

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

Advice Memorandum

DATE: October 6, 2009

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: Bank of America 518-4030-0100
Case 32-CA-24605 518-4030-9000
536-2570

SEIU
Case 32-CB-6752

The Region submitted these cases for advice as to whether Bank of America's provision of loans to SEIU, in the regular course of its business and at arms' length, violated Section 8(a)(2), where SEIU has announced an intent to organize the Bank's employees but neither currently represents nor is actively organizing those employees. We conclude that the Bank's provision of these loans did not constitute unlawful interference or support violative of Section 8(a)(2). Accordingly, SEIU's receipt of the loans did not violate Section 8(b)(1)(A).

FACTS

SEIU is a long-established, national union with an excellent A2 credit rating. In 2003, SEIU represented two million workers and had an annual budget of over \$200 million, funded primarily from member dues and employee agency fees. In that year, SEIU secured a \$65 million loan from the Bank of America (the Bank) to fund the purchase of a new headquarters building and a \$25 million construction line of credit. The Bank provided these funds at an interest rate tied to an independent index known as the LIBOR rate. The loans were secured by a security interest in and lien upon SEIU's per capita taxes and a covenant not to convey or encumber the property with other security interests or liens. In addition, SEIU executed an agreement pledging to assign \$15 million from the proceeds of the sale of its existing headquarters building to pay down the construction line of credit.¹

¹ SEIU has since used the proceeds to reduce this line of credit to \$10 million.

The Bank provided two additional loans to SEIU in 2005 and 2006. First, the Bank provided SEIU with a \$1.6 million unsecured loan to fund its purchase of telecommunications equipment, again at an interest rate tied to the LIBOR rate.² And then the Bank extended SEIU a \$15 million line of credit, to finance the Committee on Political Education's (COPE) participation in the 2006 and 2008 elections. This financing, also at a rate tied to the LIBOR rate, was secured by a lien on COPE's assets, including deposit and investment accounts, equipment, and fixtures.

In August 2007, SEIU began a campaign against the Bank to draw attention to its "irresponsible corporate practices." The campaign continued through the 2008 financial crisis and resulting government "bailout." In addition, in late 2008 and in 2009, SEIU publicly expressed an interest in organizing financial institution employees, including specifically the Bank's employees. However, SEIU has not yet engaged in any organizing activity directed at the Bank's employees.

On June 23, 2009, the National Union of Healthcare Workers (NUHW) filed the instant Section 8(a)(2) charge against the Bank, alleging that it contributed financial support to SEIU and thereby interfered with SEIU's administration and, through its financing of SEIU's campaign against NUHW, interfered with NUHW's administration. NUHW also filed a Section 8(b)(1)(A) charge against SEIU, based upon its acceptance of financial and other support from the Bank and other employers that are targets or potential targets of SEIU's organizing drives.

These charges initially were based upon the Bank's four loans to SEIU. During the investigation, NUHW also alleged that SEIU received an unlawful \$225,000 contribution from Charles Schwab and an unlawful \$100,00 contribution from the Center for Community Change, which is funded by various financial institutions. SEIU has explained that there was no contribution from Charles Schwab; instead a check from SEIU Local 668 drawn on a Charles Schwab account (a copy of which is in the record) was incorrectly listed in SEIU's 2008 LM-2 report. The alleged contribution from the Center for Community Change was actually a refund of an SEIU donation to the Center made in error.

² The Bank asserts that there is less than \$500,000 outstanding on this loan.

ACTION

We conclude that the Region should dismiss the instant charges because there is no evidence of unlawful Bank support of SEIU or interference in its administration or that of the NUHW.

This case presents two issues: (1) the usual Section 8(a)(2) question of whether the Bank has engaged in proscribed conduct, i.e. domination of or interference with the organization's formation or administration or unlawful support of the organization; and (2) if there was no such domination or interference, the more novel issue of whether the Bank is subject to the "conflict of interest" strictures of Section 8(a)(2) even though its employees are neither represented by SEIU nor the target of an SEIU organizing campaign.³

In the more typical Section 8(a)(2) case, an employer violates the act by: (1) dominating the formation of a labor organization, usually by establishing a company union or "employee committees";⁴ (2) interfering with the administration of a union, as for example through supervisory participation in union management;⁵ or (3) providing financial or other support, such as the use of company time or facilities.⁶ In addition, however, the

³ See ULLICO, Inc., Case 5-CA-30657, Advice Memorandum dated December 21, 2006 at 8, n.15 ("no known authority has applied Section 8(a)(2) in the absence of an employer-employee relationship or a potential employer-employee relationship").

