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

Advice Memorandum

DATE: June 22, 2005

TO : Timothy W. Peck, Acting Regional Director
Region 20

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

SUBJECT: United Food & Commercial Workers Union, Local 101
(Macy's West, Inc.)
Case 20-CB-12253

536-2581-3307-5010
536-5075-0150

This 8(b)(1)(A) case was submitted for advice on whether the General Motors[1] and Beck[2] notices published in the International Union's magazine "Working America" and on the back of the Local Union's membership application are deficient; and, if so, whether the employees who crossed a Union sanctioned picket line without having received proper notice were lawfully fined.

We conclude: 1) the Union's General Motors and Beck notice printed in small, faint gray type on the back of each page of a triplicate membership application does not adequately apprise employees of their rights; 2) the Union's practice of orally advising employees to read the General Motors and Beck notice on the back of the membership application cures the notice deficiencies found in the application as to those employees; 3) the General Motors and Beck notice published in the Union's International Union magazine is inadequate, as it fails to include the full amount of dues and percentage reduction in dues that an objecting employee would receive; and 4) the Union's General Motors and Beck notices need not include an audited breakdown of the calculation of chargeable and non-chargeable expenses. Accordingly, the Union violated Section 8(b)(1)(A) by disciplining members for crossing a picket line during a strike without having adequately informed them of their General Motors and Beck rights.

FACTS

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[1] NLRB v. General Motors, 373 U.S. 734 (1963).

[2] Communication Workers of America v. Beck, 487 U.S. 735 (1988).

On July 17, 2004,[3] United Food & Commercial Workers Union, Local 101 (the Union) conducted a one day strike at two Macy West's (the Charging Party) retail department stores in San Francisco, California. Members who crossed the picket line received a letter dated August 20 indicating that they were being charged with working behind a legal picket line sanctioned by the Union and that they were required to appear before the Union trial board. On August 27, the Charging Party filed the original charge alleging that the Union's threat to discipline members who crossed the picket line violated 8(b)(1)(A) because the Union had engaged in unlawful mass picketing and blocking of the ingress and egress to the Employer's store during the strike. The charge was dismissed on October 28, because the evidence was insufficient to establish the alleged blocking. The Employer appealed and the Regional Director reconsidered and revoked the dismissal. On November 1, the Union conducted a trial against the charged members and by letters dated December 15, imposed a $250.00 fine on 32 members who crossed the Union's July 17 picket line. The Charging Party filed an amended charge on February 10, 2005, alleging that the Union violated Section 8(b)(1)(A) by disciplining members without ever having provided them adequate notice of their General Motors and Beck rights.[4]

The Union maintains that the members were lawfully fined as each member had received a General Motors and Beck notice at least once either by means of a notice printed on the back of their Union membership application or by a notice published in the International Union's magazine, "Working America."

Evidence shows that 28 out of the 32 fined members signed a triplicate union membership application that had the General Motors and Beck notice printed in small, light gray type on the reverse side of each page.[5] The front of

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[3] All dates are referred to hereinafter are 2004, unless otherwise noted.

[4] The charge does not allege that the Union's failure to give adequate notice of those rights itself violated the Act.

[5] The text of the General Motors and Beck notice on the back of the membership application includes a statement informing the applicant that, "According to the auditor's review of our finances, non-chargeable expenditures are 9.57% of annual expenses." The notice further indicates that "upon receipt of an objection," the Union "will supply the objector with the breakdown of its expenditures for the preceding fiscal year." There is no allegation that the

the membership application, printed in easily readable large, black type, does not indicate that there is any additional information printed on the back. The Union asserts, however, that it has recently implemented a procedure to orally alert employees to the presence of the General Motors and Beck notice on the back of the membership application. According to the testimony of the membership services employee working at the Union's Geary Street office since March 2003, at the time employees sign up for membership, she physically turns the membership application form over to show the applicant that there is printing on the back side of the form before she hands it to them and then instructs each new applicant to read the back of the membership application form before they fill it out. The membership services employee testified that she signed up seven of the 32 fined members.[6] The membership services employee also testified that starting about one year ago, new members were given the bottom part of the first page of the application to take home, which has the complete text of the General Motors and Beck notice on the back.[7]

Evidence also shows that 17 out of the 32 members received a copy of either the May 2002 or the April 2003 International Union's magazine, "Working America" which contains a General Motors and Beck notice.[8] The Union

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language in the notice printed on the back of the membership application is deficient, unlike the notice supplied by the International Union's magazine, discussed below.

