

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

Advice Memorandum

DATE: November 8, 2005

TO : Ralph R. Tremain, Regional Director
Region 14

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

SUBJECT: Miscellaneous Drivers, Helpers, Health
Care and Public Employees, Local
Union No. 610 (Amerigas) 536-2509-2500
Case 14-CB-10014 536-2581-3307-5050

This case was submitted for advice as to (1) whether the Union violated Section 8(b)(1)(A) by failing to provide two employees with adequate initial notice of their Beck¹ rights; and (2) whether the Union violated Section 8(b)(1)(A) by threatening to request that the Employer discharge two employees and "not use [them] in the future." We conclude that the Union violated the Act, as to the initial Beck notice, by (1) failing to provide employees with accurate information as to what types of expenses were chargeable; (2) neglecting to specify what percentage of expenses Beck objectors would be required to pay; and (3) failing to apprise the employees of how to object. We further conclude that the Union violated Section 8(b)(1)(A) by threatening to discharge the employees and to request that the Employer not use them in the future.

FACTS

Amerigas (the Employer) is engaged in retail propane sales, operating from, among other locations, Hazelwood, Missouri. Teamsters Local 610 (the Union) represents certain of the Employer's Hazelwood-based employees. The parties' current collective-bargaining agreement contains a union-security clause.

The Charging Parties, Vernon Mathis and Dewitt Mitchell, are members of the Hazelwood bargaining unit. Mathis was transferred from one of the Employer's non-Union facilities to Hazelwood effective September 15, 2004. Mitchell has worked at Hazelwood since October 6, 2004. Both Mathis and Mitchell had previously worked for employers whose employees were represented by different Teamsters locals.

¹ Communications Workers of America v. Beck, 487 U.S. 735, 742-44 (1988).

On September 23 and November 16, 2004, Mathis and Mitchell, respectively, completed identical applications for Union membership. The top of the one-page, single-sided application contains a paragraph stating that, by submitting the application, the applicant chooses the Union as its collective-bargaining representative and describes Union members' rights. The paragraph also contains the following language regarding applicants' rights to object to Union membership:

I understand that I am under no legal or contractual obligation to become a member of the Union. Under the current law, I can satisfy any contractual obligation necessary to maintain my employment by paying an amount equal to the uniform initiation fee and dues required of members of the Union. I also understand that if I elect not to become a member, I may pay a service fee, which is limited to a proportionate share of the expenditures necessary to support the Union's activities as my collective bargaining representative. (Emphasis added.) If I elect not to become a member, the Union will provide additional information concerning the amount of the service fee based upon [its] most recent allocation of [its] expenditures which are devoted to activities which are germane to [its] performance as my collective bargaining representative, upon my request. The law permits service fee payers to challenge the correctness of this calculation. Procedures for filing such challenges will be provided by the Union, upon request in writing.

On December 6, 2004, the Union advised Mathis that, as a member of another Teamsters' local, he could avoid the Union's \$400 initiation fee by paying a \$340 transfer fee on or before December 30, 2004. Mathis did not respond to the Union's letter.

By letter dated January 6, 2005, the Union advised Mathis that he was liable for the \$400 initiation fee because he failed to pay the transfer fee. The Union also advised Mathis that he owed dues of \$50 per month for October through December 2004. Finally, the Union advised Mathis that, unless he contacted the Union by January 16 to make arrangements to pay, the Union would request that the Employer discharge Mathis under the terms outlined in the collective bargaining agreement and "not use [Mathis] in the future."

Two weeks later, Mathis paid the Union \$100 for October and November 2004 dues. On January 31, Mathis sent the Union his Beck objection and his Union resignation.

On June 1, the Union advised Mathis that, if he failed to make arrangements to pay the \$400 initiation fee and full dues for October through December 2004, the Union would direct the Employer to terminate Mathis consistent with the terms of the collective bargaining agreement. The Union also acknowledged Mathis' Beck objection by quoting his new service fee, explaining how the fee was calculated, enclosing a breakdown of expenditures, and indicating the representational fees owed for February through May 2005.

On June 8, Mathis challenged the Union's calculations and service fee assessment. On June 16, the Union advised Mathis that he had failed to arrange to pay his initiation fee and dues from September 15, 2004, through January 2005 and sent the Employer a letter requesting Mathis' termination consistent with the collective-bargaining agreement.

The Union engaged in a similar course of interactions with Mitchell. In January 2005, a Union representative told Mitchell that he would have to pay the Union's full initiation fee if he did not pay a transfer fee. In February, the Union again advised Mitchell that, as a member of another Teamsters local, he would have to pay the transfer fee before February 28 or he would be responsible for the Union's full initiation fee.

On February 17, 2005, Mitchell objected to Union membership and resigned from the Union. On June 1, the Union sent Mitchell a letter setting a June 15 deadline for Mitchell to pay the Union the initiation fee and back dues for the period October 2004 through February 2005. The Union also acknowledged Mitchell's Beck objection by quoting his new service fee, explaining how the fee was calculated, enclosing a breakdown of expenditures, and indicating the representational fees owed for March through May 2005.

