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

Advice Memorandum

DATE: February 26, 1996

TO : John D. Nelson, Regional Director
Region 19

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

SUBJECT: SEIU Local 49
(Fred Meyer, Inc.)
Case 36-CB-1969

536-2554-3100

This Section 8(b)(1)(A) case was resubmitted to Advice for clarification and reconsideration in light of additional evidence.[1] The issues presented are (1) whether the Region should withdraw approval of the settlement agreement in Case 36-CB-1744 where Local 49 ("the Union") is still charging objectors for organizational expenses; (2) whether the Region should reserve out the issue of the Union's charging the Charging Party objector for out-of-unit legislative expenses as it has reserved out general unit-by-unit allegations in other cases; (3) whether further proceedings as to the Union's charging objectors for lobbying expenditures are warranted where the International states in its disclosure that some lobbying expenses are chargeable but neither it nor the Union has made such expenditures in the last three accounting years; and (4) whether the Union lawfully charged objectors 100 percent of "overhead expenses."

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[1] In an Advice Memorandum dated May 1, 1995, Advice authorized the Region to revoke the settlement in Case 36-CB-1744, consolidate the charge in this case with that charge, reserve out the unit-by-unit issue and litigate the consolidated cases against the Union. This authorization was based on the Region's finding facts in connection with the instant charge to indicate that the Union was not in compliance with the settlement agreement in Case 36-CB-1744. We also concluded that the complaint should include the new allegation, in the instant case, that the Union unlawfully charged for and categorized lobbying and legislative expenses as representational.

(1) We conclude that it is necessary for the Region to revoke the settlement in Case 36-CB-1744 with regard to the Union's charging objectors for organizing expenses.[2] As alleged in the instant case, the Union and its International[3] are still charging objectors for substantial organizing expenses and still assert that organizing is properly chargeable.[4] Thus, the Union and the International's audit reports for 1991, 1992, and 1993[5] clearly state that they consider organizing expenses to be completely chargeable. Thus, the Union apparently never complied with the settlement as to organizing expenses and continued to charge objectors for organizing expenses by requesting dues amounts that were not reduced to account for organizing expenses. Although, as stated in the May 1, 1995 Advice Memorandum, the Region should argue before the Administrative Law Judge that it is the General Counsel's view that organizing expenditures should be considered chargeable,[6] the General Counsel has authorized complaint as to charging objectors for organizing expenses in order to put that issue before the Board. Consequently, the Region should revoke the portion of the settlement in Case 36-CB-1744 which relates to charging objectors for organizing expenses and consolidate it for trial with the charge in the instant case.

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[2] The Region should not revoke the remainder of the settlement in Case 36-CB-1744 because the Union has complied with those portions of the settlement.

[3] The Union makes substantial per capita payments to the International. The Union appears to be the Section 9(a) representative of the unit here.

[4] The settlement in Case 36-CB-1744 provides that the Union will not charge objectors for "nonrepresentational expenses related to organization activities."

[5] The Union and the International had not completed their 1994 audit reports at the time of the submission of this case to Advice.

[6] This view is set forth in United Food & Commercial Workers (City Market), Case 16-CB-3850, Advice Memorandum dated March 3, 1994.

(2) We also conclude that the Region should no longer reserve out from litigation the unit-by-unit issue because the Board in California Saw and Knife Works, 320 NLRB No. 11 at slip op. pp. 14, 16 (1995), recently held that the duty of fair representation ordinarily does not require unions to break down expenses on a unit-by-unit basis or to charge objectors only for expenditures spent for his/her unit. Thus, the Board found that out-of-unit expenses ordinarily inure to the benefit of the unit. Consequently, the Region should dismiss allegations in both Cases 36-CB-1744 and 1969 which allege as unlawful the Union's failure in the disclosures to break down expenditures on a unit basis and/or the Union's charging objectors for out-of-unit expenses.

Further as to the issue of whether the Union violated the Act by charging the Charging Party for litigation expenses related to bargaining units other than his own, we conclude that the Region should also dismiss those allegations. The General Counsel and the Board in California Saw have treated this issue of out-of-unit litigation expenses separately from the general unit-by-unit issue because the courts have done so in Railway Labor Act and public sector labor cases. In fact, the Supreme Court found these out-of-unit litigation expenses not to be properly chargeable to Railway Labor Act and public employee objectors.[7] However, the Board in California Saw, at pp. 15-16, held that a union does not breach its duty of fair representation by charging objectors for litigation expenses as long as the expenditure may ultimately inure to the benefit of the unit members and as long as the litigation is not the "type of political extra-unit litigation" that is "akin to lobbying."[8] In this case the notes to the International's disclosures and to the Union's

[7] See Ellis v. Railway Clerks, 466 U.S. 435, 453 (1984); Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 528 (1991).