[6] In the course of its investigation, the Region has obtained testimony from one employee-member that the membership services employee did not instruct him to read the back of the form when he joined the Union in 2004. Due to the possible credibility conflicts, the Region has held off further investigation until Advice determines whether the oral instruction supplied by the Union to read the back of the application form adequately apprises employees of their rights.

[7] In addition, since September 2004, too late to affect the decision in this case, the Union's membership services employees have been handing employee-applicants a separate one-page document describing their right to elect to be a non-member fee payer and object to the funding of certain Union expenditures. The text of this document is nearly identical to the annual notice printed in the International Union's magazine, discussed below.

[8] The evidence indicates that the four fined members who were not provided with a General Motors and Beck notice on the back of their membership application received at least

asserts that Working America is sent to all members and service fee payers who have not explicitly instructed the Union not to send them the magazine.[9] Unlike the General Motors and Beck notice on the back of the membership application, the annual notice in the International Union's magazine does not state the percentage by which objector fees will be reduced. The annual notice does state that individuals who "choose to file objections" may "request a description of the procedures which must be followed to obtain further information as to how these fees are calculated."

ACTION

We conclude: 1) the Union's General Motors and Beck notice printed in small, faint gray type on the back of each page of a triplicate membership application does not adequately apprise employees of their rights; 2) the Union's practice of orally advising employees to read the General Motors and Beck notice on the back of the membership application cures the notice deficiencies found in the application as to those employees; 3) the General Motors and Beck notice published in the Union's International Union magazine is inadequate, as it fails to include the full amount of dues and percentage reduction in dues that an objecting employee would receive; and 4) the Union's General Motors and Beck notices need not include an audited breakdown of the calculation of chargeable and non-chargeable expenses. Accordingly, the Union violated Section 8(b)(1)(A) by disciplining members for crossing a picket line during a strike without having adequately informed them of their General Motors and Beck rights.

I. The Union's General Motors and Beck notice printed in small, faint gray type on the back of each page of a triplicate membership application does not adequately apprise employees of their rights.

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one edition of the International Union's "Working America" magazine.

[9] However, the Union's own records indicate that three of the fined members who did not explicitly opt out of the Union's mailings failed to receive a timely copy of the International Union's "Working America."

The Supreme Court held in General Motors[10] and Beck[11], respectively, that employees subject to a union-security clause have the right to be non-members, and that a union has a fiduciary duty not to spend an objecting non-member's dues and fees on nonrepresentational activities. A union must inform employees of those rights.[12] The underlying issue in this case is whether the Union's notices adequately informed employees of those rights.

A union's publication of a General Motors and Beck notice is lawful if it is "reasonably calculated to apprise the non-member employees of their Beck [and General Motors] rights."[13] In California Saw & Knife Works, the Board found lawful the union's publication of an annual Beck notice in its newsletter because, although the newsletter's cover did not alert readers to the notice therein, the notice was highlighted in color distinct from other text and was set apart by a horizontal format with a highlighted outline containing the word "Notice" in bold print at the top. Moreover, the particular issue of the newsletter was only twelve pages long, so that the Beck notice was "apparent from even a cursory review … ."[14] The Board thus found that the Union's notice was not hidden in a lengthy publication such that, without a cover notation alerting a non-member to its placement, a non-member making any "reasonable perusal of the publication" would likely not be alerted to the Beck policy.[15]

[*FOIA Exemptions 5 and 7(a)*],[16] [*FOIA Exemptions 5 and 7(a)*

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[10] 373 U.S. 734.

[11] 487 U.S. 735.

