

*Ask Rule*

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 94-84

September 15, 1994

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

FROM : William G. Stack, Associate General Counsel

SUBJECT: Training Monographs Concerning Union Security and  
Guidelines for Taking Affidavits

Under separate cover, you will be receiving a supply of Training Monograph No. 15, Union Security, and Training Monograph No. 16, Guidelines for Taking Affidavits.

Monographs have issued earlier with respect to Section 10(b); Solicitation/Distribution Rules; Duty of Fair Representation; Jurisdiction and Coverage of the Act; Duty to Furnish Information; Wright Line; Section 10(j); Hiring Halls; Procedural Bars to the Litigation of Unfair Labor Practice Charges; Backpay; Deferral of Unfair Labor Practice Charges; Section 8(b)(4)(B) of the Act; Successors and Alter Egos; and Sequestration of Witnesses in Administrative Proceedings.

As noted in prior memoranda, these training monographs are intended to provide a general introduction to the subject, rather than an exhaustive treatment, and should serve as a focal point for additional discussion between employees and supervisors. It is recommended that you place at least one copy of each monograph in a binder in your library.

I wish to thank Supervisory Examiner Donald Gardiner of Region 14, St. Louis, for his work in developing Training Monograph No. 16 and the Division of Advice for their assistance to the Division of Operations-Management staff in developing Training Monograph No. 15.

  
W. G. S.

cc: NLRBU

MEMORANDUM OM 94-84

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

UNION SECURITY<sup>1</sup>

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Furthermore, Section 7 of the Act provides employees "the right to self-organization, to form, join, or assist labor organizations . . . and the right to refrain from [doing so]."

While the Act preserves the right of employees to refrain from union activity, it also permits the parties, employer and union, to a collective-bargaining contract to agree to charge unit employees for the union's costs of representation. This is commonly referred to as a "union-security" clause. In short, the parties can ensure "that there [are] no employees who are getting the benefits of union representation without paying for them."<sup>2</sup> Thus, under a proviso to Section 8(a)(3) [please consult a copy of the Act for exact language], employers and unions may enter into union-security agreements requiring (except in those states

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<sup>1</sup> This training monograph is designed to provide Agency employees with a general introduction to union security and to serve as the basis for further discussion between employees and their trainer. It is not intended as an exhaustive treatment of the topic. As always, users are responsible for verifying the current state of the law when actual case situations arise.

<sup>2</sup> *Oil Workers v. Mobil Oil Corp.*, 462 U.S. 407, 92 LRRM 2737, 2740 (1976).

banning such agreements; see discussion below) all employees in a given bargaining unit to become "members" 30 days after being hired.<sup>3</sup> However, the Supreme Court has interpreted the term "member" to require only the payment of periodic dues and fees. As the Court concluded, "the membership that is required has been whittled down to its financial core."<sup>4</sup> Moreover, the Supreme Court has held that "full" union members may resign from that status at any time, and become financial core members.<sup>5</sup>

In accordance with the concept of "financial core membership, a union cannot require attendance at meetings or other incidents of membership as a condition of employment."<sup>6</sup> Furthermore, the payment of dues or their equivalent can only be compelled if this requirement is expressed in "clear and unmistakable terms" in a collective-bargaining agreement.<sup>7</sup> Union members cannot be compelled to pay dues after the expiration of a collective-bargaining agreement containing a union-security clause<sup>8</sup> or during periods of permanent unemployment.<sup>9</sup> As noted

<sup>3</sup> Pursuant to Section 8(f), employees in the construction industry are given only a 7-day grace period in which to become financial core members of the union.

<sup>4</sup> *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 53 LRRM 2313, 2316 (1963).

<sup>5</sup> *Pattern Makers League v. NLRB (Rockford-Beloit Pattern Jobbers)*, 473 U.S. 95, 119 LRRM 2928 (1985).

<sup>6</sup> *Union Independiente de Trabajadores de Servicios Legales de Puerto Rico (Corporacion de Servicios Legales de Puerto Rico, Inc.)*, 277 NLRB 1510 (1986).

<sup>7</sup> *District Lodge 727, International Association of Machinist and Aerospace Workers, AFL-CIO (Lockheed California Co.)*, 266 NLRB 12, 112 LRRM 1303 (1983).

<sup>8</sup> *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376 (Emhart Industries)*, 278 NLRB 285 (1986).

