

SHEDDING A FINANCIAL BURDEN:  
UNION DISCLAIMER OF INTEREST IN BARGAINING UNITS

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Financial considerations may make representing a particular bargaining unit extremely difficult. In a right-to-work state, the number of dues-paying members may decrease precipitously. Or unit members may file a deauthorization petition to eliminate union security provisions. Disclaimer offers unions in an untenable financial position a way out, even if years remain on the stated term of the collective bargaining agreement (CBA).

The National Labor Relations Board has long permitted a labor union to disclaim its interest in representing employees in a bargaining unit.<sup>1</sup> For a disclaimer to be effective, it must be clear, unequivocal and made in good faith.<sup>2</sup> Conduct inconsistent with the intent to withdraw as bargaining representative, such as continuing to collect dues from unit members, picketing, or initiating new grievances, will negate the effect of the purported disclaimer.<sup>3</sup>

Union disclaimers are frequently made in the face or the aftermath of a deauthorization election. The Board has held that a union may lawfully tell the bargaining unit members that if the deauthorization campaign is successful, the union will disclaim its interest in the unit because it would no longer be economically viable to

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<sup>1</sup> *E.g.*, Retail Associates, 120 NLRB 388 (1958); Rochelle's Restaurant, 152 NLRB 1401 (1965).

<sup>2</sup> Rochelle's Restaurant, 152 NLRB at 1405.

<sup>3</sup> *See* VFL Technology Corp., 329 NLRB 458, 460 (1999); Gazette Printing Co., 175 NLRB 1103 (1969).

continue representation.<sup>4</sup> The Board has also held that the union has no duty to provide bargaining unit members with any evidence that continued representation would be economically infeasible.<sup>5</sup> Neither the disclaimer itself nor the threat to disclaim if the deauthorization campaign is successful constitutes an unfair labor practice.<sup>6</sup>

The two most significant consequences of a union's disclaimer of interest in a bargaining unit are termination of the duty of fair representation<sup>7</sup> and removal of the contract bar for a subsequent representation election.<sup>8</sup> Until the late 1970s, a valid disclaimer, standing alone, was not necessarily sufficient to suspend the contract-bar rule. But with the American Sunroof decision, the Board likened disclaimer to decertification or the transfer of a business to a successor employer, and held that a valid disclaimer would effectively terminate the CBA and thus suspend the contract-bar rule.<sup>9</sup> The American Sunroof decision has occasioned some criticism of the Board in the courts for its failure to explain adequately its apparent shift in policy, but still stands.<sup>10</sup>

The elimination of the contract bar is a potentially thorny issue for litigation, particularly when another union moves to organize employees in the unit and quickly

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<sup>4</sup> Bake-Line Products, Inc., 329 NLRB 247 (1999). The Board had previously, in dicta, noted that "such a statement by a union simply conveys an economic reality to the employees." Sears, Roebuck and Company, 324 NLRB 865, 866 n.12 (1997).

<sup>5</sup> Bake-Line Products, 329 NLRB 247.

<sup>6</sup> Id. Dissenting Board members Hurtgen and Brame would have permitted the union to disclaim its interest, but would have found an unfair labor practice in its threat to do so, drawing an analogy to N.L.R.B. v. Gissell Packing Co., 395 U.S. 575 (1969).

<sup>7</sup> Joint Council of Teamsters No. 42 (Grinnell Fire Protection), 235 NLRB 1168 (1978). *Enf'd sub nom Dycus v. N.L.R.B.*, 615 F.2d 820 (9th Cir. 1980).

<sup>8</sup> Plough, Inc., 203 NLRB 121 (1973).

<sup>9</sup> American Sunroof Corp.-West Coast, Inc., 243 NLRB 1128 (1979). American Sunroof was decided shortly after another case in which the Board offered no hint of what was to come. In East Manufacturing Corp., 242 NLRB No. 5 (1979), decided just months earlier, the Board followed its previous policy of viewing disclaimer through the lens of a balancing test between the need for industrial stability and employees' right to select a bargaining representative.

<sup>10</sup> N.L.R.B. v. Circle A & W Products Co., 647 F.2d 924, 927 (9th Cir., 1981) (Pregerson, J., dissenting). In Circle A & W, the majority enforced the Board's order requiring the employer to bargain with the newly-elected union, rejecting the contract-bar rule as a defense to an 8(a)(5) charge in these circumstances.

petitions for an election. The Board will carefully scrutinize the “good faith” element of disclaimer in this interest, and will refuse to lift the contract bar if there is evidence of collusion between the two unions to merely shift representation of the unit from one to the other.<sup>11</sup> When there is no evidence of collusion, however, employers have been unsuccessful in raising the contract bar doctrine as an obstacle to a representation petition.

In addition to collusive agreements to shift representation from one union to another, unions also face potential pitfalls in attempting to use disclaimer unilaterally to expand or contract the scope of the bargaining unit. In the 2005 Skilbeck case, in which the union disclaimed its interest to comply with an arbitration award, the Board held that any disclaimer that unilaterally changes the scope of the bargaining unit will be ineffective.<sup>12</sup> In Skilbeck, the Steelworkers had entered into a jurisdictional agreement with the Operating Engineers on heavy and highway construction jobs. Skilbeck, whose employees were represented by the Steelworkers, bid on a contract involving work in Ohio, which was the Operating Engineers’ jurisdiction. An arbitrator ruled that the Steelworkers had to disclaim its interest in the employees working on the Ohio project, which the Steelworkers promptly did. While finding that the disclaimer was clear, unequivocal and in good faith, the Board nonetheless refused to give it effect.<sup>13</sup> The Steelworkers “in essence, effectuated a unilateral change in the scope of the unit, which

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<sup>11</sup> Mack Trucks, Inc., 209 NLRB 1003 (1974).

<sup>12</sup> Skilbeck, P.L.C., Inc., 345 NLRB No. 46 (2005).

<sup>13</sup> Id.

has long been recognized as a matter that may not be unilaterally altered by either party.”<sup>14</sup>

The Board reached the identical conclusion in a case where the union attempted to disclaim representation as to only a small group of employees in a right-to-work state when the historical bargaining unit covered the employer’s entire multistate system.<sup>15</sup>

Disclaimer of interest in representing a bargaining unit is a permissible and effective means for a union to extricate itself from representing a bargaining unit that, as a result of a deauthorization election or otherwise, has become financially burdensome to maintain. However, the union must have a sincere desire to give up representation, and must do so unequivocally and without unilaterally changing the scope of the bargaining unit for the disclaimer to be effective.

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<sup>14</sup> Id. One key fact in Skilbeck was that the employer refused to accede to the Steelworkers’ disclaimer as to the Ohio employees. Prior Board decisions have permitted disclaimers to change the scope of the bargaining unit, so long as the employer agrees to the change. Steinmetz Electrical Contractors Ass’n, Inc., 234 NLRB 633, 634 (1978).

<sup>15</sup> Lanier Brugh Corp., 339 NLRB 131 (2003).