[8] The Board, at p. 15, noted that the Court in Lehnert found out-of-unit litigation expenses nonchargeable to deter the possible burden on free speech raised by "the important political and expressive nature" of out-of-unit litigation that made it "akin to lobbying."

disclosures state that litigation not related to bargaining unit members is not chargeable. However, the notes also state that the "prosecution or defense of litigation or administrative agency procedures to obtain ratification, interpretation, or enforcement of collective bargaining agreements or collective bargaining or representational rights" are chargeable. The Union's International represents public employees as well as private sector employees. Such public employees' collective bargaining agreements and rights might be among those prosecuted or defended and therefore charged by the Union. However, we cannot prove that the Union's chargeable litigation expenditures are "akin to lobbying." In any event, according to the disclosures, these chargeable expenditures are a de minimus portion of the Union's total expenditures.[9]

(3) We conclude, in agreement with the Region, that it should dismiss the allegation that the Union has charged objectors lobbying expenditures because the International's and the Union's disclosures indicate that the Union is not charging objectors for lobbying expenses of any kind. Also, the Union has written a letter to the Charging Party expressly stating this. We realize that the notes to both the Union's and the International's disclosures state that "Lobbying state or local legislative bodies to secure ratification of negotiated agreements" is chargeable,[10] and as noted above, the International represents public sector employees as well as private sector employees. However, since neither the Union nor the International actually charged objectors for such expenditures, there is no

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[9] The International's chargeable litigation expenses were one percent or less of its total expenditures for the three years for which it furnished disclosures. The Union itself apparently spent no money on litigation expenses. See St. Louis Post-Dispatch, supra at 11, fn. 32, citing cases (less than 5% found de minimus).

[10] These notes also state that, "Lobbying for collective bargaining legislation, regulations, ordinances or charter amendments affecting wages, hours, and working conditions before Congress, State legislatures, state and federal boards or councils" is nonchargeable.

violation as to charging objectors for such expenditures.[11] Consequently, the Region should dismiss this lobbying allegation.

(4) We conclude that the Union unlawfully charged objectors 100 percent of overhead expenses. We have taken the position in the past that if more than de minimus nonrepresentational activities are supported by overhead expenses, the latter must be prorated so that the union does not charge objectors for the portion of those overhead expenses which support nonrepresentional activities.[12] Here, as stated above, the Union and its International spend substantial sums on organizing expenses and the Union charges objectors for these expenses. Consequently, the Union should prorate more than de minimus overhead expenditures so that it does not charge objectors for the expenses which support organizing activities. The Union's disclosure lists as 100 percent chargeable the "overhead" categories of telephone, stationary and supplies, repair and maintenance, postage, depreciation, rent, utilities, computer, and property taxes. Each of these expenditure categories is lower than 3 percent. These amounts are clearly de minimus.[13] Since these various overhead categories listed by the Union in its disclosures as 100% chargeable are not more than de minimus, the Union did not

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[11] The Board in California Saw did not resolve the issue of whether a union violates the Act by charging objectors for lobbying expenses. Thus, at p. 16, fn. 79, the Board stated that, in the absence of exceptions, it adopted the ALJ's holding that the Union violated Section 8(b)(1)(A) by charging objectors for legislative expenses. The union there had admitted that such expenditures were not properly chargeable. However, we note that the Board in California Saw, at 15-16, limited its finding that out-of-unit litigation was chargeable to that which was not akin to lobbying.

[12] St. Louis Post-Dispatch, Case 14-CB-8343, Advice Memorandum dated April 3, 1995, at 10.

[13] See St. Louis Post-Dispatch, supra at 11, fn. 32, citing cases (less than 5% found de minimus).

unlawfully fail to prorate them.[14] However, although the International,[15] does not charge objectors 100 percent of its overhead costs, it charges them a substantial part of those costs[16] and considers all organizational expenses to be chargeable. Since the International charges objectors for 100 percent of organizing expenditures and since these expenditures are a large proportion of the International's total expenditures, approximately 23 percent, it is likely that the portion of overhead costs which supports organizing is substantial and is also charged objectors. Consequently, the Union unlawfully failed to prorate the International's overhead costs or in any other way take into account the nonchargeability of overhead which supports organizing.[17] The International's "Rent and Overhead" chargeable expenditures were 4.8 percent for 1993, 5.2 percent for 1992, and 6 percent for 1991.[18] The International's "Supplies and Telephone" expenditures were 6.0 percent for 1993, 4.4 percent for 1992, and 5.8 percent for 1991. These two expense categories could arguably be considered together as overhead. Also, each category alone was above what we have considered de minimus for two of the three years covered by the charge.[19] Consequently, in these circumstances, we conclude that the Region should allege

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[14] See St. Louis Post-Dispatch, supra at 10.

[15] The Union charges objectors for per capita payments of approximately 18 percent of its total expenditures, which it sends to the International.

[16] For example, the International charges objectors 88 percent of its "Supplies and Telephone" and 95 percent of its "Rent and Overhead."

[17] Of course, if the Board were to find that organizing is chargeable as the General Counsel contends, this charging objectors for overhead costs which support organizing would similarly be lawful.

[18] All three of these years are relevant because the Charging Party first objected in 1991.

[19] See note 11 supra.

that the Union unlawfully charged objectors for nonrepresentational expenses by failing to prorate these two overhead categories so that it does not charge objectors expenses which support organizing.[20]

In sum, the Region should set aside the settlement agreement in Case 36-CB-1744 and consolidate it for hearing with this case, alleging that the Union violated Section 8(b)(1)(A) by charging objectors for organizing activities and for overhead, "Rent and Overhead" and "Supplies and Telephone," which supported organizing.

B.J.K.

[20] The International's other arguably overhead categories constituted de minimus amounts as each being around 3 percent or less of the International's total expenditures.