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

Advice Memorandum

DATE: November 18, 2015

TO: Joseph Frankl, Regional Director
Region 20

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

SUBJECT: California Nurses Association (Kaiser Permanente South Sacramento)
Case 20-CB-148342

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This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) by using dues and fees collected from *Beck* objectors for (1) the Union's nationwide organizing expenses, and (2) the Union's expenses involving "regulatory monitoring and advocacy activities and legislative advocacy." We agree with the Region that both charges should be dismissed, absent withdrawal, because (1) the Union's pooled funds are reciprocal in nature, and the Union has demonstrated a positive relationship between its nationwide organizing expenses and the terms and conditions of bargaining unit employees in the competitive market, and (2) the Union's description of chargeable regulatory and legislative advocacy expenses is lawful under *Kent Hospital*[1] and the Charging Party has presented no evidence to support its generalized allegation that they are not germane to collective bargaining, contract administration, or grievance adjustment.

FACTS

Since 2014, the Charging Party, who is a registered nurse, has been employed by The Permanente Medical Group and Kaiser Foundation Hospital (collectively "the Employer") at its South Sacramento facility. The Employer and the California Nurses Association (the "Union") are parties to a collective bargaining agreement containing a union security clause that requires bargaining unit employees to be Union members in good standing. The bargaining unit covers the approximately 18,000 registered nurses employed at the Employer's facilities in northern California. The Union is an

[1] *Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (2012). *Kent Hospital* was issued by a panel that under *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014), was not properly constituted. It is the General Counsel's position that *Kent Hospital* was soundly reasoned.

affiliate of National Nurses United ("NNU"), a national union organization that directly represents nurse members in a single national union and NNU affiliates.

The Union and the Employer began negotiating for a new collective bargaining agreement in April 2014 and ended in January 2015 when the agreement was ratified by bargaining unit members. During bargaining, the Employer released a series of bargaining updates and press releases highlighting the parties' progress during negotiations. The updates included statements such as: "[O]ur proposals for wages and medical benefits for current employees would keep our nurses' wages and medical benefits among the best in Northern California;" "Nationally, the number of large employers providing any retiree health coverage has dwindled down to about 25 percent" (regarding the Employer's proposals to change retiree health benefits); and "[The Employer] is one of the best-staffed health care systems in California and the nation. Our nurse staffing always meets, and often exceeds, state-required levels."

Around November 17, 2014, the Charging Party resigned her Union membership and requested to be a *Beck* objector. On February 12, 2015 the Charging Party received copies of the monthly magazines from the Union and NNU, which included the respective unions' annual consolidated financial statements, *Beck* notices, and protest procedures for non-members who do not agree with the unions' determination of chargeable and non-chargeable expenses. The *Beck* notices each contain nearly identical sections on activities germane to the respective unions' representational role. Included in the activities the unions consider germane, are the following sections:

> Regulatory monitoring and advocacy activities and legislative advocacy at the national, state, and local levels to protect and improve terms and conditions of work and practice of nurses represented by [the Union], including advocacy related to particular corporate and community campaigns to maintain local health facilities and prevent hospital closings, cutbacks in critical and emergency healthcare systems, and abandonment and withdrawal of healthcare services from selected communities.
>
> Legislative and regulatory initiatives that directly and positively affect the working and practice conditions of direct-care registered nurses generally (on a state or national basis) and provide a foundation and framework for collective bargaining-based representational activities to improve working, practice, and economic conditions for represented nurses with specific healthcare providers, provider systems, and other employer groupings . . . including policy and regulatory changes that directly and positively affect healthcare service delivery methods

> that may ultimately inure to the benefit of all registered nurses represented by [the Union] . . .

The *Beck* notices also contain a section outlining expenses not charged to non-member agency fee payers. They include:

> Lobbying for purposes unrelated to [the Union's] representational role.
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> Political action including legislative campaign activities not related to [the Union's] representational role.
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> Political campaigns and activities in support of candidates for elected office.

The Charging Party alleges that the Union's expenses related to organizing registered nurses outside of the Sacramento area are non-chargeable to *Beck* objectors because they are located outside the Employer's competitive market; and that the Union's activities related to "regulatory monitoring and advocacy activities and legislative advocacy" are non-chargeable to *Beck* objectors because they do not pertain to ratifying or implementing collective bargaining agreements or to collective bargaining, contract administration, or grievance adjustment.[2]

ACTION

We conclude that both charges should be dismissed, absent withdrawal, because (1) the Union's pooled funds are reciprocal in nature, and the Union has demonstrated a positive relationship between its nationwide organizing expenses and the terms and conditions of bargaining unit employees in the competitive market, and (2) the Union's list of chargeable regulatory and legislative advocacy expenses is lawful under *Kent Hospital* and the Charging Party has presented no evidence to support its generalized allegation that they are not germane to collective bargaining, contract administration, or grievance adjustment.

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[2] The Charging Party did not file an internal objection under either of the unions' protest procedures outlined in their *Beck* notices.