<sup>9</sup> *Local Union No. 277 International Brotherhood of Painters and Allied Trades (Del E. Webb New Jersey Inc.)*, 278 NLRB 169 (1986).

above, a union can require the payment of dues and initiations fees, but upon proper objection the nonmember employee can reduce these "dues" to only those moneys spent on representational activities by the union. The Supreme Court, in a 1988 decision, *Communications Workers v. Beck*, dealt with the issue of employee objections to the use of dues for only representational activities.<sup>10</sup>

#### Dues Checkoff

Unions often collect dues through a dues-checkoff system whereby funds are deducted from employees' paychecks. Dues checkoff, just as union security, is dependent on a collective-bargaining agreement. The Board, pursuant to Section 302(c)(4) of the Act, requires that the individual employee's execution of dues-checkoff authorization be written and entirely voluntary.<sup>11</sup> Further, these authorizations can be irrevocable for stated periods so long as the employee can revoke his authorization at least once a year and at the termination of any collective-bargaining agreement.<sup>12</sup>

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<sup>10</sup> In *Beck*, 487 U.S. 735, 128 LRRM 2729 (1988), the Supreme Court held that "Section 8(a)(3) authorized the exaction of only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." Therefore, the NLRA does not "permit a union, over the objection of dues paying nonmember employees to expend funds . . . on activities unrelated to collective bargaining, contract administration or grievance adjustment." Board agents should consult with their supervisors as to the applicability of *Beck* when dealing with cases involving union-security issues. It should also be noted that at the time this monograph issued, a number of unfair labor practice cases raising *Beck* issues were pending determination by the Board.

<sup>11</sup> *Air La Carte, Inc.*, 284 NLRB 471, 125 LRRM 1161 (1987).

<sup>12</sup> See Section 302(c)(4) of the Act, and the proviso thereto.

The Board has held that a union can require a former member to continue checkoff deductions, despite his or her resignation from the union, if the checkoff authorization clearly and unmistakably states that the employee will pay dues in the absence of union membership.<sup>13</sup> Absent such a clear intention, the Board has held that a resignation also operates to cancel a checkoff authorization, at least where there is no union-security clause.<sup>14</sup>

It should be noted that at the time this monograph was prepared, the Board had not yet decided whether a resignation operates to cancel a checkoff where the contract also contains a union-security clause. The General Counsel's position in this situation is that the result depends on the language of the checkoff authorization. Therefore, the precise language is critical to a determination whether the checkoff was canceled. Board agents should keep abreast of developments in this area of law and consult with their supervisors when confronted with such issues.

#### "Right-to-Work" States

In certain states, often referred to as "right-to-work" states, employers and unions are barred from union-security agreements. This exception exists because the Taft-Hartley

<sup>13</sup> *United Steelworkers of America, Local 4671 (National Oil Well, Inc.)*, 302 NLRB 367 (1991). In the Postal Service, however, a union can require a newly resigned member to continue his checkoff where the checkoff authorization mirrors the language of the Postal Reorganization Act. *United States Postal Service*, 302 NLRB 332 (1991).

<sup>14</sup> *International Brotherhood of Electrical Workers, Local 2088, AFL-CIO (Lockheed Space Operations Co., Inc.)*, 302 NLRB 322 (1991).

amendments to the Act, under Section 14(b), empower the states to prohibit union-security agreements. In other words, Section 8(a)(3) permits union-security agreements unless there is a state law outlawing such provisions. As of this writing, 21 states<sup>15</sup> have "right-to-work" laws on their books. However, dues checkoff is not prohibited in right-to-work states. That is, if an employee chooses to pay dues and further chooses to pay them through a payroll deduction system, agreed to by the employer and union, then the state cannot forbid that arrangement.

#### Section 19

Another provision of the Act which affects union security is Section 19.<sup>16</sup> Under that Section, "any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment. . . ." However, such employees may be required, in lieu of periodic dues, to pay sums equal to such dues, to a

<sup>15</sup> Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. However, "right-to-work" laws differ from state to state. Check with your supervisor when the case you are investigating arises in one of these states.