⁴ See, e.g., Elecromation, Inc., 309 NLRB 990, 996 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994) (employer violated Section 8(a)(2) through domination in the formation and administration of "Action Committees" that functioned as labor organizations).

⁵ See, e.g., General Steel Erectors, 297 NLRB 723, n.1 (1990), enfd. 933 F.2d 568 (7th Cir. 1991) (employer unlawfully permitted statutory supervisor to serve union in various official capacities including president).

⁶ See, e.g., Upper Great Lakes Pilots, 311 NLRB 131, 132-33 (1993) (employer violated Section 8(a)(2) by contributing clerical assistance to the union, including helping to write letters, taking telephone messages, and paying union bills out of union funds); Jackson Engineering Co., 265 NLRB 1688 (1982), enfd. 735 F.2d 1384 (D.C. Cir.), cert. denied 469 U.S. 1072 (1984) (employer unlawfully paid union

Board has held that an employer violates Section 8(a)(2) by recognizing and bargaining with a union that is disqualified from representing the unit employees because of an inherent conflict of interest.⁷ A Section 9(a) representative "must be there with the single-minded purpose of protecting and advancing the interests of the employees[.]"⁸

In this regard, the Board has found that a loan transaction between an employer and a union official may present a sufficient conflict of interest to disqualify the union from representing the employer's employees.⁹ Thus, in Garrison Nursing Home, the Board determined that the financial relationship between the employer and the union's executive director, which presented the possibility that their negotiations over note payments might affect the collective-bargaining process between the union and the employer, could create a conflict of interest that would impair the union's effectiveness in representing the unit employees.¹⁰

official \$67,700 in kickbacks for business referred by the union).

⁷ See, e.g., Kaplan, Sicking, Hessen, Etc., 250 NLRB 483, 489-90 (1980) (employer law firm violated Section 8(a)(2) by bargaining with union that retained the employer as its counsel); Centerville Clinics, Inc., 181 NLRB 135, 140 (1970) (employer clinic, established and operated by UMW and UMW affiliates, violated section 8(a)(2) by bargaining with a UMW local).

⁸ Bausch & Lomb Optical Company, 108 NLRB 1555, 1559 (1954) (finding no unlawful refusal to bargain where union had established a business that directly competed with the employer).

⁹ Garrison Nursing Home, 293 NLRB 122, 123-24 (1989) (union's founder and executive director held the employer's promissory note).

¹⁰ Ibid. (Regional Director ordered to withhold certification until the union official relinquished his position or terminated his financial relationship with the employer). Cf. Cherry River Boom & Lumber Co., 44 NLRB 273, 283-284 (1942) (no Section 8(a)(2) violation where bank president, who was also employer's general plant superintendant, was not involved in loan granted to union officials in the ordinary course of business).

Here, the Bank was not involved in the formation of SEIU, has not participated in its administration, and has not made any financial donation to it. Rather, the Bank extended loans to SEIU in the regular course of business, based upon SEIU's excellent credit rating, and at arm's length. Further, the Bank's approval of these loans preceded by years SEIU's announcement of its intent to organize the Bank's employees, and the Bank employees who processed these loans were unfamiliar with any SEIU organizing goals.

Therefore, we would not find unlawful interference and support in this case unless the Union's receipt of Bank loans presents a disqualifying conflict of interest. And such a conflict is not presented at this time. Thus, even if these loans would ultimately disqualify SEIU from representing Bank employees, there can be no disqualifying conflict of interest where SEIU does not represent, and is not petitioning to represent, the Bank's employees because SEIU does not yet have any duty of fair representation to the employees or obligation to represent them with the "single-minded purpose of protecting" their interests. Therefore, the commercial relationship between the Union and the Bank does not violate Section 8(a)(2) or Section 8(b)(1)(A). Accordingly, the Region should dismiss the instant charges, absent withdrawal.

B.J.K.