A. The Union's National Organizing Expenses Are Chargeable to *Beck* Objectors

1. The extra-unit expenditures are chargeable to *Beck* objectors because they are reciprocal in nature.

Extra-unit expenditures may be chargeable if they are reciprocal in nature. 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 litigation is reciprocal in nature.[3] 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."[4] The Court further expressly linked its reciprocity standard to the inure-to-the-benefit test annunciated in *Lehnert*.[5] There, 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."[6]

Here, the Union provided evidence that the dues and fees collected from various locals are pooled together and made available for any bargaining unit's organizing expenses. Thus, the Union's collected funds are reciprocal in nature. Further, they ultimately inure to the benefit of the members of the Charging Party's local. This was the case during the most recent round of collective bargaining for the contract ratified in January 2015, where pooled funds were used to pay for collective bargaining expenses. Moreover, the Union recently became the certified representative at other hospitals in the state and is moving forward with efforts to organize additional hospitals. These additional dues and fees will be made reciprocally available for representation and organizing expenses to the Charging Party's unit, and may ultimately increase overall wage rates, including those of the Charging Party's unit.

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

[4] *Id.*

[5] *Id.* at 219-20.

[6] *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991).

2. The extra-unit expenditures are also chargeable to *Beck* objectors because the Union has demonstrated the requisite relationship between unit employees' wage levels and the level of organization of employees of other employers in the same competitive market.

The Board has made it clear that a union may charge nonmember employees for its organizing expenses so long as the union demonstrates a direct, positive relationship between the wage levels of employees it represents and the level of organization of the employees of employers in the same competitive markets as these employees. Thus, in *Meijer*, the Board held that a local union lawfully charged nonmember objectors for expenses incurred in organizing employees within the retail food industry, where the union presented specific and extensive evidence, including the testimony of economic experts and that of union representatives regarding their experience in bargaining, establishing a relationship between the level of organization in the retail grocery industry and the union's ability to negotiate higher wages in the same metropolitan area.[7] By contrast, the Board in *Schreiber Foods* found that the union unlawfully charged nonmember objectors for expenses incurred organizing the employees of other employers within the dairy and cheese processing industry, although it was the competitive market of the employer.[8] The Board explained that the union failed to show the required "nexus between the actual organizing activities the [union] undertook and a benefit to the objectors' bargaining unit."[9] The Board further explained that, unlike in *Meijer*, the expert testimony was limited to academic research supporting the "generalized proposition" that increased expenditures in organizing will typically result in increased membership for the union; and that the union's testimony never developed beyond the purpose of the union's organizing efforts to a discussion of the actual effects of those efforts.[10]

Here, the Union has provided sufficient evidence to show the requisite nexus between its national organizing efforts and the resulting direct and positive relationship to the Charging Party's bargaining unit. Specifically, the Union provided a national study showing that unionized registered nurses in hospital settings receive, on average, 8% higher wages than their non-unionized counterparts through

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[7] *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer)*, 329 NLRB 730, 734-35 (1999), *enforced in relevant part sub nom.*, *United Food & Commercial Workers Union Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).

[8] *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 82-83 (2007), *enforced in relevant part sub nom.*, *Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008).

[9] *Id.* at 83 (citing *Meijer*, 329 NLRB at 734 n.22).

[10] *Schreiber*, 349 NLRB at 82-83.

higher negotiated wage rates and through "threat effects," which result from a desire by nonunion employers to avoid employee unionization by providing higher wages in an attempt to mitigate the wage advantage of union workers. The study concluded by saying that continued unionization of registered nurses has increased nurses' bargaining power in health care labor markets to obtain higher wage gains, increased election ratios, and increased union density in the health care sector.[11] The Union also provided evidence from its Division Director, with 13 years' experience, stating that the Employer, during recent contract negotiations, consistently compared its wages and proposals to local, state, and national competitive markets to demonstrate that its offers were on par or exceeded others in the competitive market. Indeed, this evidence was corroborated by the Employer's published press releases and bargaining updates, which expressly made the same arguments in support of its bargaining positions. Further, the Union's direct evidence supports the assertions made in the proffered national study that unionized nurses earn higher wage rates than their non-represented counterparts nationally, and that even where there are no unionized hospitals, the "threat effects" cited in the study still serve to keep wages higher. Indeed, this positive impact was demonstrated by the Employer's press releases that stated: "[O]ur proposals for wages and medical benefits for current employees would keep our nurses' wages and medical benefits among the best in Northern California," and "[The Employer] is one of the best-staffed health care systems in California and the nation. Our nurse staffing always meets, and often exceeds, state-required levels." Thus, the Union has demonstrated the requisite nexus, using a "focused and specific analysis," between its national organizing endeavors and the positive results that benefit members of the Charging Party's bargaining unit. Accordingly, the charge should be dismissed, absent withdrawal.

