

OFFICE OF THE GENERAL COUNSEL

Memorandum GC 98-11 August 17, 1998

TO: All Regional Directors, Officers-in-Charge, and
Resident Officers

FROM: Fred Feinstein
Acting General Counsel

SUBJECT: Guidelines Concerning Processing of Beck Cases

In Communications Workers v. Beck, 487 U.S. 735 (1988), the Supreme Court held that a collective-bargaining representative under the NLRA may not charge an objecting nonmember covered by a contractual union-security clause for union activities unrelated to collective bargaining, contract administration or grievance adjustment. In ALPA v. Miller, -- U.S. --, 158 LRRM 2321 (May 26, 1998), the Supreme Court recently held that agency fee objectors under the Railway Labor Act could not be required to exhaust union-established arbitration procedures before bringing their fee disputes to federal court. This Memorandum is intended to provide guidance on the processing of unfair labor practice charges alleging that unions have improperly charged objectors for nonrepresentational activities, in light of ALPA v. Miller.

In California Saw, 320 NLRB 224, 233 (1995), enf'd 133 F.3d 1012 (7th Cir. 1998), the Board held that, "when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) 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. If the employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures." Thereafter, in United Brotherhood of Carpenters and Joiners of America, Local Union No. 943 (Oklahoma Fixture Co.),¹ the Board "made it clear that when a union seeks to require an objecting employee to pay dues under a union security clause,

reasonable procedures must be available for filing challenges to the amounts charged.”

¹ 322 NLRB 825 (1997).

While the above requirement to have a challenge procedure is based upon the union’s duty of fair representation obligation, this requirement has as its genesis the Supreme Court decision in Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986). In Hudson, the Court held that first amendment considerations required, inter alia, that a union must give objectors “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker.” 475 U.S. at 310. The Court in Hudson, however, did not answer the question of whether agency fee objectors would be required to utilize or exhaust this arbitration remedy before commencing a federal-court action.

In ALPA, the Supreme Court answered the above question and held that agency fee objectors cannot be required to exhaust union arbitration procedures to challenge a union’s allocation of its expenditures despite the requirement in Hudson that the union make such an arbitration available to agency fee objectors. The Court found no basis for forcing into arbitration a party who never agreed to submit his claim arising under federal law to such a process.

The Court, however, acknowledged ALPA’s argument that arbitration was an efficient way to identify facts and issues in dispute and avoid multiple litigation. The Court also noted the union’s argument that “it is difficult to conceive how a court could fairly try an agency fee dispute ab initio, given that the plaintiffs who challenge an agency fee calculation are not required to state any grounds whatsoever for their challenge.” (158 LRRM at 2325).

In responding to the above union contentions, the Court viewed ALPA as overstating the difficulties of holding a federal-court hearing without a preparatory arbitration. Thus, in responding to ALPA’s assertions, the Court held that while prior court decisions found that an objector’s burden is only to make any objection known² and that the union retains the burden of proof,³ this does not mean that a plaintiff can file a generally phrased complaint and then require the union to prove the germaneness of all of its expenditures without any specificity from the objector. Specifically the Court held that,

Agency fee challengers, like all other civil litigants, must make their objections known with the degree of specificity appropriate at each stage of litigation their case reaches:

² Abood v. Detroit Board of Education, 431 U.S. 209, 241 (1977).

³ Hudson, 475 U.S. at 306 n.16.
motion to dismiss; motion for summary judgment;
pretrial conference (158 LRRM at 2325).

The Court stated:

The very purpose of Hudson's notice requirement is to provide employees sufficient information to enable them to identify the expenditures that, in their view, the union has improperly classified as germane. See 475 U.S. at 306-307. With the Hudson notice, plus any additional information developed through reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable. Although the union must establish that those expenditures were in fact germane, the shifted burden of proof provides no warrant for blocking dissenting employees from bringing their claim in federal court in the first instance, if that is their preference. (158 LRRM at 2326).

