

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

# Advice Memorandum

DATE: March 20, 1997

TO : Terry C. Jensen, Acting Regional Director  
Region 19

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

SUBJECT: Inlandboatmen's Union of the Pacific,  
Case 36-CB-2101

This case was submitted for advice on whether the Union violated Section 8(b)(1)(A) of the Act by (1) classifying payments to the Membership Assistance Trust, a sick leave trust, as dues and telling employees that they must pay the money in order to retain employment under the union security clause; (2) by utilizing an employee's accumulated contributions in said trust as a source for payment of that employee's previously levied fines; and (3) by threatening to cause the employee's discharge in the event that the employee's accumulated contributions to the trust are insufficient to pay off the employee's fines.<sup>1</sup>

### FACTS

Charging Party Parker is a warehouseman with Western Transportation (the Employer). Parker, and all other warehouse employees, have been covered by consecutive collective bargaining agreements between the Employer and the Union, which in turn have contained union security clauses.

The Union uses a combined membership enrollment and Union dues payroll deduction authorization form. Members can authorize a payroll deduction for both dues and initiation fees or for dues only.

In 1984, after the Employer successfully bargained for elimination of paid sick leave, the Union established a Membership Assistance Trust (MAT), a Union-administered entity to collect and distribute sick leave benefits to eligible unit employees. In 1987, the Trust was formally

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<sup>1</sup> There is no question that the fines themselves were lawfully assessed.

established as an ERISA trust.<sup>2</sup> The Trust documents are unambiguous and direct in setting forth the purpose of MAT, the ground rules for the collection and distribution of benefits and the obligation of the Trustees of MAT. For example, the Summary Plan Description describes MAT as "...a lost time benefit plan which provides benefits to compensate employees who lose actual work time." An employee of the Employer is eligible to receive benefits only if he or she: "...has elected to pay his/her (Union) dues by checkoff." and 2) has lost paid work time. The Summary Plan description further provides that an employee's benefits are limited to his/her accrued, unused contributions and "...that an employee's (accrued) ..benefits may not be lost, forfeited or suspended." Parallel provisions are set forth in MAT's Declaration of Trust, accompanied by recitations of the MAT trustees fiduciary obligations.<sup>3</sup> Initially, MAT's sole participants were employees of the Employer; subsequently, Union-represented employees of other industry employers separately voted to join MAT.

At the time the Trust was established, the Union decided to collect MAT contributions through payroll deduction. The Employer was initially reluctant to deduct hourly MAT contributions from employees' paychecks, since the Union security clause and the payroll deduction authorization form are both silent concerning MAT contributions being extracted via payroll deduction. After the conclusion of negotiations in 1984, the Union sent a letter to the Employer stating that the dues as listed in the union security clause and checkoff provisions of the contract had been increased by \$0.25 per hour. The Employer has been making the MAT per hour deduction since

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<sup>2</sup> Employee Retirement Income Security Act of 1974. Title\_\_USC\_\_.

<sup>3</sup> See Recitals, first paragraph, second sentence and Article 1, Declaration of Trust, Section 1.02 (purpose of the trust); Section 2.04 (eligible employee beneficiaries); Section 5.04 (fiduciary obligations of trustees, exclusivity of purpose); Section 10.04 (parties rights and obligations, limitations on use of accrued benefits held in the MAT).

that time. The money is listed separately on the pay stubs of the employees, the "Union 1" deduction for the regular monthly dues and the "Union 2" for the hourly amount. In 1994, the Union increased the amount of the hourly deduction to \$0.50 per hour.

During the strike of 1994, Parker was fined \$480 for failure to stand picket duty. When Parker ignored Union notices of the fine, the Union, without notifying Parker, made deductions, in irregular increments, from Parker's accrued MAT contributions, for the purpose of paying off the \$480.00 fine and for his strike period dues. In about May of 1996, Parker missed five days of work due to illness. Parker contacted the Union office about obtaining a weeks-worth of MAT benefits. Union Regional Director Don Liddle advised Parker that he would be receiving an amount less than a full five days of MAT benefits, because there were insufficient funds in Parker's MAT account to pay him a week's sick leave. When Parker asked Liddle why his accrued MAT contribution was insufficient, Liddle responded that it had been deducting the money Parker owed in fines from his MAT account. When Parker questioned the Union's ability to do so, Liddle replied: "...yea, he (Liddle) can do that because if not he (Liddle) would have to pull me off the job."

Parker then filed a charge (36-CB-2093), alleging that the Union's deductions from his MAT account for the 1994 fine were unlawful. After initial investigation and discussions with the Subregional office and with representatives of the Pension and Welfare Benefits Administration, Department of Labor, Parker withdrew charge 36-CB-2093 and announced his intention of filing a charge with the Pension and Welfare Benefits Administration (PBWA).<sup>4</sup> Later, Parker filed the instant charge. To date,

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<sup>4</sup> Further inquiry conducted by the Division of Advice revealed that while the PWBA has yet to commence an investigation, they will make an initial jurisdictional determination and open an investigation if jurisdiction exists under ERISA, as soon as either the charging party or Region 19 presents PWBA with sufficient information about MAT for the jurisdictional determination to be made. Advice concerning how to proceed concerning PWBA is set forth below.

the Employer has continued to make the \$0.50 per hour deduction from employees paychecks.

