Release 25 Datz

UNITED STATES GOVERNMENT

memorandum

DATE: MAR 2 1 1978

REPLY TO ATTN OF: Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: IBEW, AFL-CIO
(National Constructors Association)
Cases 5-CC-871 and 5-CB-2422

IBEW, AFL-CIO and Local No. 534
(National Constructors Association)
Cases 5-CC-876 and 5-CB-2475

650-1125-0150; 650-1125-8100;
650-1125-2200; 650-6625; 650-8811-6701;
650-8833-2800; 650-8833-4400;
650-8833-9100; 560-7520-5000;
560-7520-5025; 560-7520-5063;
560-7520-5075-7500; 554-1450-7500;
554-1467-0100; 554-1467-3033;
542-6725-3300; 542-6725-5000;
542-3333-0100; 542-3333-1700;
542-3333-3300; 542-3333-6700

TO: William C. Humphrey, Director
Region 5

A.D. 05086

COPY

These cases were submitted for advice because they raise issues which are both novel in character and inter-Regional in scope. The charges in Cases 5-CC-871 and 5-CB-2422 allege that the International Union is engaged in an effort, on a nation-wide scale, to force unwilling contractors to accept an obligation to contribute to the National Electrical Industry Fund (herein "NEIF" or "Fund") by means of bad faith bargaining in violation of Section 8(b)(3), and by means of restraint or coercion in pursuit of objectives prohibited by Sections 8(b)(1)(B) and 8(b)(4)(A). Additionally, the Charging Party has requested Section 10(j) relief.

Also submitted for advice are 23 "local" charges from other Regions, involving identical allegations against various IBEW local unions as well as against the International. These cases will be disposed of individually, but are considered herein insofar as they relate to an alleged nation-wide effort on the part of the International to force unwilling contractors to sign agreements providing for contributions to the Fund. 1/

1/ This memorandum disposes of the "nation-wide" allegations of Cases 5-CC-871 and 5-CB-2422. However, these cases in addition to alleging that the International and various locals engaged in a nation-wide effort to force acceptance of the Fund, also allege separate violations by the International and these Locals in each of the local cases. To the extent that these two Region 5 cases allege localized violations, they are merely a duplication of the other charges filed in other Regions and will be dealt with by the other Regions. Accordingly, Region 5 can dismiss these allegations. However, there is apparently no charge in Region 12 covering the conduct of Local 323 and the International vis-a-vis Howard P. Foley Corp. Accordingly, those portions of the charges in Cases 5-CC-871 and 5-CB-2422 that deal with conduct by Local 323 and the International in regard to Foley in Region 12 have been transferred to Region 12 and have been assigned Region 12 case numbers. Finally, Cases 5-CC-876 and 5-CB-2475 were refiled in Region 16 as Cases 16-CC-597 and 16-CB-1358.

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5010-112

FACTS

The National Electrical Contractors Association (herein "NECA") and various locals of the IBEW have been parties to local collective bargaining agreements for many years. In connection with the renegotiation of these local agreements, it has been the practice of NECA and the IBEW to negotiate at the national level for certain provisions of national concern, and for any agreements thus reached to provide a pattern for the resolution of such issues at the local level. Other issues, including wages, are resolved locally.

1. The International's conduct through February 23, 1977.

Pursuant to this practice, the IBEW and NECA signed a new "national agreement" on December 6, 1976, which provided, in pertinent part, that:

> The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund. All construction agreements in the electrical industry shall contain the following language. [The terms of the Trust agreement establishing the Fund were then set forth.]

Among the purposes of the Fund, as set forth in the trust agreement, are promotion of the electrical contracting industry, educational research and experimentation, formulation of safety codes, introduction of employees to new products, safety training, market surveys and data collection, promotion of sound labor relations, payment of employers' costs of collective bargaining and grievance handling, and payment of all NECA expenses.

Under NECA's National Constitution and Bylaws, members are required to pay annual dues of $50 as well as service charges based on their productive labor payroll. Under the terms of the Trust Fund, a member fulfills his responsibility for the service charge requirements by paying the Fund contribution which is determined locally. Up to 1% of the employer's productive labor payroll may be required as a Fund contribution. The first .2% is forwarded to the Fund on a national level and the remainder may be used by the local NECA chapter.

On December 8, 1976, IBEW President Charles Pillard and NECA President Robert Higgins issued a joint statement of "Understandings and Interpretations" of the new agreement. In regard to the Fund, the parties stated, inter alia:

> " . . . that the intent of this Article is to insert the industry fund contribution language in all IBEW construction agreements containing the NEBF [National Electrical Benefit Fund — a Section 302 trust fund]

> language except those covering employees of utility companies and municipalities . . . . In return, NECA will provide basic service to electrical contracting employers, employing workmen obtained from the IBEW without regard to the affiliation of the individual employer with NECA."

