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

DATE: June 5, 2014

TO: Rik Lineback, Regional Director
Region 25

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

SUBJECT: United Food & Commercial Workers, Local 700
(Kroger Company) 536-2581-3307-5040
Case 25-CB-8807

The Region submitted this case for advice as to whether a local union may charge a supermarket-grocery-clerk *Beck* objector for all of the local union's organizing expenses, the vast majority of which comprise contributions to an international union's "Packinghouse Fund" used for organizing meatpacking employees nationwide.

We conclude, in agreement with the Region, that even if none of the local union's organizing expenses are chargeable, issuing complaint would not effectuate the purposes and policies of the Act, because the organizing expenses represent a *de minimis* percentage of the local union's total expenditures, the Packinghouse Fund is no longer in effect, and Indiana has adopted right-to-work legislation that will soon nullify any union-security requirement in the charging party's unit. In addition, the current evidence is insufficient for us to determine that the local's contributions to the Packinghouse Fund were not properly chargeable.

FACTS

I. Background

The United Food and Commercial Workers, Local 700 (the "Union") represents approximately 13,000 employees in the state of Indiana employed in manufacturing, food processing and packing plants, supermarkets, agribusiness, hair care and cosmetology, and health care facilities.

The Kroger Company (the "Employer") is one of the world's largest grocery retailers. The Employer's Elkhart, Indiana store is represented by the Union, and its meat and grocery departments are divided into separate bargaining units with distinct collective-bargaining agreements. The current collective-bargaining agreement governing the grocery department contains a union-security clause, and its term is from February 13, 2011 to October 25, 2014.

The Charging Party is a clerk in the grocery department of the Elkhart store. He has been a non-member *Beck* objector since 2002. He alleges, *inter alia*, that the Union wrongly categorized its 2003 organizing expenses as fully chargeable because they included organizing for campaigns outside of the relevant market.[1]

II. 2003 Organizing Expenses

In 2003, the year at issue in the instant charge, the Union's total expenditures were $4,446,620. Of that amount, the Union charged $21,469 in organizing expenses (or 0.48% of total expenditures). $19,611 (or 91.3%) of the Union's organizing expenses were contributions to the "Packinghouse Fund" administered by the International United Food and Commercial Workers Union (the "International"), and $1,858 (or 8.7%) of the organizing expenses were contributions to other organizing campaigns.

The Packinghouse Fund is administered by the International to provide resources nationwide to local unions who are organizing packinghouse (i.e., meatpacking) facilities within their respective jurisdictions. It is funded by an assessment paid by each local union to the International in the amount of $1.00 per local packinghouse member per month. There is no evidence that members of packinghouse bargaining units pay more dues than other bargaining units to offset the cost of the Packinghouse Fund, but the Union states that the revenue from its packinghouse members exceeds its representational costs for those members by approximately $35,000.

Only 31% of the 2003 monies collected for the Packinghouse Fund were spent as of October 21, 2004. According to the Union, those expenditures were almost exclusively for an organizing campaign at a packinghouse facility located somewhere outside of the Union's jurisdiction. The Region does not have any information about how the remaining 69% of 2003 Packinghouse Fund monies were spent in subsequent years. The Union stopped contributing to the Packinghouse Fund in September 2009.

The remaining organizing expenses charged by the Union in 2003 ($1,858) went to the International's "Albertson's Fund" to assist local unions nationwide in their efforts to organize employees of Albertson's grocery stores within their respective

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[1] This case was initially submitted for advice in 2004, and we instructed the Region to hold the case in abeyance pending the Board's decision in *Teamsters Local 75 (Schreiber Foods)*, which involved similar issues. *United Food & Commercial Workers Local 700 (Kroger Co., Elkhart, IN)*, Case 25-CB-8807, Advice Memorandum dated February 25, 2005.

jurisdictions; organizing Perdue Turkey in Washington, Indiana; organizing CVS employees in Anderson, Indiana; organizing Indiana Wal-Mart stores; training Kroger employees to assist in organizing at other Kroger locations; organizing an Indiana pet food processing plant; and organizing three Indiana nursing homes.

III. Indiana Right-to-Work Law

On February 1, 2012, Indiana enacted right-to-work legislation.[2] The law took effect immediately but did not apply to existing collective-bargaining agreements in effect as of March 14, 2012. Rather, the law only applies to collective-bargaining agreements entered into, modified, renewed or extended after that date.[3]

ACTION

We conclude, in agreement with the Region, that even if none of the Union's organizing expenses are chargeable, issuing complaint would not effectuate the purposes and policies of the Act, because the organizing expenses represent a *de minimis* percentage of the Union's total expenditures, the Packinghouse Fund is no longer in effect, and Indiana has adopted right-to-work legislation that will eliminate any requirement that the Charging Party pay dues to the Union once the current contract expires in a few months. In addition, the current evidence is insufficient for us to determine that the Union's contributions to the Packinghouse Fund were not properly chargeable.