On June 8, Mitchell challenged the Union calculations and assessments for fees and back dues. On June 16, the Union advised the Employer that Mitchell had failed to pay his initiation fees and dues and requested his termination consistent with the collective-bargaining agreement.

On June 24, 2005, the National Right to Work Legal Defense Foundation filed the instant charge on Mathis and Mitchell's behalf.

On August 12, the Union sent letters to Mathis and Mitchell detailing their back dues and fees. The Union told Mathis that he owed the Union the initiation fee and back dues for November 2004 (rather than October 2004, as the Union originally asserted) through January 2005, minus the \$100 he paid in January. The Union told Mitchell that he owed the Union the initiation fee and full back dues for December 2004 (rather than November 2004, as the Union originally asserted) and January 2005. The Union stated that, if the employees did not make arrangements to pay within ten days, it would direct the Employer to terminate the employees "under the terms outlined in the Collective Bargaining Agreement and not use [them] in the future" (emphasis added).

The Union sent copies of these letters to the Employer and withdrew its June 16 requests that the Employer terminate Mathis and Mitchell. The Union also told Mathis and Mitchell that the Union would schedule a hearing before an independent arbitrator for each to challenge the Union's dues calculations.²

ACTION

The Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by failing to provide the employees with adequate initial notice of their Beck rights, including (1) failing to provide accurate information regarding what types of expenses are chargeable, (2) failing to provide the percentage of chargeable expenditures, and (3) failing to inform employees how to register Beck objections. The Region should also issue complaint, absent settlement, alleging that the Employer violated Section 8(b)(1)(A) by threatening the employees that it would request their discharge and that the Employer not use them in the future.

1. The Inadequacy of the Initial Beck Notice.

In California Saw and Knife Works,³ the Board held that when a Union seeks to collect dues and fees under a union security clause, it must inform employees of their right to

² The Union has advised the Region that it will not seek service fees from the dates on which Mathis and Mitchell submitted their Beck objections through the challenge process, given that the Union failed to respond to their objections until June 2005, several months after the Union received the objections.

³ 320 NLRB 224, 233 (1995).

be or remain non-members and that non-members have the right:

to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.

The first issue is whether the initial notice here provides "sufficient information" for an intelligent objection choice. The Board has not fully addressed what language a union must use to describe chargeable activities. However, California Saw would appear to require, at a minimum, that the notice inform employees that nonmember Beck objectors must pay the costs of collective bargaining, contract administration, and grievance adjustment.⁴ In Teamsters Local 377 (St. Elizabeth Health Center),⁵ the union's initial Beck notice was identical to that at issue here, providing for objectors to pay "a service fee which is limited to a proportionate share of the expenditures necessary to support the Union's activities as [the] collective bargaining representative." The Administrative Law Judge agreed with the General Counsel and found this language deficient because the union's "activities as collective bargaining representative" could include more than its representational activities.⁶ The notice therefore failed to alert nonmembers of their right not to pay for expenses incurred by the union for nonrepresentational activities and was vague, misleading, and overbroad.⁷

⁴ See Teamsters Local 435 (United Parcel Service), 27-CB-3759, Advice Memorandum dated November 9, 1998, at p. 4-5. See also Abrams v. Communication Workers of America, 59 F.3d 1373, 1379 (D.C. Cir. 1995) (informing employees that objectors pay only for expenditures "undertaken by the Union to represent the employees . . . with respect to their terms and conditions of employment" failed to adequately inform employees of right to object because "terms and conditions of employment" could include activities beyond those germane to collective bargaining, contract administration, and grievance adjustment).

⁵ JD 03-04 (February 11, 2004), slip op. at 6-7 (no exceptions have been filed to this decision).

⁶ Id.

We conclude that the initial Beck notice here fails accurately to apprise employees regarding the categories of expenses Beck objectors would be required to pay. As in St. Elizabeth Hospital, the language here is overbroad because a "collective bargaining representative" engages in duties other than collective bargaining, contract administration, and grievance adjustment. Thus, the notice here fails to give employees sufficient information to determine whether to object.⁸

The second issue is whether the notice is unlawful because it fails to apprise Beck objectors of the percentage by which dues and fees are reduced for objectors. In Penrod v. NLRB,⁹ the D.C. Circuit held that an initial Beck notice must apprise potential objectors of the percentage of union dues chargeable to them in order for potential objectors to gauge the propriety of a union's fee. While under current Board law, an initial Beck notice need not provide this information,¹⁰ Advice has issued several memoranda urging the Board to adopt the D.C. Circuit's Penrod rationale.¹¹ Thus, we have taken the

⁷ Id., slip op. at 7. Compare Auto Workers Local 95 (General Dynamics Corp.), 328 NLRB 1215, 1218 (1999) (in considering General Counsel's other objections to initial notice, Board indicates that clause informing employees that objecting nonmembers' money can be expended only for activities "concerning collective bargaining and related matters" was sufficiently specific), enf. denied in part on other grounds, Thomas v. NLRB, 213 F.3d 651 (D.C. Cir. 2000).