On December 16, the International sent a letter to all inside and outside construction locals who have agreements with NECA chapters. In it, the IBEW set forth the changes in the National Agreement, listing changes in the agreement to be incorporated in Local Union - NECA agreements, to become effective July 1, 1977. It instructed the locals to meet with the applicable NECA chapters to amend the current agreements to include inter alia:

> "Article VI - Industry Fund. This is to be inserted in all IBEW - NECA agreements. You will be furnished, by separate letter, instructions for non-NECA Chapter agreements and other agreements with the 1% clause outside the construction industry." (Emphasis supplied).

On December 28, the IBEW sent a letter to all Locals having agreements containing the 1% NEBF clause. It detailed changes in the national agreement which included increasing employer contributions to NEBF to 3%, revising clauses pertaining to shift work, management rights and apprenticeship ratios, and stated that:

> "[F]or all agreements except the NECA Chapter construction agreements, the Local Union is to notify ALL employers who have agreements with the Local Union which presently contain the 1% clause and request that the agreement be opened by mutual consent to include the applicable sections in the agreement;
> * * *
> Article VI - Industry Fund. This is to be inserted in all inside and outside construction agreements."

On February 23, 1977, the IBEW sent letters to those Locals having agreements with either The Howard P. Foley Corporation (herein "Foley") or Commonwealth Electric Inc. (herein "Commonwealth"). 2/ This letter stated, in pertinent part, that:

2/ Charges were filed against the IBEW and 23 of its Locals in eighteen regions. Fourteen of these charges involve Foley and three involve Commonwealth. Six other contractors are involved in the remaining cases.

> "Where [the Employer] terminates its agreement (letters of assent), it has no agreement with the local union or the IBEW. IBEW Local Unions are not, of course, under any obligation to furnish men to any contractor without an agreement.
> "The local union must, if requested by [the employer], enter into separate negotiations with [it] and must, in accordance with Section 8(b)(3) . . . bargain in good faith. The Local Union must bargain for a complete agreement, and may not simply insist, on a "take-it-or-leave-it" basis, that [the Employer] accept all of the terms of the Local's agreement with the Chapter or sign a new Letter of Assent . . . . Local Unions may negotiate for better terms and conditions; however, they need not settle for lesser terms or conditions.

Although not set forth in the letter of February 23, it had been and continues to be the position of the International that it will not approve standard form letters of Assent "A" or "B" with modifications. 3/ These letters are standard forms, developed in 1960 and distributed by the International to the Locals. Letter of Assent "B" binds a signatory employer to the local collective bargaining agreement. Letter of Assent "A", in addition, designates the local NECA chapter, or other local electrical employer association, as the employer's bargaining representative until and unless the letter is revoked in accordance with its terms.

2. Conduct of various International Representatives in connection with several of the Local charges.

As set forth more fully in the individual cases, there is some evidence to suggest that International representatives behaved contrary to the instructions of the International's letter of February 23. The Charging Party contends that this conduct establishes that there was such a broad pattern of conduct as to warrant a finding that the International was responsible, on a nation-wide scale, for seeking NEIF by improper means. In view of this allegation, we briefly set forth at this point the evidence of International conduct. 4/

3/ The International will permit modifications in a letter of Assent in certain limited circumstances, e.g., where the parties have signed a "Limited Letter" restricting the type of work the employer may do, or where the "notice for termination" provisions have been altered. In addition, although a non-NECA employer cannot get a "modified" B, it can bargain for a wholly different "alternative" contract.

4/ The evidence is more fully set forth in the individual cases in which the International is considered responsible for local conduct.

On December 31, 1976, International Representative Namaden told Foley that he was under orders from Pillard to enforce the NEIF provision. If Foley did not agree to Namaden's proposals, including NEIF, it would suffer the consequences and would be better off cleaning up and leaving town. He repeated his statement in July, 1977, when Foley had not yet acceded to the Union's demand.

In April, May and June 1977, International Representative Moreland attended and assisted in Local 601's negotiations with Foley in Urbana, Illinois. Throughout those negotiations, ostensibly for the purpose of reaching a successor agreement excluding NEIF, the Union presented exorbitant demands, one of which would have increased Foley's wage costs approximately 42%.

On May 31, International Vice-President Malone interceded in Commonwealth's dispute with IBEW Local 16. He told Commonwealth that he could settle its dispute provided it agreed to the NEIF provision.

In July and August, International Representative Cook participated in Local 428's negotiations with the Kern County (Cal.) Electric Contractors Association (a local association not affiliated with NECA). Cook insisted upon contributions to the Fund, and when the employers suggested negotiating an agreement excluding NEIF, Cook presented exorbitant demands and warned the employers of dire consequences.

