

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

Advice Memorandum

DATE: February 14, 2011

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: Unimark Truck Transport and 240-5000
International Association of Machinists 524-5090-3380
Lodge 777 524-5090-5077-2000
Cases 16-CA-27309 and 16-CB-8064 524-5090-5077-8000
524-5090-6750
548-6050-3325
548-6050-6709
625-8833-9200

The Region resubmitted these cases for advice on the appropriate reimbursement remedy to seek for the alleged violations concerning forced payment of dues upon hire and the maintenance of a facially unlawful union-security clause.

Prior to initially submitting these cases to Advice, the Region had concluded that the Employer violated Sections 8(a)(1),(2) and (3) by telling employees, on their first day of employment, that they had to become members of the Union pursuant to the union-security provision, that dues check-off was compulsory, and by collecting dues during the statutory grace period, i.e., prior to the completion of 30 days of employment. The Region further concluded that the Union violated Section 8(b)(1)(A) and (2) by accepting and retaining those dues.

In our memorandum of November 29, 2010, we authorized the Region to also allege that the charged parties' union-security clause was facially invalid insofar as it failed to provide employees the statutory grace period of 30 days after the effective date of the collective-bargaining agreement before they were required to become members of the Union.

The Region now seeks advice on the appropriate reimbursement remedy to seek for these violations. We conclude that the Region should seek a limited reimbursement remedy for all the Employer's employees,

nationwide,¹ who were hired within the Section 10(b) period, and who had dues deducted from their checks within the first 30 days of their employment.

The Supreme Court addressed the appropriate breadth of a reimbursement remedy in Carpenters Local 60 v. NLRB.² In that case, the union had unlawfully maintained and enforced a closed shop hiring system and the Board ordered, among other things, that the union disgorge all dues payments that had been exacted from employees hired under the unlawful hiring system. The Supreme Court rejected this remedy as punitive because there had been no showing that any employees-- all of whom had been members of the union at the time of their hire-- had been coerced to join or remain with the union.³ The Court held that the Board's remedial authority in cases involving unlawful union-security clauses is limited to a cease and desist order and compensation to employees whose membership in a union has been shown to be "influenced or compelled by reason of any unfair labor practice."⁴

The Board followed this reasoning in Gladys A. Juett.⁵ In that case, the Board found that the employer unlawfully required the execution of membership applications and check-off authorizations from employees at the time of hire.⁶ As a remedy, the Board ordered reimbursement of dues "for all periods in which such dues and fees were not legally required."⁷ Since that case arose in the construction industry, where Section 8(f) allows parties to require union security payments after seven days, the Board limited the reimbursement remedy to the first seven days after the contract was executed, i.e., the period in which the employer could not legally require new employees to pay

¹ All of the Employer's employees who are similarly harmed should be included in any remedy the Region seeks, as all employees are under the same contract in a single unit, regardless of whether they work in Laredo, Texas or Williamstown, West Virginia.

² 365 U.S. 651 (1961).

³ 365 U.S. at 655.

⁴ Id.

⁵ Gladys A. Juett, 137 NLRB 395 (1962)

⁶ Id. at 396.

⁷ Id. at 397 (emphasis added).

dues.⁸ Thus, following the Court's reasoning in Carpenters Local 60, the Board tailored the reimbursement remedy to remove the consequences of the unlawful coercion of employees, but did not require the employer to reimburse employees for the period beyond which the union-security agreement legally required the payment of dues and fees. The Board followed similar reasoning in American Geriatric Enterprises, Inc.,⁹ a case involving the deduction of dues in the absence of signed check-off authorizations. The Board rejected a reimbursement remedy in that case because, regardless of whether the employees had authorized the deductions, they nevertheless were subject at all times relevant to an otherwise lawful union-security obligation. Therefore, the Board would not require the employer to reimburse the employees for that which they were legally required to pay.¹⁰

These cases instruct that the Board will fashion a remedy that is narrowly tailored to fit the violation. Here, where the Employer unlawfully compelled the employees to sign dues check-off authorizations, and unlawfully collected dues from employees before they completed 30 days of employment, they nevertheless were thereafter subject to a lawful union-security obligation. Consequently, while the Region should seek a reimbursement remedy for all employees who had been hired within the 10(b) period, and from whom the Employer withheld dues and fees within their first 30 days of employment, that reimbursement should be limited to those dues and fees that were actually collected within the first 30 days of employment. An order requiring the reimbursement of dues and fees collected after an employee's first 30 days would be punitive under the rationale of Carpenters Local 60, supra.

⁸ Ibid.

⁹ 235 NLRB 1532 (1978).

¹⁰ Id. at 1532. We recognize that in Stafford's Restaurant, Inc., 182 NLRB 474 (1970), the Board ordered a full reimbursement remedy where the parties' union-security agreement provided for an illegally short grace period and they coerced employees to sign a dues check-off authorization. However, in that case, the Board did not discuss the Supreme Court's admonition in Carpenters Local 60 against punitive remedies. In light of Carpenters Local 60, we think Gladys A. Juett is a better view of the law and, given the Board's reaffirmation of that principle in American Geriatric Enterprises, we find its approach more persuasive than Stafford's Restaurant.

As to the remedy for the facial invalidity of the union-security clause that we addressed in our prior memorandum, we conclude that no reimbursement remedy is necessary for that violation because no employees suffered economic harm within the Section 10(b) period from the defect in the clause. The essence of that violation is that the union-security clause failed to provide employees with the statutory 30-day grace period that starts with the execution of the contract.¹¹ Thus, for an employee to suffer harm from that facial defect, he or she would have to have been a nonmember employed prior to the execution of the contract and been required to pay dues and fees within the first 30 days after the contract was executed.¹² The contract here was executed on April 24, 2009, and therefore, an employee harmed by this defect would have suffered that harm between April 24 and May 24, 2009. However, the first charge in this matter was filed on February 24, 2010, triggering the commencement of the statute of limitations period six months before, on August 24, 2009. Therefore, any harm that occurred between April 24 and May 24, 2009 occurred at least three months before the statute of limitations period commenced on August 24, 2009. Because no employee was harmed by this violation during the applicable Section 10(b) period, a reimbursement remedy is not warranted for this violation.¹³

In sum, as a remedy for the violations of Sections 8(a)(1),(2) and (3) and 8(b)(1)(A) and (2) in this matter, the Region should seek a limited reimbursement remedy for all the Employer's employees, nationwide, who were hired within the Section 10(b) period, and who had dues deducted from their checks within the first 30 days of their employment.

B.J.K.

¹¹ The clause did provide the 30-day grace period that starts with an employee's date of hire.

¹² Since the clause did provide the 30-day grace period from an employee's date of hire, any employee hired after the contract was executed would, on the face of the contract, receive the benefit of that grace period as the "later" of the two statutory grace periods. And, as to anyone hired on the effective date of the contract, the grace period would be identical regardless of whether it runs from the date of hire or the date of the contract.

¹³ True Temper Corp., 217 NLRB 1120, 1120-1121 (1975).