

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

Advice Memorandum

DATE: May 12, 2009

TO : Joseph P. Norelli, Regional Director
Region 20

Thomas W. Cestare, Officer-in-Charge
Subregion 37

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

SUBJECT: UNITE HERE! Local 5 and UNITE HERE!
(Turtle Bay Resort)
Case 37-CB-1946

536-2581-3307-5001
536-2581-3307-5040

The Region submitted this case for advice on whether a local Union violated Section 8(b)(1)(A) by charging a Beck objector for strike fund expenses that could be used to support employees in a different industry and/or geographic location than the objector's employer.

We agree with the Region that, under the Supreme Court's decision in Locke v. Karass,¹ the strike fund expenses here are chargeable because a strike fund relates to collective bargaining and the strike funds here are reciprocal in nature. The Court's decision makes clear that whether or not the strike funds are available to other bargaining units whose employers are not in the same competitive market is irrelevant. Accordingly, the Region should dismiss the outstanding complaint allegation regarding the strike funds.

FACTS

UNITE HERE! Local 5 ("Local 5") represents several bargaining units of hotel and healthcare employees in Hawaii. The Charging Party is a Beck objector employed at the Turtle Bay Resort hotel in Oahu.

In March 2003, Local 5 increased dues by \$1.00 per month per member to be diverted from its general fund into a dedicated strike fund ("Strike and Defense Fund"). The resolution that established the Strike and Defense Fund stated, *inter alia*, that strikes can be a means of achieving favorable contract terms; that a strike fund will ensure that employees are prepared for a strike if necessary; that employers will be aware that Local 5 is

¹ Locke v. Karass, ___ U.S. ___, 129 S.Ct. 798 (2009).

prepared for a strike; and that the strike fund will pay strike benefits to members who are "obliged to take economic action against employers in the event of a labor dispute." A subsequent resolution governing the disbursement of Strike and Defense Fund monies states, inter alia, that monies will only be disbursed if Local 5's executive board has first accepted and adopted a "basis and program of negotiating goals"; the majority of the affected bargaining unit has indicated its willingness to strike, or is locked out by the employer; and that strike fund disbursements are subject to accounting procedures that will ensure that funds are expended for their intended purpose and for the benefit of the membership. All employees represented by Local 5 pay dues into the Strike and Defense Fund.

In late 2004, hotels in San Francisco locked out employees represented by UNITE HERE! Local 2 for several weeks, prompting Local 2 to provide millions of dollars from its strike fund to the locked out workers. At the time, Local 5's Strike and Defense Fund only held about \$200,000. Local 5 embarked on a campaign to enhance its own strike fund because its bargaining unit members were employed by the same hotel owners and operators that locked out the San Francisco employees and several Local 5 contracts were set to expire in 2006. In this regard, Local 5 produced a document entitled "Questions and Answers," which likened a strike fund to "having insurance," and stated that the Local 5 Executive Board is the only body that decides how the money is spent, although "[t]his doesn't mean we can't decide to help another local if they are in trouble, just like we will ask for help if we are in trouble."

On December 16, 2004, the Local 5 membership voted in favor of a bylaw amendment establishing a second strike fund ("Hotel and Healthcare Assessment") to be levied on Local 5 bargaining unit members employed at 20 Hawaii hotels (including Turtle Bay Resort) and two Hawaii health care facilities²:

There shall be a special assessment for the purpose of generating contributions to the Local 5 Strike and Defense Fund.... Such assessment shall be in the amount of ten dollars (\$10) per month for the period of January, 2005, through December 2006, and two dollars (\$2) per month thereafter. Funds generated by

² Unlike the Strike and Defense Fund, some Local 5 bargaining units do not pay into the Hotel and Healthcare Assessment.

this special assessment shall be accounted for separately from other funds held by the Strike and Defense Fund, and shall be utilized for the purpose of providing support and assistance to those who lose work due to a labor dispute. The Executive Board shall approve disbursements from the Strike and Defense Fund.³

After the bylaw was adopted, Local 5 produced a newsletter stating that the Hotel and Healthcare Assessment "sends a strong message to all employers that we know what's happening in our industries and we are coming to the table prepared to win," and that its funds "can only be used to aid members from the health care and hotel industries who lose work due to a labor dispute."

In May 2005, employees at the Turtle Bay Resort staged a one-day strike during contentious collective-bargaining negotiations.⁴ Turtle Bay Resort subsequently locked out employees, and Local 5 disbursed Strike and Defense Fund benefits to them. According to Local 5, that is the only time it has disbursed monies from the Strike and Defense Fund, and it has never disbursed monies from the Hotel and Healthcare Assessment.

In June 2005, the Charging Party resigned her membership in Local 5 and became a Beck objector. Local 5 considers its strike funds to be 100% chargeable.