The Court's holding in ALPA is equally applicable to agency fee objector cases arising under the NLRA. In this regard, the Court made clear that the exhaustion of remedies doctrine has no application to any agency fee arbitration since such private unilaterally established arbitration is not encompassed within the normal application of exhaustion of remedies principles (158 LRRM at 2325). Thus, any requirement to arbitrate agency fee disputes must be based on the agreement of the agency fee objector. Absent such an agreement, the Court would not impede access to federal courts. (158 LRRM at 2324-25)

The same concern of the Court not to impede agency fee objectors' access to federal courts "for adjudication of their federal rights" (id. at 2326) is also shared by the Board and the Court concerning impeding access to Board processes. See

NLRB v. Industrial Union of Marine and Shipbuilding Workers, 391 U.S. 418 (1968), where the Supreme Court agreed with the Board's conclusion, 159 NLRB 1065 (1966), that a union violated Section 8(b)(1)(A) by expelling from membership a member who had filed an unfair labor practice charge against the union without first exhausting internal union procedures to resolve his dispute with the union, which he had accused of causing his discharge by his employer.

Consistent with Marine & Shipbuilding Workers, the Board has not required an employee to exhaust internal union procedures before filing an unfair labor practice charge alleging a breach of the duty of fair representation. See, e.g., IBEW Local 581, 287 NLRB 940, 948 fn. 25 (1987); IBEW Local 367, 230 NLRB 86, 94-95 (1977), aff'd 578 F.2d 1375 (3d Cir. 1978), cert. denied 439 U.S. 1070 (1979); IBEW Local 592, 223 NLRB 899, 902 fn. 10 (1976). In these cases, the unions had internal procedures for dealing with complaints about the operations of their hiring halls and argued that the Board should dismiss unfair labor practice charges relating to those operations because the disgruntled employees had failed to exhaust the internal union grievance procedures before filing their unfair labor practice charges. The Board rejected these arguments, holding that the employees had not forfeited their statutory rights even though they had failed to exhaust the internal union procedures. These conclusions reflected Board concern with preserving free and open access to the Board and its processes.

Finally, while the Board held in California Saw that RLA precedents premised on constitutional principles are not controlling in the context of the NLRA (320 NLRB at 226), the Board will look for guidance in Supreme Court RLA cases, particularly when the Court appears to be resting its analysis on the duty of fair representation (320 NLRB at 227 n.25). Further, in California Saw (320 NLRB at 232-233), the Board found that cases arising out of the NLRA share the same concern about fairness as public sector and RLA cases and that this fairness equated to a union's duty of fair representation. Therefore, in California Saw, 320 NLRB at 224 fn. 1, the Board agreed with the ALJ, who had held at 276-77, that deferral of the objectors' challenges to the union's internal dispute resolution procedure, including AAA arbitration, was not appropriate, relying on IBEW Local 581, supra. The Board specifically noted its agreement with the ALJ, even though no party had filed exceptions, as to this holding. The Board similarly found deferral inappropriate in Electronic Workers IUE (Paramax Corp.), 322 NLRB 1 n. 5

(1996), remanded on other grounds sub nom. Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997).

In summary, based upon duty of fair representation considerations alone, the weight of authority under the NLRA is that employees raising duty of fair representation claims cannot be required to exhaust internal union dispute resolution procedures before filing unfair practice charges. Since, as noted above, a union's Beck obligations flow from its duty of fair representation, it follows that Beck objectors similarly cannot be required to use internal union dispute resolution procedures to resolve their Beck disputes with a union.⁴ Instead, objectors have the right to present their fee disputes with unions directly to the Board.⁵ At the same time, however, agency fee objectors have the burden of making known their objections with the required degree of specificity.

⁴ Of course, objectors may choose to use a union's nonexclusive arbitration system instead of Board proceedings to challenge a union's charges. See ALPA, 158 LRRM at 2326. All cases raising questions concerning ULP charges attacking resulting arbitral awards should be submitted to the Division of Advice.