ACTION

Complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) of the Act by threatening discharge for failure to pay a Union fine; for deducting Union fine and dues from the Membership Assistance Trust, and by using checkoff for collection of MAT contributions.

In Mine Workers District 5 (Pennsylvania Mines) 317 NLRB 663 (1995), the Board, citing Miranda Fuel<sup>5</sup> and Vaca v. Sipes<sup>6</sup> held that the union acted arbitrarily and unreasonably in violation of its duty of fair representation by retaining proceeds of an arbitration award rather than distributing those funds to unit employees. The Board reasoned that the arbitrator's award was unambiguous so that the union had no discretion in the final resolution of the grievance.

Applying that decision here, we note that under the terms of MAT's trust documents, the sole and exclusive purpose of MAT is to provide a sick leave benefit for participating employees; forfeiture of accumulated benefits to satisfy non-MAT debts is prohibited, and the trustees and administrators of MAT have both sole and exclusive fiduciary obligation to MAT's beneficiaries and a duty to refrain from serving. Thus, the Union has **no discretion** as to distribution of funds and has no right to take money out of Parker's account except to pay him for lost work time. Thus, the Union violated its duty of fair representation by acting arbitrarily and unreasonably in taking money out of Parker's MAT account to pay the Union fine and dues.

Further, the Union's statement to Parker that it would have pulled him off the job if it had not deducted the fine from Parker's MAT account is an unlawful threat of discharge for failure to pay a Union fine. A union's

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<sup>5</sup> 140 NLRB 181 (1967).

<sup>6</sup> 386 U.S. 171 (1967).

request or threat to request the employee's discharge pursuant to a lawful union security clause, made because the employee has not paid previously levied fines, is violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act because a union-imposed fine is not a form of periodic dues and/or initiation fees. Painters Local Union No. 1627, 233 NLRB 820, 821 (1977); Int'l Longshoreman & Warehousemen Union, Loc. 13 (Pacific Maritime Assn.), 228 NLRB 1383, 1385 (1977).

We further conclude that the Union violated Section 8(b)(1)(A) of the Act by using checkoff for collecting MAT contributions. Generally, the Board and Courts have construed checkoff authorizations very narrowly. These authorizations, which are a creature of contract between an employer and an employee,<sup>7</sup> specifically authorize the employer to deduct certain monies for specific purposes; typically the employees' membership dues for the benefit of a third party, a union.

In AMCAR<sup>8</sup> an employer unlawfully used the checkoff authorizations to deduct the union's lawful assessment from the employees' wages. The Board reasoned that, where there is no ambiguity in the checkoff cards which provide simply and clearly for the checkoff of "initiation fees" and "monthly dues," but did not authorize the deduction of "assessments," the union could not lawfully deduct "assessments" under the dues checkoff authorization. This conclusion was premised upon Board cases which have repeatedly held that dues checkoff authorizations must be voluntarily made and that an employee has a right under Section 7 to refuse to sign checkoff authorization cards. Any conduct which coerces an employee in his attempt to exercise this right violates the Act.<sup>9</sup> Thus the Board reads

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<sup>7</sup> UFCW, Local 115 (California Meat Co.), 277 NLRB 676, 678 at n. 4 (1985).

<sup>8</sup> AMCAR Division, ACF Industries, 245 NLRB 339 (1979), enfd. in relevant part, 624 F.2d 819, 104 LRRM 3046 (8th Cir. 1980).

dues checkoff authorizations literally and any deduction outside that authorization violates the Act.

In the present case there is no ambiguity in the checkoff authorization. The checkoff clearly only authorizes an employee to chose checkoff for Union dues and initiation fee or Union dues only. It does not contain any provision for checkoff of contributions for MAT. However, the Union refers to the MAT contributions as dues. Therefore, the question is whether under Board law the Union can consider the MAT contributions as dues.

Board law regarding the definition of "dues" versus "assessments" is muddled. Current Board law on this issue finds its genesis in NLRB v. Food Fair Stores, Inc.,<sup>10</sup> where the court enforced a Board order finding, inter alia, that the union violated Section 8(b)(1)(A) and (2) by threatening employees with discharge for failing to pay a strike fund assessment. In its discussion of whether the strike fund assessment should be considered an assessment or "periodic dues" under Section 8(a)(3) of the Act, Judge Forman stated,

It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues".<sup>11</sup>

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<sup>9</sup> International Union of Electrical, Radio, & Machine Workers, Local 601, (Westinghouse Electric Corporation), 180 NLRB 1062 (1970) and case cited therein.

<sup>10</sup> 307 F.2d 3 (3d Cir. 1962).

<sup>11</sup> Id. at 11.