On September 30, 2008, the Region issued a complaint alleging that Local 5 and UNITE HERE! violated Section 8(b)(1)(A) by charging the Charging Party for strike funds that could be used outside of Turtle Bay Resort's competitive market. The complaint allegation was based on

³ Neither the Region, in its outstanding ULP complaint, nor the Charging Party have alleged that either of the strike funds constitutes an "assessment" rather than "periodic dues" lawfully collected pursuant to a union security clause. Under current Board law, so long as employee payments are periodic, uniformly imposed, and not inimical to public policy, they constitute "periodic dues," and may be collected pursuant to a union security clause, even if they are labeled "special assessments," established for a special purpose, or levied in addition to regular dues. See Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1496 (2000), order modified 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003).

⁴ See generally Turtle Bay Resorts, 353 NLRB No. 127, JD slip op. at 23, 41-42 (2009).

a previous case, UNITE Hotel Employees & Restaurant Employees, Local 5, AFL-CIO (Hilton Hawaiian Village), Case 37-CB-1767, where complaint issued alleging that Local 5 had unlawfully charged a different Beck objector for strike fund expenses, based on the Board's decision in Meijer⁵ that extra-unit organizing expenses outside the employer's competitive market are not chargeable. Hilton Hawaiian Village settled prior to the ALJ hearing.⁶

On February 4, 2009, the ALJ issued an order that indefinitely postponed the hearing in the instant case.

ACTION

We agree with the Region that, under the Supreme Court's recent decision in Locke v. Karass,⁷ the strike fund expenses here are chargeable because a strike fund relates to collective bargaining and the Local 5 strike funds are reciprocal in nature. The Court's decision makes clear that whether or not the strike funds are available to other bargaining units whose employers are not in the same competitive market is irrelevant. Accordingly, the Region should dismiss the outstanding complaint allegation regarding the strike funds.

In Locke v. Karass,⁸ which arose in the public employment context, the Supreme Court held that national litigation expenses are chargeable to members of a local union if (1) the subject matter of the litigation is the kind of activity that bears an appropriate relation to

⁵ See generally Food & Commercial Workers Locals 951, 7, and 1036 (Meijer, Inc.), 329 NLRB 730, 734-736 (1999), affd. in pertinent part 307 F.3d 760 (9th Cir. 2002) (extra-unit organizing expenses chargeable to extent union demonstrated positive relationship between grocery employees' earnings and the percentage of grocery workers represented by union in the same competitive market).

⁶ Under the settlement, Local 5 agreed to establish a separate strike fund account for all strike fund monies collected from Local 5's Beck objectors employed by the Hilton Hawaiian Village hotel, and to only use the money in that separate strike fund account for the purpose of providing support and assistance to Local 5-represented employees in the hotel industry in Hawaii who lose work due to a labor dispute.

⁷ Locke v. Karass, ___ U.S. ___, 129 S.Ct. 798 (2009).

⁸ Locke v. Karass, 129 S.Ct. at 802, 806.

collective bargaining, and (2) the litigation is reciprocal in nature, i.e. the contributing local "reasonably expects" other locals to contribute similarly to the national union's resources for the costs of similar litigation on behalf of the contributing local if and when such litigation takes place. The Court found that the national litigation at issue was chargeable because it concerned aspects of collective bargaining, contract administration, and other matters that courts have held to be chargeable, and the existence of reciprocity had been assumed by the parties and was not in dispute.⁹

Locke v. Karass is consistent with, and follows directly from, Lehnert.¹⁰ In Lehnert, the Court found that expenses outside the objector's bargaining unit are chargeable if they are germane to the union's role in collective bargaining, regardless of whether the activities have been performed for the direct benefit of the objector's bargaining unit, so long as the expense is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."¹¹ The Locke Court stated that its decision regarding the chargeability of national litigation expenses was based on the "relevant standards for charging other national expenditures that the Lehnert majority enunciated," and directly tied the reciprocity concept to Lehnert's inure-to-the-benefit test.¹² The reciprocity requirement is a refinement of, and a means of satisfying, Lehnert's requirement that extra-unit expenditures may ultimately inure to the benefit of the contributing bargaining unit.¹³ Thus, although Locke v. Karass involved extra-unit litigation expenses, the reciprocity standard

⁹ Id. at 807.

¹⁰ Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 524 (1991).

¹¹ Ibid. In California Saw & Knife Works, 320 NLRB 224, 239 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998), cert. denied 525 U.S. 813 (1998), the Board applied the Lehnert test to determine whether extra-unit litigation was chargeable in the context of a union's duty of fair representation under the Act.

¹² Locke v. Karass, 129 S.Ct. at 806.

¹³ This is not to say that showing that an expenditure is reciprocal in nature is the only way to demonstrate that it may ultimately inure to the benefit of the contributing bargaining unit.

enunciated therein is applicable to the question of whether Local 5's strike funds are chargeable.