[12] California Saw & Knife Works, 320 NLRB 224, 233 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998); Paperworkers Local 1033 (Weyerhaeuser Paper Co.), 320 NLRB 349, 350 (1995), revd. on other grounds 124 F.3d 788 (6th Cir. 1997), vacated 525 U.S. 979 (1998).

[13] California Saw & Knife Works, 320 NLRB at 234 n. 55.

[14] California Saw, 320 NLRB at 234.

[15] Id.

[16] [*FOIA Exemptions 5 and 7(a)*
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[*FOIA Exemptions 5 and 7(a)*

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Similarly here, we conclude that the Union's General Motors and Beck notice on the back of the triplicate membership application is inadequate. Although the General Motors and Beck notice appears on the back of all three pages of the application, there is no language on the front side of the application that would alert non-members that notice of their rights to select fee payer status and object to use of their fees for non-representational purposes is printed on the reverse side. Additionally, the use of small, light gray type conceals the importance of the information contained on the back of each page. The placement of the notice on the back of the membership application in conjunction with the small gray type constructively hides the General Motors and Beck information from a non-member making a reasonable perusal of the application. Thus, as in Safeway, Inc. and Anheuser Busch, the notice here was hidden and not reasonably calculated to apprise non-members of their General Motors and Beck rights.

II. The Union's practice of orally advising employees to read the General Motors and Beck notice on the back of the membership application cures the notice deficiencies found in the application as to those employees.

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17 [*FOIA Exemptions 5 and 7(a)*
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18 See also, Chauffeurs, Teamsters, Warehousemen and Helpers Union, Local 377, Case 8-CB-9415, JD-03-04, slip op. at 6 (February 11, 2004), where the ALJ found a triplicate style membership application form failed to convey proper notice of Beck rights where the top form served as the application and made no mention or otherwise alerted employees to the fact that the following two pages were different from the top page and contained notice of their Beck rights.

The deficiencies found in the General Motors and Beck notice on the membership application are due to the placement of the notice on the back of the application in small, gray type and the lack of language on the front side of the application alerting applicants to read the notice on the back. If the Union can establish that they orally advised applicants to read the back of the membership application before signing, the Union's actions would be "reasonably calculated" to inform them of their rights, and would thus cure the application's notice deficiencies only as to those employees. However, if there is a credibility conflict as to whether the Union actually informed particular applicants to read the notice on the back, the issue should be submitted to a trier of fact.

III. The General Motors and Beck notice published in the Union's International Union magazine is inadequate, as it fails to include the full amount of dues and percentage reduction in dues that an objecting employee would receive.

In interpreting the law set forth in General Motors and Beck the Board in California Saw held that when a Union seeks to collect dues and fees under a union security clause, it must inform employees of their right to be or remain non-members and that non-members have the right:

> to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.[19]

The Board held that if an employee then chooses to object, the union must then apprise the employee of "the percentage of the reduction, the basis for the calculation, and the right to challenge these figures."[20] Thus, under current Board law, an initial Beck notice need not provide the percentage of a union's expenditures that is spent on non-representational matters.[21] Rather, such information is

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[19] 320 NLRB at 233.

[20] Id.

[21] See Teamsters Local 166 (Dyncorp Support Services), 327 NLRB 950, 952 (1999), enf. denied sub nom. Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Grocery Employees, Local 738 (E.J. Brach), 324 NLRB 1193, 1193-94 (1997); Teamsters Local

required only if an employee takes the initiative and makes a Beck objection.

However, in denying enforcement to Dyncorp, the D.C. Circuit, in Penrod v. NLRB, held that an initial Beck notice must apprise potential objectors of the percentage of union dues chargeable to them in order for potential objectors to gauge the propriety of a union's fee.[22] The D.C. Circuit found that case to be "squarely controlled by" the Supreme Court's decision in Chicago Teachers Union, Local No. 1 v. Hudson,[23] where the Court said, in a public sector case, that: "[b]asic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."