In Teamsters Local 959 (RCA Service Co.), the Board adopted Judge Foreman's reasoning, stating that the court "drew the distinction which we find delineates the 'periodic dues' which a union may validly require employees to pay."<sup>12</sup> The Board elaborated on the test by stating that Section 8(a)(3) dues that go to costs "incurred by the collective bargaining agent in representing [the employees]" do not include charges that do not "contribute to the cost of operations of a union in its capacity as a collective bargaining agent."<sup>13</sup> Applying this test, the Board in Local 959 found credit union and building fund collections to be assessments rather than periodic dues. The Board relied upon its finding that the collections "are clearly not for the support and maintenance of the Respondent as an organization but are special purpose funds established by the Respondent to accomplish ends not encompassed in its duties as a collective-bargaining agent of the employees."<sup>14</sup>

On the other hand, in Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Association),<sup>15</sup> the Board found the ALJ's reliance upon Teamsters Local 959 misplaced, and rejected his conclusion that the disputed funds were not "periodic dues" but special purpose funds.<sup>16</sup> The Board specifically disavowed "any distinction between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union." Rather, the Board stated that Section 8(a)(3) dues are those that are "periodic and uniformly required and are not devoted to a purpose. . . inimical to public policy."<sup>17</sup>

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<sup>12</sup> 167 NLRB at 1045.

<sup>13</sup> Ibid.

<sup>14</sup> Id. at 1044.

<sup>15</sup> 192 NLRB 951 (1971).

<sup>16</sup> Id. at 952 (fees for old age pension and mortuary funds and for a printers' home).

<sup>17</sup> Ibid.

Nevertheless, based on the Food Fair test, and notwithstanding their decision in Detroit Mailers, the Board has continued to consistently hold that fees levied for the "special" purpose of establishing or maintaining a strike fund are assessments and not dues, because they are levied in addition to dues and for a special purpose.<sup>18</sup> The Board has never reconciled the approaches taken in Local 959 and Detroit Mailers.<sup>19</sup>

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<sup>18</sup> See Newspaper Guild Local 82 (Seattle Times), 289 NLRB 902, 912 (1988), remanded 877 F.2d 998, 1003 (D.C. Cir. 1989) (Board found strike defense fund to be assessment where contributions were used for specific purpose (financing strike and lockout expenses), were placed in bank account separate from other union funds and generally not used for "general fund" purposes, and since it was not possible for members to anticipate when and for what duration defense fund payments would be made); Plumbers Local 81 (Morrison Construction Co.), 237 NLRB 207, 210 (1978) (one-time levy designed to meet anticipated emergency situation in the event of a strike); Carpenters Local 455 (Building Contractors), 271 NLRB 1099, 1100 (1984) ("strike assessment" funds kept separate from union treasury to be used for strike activities, and no indication whether it was of limited duration or adopted in relation to a particular strike).

<sup>19</sup> Recently, the Board has avoided distinguishing dues from assessments where possible. See UFCW Local 1 (Big V Supermarkets), 304 NLRB 952, 952 (1991), enfd. 141 LRRM 2257 (2d Cir. 1992); General Electric, 299 NLRB 995, n. 3 (1990) (case resolved under Philadelphia Sheraton, 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3d Cir. 1963)); Pacific Northwest Newspaper Guild Local 82 (The Seattle Times), 289 NLRB 902 (1988) (Board agreed with ALJ's finding that the increased portion of dues were not sufficiently regular to be termed "periodic" and found it "unnecessary to pass on the judge's discussion of the standard to be applied in determining whether the purposes for which dues payments are expended will cause such payments to fall outside the definition of 'periodic dues' . . . "). See also D.C. Circuit's decision in Seattle Times, 131 LRRM 2924, 2926-2927 (1989), remanding to the Board for a "coherent

Applying the above principles to the facts here, it is clear that under the Teamsters Local 959 test, MAT contributions are not dues. Although MAT contributions are collected periodically, they are for a special purpose (sick leave benefits), are collected separately and in addition to dues, and do not contribute to the general operating costs of the Union. Further, MAT contributions are maintained in a separate ERISA fund account. Finally, MAT contributions are not part of the Union's dues structure because the Union does not treat the payment as regular dues. Instead the Union clearly treats the MAT contributions as a distinct financial obligation. Since MAT contributions are not dues, the Union violated Section 8(b)(1)(A) by using checkoff for collection of MAT contributions.

We note, however, that it is the General Counsel's view that Detroit Mailers test is more appropriate for determining whether a payment to a union is dues or an assessment.<sup>20</sup> In IBEW Local 48, the General Counsel has argued to the Board that the Board should adopt Detroit Mailers as the sole test for determining whether a payment is dues or an assessment, and the Board should abandon the test enunciated in Teamsters Local 959.<sup>21</sup>

Under the Detroit Mailers test, MAT contributions would constitute dues since their collection is not inimical to public policy. [FOIA Exemption 5

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reconciliation of its own precedent." The case has since settled.

<sup>20</sup> See IBEW Local 48, Case 36-CB-2052, Advice Memorandum dated January 17, 1997 for a detailed analysis of dues versus assessments.

<sup>21</sup> Id.

<sup>22</sup> [FOIA Exemption 5

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B.J.K.

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