On September 8, International Vice-President Farnan attempted to resolve a dispute between Commonwealth and Local 12. He offered assurances that the IBEW would not enforce the Fund provision, provided Commonwealth assented to the local agreement including NEIF. However, when the Employer accepted Farnan's offer, he refused to agree in writing to the non-enforcement aspect of the agreement.

3. Conduct of the local unions.

The individual cases involve conduct by IBEW locals. That conduct is described more fully in the individual case memoranda. In brief, the evidence indicates that several local unions have unlawfully insisted on contributions to the Fund, sometimes in circumstances involving the direct participation of International representatives, as indicated supra, and sometimes not. Other locals allegedly insisted on the Fund, but in the context of negotiations for an initial 8(f) prehire agreement, or in the context of a national agreement whereby the affected employer had agreed to be bound by all provisions in local contracts, or outside the 10(b) period. There is no evidence that the remaining locals unlawfully insisted on contributions to the Fund or engaged in conduct from which such an object might be inferred. Instead, they offered in good faith to negotiate agreements not including the Fund.

ACTION

It was concluded that the charges in Cases 5-CC-871 and 5-CB-2422 should be dismissed, absent withdrawal, for the reasons set forth below. 5/

Section 8(b)(3).

An industry promotion fund is a non-mandatory subject of bargaining. Accordingly, insisting to impasse on the incorporation of the Fund in a collective bargaining agreement would violate Section 8(b)(3). Laborers' Local 264 (J.J. Dalton and Owen Glover), 216 NLRB 40; Metropolitan District Council of Philadelphia (McCloskey and Company), 137 NLRB 1583.

If a party presents a package in negotiations containing both mandatory and non-mandatory subjects, and the other party accepts the proposal, except for the non-mandatory features, the party presenting the package may not insist on the inclusion of the non-mandatory features, but may alter its proposal on mandatory subjects in light of the other party's refusal to accept the entire package. Nordstrom, Inc., 229 NLRB No. 70. Cf. Kent Engineering, 180 NLRB 86. However, where the proposed alternatives are so extreme as to preclude a reasonable expectation of acceptance, it may be concluded that the party making the proposals is still attempting to force an agreement on the package, including the non-mandatory subjects, thus violating Section 8(b)(3). So. Calif. Pipe Trades Dist. Council No. 16 (Aero Blumbing Co.), 167 NLRB 1004.

In the instant case, it was concluded that the International's course of conduct, culminating in the February 23 letter to its locals, was not violative of Section 8(b)(3). In this regard, it was noted that such conduct antedated the 10(b) period. 6/ Nor can such conduct be considered as casting an unlawful light on the events within the 10(b) period. In this regard, the evidence does not clearly establish that the conduct preceding February 23 evinced an object of forcing unwilling contractors to accept the Fund. Admittedly, the language in the national NECA-IBEW agreement, quoted supra, p. 2, 3, may be susceptible of an interpretation that the Fund must be included in all agreements between the parties to that agreement. However, the December 28th letter, which deals specifically with non-NECA members, states that the Fund provision will be "requested", not unlawfully insisted upon. Further, that conduct was clarified by the February 23 letter, which defined the International's objective of bargaining in good faith for an alternative contract in the event any contractor was unwilling to accept an unmodified Letter of Assent "B". This objective was considered to be a lawful one, consistent with Nordstrom, Inc., supra, in the absence of evidence that the February 23 letter was a sham, designed to mask covert attempts to force unwilling contractors to agree to the Fund provision. 6a/

5/ As noted supra, p. 1, the charges in the 23 local cases are being dealt with in separate memoranda.

6/ Bryan Mfg. Co., 362 U.S. 411.

6a/ The fact that the International does not ordinarily permit modifications of letters of assent does not require a contrary result. It appears that the International's policy extends to any modification, not just the "NEIF" modification. Further, it is clear that the International's policy while not per-permitting a modification, would permit the negotiations of a completely different contract.

Finally, the evidence was viewed as insufficient to establish that the International had embarked upon a course of conduct aimed at unlawfully securing agreement by unwilling contractors to the Fund provisions. In this regard, evidence in the related local cases establishes International responsibility for such unlawful conduct on the part of only 2 of 12 International Vice-Presidents, and only 3 of approximately 250 International representatives.

The evidence in the local cases also establishes that 5 Locals engaged in unlawful conduct aimed at requiring contributions to the Fund. However, the mere fact that a local union carries out a lawful International policy in an unlawful way does not, without more, implicate the International in the local's act. IBEW, Local 5 (Franklin Electric), 121 NLRB 143; Local No. P-575, Meat Cutters (Iowa Beef Packers, Inc.), 188 NLRB 5; UAW, Local 1303 (Jervis Corp., Bolivar Division), 192 NLRB 966. 7/

Finally, it was recognized that the International was responsible, along with its locals, in five of the cases. 8/ However, the conduct of these International representatives in these few cases was not deemed sufficient to warrant a finding that the International was engaged in a nation-wide effort unlawfully to require contributions to the Fund. 9/

Section 8(b)(1)(B).

