations following membership resignation.

(b) Failing to honor the consequences of Timothy R. Emineth’s resignation from union membership during the term of the 1987–1990 contract with the Employer by demanding, receiving, accepting, and retaining financial core payments from Emineth during the term of the 1990–1993 contract.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, Timothy R. Emineth for all moneys received from him as financial core payments during the term of the 1990–1993 contract with the Employer.

(b) Post at its Pittsburgh, Pennsylvania and East Helena, Montana offices and, with permission, at the Employer's Helena, Montana facility, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

#### APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To form, join, or assist any union  
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

We will not advise an employee that failure to honor financial obligations to us will result in the termination of employment pursuant to a contractual maintenance-of-membership clause, where the employee tendered a valid resignation of union membership during the term of the predecessor contract, and where the maintenance-of-membership clause in the predecessor contract did not clearly and unmistakably advise employees of the potential, in the absence of a contractual hiatus, for perpetual financial obligations following membership resignation.

WE WILL NOT fail to honor the consequences of Timothy R. Emineth's resignation from union membership during the term of the 1987–1990 contract with the Employer by demanding, receiving, accepting, and retaining financial core payments from Emineth during the term of the 1990–1993 contract.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, Timothy R. Emineth for all moneys received from him as financial core payments during the term of the 1990–1993 contract with the Employer.

UNITED STEELWORKERS OF AMERICA,  
AFL–CIO, CLC, AND UNITED STEEL-  
WORKERS OF AMERICA, AFL–CIO,  
CLC, LOCAL NO. 72