<sup>16</sup> The reader should be aware that in 1990, the Sixth Circuit found Section 19 to be unconstitutional for violating the establishment clause of the First Amendment because it confines the benefit of the exemptions to members of a particular category of religious organizations. *Wilson v. NLRB*, 902 F.2d 1282, 135 LRRM 3177. The Supreme Court declined to grant certiorari. 112 S.Ct. 3025, 140 LRRM 2624.

nonreligious, nonlabor organization, charitable, tax exempt fund, chosen by the employee from a list of at least three such funds designated in the collective-bargaining agreement.<sup>17</sup>

#### Union-Shop Deauthorization Elections (UD)

Although union-security provisions are negotiated by employers and unions as part of a collective-bargaining agreement, the employees covered by such an agreement may vote to rescind the union-security provision from the labor contract. Pursuant to Section 9(e)(1) of the Act, employees covered by a union-security agreement may petition for a union-shop deauthorization (or UD) election to determine whether a majority of the bargaining unit employees desires to rescind the authority of the union to require union membership (as defined herein) as a condition of employment. Board agents should consult Section 11500-11506 of the Casehandling Manual (Representation Proceedings) for further details regarding this type of election.

Obviously, the foregoing is not intended to be a comprehensive treatment of the entire body of union-security law. Rather, it is intended merely to acquaint you with some of the issues with which you may be confronted during the investigation of a ULP charge. It is suggested that you read the cases that have been cited herein, as well as other cases your supervisor and/or mentor may suggest.

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<sup>17</sup> If a party raises the applicability of *Beck*, supra, to Section 19, be sure to consult your supervisor for further guidance.

SUMMARY

While your supervisor will provide you with information about how to investigate an unfair labor practice charge with respect to union dues, the following key points should be kept in mind:

1. Section 8(a)(3) permits employers and unions to enter into union-security agreements, provided that they express in "clear and unmistakable terms" in a collective-bargaining agreement the requirement to pay dues or their equivalent.

2. The Supreme Court has held that "membership" as it is used in the proviso to Section 8(a)(3) requires only the payment of periodic dues and fees. Moreover, the Court has also held that "full" members may resign from membership at any time, but if there is a valid union-security clause, resignation does not relieve the employee of the obligation to pay the union the equivalent of union dues. In addition, the Court has held that nonmember employees cannot be required as a condition of employment to contribute to nonrepresentational expenses.

3. The Act also allows unions to collect dues through a dues-checkoff system whereby the funds are deducted from employees' paychecks. This system is set up pursuant to a collective-bargaining contract, and the authorization by employees must be written and voluntary.

4. While Section 8 permits union-security agreements, Section 14(b) allows states to pass legislation (commonly referred to as "right-to-work" laws) prohibiting such agreements within that state.

5. Section 19 of the Act places an additional limitation upon union security in that it allows employees with certain religious beliefs to refrain from union activity, including the payment of any dues. That Section allows such employees to pay the equivalent to a charitable organization rather than to the union.

6. Pursuant to Section 9(e)(1) of the Act, employees covered by union-security agreements may rescind such agreements in a union-shop deauthorization election (UD).

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

GUIDELINES FOR TAKING AFFIDAVITS

INTRODUCTION

The quality of any investigation, and the soundness of the Region's merit determination, rely in significant part on the affidavits obtained by the Board agent during the course of the investigation.<sup>1</sup>

The affidavit is the keystone of the investigation and requires a very careful recording of facts offered by, and elicited from, the witness. In addition to serving as the basis for a merit determination, the affidavit also provides a reliable means of refreshing witnesses' recollection if later testimony is needed.<sup>2</sup>

Advance preparation is critical to taking a high quality affidavit. The Board agent should develop a list of questions or areas of inquiry in advance of the interview, consulting as applicable with the supervisor when the case presents an

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<sup>1</sup> This monograph is designed to provide general guidance for Agency employees and to serve as a basis for further discussion with the trainer. As usual, Board agents should follow the investigative practices in their Region and consult with the supervisor with respect to practical application of the principles discussed below.

<sup>2</sup> Pursuant to Section 102.118(b), (c), and (d) of the Board's Rules and Regulations, counsel for the General Counsel must produce at trial relevant portions of the affidavit of a witness he or she has called to testify in order that the respondent's counsel may use the affidavit for purposes of cross-examination. See Sections 10059.2 and 10394.7 of the National Labor Relations Board Casehandling Manual (Part One) Unfair Labor Practice Proceedings, for further information.

unfamiliar issue. It is also important to review the file(s) in any applicable prior case(s) filed by the same charging party or in which the charging party was a witness. When the case presents a legal issue, the Board agent should conduct necessary research before the interview to ensure that all relevant areas of inquiry are covered.<sup>3</sup>

At the start of the interview, the witness should be given a brief explanation of the interview process, emphasizing that at the investigative stage, the Board agent is a neutral who is not an advocate of any party, and that the purpose of the interview is to gather information which is necessary to a Regional determination. During the interview, the agent should always maintain a position of neutrality.