Applying these principles to the investigation and litigation of unfair labor charges alleging the charging of agency fees prohibited by Beck, it is initially noted that historically the Agency has required more than a generalized allegation of an unfair labor practice before proceeding with an investigation and merit determination. Thus, Casehandling Manual Section 10056.1 requires the charging party to file a statement outlining and be ready to submit proof concerning the basis for the charge, including dates, documents, and a list of witnesses. Failure to submit such evidence may result in dismissal. Also, CHM Section 10056.5 provides that only when the investigation of the charging party's evidence and pertinent leads points to a prima facie case should the charged party be contacted to provide evidence. This approach to the investigation of ULP charges, which includes allegations of improper charging of agency fees, is consistent with the Supreme Court's view in ALPA that the agency fee objector cannot meet his burden in litigation by merely filing a generalized challenge.

Accordingly, pursuant to the Manual and historical Agency practice, in charges filed with the Agency, the charging party

agency fee objector is required to explain why a particular expenditure treated as chargeable in a union's disclosure is not chargeable and to present evidence or to give promising leads that would lead to evidence that would support that assertion. Therefore, an unfair labor charge alleging improper agency fee charges should be dismissed if the objecting party generally asserts that he has been improperly charged and contends merely that it is the union's burden to prove the germaneness of all of its charges. Such a dismissal would be consistent with the Casehandling Manual and the Supreme Court decision in ALPA as discussed above. All cases raising questions as to whether the charging party has met this burden should be submitted to the Division of Advice.

Once the charging party has met his burden of presenting sufficient evidence which points to a violation, the burden is then on the "union to establish that the expenditures were in fact germane." ALPA, 158 LRRM at 2326. In this regard, during the investigation the union should be informed of the specific expenditures that are claimed to be non-chargeable and the specific evidence which raises doubt as to the validity of these union charges to objectors. If the union is unable to meet its burden of demonstrating that the expenditures were germane, complaint should issue. All cases raising questions as to whether the charged party has met this burden should be submitted to the Division of Advice.⁶

⁵ This is the same conclusion the D.C. Circuit Court reached in Abrams v. CWA, 59 F.3d 1373 (1995), where it held that a union violated its duty of fair representation when it required an objector to go through arbitration.

Once complaint has issued, the General Counsel has the burden of specifying the expenditures for which the union improperly charged objectors and why there is reason to believe that contention. The burden is then on the union to establish that the expenditures were in fact germane or properly allocated. This burden of proof was initially placed on the union in Railway Clerks v. Allen, 473 U.S. 113, 122 (1963) (the burden of proving the proportion of political to total union expenditures). The Court expanded this burden in Hudson by requiring the union to have an arbitration proceeding and then placing the burden on the union during arbitration to demonstrate the validity of the expenditure (475 U.S. at 316-308). Finally, in ALPA the Court placed the same burden on the union in federal court litigation which it has in the arbitration proceeding (158 LRRM at 2326).

This allocation of burden in unfair labor practice litigation is not inconsistent with NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), or with the General Counsel's obligation under Section 10(c) of the Act. It is clear that a union has a duty of fair representation obligation to charge an agency fee objector only those expenses germane to the union's representational role. We would also contend, based on Allen, Hudson, and ALPA, that since the union is in possession of all the facts and records, a union also has a duty of fair representation obligation to demonstrate the validity of the expenditures. Thus, once the General Counsel has presented evidence to establish a prima facie case that there is reason to believe that an objector was improperly charged, the union can defend against the General Counsel's case by showing that the charge was consistent with the union's duty of fair representation obligation of charging only for germane expenditures. The General Counsel ultimately prevails in his complaint that the union violated its duty of fair representation obligation if the union cannot finally demonstrate the validity of the expenditure.

⁶ Whether the union relies on an audit performed by an outside independent auditor is relevant to the question of whether the union has met its burden of proper allocation.

All questions not addressed by this memorandum should be submitted to the Division of Advice.

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