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**United Food and Commercial Workers Union, Local 4, affiliated with United Food and Commercial Workers Union (Safeway, Inc.) and Pamela Barrett.** Case 19–CB–009660

February 13, 2017

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On February 22, 2016, the National Labor Relations Board issued a Decision and Order in this case on remand from the United States Court of Appeals for the Ninth Circuit.<sup>1</sup> As explained there, the case involves the straightforward application of existing precedent concerning employees who object to paying dues for nonrepresentational activities pursuant to the Supreme Court’s decision in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), and the sufficiency of the financial information a union must provide to these objectors to satisfy its duty of fair representation under the Board’s decisions in *California Saw & Knife Works*, 320 NLRB 224 (1995), *enfd.* 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998), and *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999), reconsideration denied 327 NLRB 802 (1999), petition for review dismissed 1999 WL 325508 (D.C. Cir. 1999).

In the underlying decision, the Board accepted the court’s remand and decided to review the administrative law judge’s May 20, 2008 decision anew. Applying the well-established precedent set forth in *California Saw* and *KGW Radio*, the Board reversed the judge and found that the Respondent violated its duty of fair representation and therefore Section 8(b)(1)(A) by its failure to provide sufficiently verified expenditure information to a *Beck* objector. In so doing, the Board explained that a union satisfies the Board’s verification requirements so long as an auditor—who may be an in-house auditor and need not be a certified public accountant—independently verifies that the expenditures claimed by the union were in fact made. See 363 NLRB No. 127, slip op. at 3 fn. 8. As the Respondent’s accountant only reviewed expenditure information provided by the Respondent’s officials, and did not verify that the claimed expenditures were in

<sup>1</sup> 363 NLRB No. 127 (2016), as modified by a March 8, 2016 unpublished order.

fact made, the Board found that the Respondent failed to satisfy the Board’s expenditure verification requirements and thus violated Section 8(b)(1)(A). *Id.* at 3. The Board also denied the Respondent’s request that the Board depart from existing law and permit expenditure verification similar to that provided by union officials on the Department of Labor’s Form LM-2.

On March 18, 2016, the Respondent filed a motion for reconsideration. As discussed below, we grant the motion only to clarify the Order wording. We deny the motion in all other respects.

The Respondent first argues that the underlying decision effectively overrules Board precedent by failing to prescribe defined audit procedures and by providing that the required audit may be performed by someone *within* a union’s organization who need not be a certified public accountant. In so arguing, the Respondent plainly misunderstands our decision and the well-established precedent underlying it. The Board has consistently held that, in the NLRA context, no particular type of audit is mandated and that only the usual functions of an auditor need to be performed. See *KGW Radio*, 327 NLRB at 477; *California Saw*, 320 NLRB at 241. Thus, Board precedent requires “an audit within the generally accepted meaning of the term, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepts the representations of the union[.]”<sup>2</sup> *KGW Radio*, 327 NLRB at 477. Further, Board precedent makes clear that the individual performing the audit need not be a CPA or an auditor from outside a union’s organization; an in-house auditor may be used.<sup>3</sup> See *Cal-*

<sup>2</sup> In *KGW Radio*, the Board determined that the term “audit” is a generally accepted term of art in the accounting profession and “describes a service performed by which an accountant undertakes an independent verification of selected transactions within the major categories of financial information presented in the accountant’s report.” 327 NLRB at 476. Noting that the Board in *California Saw* did not specifically define the term “audit,” the *KGW Radio* Board held that “ascribing the generally accepted meaning of the term to the verification necessary for a union to fulfill its obligations to objecting nonmembers is consistent with ‘[t]he fundamental purpose for requiring an audit of union expenditures,’ that is, ‘to provide objecting nonmembers with a reliable basis for calculating the fees they must pay.’” *Id.* at 477 (quoting *California Saw*, 320 NLRB at 242).

<sup>3</sup> In *California Saw*, the international union used in-house auditors to conduct the expenditure verifications for the district and local unions. The in-house auditors were not certified public accountants, but possessed training in accounting and followed expenditure verification protocols set by the international union. The Board found that the union did not violate its duty of fair representation by using the in-house auditors. 320 NLRB at 241. Doing so, the Board rejected arguments that the in-house auditors lacked the necessary training and objectivity to fulfill the required function of determining whether the expenses claimed by the district and local unions were in fact made. *Id.* The Board also rejected the proposition “that the independence neces-

*ifornia Saw*, 320 NLRB at 240–242. The important component of the Board’s verification requirements is that the usual functions of an auditor be performed, i.e., that the person conducting the audit independently verifies that the expenditures claimed were in fact made. See *id.* Our underlying decision recites and faithfully applies these principles and, contrary to the Respondent’s assertions, does not overrule them.