⁸ We do not believe that the second sentence of the clause (which refers to the service fee as being based on the most recent allocation of the Union's expenditures which are devoted to activities germane to its performance as collective-bargaining representative) rectifies this overbreadth. Like the preceding sentence, this sentence does not provide any information as to what expenditures are chargeable, e.g., collective bargaining, contract administration, and grievance adjustment.

⁹ 203 F.3d 41, 48 (D.C. Cir. 2000).

¹⁰ See California Saw, 320 NLRB at 233; Teamsters Local 166 (Dyncorp Support Services), 327 NLRB 950, 952 (1999), enf. denied sub. nom. Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000).

¹¹ See United Food & Commercial Workers Union, Local 101 (Macy's West), 20-CB-12253, Advice Memorandum dated June

position that the percentage information is essential to an employee's informed decision as to whether to become a Beck objector. Accordingly, the Region should allege that the Union's failure to include in its initial Beck notice the percentage by which dues and fees are reduced for objectors was unlawful.

The final issue is whether the notice adequately apprises employees of the Union's procedures for filing Beck objections. The notice must, at a minimum, inform employees to notify the union of their decision to become Beck objectors.¹² The notice here refers to an employee's right to "elect not to become a member," but it provides no guidance as to how to make such an election. In St. Elizabeth Health Center, the Administrative Law Judge found identical language to be deficient. Accordingly, the Region's complaint should allege that the notice fails to inform employees seeking nonmember status regarding how to file Beck objections.

2. Union's Threats to Request that Employer Discharge the Employees and Not Use Them in the Future.

A union seeking the termination of an employee under a union security clause has a fiduciary duty to deal fairly with that employee.¹³ That duty requires that a union, at a minimum, apprise a dues-delinquent employee of the amount of dues arrearage, the time period in question, an explanation of the calculation, and an opportunity to make payment.¹⁴ A union cannot lawfully demand the discharge of an employee for nonpayment of dues pursuant to a union-security clause unless it has met this requirement.

Even if a union properly seeks an employee's discharge for nonpayment of dues, it cannot later deny him reinstatement if he pays his delinquency.¹⁵ Similarly, a

22, 2005; Addus Health Care, 21-CA-36170, Advice Memorandum dated October 15, 2004; United Government Security Officers of America Local 80 (MVM), 5-CB-9447, Advice Memorandum dated April 29, 2003.

¹² See United Parcel Service, 27-CB-3759, Advice Memorandum dated November 9, 1998.

¹³ Western Publishing Co., 263 NLRB 1110, 1111 (1982); Philadelphia Sheraton Corp., 136 NLRB 888, 896 (1962).

¹⁴ Id.; Helmsley-Spear, Inc., 275 NLRB 262, 262 (1985).

¹⁵ See Asbestos Workers, Local 5 (Insulation Specialties Corp.), 191 NLRB 220, 221 (1971) (union violated Section

union acts unlawfully by telling an employee that the union might not authorize him to return to work even if he pays his dues delinquency.¹⁶

Here, even if the Union's Beck notice had been adequate,¹⁷ the Union's threat to request that the Employer not rehire the employees violated its fiduciary duty to deal fairly with employees. Without any qualifying language, the threat is misleading because it implies that the employees would never be eligible for re-employment at this facility, even if they later fulfilled their union-security obligations, and that the employees would not be able to work at any of the Employer's nonunion facilities. The Union thus acted unlawfully by, in essence, threatening the employees that they would not be hired again even if they later fulfilled their union-security obligations.

In sum, the Region should issue complaint, absent settlement, alleging that (1) the Union's initial Beck notice was deficient for the reasons specified above; and (2) the Union acted unlawfully by threatening the employees that it would request their discharge and that the employer refuse to rehire them.

B.J.K.

8(b)(1)(A) by denying employee referral and failing to advise employee of what he was required to do to qualify for registration on out-of-work list where employee had been terminated 21 months earlier for failing to pay his union initiation fee), enf. 464 F.2d 1394 (9th Cir. 1972). See also Argonne National Laboratory, 123 NLRB 375, 376 (1959) (provision stating that employee who failed to join union could not be rehired during life of agreement was unlawfully discriminatory because it failed to account for employee who was later willing to fulfill any valid union-security requirement).

¹⁶ See Operating Engineers Local 542C (Ransome Lift), 303 NLRB 1001, 1006 (1991) (union violated Act where it informed an employee who asked whether he could return to work if he paid his union dues obligation that he would not be permitted to return to work until the union board approved his reinstatement).

¹⁷ As discussed above, the Union failed to give the employees adequate initial notice of their Beck rights. Accordingly, the Union violated its duty of fair representation by threatening to discharge them without having given them proper Beck notice.