#### GUIDELINES

In taking the affidavit, the agent should be keenly aware of certain guidelines:<sup>4</sup>

##### Orderliness

It is always desirable that the affidavit present a meaningful chronology. For that reason it is helpful to "talk through" the evidence to be presented before an affidavit is actually reduced to writing. For example, the affidavit in an 8(a)(3) discharge case should include a chronological recitation

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<sup>3</sup> At the time of making arrangements for the interview, it is helpful to advise the witness of the need to bring relevant documents (e.g., discharge letter).

<sup>4</sup> This monograph assumes a cooperative witness. Reluctant or uncooperative witnesses present a different situation. Board agents should seek advice from their supervisor in dealing with the latter situation.

of events relating to the alleged discriminatee's union activity and the events surrounding the allegedly discriminatory action. An 8(a)(5) course of conduct bad-faith bargaining investigation would logically require an affidavit that addresses the bargaining sessions in chronological order.

Similarly, affidavits for the purpose of resolving supervisory status or the eligibility of a challenged voter should address, in logical order, a general description of the employer's operations, the supervisory hierarchy, a general description of the layout of the workplace, followed by a step-by-step description of a typical workday and, thereafter, "catch all" questions to fill in any gaps.

#### Specificity

The Board agent must endeavor to include specifics in the affidavit, not conclusions. When recording a relevant conversation between or overheard by a witness and a supervisor, it is insufficient to record "Supervisor Jones threatened me with discharge if I kept passing out cards." Specificity requires inquiry into and recording of, "On Friday, May 15, I was working at my machine about 10 minutes before quitting time (4:30 p.m.) when Supervisor Jones approached me and said, 'There's something I want you to think about over the weekend. If you keep pushing the Union, you're going to find yourself out of a job real fast.' I was so caught off guard by his comment that I just said, 'I'll give it some thought,' and Supervisor Jones just walked away. I don't know if anyone else heard that. Mike Smith and Joe Murphy

work right next to me, but it's pretty noisy around our machines."

Specificity also requires inquiry into the source of a witness' purported knowledge. Rather than recording the conclusion, "I know Connors isn't the worst producer in the plant," the Board agent should have the witness identify the basis for the conclusion, e.g., "I know Connors isn't the worst producer in the plant because the weekly production figures posted in the plant always show him right about in the middle."

Another example of the need for specificity arises with respect to supervisory issues. The witness may assert that Smith is his supervisor, and that Smith questioned him concerning union activities. The Board agent should ascertain whether it is clear that Smith possesses one or more of the supervisory indicia set forth in Section 2(11) of the Act. If this presents a close question, the affidavit should cover the necessary information for the Region to make a determination on this point.

Remember, in seeking the specifics of a conversation or event always ask the questions "who, what, when, where, why and how."

#### **Inquire Beyond What the Affiant Offers**

The Board agent should take an active role in questioning the witness, and probe carefully for necessary details and potential sources of additional information. Similarly, any assertion by the witness which, on its face, is not intuitively obvious warrants further questioning (e.g., a witness asserts

that employees may be 2 hours late for work in the morning without calling in).

Some Board agent inquiries may involve areas into which the witness was not planning to venture, and/or which the witness does not view as helpful to his or her case. The agent should be firm in pursuing necessary areas of inquiry, explaining if necessary that the purpose of the interview is to secure all relevant information, and not just that which may be favorable to the charging party's theory.