I. Dismissal is Proper Based on Non-Effectuation Principles

As a threshold matter, regardless of whether the Union's organizing expenses are chargeable to a non-member *Beck* objector, the organizing expenses in this case represent a *de minimis* percentage of the Union's total expenditures. The Union's organizing expenses in 2003 constituted only 0.48% of the Union's total expenditures. This is well below the *de minimis* threshold that we have found in prior *Beck* cases.[4]

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[2] H.B. 1001, 117th Leg., Gen. Assembly (Ind. 2012).

[3] *Id*. at Section 13. On September 5, 2013, an Indiana Superior Court judge ruled that the law violates the Indiana constitution but stayed its ruling pending appeal to the Indiana Supreme Court. *Sweeney v. Zoeller*, Ind. Super. Ct., Case No. 45D01-1305-PK-52 (Ind.Super.Ct. Sept. 5, 2013).

[4] *Compare United Food & Commercial Workers Union Local 2 (Dillon Companies),* Case 17-CB-5385, Advice Memorandum dated March 13, 2001, p. 5 & n.16 (organizing expenses of less than 1% are *de minimis*); *Teamsters Local 580 (State Employees Credit Union)*, Cases 7-CB-10610 and 7-CB-10718, Advice Memorandum dated June

We would also find the organizing expenses to be *de minimis* if focusing on the total dollar amount—the relatively low figure of $21,469—rather than the percentage.[5]

Moreover, the Charging Party will not bear the cost of any of the Union's organizing expenses in the near future. The Union has already stopped contributing to the Packinghouse Fund, which accounts for over 91% of the challenged expenses in this case. Further, Indiana enacted right-to-work legislation in 2012, which will apply to the Charging Party upon expiration of the current collective-bargaining agreement on October 25, 2014. Accordingly, unless that law is overturned on appeal, the Charging Party will not be forced to pay for any organizing expenses in the future.

10, 1996, p. 3 (professional fees totaling 3.7% are *de minimis*); *Kaiser San Diego Registered Nurses Association*, Cases 21-CB-11587, et al., Advice Memorandum dated December 7, 1993, p. 12 (non-chargeable portion of expenses for "dues and subscriptions" constituting some amount less than 5.9% are *de minimis*); *with St. Louis Newspaper Guild, Local 57 (St. Louis Post-Dispatch)*, Case 14-CB-3843, Advice Memorandum dated April 3, 1995, p. 13 (non-chargeable expenses of 8.1% are too high to be *de minimis*); *Local 580, International Brotherhood of Teamsters (State Employees Credit Union)*, Cases 7-CB-10610, et al., Advice Memorandum dated June 10, 1996, p. 2 (per capita taxes of 11.9% are too high to be *de minimis*).

[5] Only two earlier Advice memoranda, both involving a significantly higher dollar amount than here, determined that even though the percentage of the charged expense relative to total expenditures suggested that the charge would be *de minimis*, the dollar amount was large enough to issue complaint. *See Transportation Workers Union, Local 526 (Johnson Controls, Inc.)*, Case 10-CB-6808, Advice Memorandum dated May 19, 1997, p. 4 (although expense for scholarship constituted less than 1% of total expenditures, complaint was warranted where dollar amount was the "substantial sum" of $82,000); *District 1199P, SEIU (Carpenter Care Center)*, Case 6-CB-10113, Advice Memorandum dated March 4, 1999, p. 6 (finding that organizing expenditures constituting 2% of total expenditures were not *de minimis* because they totaled $56,000). However, no other Advice memorandum expressly considered the dollar amount in the *de minimis* analysis, and we have since found a local union's $150,297 expenditure (0.41% of its total expenditures) for per capita taxes paid to AFL-CIO accounts to be *de minimis*. *See IUOE Local 150 (Minteq International)*, Case 25-CB-9289, Advice Memorandum dated July 30, 2010, p. 6.

II. Current Evidence Insufficient to Determine that the Packinghouse Fund Contributions are Not Chargeable

The Board has made clear that where a union can demonstrate that there is a direct, positive relationship between the wage levels of the employees it represents and the level of organization of the employees of employers in the same competitive market as those employees, a union may charge *Beck* objectors for its organizing expenditures. Thus, in *Meijer*,[6] the Board held that a local union lawfully charged non-member objectors for expenses incurred in organizing employees within the retail food industry, where the unions presented the testimony of economic experts and specific and extensive evidence establishing a relationship between the degree to which the retail grocery industry is organized and the union's ability to negotiate higher wages in the same metropolitan area. This included evidence that wages in the meatpacking industry impact the wages of the retail supermarket industry because meatpacking firms offer supermarkets precut, prepackaged "boxed beef" that can be purchased as a lower-cost alternative to having meatcutters perform the same work in-house.[7] In contrast, in *Schreiber*,[8] the Board found that a union failed to show the requisite nexus between its organizing and the bargaining unit at issue. The Board observed, *inter alia*, that the union presented no evidence on how organizing among the dairy and cheese processing companies that competed with the employer affected the unit of production and maintenance employees at the employer's cheese processing plant.[9]

Extra-unit expenditures may also be chargeable if they are reciprocal in nature, without regard to competitive market. In *Locke*, 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 collective bargaining, and (2) the

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[6] *Food & Commercial Workers Local 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 736 (1999), *enforced in pertinent part sub nom. UFCW, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).

