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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 19-06 April 29, 2019

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

FROM: Peter B. Robb, General Counsel

SUBJECT: *Beck* Case Handling and Chargeability Issues in Light of *United Nurses & Allied Professionals (Kent Hospital)*[1]

Section 8(a)(3) allows employers and unions, in non-right-to-work states, to enter into union-security agreements requiring union membership as a condition of employment as part of a collective-bargaining agreement, but the "membership" that can be compelled has been "whittled down to its financial core."[2] In *Communications Workers v. Beck*,[3] the Supreme Court determined that this provision, like its "statutory equivalent" in the Railway Labor Act (RLA), was aimed at preventing so-called "free riders," employees who reap the benefits of collective-bargaining without providing any financial support to the union.[4] Accordingly, *Beck* held that a union is not permitted to charge an objecting nonmember covered by a contractual union-security clause for activities not germane to collective bargaining, contract administration or grievance adjustment.[5] That is, the union-security proviso "authorizes the exaction of only those fees and dues necessary 'to performing the duties of an exclusive bargaining representative of the employees in dealing with the employer on labor-management issues.'"[6]

In *United Nurses & Allied Professionals (Kent Hospital)*, the Board determined that RLA and public sector jurisprudence compelled the conclusion that lobbying costs are not chargeable under *Beck*.[7] In its view, lobbying is not the kind of activity that is a necessary part of a union's statutory function as an exclusive bargaining representative, and it therefore falls outside the

[1] 367 NLRB No. 94 (Mar. 1, 2019).

[2] *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963).

[3] 487 U.S.735 (1988).

[4] *Id.* at 745-46, 752-54, 761-62.

[5] *Id.* at 745.

[6] *Id.* at 762-63 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

[7] 367 NLRB No. 94, slip op. at 5.

scope of permissible uses for dues and fees collected from nonmember objectors.[8] Moreover, lobbying costs are "in the realm of the political activities" the Supreme Court has found to be nonchargeable under the RLA and public sector labor statutes.[9] The Board further clarified that lobbying does not become a representational function merely because it involves a matter that might be the subject of collective bargaining, such as legislation to improve employee safety in the industry.[10] Accordingly, the Board determined that the union violated its duty of fair representation by charging nonmember objectors for lobbying expenses incurred in support of a wide range of state legislative proposals.

In light of *Kent Hospital*, the following offers guidance to the Regions and the general public regarding case handling procedures in *Beck* chargeability cases and the proper allocation of secondary expenses flowing from a union's lobbying activities.

Approach to Case Handling in *Beck* Cases Challenging the Chargeability of Expenses

When a *Beck* objector has reason to believe that the union has overcharged for its representative functions, there are two avenues for disputing the union's expense allocations: (1) filing a duty-of-fair-representation charge with the Board, and (2) filing a challenge pursuant to the union's established challenge procedure.[11] These avenues are not mutually exclusive.[12] Thus, if a nonmember objector opts to use the union-established procedure and doubts the correctness of the outcome, a duty-of-fair-representation charge can still be filed with the Board. Under either procedure, the union has the burden of justifying the propriety of its expense allocations.[13]

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[8] *Id.*, slip op. at 5-6.

[9] *Id.*, slip op. at 6 (citing *Machinists v. Street*, 367 U.S. 740 (1961) and *Lehnert*, 500 U.S. 507).

[10] *Id.* (citing *Miller v. Air Line Pilots*, 108 F.3d 1415 (D.C. Cir. 1997), *aff'd*, 523 U.S. 866 (1998)).

[11] *See* Memorandum GC 98-11, *Guidelines Concerning Processing of* Beck *Cases*, at 5 (Aug. 17, 1998); *Carpenters Local 943 (Oklahoma Fixture)*, 322 NLRB 825, 825-26 (1997) (union must afford *Beck* objectors reasonable procedures for filing challenges to the amounts charged (citing *Cal. Saw*, 320 NLRB at 242-43)).

[12] *See Air Line Pilots v. Miller*, 523 U.S. 866 (1998) (agency fee objectors under the RLA are not required to exhaust union-established arbitration procedures before bringing the fee dispute to federal court).

[13] *See Communications Workers Local 9403 (Pacific Bell)*, 322 NLRB 142, 144 (1996) (union "bear[s] the burden of proving that the local union's expenditures are chargeable to the degree asserted" in a challenge proceeding (citing *Price v. Auto Workers*, 927 F.2d 88, 94 (2d Cir. 1991))), *enforced sub nom. Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997); *Cal. Saw*, 320 NLRB at 242 (union has burden of proof in *Beck* arbitration); *Teamsters Local 75 (Schreiber Foods) ("Schreiber II")*, 349 NLRB 77, 79 n.11, 82-83 (2007) (union met evidentiary burden as to public sector related expenses but failed to meet its burden of establishing that organizing