B. <u>The Union's Lobbying Expenses Are Chargeable to *Beck* Objectors</u>

As an initial matter, under the General Counsel's "*Guidelines Concerning Processing of Beck Cases*,"[12] a charging party who files an unfair labor practice charge alleging that a particular expenditure asserted by a union as chargeable is in fact non-chargeable must present evidence, or give promising leads that would lead to evidence, to support that assertion. Although fee objectors have the right to present their disputes directly to the Board, they also have a corresponding burden to make known their objections with the required degree of specificity. Thus, the General

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[11] Christopher Coombs, Robert Newman, Richard Cebula, Mary White, *The Bargaining Power of Health Care Unions: Union Wage Premiums for Registered Nurses in Hospitals*, (Nov. 9, 2013). Available at http://mpra.ub.uni-muenchen.de/56223/.

[12] Memorandum GC 98-11, dated August 17, 1998. *See also* NLRB Case Handling Manual, Part 1, §§ 10052.7, 10054.1(c).

Counsel requires a Charging Party to present something more than a generalized allegation of an unfair labor practice before proceeding with an investigation and merit determination.[13] Failure to submit a charge with the necessary specificity and supporting evidence may result in dismissal under the Agency's Case Handling Manual.[14] This approach to the investigation of chargeability issues is consistent with the Supreme Court's discussion in *Air Line Pilots Association*,[15] where the Court stated that a plaintiff cannot "file a generally phrased complaint, then sit back and require the union to prove the 'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose."[16]

Here, the Charging Party claims that the Union has impermissibly charged nonmember objectors for expenses related to "regulatory monitoring and advocacy activities and legislative activity" (collectively, "lobbying activities"); however, she has not offered any specific evidence or argument to support her objection beyond a general allegation and supplying the Union's annual *Beck* notice. Rather, the Charging Party alleges, with no specific evidence as to the germaneness of any particular lobbying activity, that none of the Union's lobbying activities pertain to collective bargaining, contract administration, or grievance adjustment and thus all should be treated as non-chargeable.[17] Therefore, the Charging Party's failure to specifically allege which activities were not germane and in what way, or to provide any evidence supporting her allegation, require that the charge be dismissed.[18]

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[13] Memorandum GC 98-11, dated August 17, 1998.

[14] NLRB Case Handling Manual, Part 1, §§ 10052.7, 10054.1(c). The mere filing of an unfair labor practice charge by an objector does not obligate the union to provide information to the General Counsel, or information beyond its disclosure to a charging party objector. *See California Saw & Knife Works*, 320 NLRB 224, 239 (1995) (unions sufficiently fulfill duty of fair representation by providing objectors with disclosure containing breakdowns of major spending categories), *enforced sub nom., International Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

[15] *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998).

[16] *Id*. at 878 (citations omitted).

[17] Although a charging party is not required to file an internal objection with a union before bringing chargeability allegations before the Board, such protest procedures typically provide objecting non-members with specific information on the challenged expenses.

[18] *Cf. Teamsters Local 332 (Genesys Regional Medical Center)*, Case 7-CB-12343, Advice Memorandum dated August 31, 2000, at 3 (charging party provided sufficient

Moreover, the lobbying activities that the Union included as chargeable in its *Beck* disclosure are of the kind that the Board has found to be germane to its representational function, and therefore lawfully chargeable. Thus, in *Kent Hospital*, the Board stated that lobbying expenses, such as legislative and regulatory activities, are chargeable to objectors if they are germane to collective bargaining, contract administration, or grievance adjustment, and that legislative proposals involving core employee concerns such as wages, hours, and working conditions "all clearly raise issues that relate to a union's most essential representative function."[19] The Board further explained that a union may charge for extra-unit lobbying expenses as long as they are for services that may ultimately inure to the benefit of members of the local by virtue of the membership with the parent.[20]

Here, the Union's disclosure lists several lobbying activities under the section laying out activities germane to its representational role. The disclosure explains that these activities ". . . includ[e] policy and regulatory changes that directly and positively affect healthcare service delivery methods that may ultimately inure to the benefit of all registered nurses represented by [the Union] . . ." The disclosure also contains a section that states what expenses are not considered germane and are thus non-chargeable, including "[l]obbying for purposes unrelated to [the Union's] representation role" and "[p]olitical campaigns and activities in support of candidates for elected office," among others.[21] Accordingly, as there is no evidence that the Union's lobbying activities extend to topics unrelated to "core employee concerns . . . that relate to the union's most essential representative functions," the charge should

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evidence to warrant further investigation by providing local newspaper articles to highlight union's organizing activities that were omitted from its disclosure). If the Charging Party wishes to pursue an internal objection with the Union and evidence of improper charges comes to light as a result, the Charging Party is free to then come forth and submit a charge with the necessary specificity and supporting evidence.

[19] *Kent Hospital*, 359 NLRB at 7.

[20] *Id.* at 8.

[21] *See Id.* at 7 (unions may not charge objectors for purely partisan expenses).

be dismissed, absent withdrawal.[22]

/s/
B.J.K.

[22] The Board in *Kent Hospital* proposed a rebuttable presumption of germaneness for a union's lobbying expenses and solicited the views of interested parties. We do not need to reach the issue of a rebuttable presumption in this case because, based on the Union's disclosure, its lobbying expenses are facially germane to its representation role.