While it is arguable that the D.C. Circuit's view is correct that Hudson requires the percentage information to be submitted to potential Beck objectors, it is also arguable that the Supreme Court's decision in Hudson applies only to employees who are already Beck objectors in order to allow them to determine whether to challenge the union's apportionment of chargeable and nonchargeable expenditures.[24] We agree with the result in Penrod, however, that this percentage information should be provided in the initial notice, because it is essential to an employee's informed decision as to whether to become a Beck objector. Just as the Supreme Court found this information crucial to an informed evaluation of the apportionment of chargeable and nonchargeable expenses, we believe an employee also needs to know the full dues as well as the amount of dues expense he would save by becoming a Beck objector in order to make an informed decision whether to make the Beck objection.

When California Saw issued in 1995, the concern that caused the Board not to require disclosure of the percentage reduction in dues in an initial Beck notice was that calculating this percentage for inclusion in an initial notice would likely be an expensive and time-consuming

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688 (Jefferson Smurfit Corp.), 326 NLRB 878, 880, n. 5 (1998).

[22] Penrod v. NLRB, 203 F.3d at 48. See also Abrams v. Communication Workers of America, 59 F.3d 1373 (D.C. Cir. 1995).

[23] 475 U.S. 292 (1986).

[24] See dissent in Abrams, 59 F.3d at 1383-84.

burden upon unions.[25] However, the burdensomeness of such a requirement no longer appears to be a significant concern. Since California Saw, many major national and international unions have developed Beck systems and thus have percentage information already available. A review of Board cases, ALJ decisions and district court duty of fair representation cases revealed that at least 26 national and international unions, collectively representing well over 10 million employees, have Beck systems in place.[26] We also note that local unions are entitled to a "local presumption" that the percentage of a local's expenditures chargeable to objectors is at least as great as the chargeable percentage of its parent union.[27] Accordingly, under current Board law local unions can rely on their International's Beck system to comply with their duty of fair representation obligation.

In light of the increased prevalence of Beck systems among unions, particularly international unions who can supply the necessary Beck information to their local affiliates through the use of the local presumption, the importance of this information for making informed decisions as to whether to become a Beck objector now appears to outweigh any burden associated with compiling the percentage information.

Accordingly, although the Union's Beck notice placed in "Working America" would be sufficient under current Board law, we believe the Region should put this issue before the Board so that the Board may have an opportunity to reverse its prior policy and require that unions inform employees, in an initial Beck notice, of the percentage reduction in dues that an objecting employee would receive.

IV. The Union's General Motors and Beck notices need not include an audited breakdown of the calculation of chargeable and non-chargeable expenses.

Under current Board law, an employee's right to an audited breakdown of chargeable and nonchargeable expenses only occurs when a non-member objects to the payment of dues

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[25] See Dyncorp Support Services, 327 NLRB at 952, where the Board explained that its concern in California Saw was that calculating the percentage by which dues and fees are reduced for objectors "can be an expensive and timeconsuming undertaking."

[26] See attached appendix listing national and international unions with established Beck systems as of 2003.

[27] California Saw, 320 NLRB at 242.

and fees for nonrepresentational activities.[28] The D.C. Circuit's decision in Penrod[29] does not hold to the contrary. Unlike the inclusion of the total percentage that an objecting member would pay, the inclusion of an audit of chargeable expenses in the initial General Motors and Beck notice would not be necessary to provide the employee with meaningful information that would aid the employee's decision whether to exercise her General Motors and Beck rights. The audit of the Union's chargeable expenses only becomes relevant to an employee after he or she becomes a non-member Beck objector and subsequently chooses to challenge the Union's expenditures. Consequently, the Union's failure to include an audited breakdown of the calculation of chargeable and non-chargeable expenses in either the notice printed on the back of the membership application or the notice printed in "Working America" neither impinged on the fined employees' ability to make an informed decision to withdraw from the Union and become Beck objectors, nor does it render the Union's General Motors and Beck notices invalid.

V. The Union violated Section 8(b)(1)(A) by disciplining members for crossing a picket line during a strike without having adequately informed them of their General Motors and Beck rights.