If an employee opts to file a charge, prior General Counsels have required that the employee explain why a particular expenditure classified as chargeable by the union is not for a representational purpose and present evidence, or point to evidence, in support of that assertion.[14] In my view, that approach to case handling improperly forecloses *Beck* objectors from utilizing the Board as a viable forum for their chargeability challenges and is inconsistent with the decisions placing the burden of proving union expenses are chargeable on the union. In this regard, despite advances in the law requiring that a union provide more detailed information to objectors showing the basis for its calculations,[15] in practice, such disclosures are often so conclusory in nature as to preclude a meaningful assessment of the chargeability of expenditures. As a result, participation in the union's internal challenge procedure has, for all practical purposes, become a necessary first step before a complaint could ever issue with the Board. This creates an undue burden on the *Beck* objector. Moreover, extant casehandling procedures are inconsistent with *Miller*'s teaching that employees are entitled to skip over the union's challenge process, and are inconsistent with analogous Board precedent disfavoring exhaustion and deferral to arbitral decisions on *Beck* chargeability issues.[16] Notably, *Miller's* expectation that objectors would be able to identify questionable expenditures or classes of expenditures in federal court was predicated on the notion that the union disclosure "plus any additional information developed through reasonable discovery" would provide a sufficiently detailed accounting. However, unlike a complainant in federal court, a charging party before the Board is not entitled to discovery. Thus, greater scrutiny of union expenditures at the investigation stage, without the objecting employee having to first identify and present evidence regarding questionable expenditures, is warranted to preserve employees' right to adjudicate their *Beck* claims before the Board in the first instance.

Accordingly, we will no longer require agency fee objectors to explain why a particular expenditure is nonchargeable and to provide evidence or promising leads to support that contention.[17] In investigating charges contesting the chargeability of expenses, the Region should contact the union to obtain a detailed explanation of the union's chargeability decisions for each major category of expenses and, in particular, the method it used to determine the

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expenses were chargeable), *enforced in relevant part sub nom. Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008). *Cf. Miller*, 523 U.S. at 877-78 (union has "burden of proof" in establishing germaneness of expenses in federal court under RLA and public-sector precedent).

[14] *See* Memorandum GC 98-11, at 5-6.

[15] *See Teamsters Local 75 (Schreiber Foods) ("Schreiber III")*, 365 NLRB No. 48, slip op. at 3 (Mar. 21, 2017) (unions must provide a "detailed account" of how its allocations were calculated for its own categories of expenditures in addition to those of its affiliates (citing *Teamsters Local 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166 (2007))).

[16] *See* Memorandum GC 98-11, at 4-5.

[17] Of course, it would still be prudent to inquire as to a charging party's particular objections and evidence. Likewise, some charges may have facial validity, such as fees for arbitration of contractual grievances.

portion of expenses chargeable in mixed expenditure categories.[18] To the extent the union's explanations raise concerns about the propriety of certain allocations, the Region should inform the union of the specific expenditures that are at issue and the evidence that raises doubt as to the validity of these charges to objectors, and should solicit further justification from the union before making a merit determination. In determining whether to issue complaint, the Region should bear in mind that it is the union's burden to establish that the expenses it has charged to nonmember objectors are germane to collective bargaining, contract administration, and grievance handling. If the Region is uncertain about the chargeability of certain expenditures, it should submit the case to the Division of Advice.

Guidance Concerning Allocation of Overhead, Salaries and Benefits, and Other Secondary Expenses Connected to Lobbying Activities

A union should not be found to have satisfied its *Beck* obligations, as construed in *Kent Hospital*, merely by deducting the salary and benefit expenses for its lobbyists. Rather, lobbying necessarily entails at least some spillover costs, such as overhead expenses,[19] preparation of lobbying literature, reporting on lobbying efforts in union publications, and so forth. Thus, compliance with *Kent Hospital* requires that a union not only categorize its lobbying expenses as nonchargeable, but also account for any other secondary costs used to support its lobbying activities.[20] To effectuate this position, a union may reasonably prorate a percentage of its overhead costs as nonchargeable based on the overall percentage of nonchargeable expenses.[21]

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[18] *See Teamsters Local 443 (Connecticut Limousine Service)*, 324 NLRB 633, 636 (1997) (reaffirming that union may utilize mixed categories, i.e. an "accounting category containing both chargeable and substantial nonchargeable expenditures," on a limited basis); *Cal. Saw*, 320 NLRB at 240 (approving the "*limited* use of mixed categories" but cautioning that there is the "potential for unlawful manipulation by a union hiding nonchargeable expenses" in such categories).

[19] Overhead expenses would include items such as clerical salaries and benefits, office rent or mortgage, utilities, equipment and its maintenance and repairs, insurance, taxes, janitorial services, office supplies, printing, telephone and fax, postage, information technology, transportation, legal and audit fees, meeting and conference expenses, depreciation and interest, and bank charges.

[20] Absolute precision in calculating the proportion of dues charges to nonmember objectors is not required. *See Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 (1999) (citing *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 307 n.18 (1986)). However, a union's failure to make a good faith effort to identify these secondary expenses amounts to a willful disregard of its *Beck* obligations and therefore violates its duty of fair representation.