The Respondent next asserts that it is inconsistent for the Board to permit an audit performed by a union’s in-house auditor, but not permit unions to rely on information in the Department of Labor Form LM-2, which involves a union official’s sworn attestation regarding a union’s expenditures, as evidence of expenditure verification. Contrary to the Respondent’s assertion, an audit conducted by a union’s in-house auditor is not self-evidently “a lesser form of . . . verification” than a union official’s LM-2 disclosures. In fact, as stated, an audit, even one performed by an in-house auditor, must accord with the generally accepted definition of an audit, in which the auditor independently verifies that the expenditures claimed were in fact made. *KGW Radio*, 327 NLRB at 477. The Board’s audit requirement thus differs from the LM-2 reporting requirement and involves expenditure verification not necessarily required as part of the LM-2 reporting requirement.<sup>4</sup> As a result, we see nothing inconsistent in permitting use of an in-house auditor to perform expenditure verification and declining to allow unions to rely on the information in the LM-2 for that purpose.

Finally, the Respondent asserts that the language of the Order creates confusion because it requires both that the information provided to the objector be “sufficiently verified” and that the information be “verified by an independent auditor.” In the cease-and-desist portion of the Order, we directed the Respondent to stop providing nonmember objectors expenditure information that is not “sufficiently verified[.]” However, in the affirmative-action portion of the Order, we directed the Respondent to provide to the Charging Party expenditure information that “has been verified by an independent auditor.” The Order language requiring that the expenditure information be “verified by an independent auditor” is arguably unclear in light of our cases’ allowance that an audit may be conducted by an in-house auditor. As discussed

sary to prepare verification-of-expense audits . . . can never be assured” by an in-house auditor. *Id.* at 241–242.

<sup>4</sup> In this regard, the LM-2 form specifically asks whether there has been an audit, either by an outside auditor or an auditor who works for the international union, of the financial information presented, thus indicating that an audit is an additional step not necessarily implied by the union official’s attestation to the information given on the LM-2.

above, the auditor need not be “independent” in a strict formal sense. On the other hand, the Order’s requirement that the information provided to a *Beck* objector be “sufficiently verified” captures the intent of the Board’s case law, which focuses on providing the objector with expenditure information that has been audited to determine that the expenditures claimed were in fact made. Because the latter phrasing is more in line with the requirements of our precedent, we grant the Respondent’s motion in part and revise the Board’s Order to make clear that the Respondent’s obligation is to provide expenditure information that is sufficiently verified in accordance with our well-established precedent. We shall substitute a new notice to conform to the Order as modified.

IT IS ORDERED that the Respondent’s motion for reconsideration is granted in part and denied in part.

#### AMENDED ORDER

The National Labor Relations Board affirms its previous Order as modified below and orders that the Respondent, United Food and Commercial Workers Union Local 4, affiliated with United Food and Commercial Workers Union, Butte, Montana, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“For all accounting periods covered by the complaint, provide Pamela Barrett with information concerning expenditures by the Respondent (or, in the event that the Respondent relies on a local presumption, expenditures by its parent union) that has been sufficiently verified. If Barrett, with reasonable promptness after receiving this information, challenges the dues reduction calculation for any such accounting period, process such challenge as it would otherwise have done in accordance with the principles of *California Saw & Knife*, 320 NLRB 224 (1995).”

2. Substitute the attached notice for the notice in the Board’s underlying Decision and Order.

Dated, Washington, D.C. February 13, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX  
NOTICE TO MEMBERS AND EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT provide to nonmember objectors expenditure information that is neither sufficiently verified nor supported by a local presumption.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide Pamela Barrett with information concerning our expenditures (or, in the event that we rely

on a local presumption, expenditures by our parent union) that has been sufficiently verified.

UNITED FOOD AND COMMERCIAL WORKERS  
UNION LOCAL 4, AFFILIATED WITH UNITED  
FOOD AND COMMERCIAL WORKERS UNION

The Board's decision can be found at [www.nlr.gov/case/19-CB-009660](http://www.nlr.gov/case/19-CB-009660) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273-1940.