Applying the Locke v. Karass test here, we conclude that Local 5's strike funds are chargeable, because they are (1) germane to collective bargaining and (2) reciprocal in nature. First, a strike fund is a type of expenditure that directly relates to collective bargaining. It goes without saying that a union's bargaining strength is enhanced when it possesses the financial resources to weather a lengthy work stoppage. Indeed, the evidence here indicates that Local 5's strike funds were established against the backdrop of a lengthy lockout of Local 2 members in San Francisco by the same hotel owners and operators that employ Local 5 members in Hawaii, and were instituted to enhance Local 5's bargaining strength in upcoming contract negotiations. Second, the Local 5 strike funds are reciprocal in nature. All Local 5 bargaining units whose members contribute to the strike funds - including the Charging Party's unit - can "reasonably expect" to receive strike fund payments in the event of a strike or lockout.¹⁴ Thus, Local 5's bylaw amendments, resolutions, newsletters, and other literature indicate that the strike funds are akin to insurance policies, are under the exclusive control of Local 5's executive board, and will be available to all contributing Local 5 bargaining units that lose work due to a labor dispute. Indeed, the only time either Local 5 strike fund has ever been used was to provide lockout benefits for employees in the Charging Party's bargaining unit in 2005.

The fact that strike fund monies are not limited to use by Local 5 bargaining units in the hotel industry, but are also available to units in the healthcare industry, does not affect the Locke v. Karass analysis. Where it has been demonstrated that the challenged extra-unit expenditures are reciprocal in nature, Locke v. Karass does not require that they be limited to the same competitive market in order to satisfy Lehnert's "inure to the benefit" requirement. Accordingly, the analysis in Hilton Hawaiian Village, Case 37-CB-1767, no longer governs the chargeability of extra-unit strike expenditures that are reciprocal in nature. Since the Local 5 strike funds are available to all striking or locked out units and enhance the bargaining strength of all of the units, they are chargeable even though they support employees outside the competitive market where the Charging Party is employed.

¹⁴ Locke v. Karass, 129 S.Ct. at 802.

We reject the Charging Party's argument that Local 5 has not provided sufficient evidence that its strike funds are truly reciprocal in nature.¹⁵ As discussed above, Local 5 has provided copies of bylaw amendments, executive board resolutions, newsletters, and other literature that indicate that contributing units could reasonably expect to benefit from the strike funds in the event of a strike or lockout, i.e. that the strike funds are a bona fide pooling arrangement between Local 5 and all participating units. Further, the only monies expended from the funds were for a unit represented by Local 5. Contrary to the Charging Party, we conclude that this evidence is sufficient to satisfy Local 5's burden under the Locke v. Karass reciprocity test. Local 5's statement, in its "Questions and Answers" document, that it could decide to use strike fund money to help another local "just like we would ask for help if we are in trouble," raises a possibility that fund monies could be used in the future in a manner that is not sufficiently reciprocal. However, the strike funds have not been used thus far to assist units represented by other locals.

If Local 5 disburses strike funds to another local in the future without conditioning it on a promise to similarly fund Local 5, the chargeability of the disbursement can be addressed on consideration of another charge.

We also reject the Charging Party's argument that the Local 5 strike funds are not chargeable because they could be used to fund non-chargeable sympathy strikes.¹⁶ Local

¹⁵ Specifically, the Charging Party argues that in order for a union to demonstrate reciprocity, it must have a written agreement or a provision in its constitution guaranteeing that it will provide full financial support to any contributing bargaining unit.

¹⁶ Some courts have questioned whether sympathy strikes, which are intended to express solidarity with the primary striking union rather than to advance a union's own collective bargaining objectives, are chargeable. See Lancaster v. Air Line Pilots Assn., 76 F.3d 1509, 1516-1518 (10th Cir. 1996) (reversing district court's entry of summary judgment for pilots union and entering summary judgment for objectors, because union failed to demonstrate that contributing pilots employed by United could some day benefit from sympathy strike by Eastern pilots in support of striking Eastern machinists); Beckett v. Air Line Pilots Assn., 59 F.3d 1276, 1279-1280 (D.C. Cir. 1995) (reversing district court's entry of summary judgment in favor of

5's strike funds have never funded sympathy strikes, and there is no evidence to indicate that they would be used in that manner. Local 5's stated intentions regarding the funds are to assist employees who are engaged in primary strikes, i.e., employees who are "obliged to take economic action against employers in the event of a labor dispute" or who "lose work due to a labor dispute." Therefore, we do not need to determine the circumstances under which use of the funds for a sympathy strike would be chargeable.¹⁷

Accordingly, the Region should dismiss the outstanding complaint allegation to the extent it alleges that the strike funds are not chargeable to Beck objectors.

B.J.K.

union and remanding for factual findings on whether sympathy strike assessment was chargeable).

¹⁷ If Local 5 funds a sympathy strike with objectors' dues, a new charge would place the issue squarely before us.