[21] Prior General Counsels have taken a similar approach to overhead costs. *See, e.g.*, *Northeast Ohio Newspaper Guild, Local 1 (Massillon Newspapers)*, Case 8-CB-8347, Advice Memorandum dated Sept. 3, 1997. However, this approach was abandoned in favor of one that afforded unions the benefit of the doubt, absent contrary proof, after the Board issued *Teamsters Local 75 (Schreiber Foods) ("Schreiber I")*, 329 NLRB 28 (1999), *enforced in part sub nom. Pirlott*, 522 F.3d 423. *See Teamsters Local 401 (UPS)*, Case 4-CB-8115 et al., Advice

It will be the union's burden to demonstrate that proration should not apply, for example, because all of its lobbying was carried out by an outside lobbyist contracted to perform this service. Even if the union successfully demonstrates that its lobbying activities were exclusively performed under a contractual arrangement so as to make proration of overhead unnecessary, the union must still demonstrate that it has accounted for the associated costs of setting up and overseeing the work of its contracted lobbyist, for example, by deducting the salaries and benefits for time spent on such activities by responsible union officials or staff. Furthermore, the union must also show that it has accounted for any other secondary costs associated with in-house or contracted lobbying efforts, for example, that it has deducted the time spent on researching and drafting lobbying materials as well as those portions of union publications reporting on lobbying activities. [22] Applying these principles, circumstances where a union engages in lobbying yet fails to allocate or prorate at least some other expenses as being connected to that nonchargeable activity warrant close scrutiny.

Memorandum dated Sept. 20, 1999, at 6-8 (establishing heightened proof requirement for charging party challenging *Beck* chargeability calculations following *Schreiber I*). In *Schreiber I*, the Board rejected the contention that an allocation disclosure was necessarily unreliable where the union reported nonchargeable expenses associated with education and publicity yet claimed that all salary expenses were chargeable, because it was "at least possible that a contractor was hired" to perform the nonchargeable activities. 329 NLRB at 31. *Schreiber I*'s benefit-of-the-doubt approach is inconsistent with a union's burden of justifying germaneness in *Beck* cases. Moreover, the Board's conjecture is not controlling because it concerned the adequacy of the union's *disclosure*, rather than the adequacy of the *chargeability allocations*; additionally, the Board's disclosure holdings were vacated on appeal. *See Pirlott*, 522 F.3d at 432. Accordingly, the union should have the burden to establish that it, in fact, used a contractor to perform nonchargeable activities, thereby obviating the need to prorate overhead for those activities.

[22] We recognize that, with regard to representational activities such as contract negotiation and administration, unions are permitted to charge objectors for ancillary (indirect) expenditures that effectuate those functions. *See Ellis*, 466 U.S. at 448 (under RLA, expenditures necessary to the performance of exclusive representative duties include "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 529-30 (1991) (in context of public sector union, approving chargeability of conventions and portions of union publication), *abrogated by Janus v. State County Employees AFSCME Council 31*, 138 S. Ct. 2448, 2459-60 (2018). Thus, activities that enable a union to maintain its "corporate or associational existence," such as conventions, are generally chargeable, *Ellis*, 466 U.S. at 448-49 ("national convention at which the members elect officers, establish bargaining goals and priorities, and formulate overall union policy" chargeable because such events are "essential to the union's discharge of its duties as bargaining agent"), as are union publications to the extent they provide a "channel for communicating with the employees . . . about [chargeable] activities" or constitute "[i]nformational support services" that are "neither political nor public in nature." *See Ellis*, 466 U.S. at 450-51; *Lehnert*, 500 U.S. at 529.

Finally, charges challenging a union's chargeability calculations should not be dismissed on non-effectuation grounds merely because the nonchargeable expenditures, or the amount of the arguable overcharge, might be de minimis.[23] Where a union's calculations contain a defect that results in *Beck* objectors being overcharged, for example, by improperly offsetting certain revenues against nonchargeable expenses, the Board has not hesitated to find a violation even where the amount of the excess charge was less than one percent of dues.[24] Accordingly, Regions should fully investigate the propriety of a union's allocation calculations without regard to the amount or percentage of the expense in question or the magnitude of the alleged overcharge.

Any questions regarding the implementation of this memorandum should be directed to your AGC/DAGC in Operations.

P.B.R.

[23] *See IUOE Local 150 (Minteq Int'l)*, Case 25-CB-9289, Advice Memorandum dated July 30, 2010, at 2, 6 (authorizing complaint against local union for charging nonmember objectors for its portion of international's nonchargeable organizing expenses even though expense was less than one percent of local's expenditures).

[24] *See Teamsters Local 399 (Hilltop Services, Inc. at Universal City Walk)*, 346 NLRB 322, 323-24 (2006), *enforced sub nom. NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898 (9th Cir. 2008).