[7] *Id*. at 735 & n.23.

[8] *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 82 (2007), *enforced in part sub nom. Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008).

[9] *Id*. at 82-83

litigation is reciprocal in nature.[10] The *Locke* Court explained that "reciprocal in nature" means that "the contributing local 'reasonably expects' other locals to contribute similarly to the national union's resources used for costs of similar litigation on behalf of the contributing local if and when [such litigation] takes place."[11] The Court further expressly linked its reciprocity standard to the inure-to-the-benefit test annunciated in *Lehnert*.[12]

Applying these concepts to a lobbying fund covering all of a union's locals across three states, the Board in *Kent Hospital* explained that reciprocal funds are "akin to insurance," meaning that "[w]hen the contributing local partially subsidizes a chargeable activity that more immediately benefits another local, it does so with the assurance that its own costs of the same type will be similarly subsidized by the other locals."[13] Conversely, where the bargaining unit at issue receives no benefit from the extra-unit expenditure, a union violates Section 8(b)(1)(A) by treating it as a chargeable expense.[14]

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[10] *Locke v. Karass*, 555 U.S. 207, 210 (2009).

[11] *Id.*

[12] *Locke v. Karass*, 555 U.S. at 219-220. In *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991), the Supreme Court held that expenses outside of 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."

[13] *See Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42, slip op. at 8 (Dec. 14, 2012), *petition for review voluntarily dismissed sub nom. In re Geary*, 2013 WL 4711668 (D.C. Cir. 2013). *See also UNITE HERE! Local 5 (Turtle Bay Resort)*, Case 37-CB-1946, Advice Memorandum dated May 12, 2009, p. 6 (finding contributions to local union's strike fund to be chargeable where all of the contributing units—including the charging party's unit—could "'reasonably expect' to receive strike fund payments in the event of a strike or lockout"); *IUOE Local 150 (Minteq International)*, Case 25-CB-9289, Advice Memorandum dated July 30, 2010, p. 5 (finding contributions to strike-fund pooling arrangement chargeable, where the strike fund was available to the charging party's bargaining unit and there was no evidence that a unit member had ever been denied use of the fund).

[14] *See Teamsters Local 399 (Hilltop Services Inc., at Universal City Walk)*, 346 NLRB 322, 324 (2006) (because the charging party's unit made a proportionate contribution to union expenses necessary to secure a liquidated damages award, the union violated

Here, even assuming the organizing expenses were not *de minimis*, we do not have sufficient evidence to conclude that there is no "direct, positive relationship" between the Union's contributions to the Packinghouse Fund and the wage levels of employees the Union represents. We have no evidence about the relationship between the particular packinghouse plant that the Packinghouse Fund attempted to organize in 2003 and the Employer, and no information about how the remaining 69% of the 2003 contributions to the Packinghouse Fund were used. And we cannot rule out the possibility that the Union could produce some evidence showing that packinghouse-plant organizing campaigns could have positively impacted the wages of the Employer's employees who are represented by the Union.[15]

Accordingly, for the foregoing reasons, we conclude that it would not effectuate the purposes of the Act to issue complaint in this case. Therefore, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

8(b)(1)(A) by not tracking the liquidated damages to ensure that at least some of that money was allocated to chargeable expenses), *enforced*, 525 F.3d 898 (9th Cir. 2008); *Teamsters Local 618* (*Chevron Chemical Co.*), 326 NLRB 301, 302 (1998) (union violated 8(b)(1)(A) by offsetting the interest and dividend income generated from funds or assets of all dues-paying members only against non-chargeable expenses).

[15] We also lack sufficient evidence to conclude that the Packinghouse Fund is not "reciprocal in nature." Although it appears that the Charging Party's unit contributed to the Packinghouse Fund, the Union asserts that revenue from its packinghouse units exceeded its representational costs for those units by enough to cover the cost of contributions to the Packinghouse Fund. Although the Union has not provided a breakdown of representational expenses among its various bargaining units, it is possible that the Union used excess revenue from its packinghouse units to defray the contributions of the Charging Party's unit to the Packinghouse Fund and/or to fund representational activities relating to grocery clerks. In this regard, we note that only 31% of the 2003 monies collected for the Packinghouse Fund were spent as of October 21, 2004, and the Region has no information about how the remaining 69% was spent in subsequent years.