

Can a union offer free dues as an incentive?

IMAGINE THAT YOU'RE the owner of a music store, and you treat your workers horribly. Eventually, your workers decide to form a union. They schedule an NLRB union election. You promise your workers that if they vote against the union, you'll give them each a \$1,000 bonus. Is this legal? No.

Now imagine the same situation from the union's point of view. Can the union promise each worker a \$30 gift certificate at Amazon.com if they vote "yes" for the union? Nope! Again, that is illegal.

How about this: can the union tell the workers that if they vote "yes" for a union contract, the union will waive the first six months of union dues? Is this legal? That question is the subject of a recent court decision and that's what I want to talk about now.

With the loss of private sector union density and rampant anti-union sentiment pervasive throughout this country, labor unions are compelled to find new ways to attract members and preserve bargaining relationships. This is particularly difficult to do in our present economic climate because most employers are offering their employees paltry wage increases. These days it is even common for employers cut wages and demand givebacks from their workers. So what is a union to do?

Well, one way for unions to increase membership is to offer a short-term dues



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abatement or membership fee abatement – something that is generally legal. Recently, I was involved in an appeal before the National Labor Relations Board in which this principle was validated.

The case involved Community Options NY, which is a social service agency for people with disabilities. Workers there had recently formed a union with DC 1707, a local of AFSCME. After a long battle, the workers finally won their first union contract. As part of the deal, the



union said it would not charge dues for the first six months.

Almost immediately, management tried to dissolve the union by calling for a decertification election. Again the union won. However, the employer disputed the results, saying the election was tainted through the union's earlier promise to offer the six-month dues waiver. The regional labor board hearing officer agreed with the employer. The union then appealed to the NLRB, where the case was heard as *Community Options NY, Inc.*, 360 NLRB No. 165 (2013).

In its finding, the board ruled in favor of the union. A review of this decision and its factual underpinnings is instructive to anyone involved or interested in union organizing campaigns.

The employer, represented by a staunch anti-union law firm, filed objections to the election on the ground that the promise of the dues waiver had a coercive effect upon the election results. Under well-established board precedent, it is unlawful for a union to promise or give tangible economic benefit in order to induce support in a representation election. To name some real-life examples, the labor board has ruled that unions cannot offer free jackets, life insurance or gift certificates – or even free medical screenings! – during the period immediately

preceding a union election, if employees were not already entitled to these benefits. *Go Ahead North America*, 357 NLRB No. 18 (2011).

However, dues waivers present a distinct variation on this theme, since they are only valuable if the union succeeds in winning the election. The U.S. Supreme Court has held that dues waivers are legitimate even in the context of union elections because a union has an interest in removing this "artificial obstacle" to union support, since individuals would naturally be reluctant to pay any money to a union before receiving any of the benefits of representation. *NLRB v. Savair MFG, Co.*, 414 U.S. 270 (1973).

On the other hand, there are still occasions when dues waivers are impermissible. For instance, if bargaining unit members actually owe back dues to the union at the time of a decertification vote, a union cannot promise that those back dues would be forgiven if the union prevailed. That was the case in *Go Ahead North America*, and as a result the board ordered a new decertification vote.

The situation in *Community Options* was on the cusp of being identical to the one in *Go Ahead North America*. However, there were important distinctions that made that prior decision inapplicable and that led to the union's ultimate victory.



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First and foremost, the promise for the dues waiver here was first made in the context of a contract ratification vote. The union had just completed an initial contract at the time the decertification petition was filed. Since the wage increase achieved by the union was so low (1.5 percent), as an inducement to bargaining unit members to ratify the contract, the union offered a six-month dues abatement. Thus, the board found that the reason for the abatement was entirely unrelated to the decertification vote and that it was the employer who, in fact, injected the fact that the wage increase would not cover the cost of union dues into the decertification campaign.

Further, because the contract had a traditional union security clause that required payment within 30 days of the effective date of the agreement, at the time of the decertification vote (which was before the effective date of the new agreement's union security provision), dues were not owed. In other words, the board held that there was no financial benefit to employees at the time of the decertification vote since the obligation to pay dues had not matured.

The decision also noted that even if there was a financial benefit conferred by the dues waiver, it was not an objectionable benefit, since offsetting the small 1.5 percent wage increase with a dues abatement was a legitimate goal

of the union. Of course, if the benefit was made in order to induce people to vote for the union, this would still not have been coercive, since whether or not employees had to pay lay totally within their hands. The dues obligation would only vest if the employees voted to retain the union. In fact, the surest way to extinguish the obligation to pay dues entirely was for the employees to vote in favor of decertification. Thus, the dues waiver was not actually an incentive to vote for the union.

The situation in this case is important since the board found that what might otherwise might be characterized as an improper economic benefit was legally permissible. Of course, the peculiarities of facts here should be noted. If the effective date of the contractual obligation to pay dues had fallen before the date of the ratification vote, the outcome might have been different. Nevertheless, the decision reaffirms the legitimacy of dues waivers as a tool to foment and bolster union density. Here, it is a certainty that had the waiver not been adopted by the union, the contract would have not been ratified and that decertification would have resulted.

The moral of this story is that in order to accomplish their long-term goals, it might be necessary for unions to sustain short-term economic losses.

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