For example, in an 8(a)(3) discharge case, the alleged discriminatee should be questioned concerning whether he or she had received any prior discipline, particularly for the conduct which assertedly led to the discharge. Thus, if the discharge was based upon absenteeism, the Board agent should ascertain whether there was any prior discipline for absenteeism or any other reason.<sup>5</sup>

Often, a witness' statement concerning what did not happen can be as important as what the witness says did happen. The agent should probe carefully into what the witness knows did happen and knows did not happen. For example, an alleged discriminatee asserts that he was disparately disciplined for tardiness, and cites the example of a known anti-union employee with tardiness problems who was not disciplined. It would be

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<sup>5</sup> If a charging party affidavit is taken after the charged party's position is known, and/or their evidence received, the affidavit should reflect the witness' response to that position or evidence. For example, "Joe did not tell me, in words or substance, that my performance was unsatisfactory in any way, and that unless I improved, my job would be in jeopardy."

helpful to inquire, and include in the affidavit, whether the witness is presently aware of any other anti-union employee with tardiness problems who was not disciplined.

#### Form of the Questions Asked

Board agents should frame their questions so as to allow for an open-ended response, and should try to avoid the use of leading questions. Rather than asking, "Did Supervisor Jones, or any supervisor, ever tell you that Connors was fired because of the Union?" the agent should first ask, "Did Supervisor Jones, or any supervisor, ever tell you why Connors was fired?"

#### Relevancy

If the agent has some doubt as to the relevancy of certain evidence or testimony, it is safer to err on the side of including it. If it is irrelevant, it won't be considered, and a protracted discussion with the witness concerning relevancy may result in wasted time, losing the witness' cooperation, or a complaint regarding the agent's conduct and perceived bias.<sup>6</sup>

#### Hearsay

It is not necessary to exclude hearsay from affidavits solely on the basis that it is hearsay. If direct evidence of the hearsay is later obtained, the hearsay evidence will corroborate it. Also, hearsay evidence will indicate the extent

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<sup>6</sup> If a question of including or excluding something is troublesome, the Board agent should confer with his or her supervisor during a break in the interview.

of dissemination of the conduct, and possibly refute any contention that the conduct, if it occurred, is isolated.

#### Documents

Documents received during the course of an investigation should be examined carefully to make sure that they are self-contained. If necessary, further explanation should be sought. If a document is to be part of the affidavit, it should be marked as an attachment and identified in the body of the affidavit. For example, "Attached as Exhibit A is a copy of the warning letter which I received." If something contained in a document is unclear to the Board agent, in all probability, any reviewer of the investigative file will encounter the same difficulty. Thus, it is important to resolve these questions at the time of the interview in order to avoid the need for a later follow-up.

#### Dates

Witnesses are sometimes reluctant to be pinned down on the date of a particular event, but establishing the date with as much certainty as possible becomes very important, especially in terms of how that date relates to another event (e.g., whether a threat of discipline occurred before or after the affiant engaged in union or protected concerted activities) or whether the event occurred within the 10(b) period.

When a witness is reluctant to assign a date to a particular event, the Board agent should try to relate the event to some other easily remembered date in the affiant's memory such as

birthdays, holidays, another easily remembered date of an event in the witness' work life such as a prior discipline, a grievance filing, the date a strike or organizing drive began, etc. Placing the event you want to date as close as possible to some other remembered event will usually spark the affiant's memory. Having a calendar to refer to during the interview also assists in pinpointing dates.

### Using Affiant's Language<sup>7</sup>

The Board agent should strive to have the affidavit prepared in the words of the affiant, i.e., using words and phrases which the witness would use in telling the story himself or herself. Thus, if the witness, in relating what happened, said that the supervisor "bawled him out," that term should be used rather than, for example, "reprimanded."

### Quotes

The Board agent should also strive to use exact quotations wherever possible. Affiants may be reluctant to place a particular statement or conversation in quotes, but it is important to know what was said with as much certainty as possible in order to decide whether the statement was unlawful. Thus, a statement by a witness that a supervisor said words to the effect that, "I would be fired for continuing my union activity" should prompt careful questioning as to the specific

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<sup>7</sup> Some witnesses may not speak or read English, or at least may not have sufficient command of the language to provide an affidavit in English. Board agents should consult with their supervisor as to the applicable Regional procedures for taking an affidavit under these circumstances.

words used, and prompt the use of quotations if the specificity of recollection warrants this.

#### SUMMARY

1. The affidavit is the keystone of the investigation. Board agents should prepare carefully for the interview and make sure that all relevant areas of inquiry are covered.

2. The Board agent should take an active role in questioning the witness and maintain a position of neutrality.

3. Following the guidelines set forth above, the Board agent should ensure that the affidavit provides an accurate and thorough account of the relevant facts.