Restraining or coercing an employer to require contributions to an industry promotion fund violates Section 8(b)(1)(B), since participation in the fund necessarily amounts to a designation of the employer association as an employer's " . . . collective bargaining representative for the purposes encompassed in the administration of such fund." Dalton and Glover, supra; McCloskey and Company, supra. However, in the instant case, there is insufficient evidence of conduct on the part of the International to establish a nation-wide plan to restrain or coerce unwilling contractors to agree to contribute to the Fund. 10/ In this regard, the suggestion in the February 23 letter that locals are not under an obligation to furnish men without an agreement was not viewed as a direction to withhold men in support of an unlawful

7/ Sheet Metal Workers Intl. Assn. (Burt Manufacturing Co.), 127 NLRB 1629 was considered distinguishable due to the extremely close relationship between the International and the local in that case, e.g., under the International Constitution, the local was constitutionally bound to support the International's policies. Id. at 1666-1667.

8/ The basis for this finding is found in the statements of the International representatives, as summarized supra and set forth in further detail in the individual cases.

9/ In this regard, it was also noted that the International approved agreements negotiated by at least 17 Locals which excluded the Fund.

10/ Again, this conclusion relates to the question of a national effort coordinated by the International. The question whether the International may be liable for the acts of certain of its representatives in the various local cases is dealt with in the memoranda in those cases.

demand for contributions to the Fund. Rather, this statement, read in the context of the letter, was viewed as relating to pressure which locals might lawfully use in support of good faith bargaining for either an Assent "B" or for some alternative not containing the Fund provisions. Cf. Columbus Building and Construction Trades Council (The Kroger Co.), 149 NLRB 1224.

Section 8(b)(4)(A).

Restraining or coercing an employer to bargain as though he were part of a multi-employer association may constitute 8(b)(4)(A) conduct, even where the employer is not forced to become a formal member of the association. Frito Lay Inc. v. IBT, 401 F. Supp. 370. However, it was concluded that the Frito Lay rationale would not apply in the circumstances of this case, even if it were to be found that the February 23 letter suggested the withholding of men with an object of requiring employers to contribute to the Fund. In Frito Lay, the employer was forced to act, for all intents and purposes, as though he were a member of the employer association. In such circumstances, the court concluded that the Union was forcing him to become a de facto member of the association. In the instant case, even if there were strike pressure with an object of forcing employers to contribute to the Fund, it is clear that the Fund itself is not an employer association within the meaning of Section 8(b)(4)(A). 11/ Moreover, assuming that the contributions to the Fund were viewed as the equivalent of NECA dues, requiring such contributions would not require the employers to adopt any indicia of membership beyond payment of the fees and such other indicia as to which the employers have voluntarily acquiesced. 12/ In this regard we note that Letter of Assent "B", unlike Letter of Assent "A", historically has not been regarded as establishing more than a "me-too" signatory relationship. Thus, compelling acceptance of a Letter of Assent "B", with the Fund provision now included, varies from prior practice only in that it would obligate an employer to pay certain fees, part of which would defer the expenses of of services which the employer assents to by signing the letter. The payment of these fees, in these circumstances, was not viewed as establishing membership in NECA, de facto or otherwise, within the meaning of Section 8(b)(4)(A). 13/

11/ The Fund has no members, as such, and does not exist for the purpose of engaging in collective bargaining.

12/ Cf. Associated Musicians of Greater New York, Local 802, AFM (Random Travel, Inc.), 171 NLRB 1106.

13/ The Charging Party points to the fact that dues payments by employees satisfy the "membership" obligations of a union security provision. However, this is so because the dues payments alone eliminate the problem of the "free rider." This, of course, does not establish that dues payments are the equivalent of membership for all purposes of the Act, including the very different purpose served by 8(b)(4)(A).

In view of the disposition of the national charges herein, Section 10(j) relief would be inappropriate.

Remedy for International misconduct in the individual cases.

Although the evidence does not establish that the International engaged in a nation-wide effort to secure NEIF through unlawful means, the evidence does establish that the International engaged in five instances of misconduct along with its locals. In view of these repeated instances of misconduct, involving more than one employer, the Regions that will be proceeding against the International should seek a broad cease and desist order for the 8(b)(3) and 8(b)(1)(B) misconduct, i.e., an order that covers not only the particular employer involved but also "any other employer." 14/

H.J.D.

14/ The other special remedies in the local cases are set forth in the separate memoranda in those cases.