Both the Union's Beck and General Motors notices placed on the back of the membership application and printed in the International Union's magazine "Working America" have been found insufficient for differing reasons.[30] Although there is no Board law holding that a union's failure to give sufficient General Motors and Beck notice would render the union's imposition of a fine against members for crossing a picket line unlawful, Advice has previously concluded that a union unlawfully fined employees who had crossed a picket line at a point in time when they were unaware of those rights.[31] In Int'l Brotherhood of Teamsters (UPS), several members crossed a union authorized picket line before they resigned from the union. The union then instituted fines against the members for crossing the picket line. Advice first determined that the charging parties had not been given proper General Motors and Beck notice prior to the

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[28] California Saw, 320 NLRB at 233.

[29] 203 F.3d at 48.

[30] See Sections I and III, above.

[31] Int'l Brotherhood of Teamsters (UPS), Case 4-CB-7972-1, et al, Advice Memorandum dated March 10, 1998.

strike, and then reasoned that because the Board has determined that the appropriate remedy for a Union's failure to provide Beck and General Motors notice is the right to retroactively resign from that union,[32] the union was precluded from disciplining the charging parties for crossing a picket line during a strike when their retroactive resignations would be effective on a date well before the strike took place.

Similarly, the General Counsel's minute in UPNA and UPNA of Lockport Memorial Hospital (Lockport Memorial Hospital), found that the union violated the Act by instituting disciplinary action against employees for crossing a picket line when they had not been informed of their General Motors and Beck rights.[33] Lastly, Advice has also concluded that expunction of fines would be proper for employees who were fined for working during a strike when they had not been given General Motors and Beck notice.[34]

Here, like in above cited memoranda, the Union failed to adequately inform members of their General Motors and Beck rights prior to the strike, the employees crossed an authorized picket line, and the Union fined them. In line with the Advice Memoranda and the General Counsel's minute, complaint should issue, absent settlement, alleging that the disciplinary proceedings and fines violated Section 8(b)(1)(A).

B.J.K.

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[32] Rochester Mfg. Co., 323 NLRB 260 (1997), affirmed by Cecil v. NLRB, 194 F.3d 1311 (6th Cir. 1999), cert. denied, 529 U.S. 1066 (2000).

[33] Case Nos. 3-CB-7988, 7989, 7990, General Counsel Minute dated March 28, 2003.

[34] SEIU Local 1877 (One Source), Case 31-CB-10722, and SEIU Local 1877 (Advance Building Maintenance), Case 31-CB-19723, Advice Memorandum dated March 28, 2001.

International and National Unions with Beck Systems

Name of Union	Membership
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America [UAW]	(728,510)
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB)	(77,643)
United Brotherhood of Carpenters and Joiners of America [UBC]	(515,986)
Communications Workers of America [CWA]	(490,621)
International Brotherhood of Electrical Workers [IBEW]	(718,742)
International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers [IUE]	(112,331)
United Food and Commercial Workers Intl Union [UFCW]	(1,391,399)
Graphic Communications International Union [GCIU]	(141,874)
Intl Assn of Bridge, Structural, Ornamental and Reinforcing Iron Workers [BSORIW]	(126,004)
Laborers' International Union of North America [LIUNA]	(774,696)
Intl Longshoremen's Association [ILA]	(47,000)
Intl Assn of Machinists and Aerospace Workers [IAMAW]	(737,510)
National Maritime Union [NMU]	(not available)
American Federation of Musicians of the US and Canada [AFM]	(110,000)
Office and Professional Employees International Union [OPEIU]	(117,997)
International Union of Operating Engineers [IUOE]	(372,527)
International Union of Painters and Allied Trades [IUPAT]	(133,000)
National Production Workers Union [NPWU]	(4,850)
Screen Actors Guild [SAG]	(76,309)
Service Employees International Union [SEIU]	(1,400,000)
Sheet Metal Workers Intl Assn [SMW]	(142,500)
United Steelworkers of America [USWA]	(690,000)
International Brotherhood of Teamsters [IBT]	(1,400,700)
American Federation of Television and Radio Artists [AFTRA]	(67,251)
Intl Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the US and Canada [IATSE]	(101,000)
Transport Workers Union of America [TWU]	(109,000)