OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 88- 14 November 15, 1988

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

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Guidelines Concerning CWA v. Beck, ___U.S.___, 128 LRRM 2729 (June 29, 1988).

## Introduction

In CWA v. Beck, the Supreme Court held that the proviso to Section 8(a)(3) of the Act does not "permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected [pursuant to a union-security clause] on activities unrelated to collective bargaining, contract administration or grievance adjustment." 1/ The Court also concluded that "such expenditures violate the union's duty of fair representation." 2/

There are presently pending several cases in which it is alleged that unions violated Section 8(b)(1)(A) of the Act by engaging in conduct of the kind condemned in Beck. 3/ In addition, it can fairly be anticipated that the decision in Beck will spawn future cases of the same type. This Guideline Memorandum deals with such cases.

In these Guidelines, I have relied not only on Beck but also, to some extent, on cases arising in the public and railway labor sectors. 4/ I recognize that the public sector cases, and

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1/ Beck, 128 LRRM at 2730.

2/ Id.

3/ It is clear that a union's breach of its duty of fair representation violates Section 8(b)(1)(A) of the Act. See Miranda Fuel Co., 140 NLRB 181 (1962), enf. den. 326 F.2d 172 (2d Cir. 1963).

4/ See, e.g., Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984);

perhaps the railway labor cases as well, rest in part on constitutional principles. By contrast, Beck does not rest on such principles. Because of this distinction, the Board and courts may ultimately hold that some of the requirements imposed by the case law developed in the public and railway labor sectors do not apply to the NLRA private sector. However, in order to place these issues before the Board and courts, I have generally taken the position that the body of law developed in the public and railway labor sectors does apply to the NLRA private sector.

As noted, Beck involved nonmember employees who objected to the expenditures of funds for non-representational purposes. 5/ Hence, in order to qualify for Beck rights, the employee must be a nonmember of the union. An employee who has never become a full member of the union or an employee who has resigned full membership would be eligible for Beck rights. 6/ In this latter regard, an employee who attempts to resign and is unlawfully prevented from doing so 7/ would be regarded as a constructive resignee and hence a nonmember.

In addition, as noted above, the nonmember must object to the expenditure of funds for non-representational purposes. 8/

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Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Machinists v. Street, 367 U.S. 740 (1960).

5/ In general, the phrase "non-representational" refers to functions other than collective bargaining, contract administration and grievance adjustment. This matter is discussed more fully infra.

6/ It is clear that, under a union-security clause, an employee need not be a full union member in order to retain employment. See NLRB v. General Motors Corp., 373 U.S. 734 (1963), and Union Starch & Refining Co., 87 NLRB 779 (1949), enfd. 186 F.2d 1008 (7th Cir. (1951), cert. den. 342 U.S. 815 (1951). At most, the employee can be required to pay initiation fees and dues.

7/ See Pattern Makers v. NLRB, 473 U.S. 95 (1985).

8/ Machinists v. Street, supra at 774:

> [D]issent is not to be presumed -- it must affirmatively be made known to the union by dissenting employees. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be

If the nonmember does not object, the union can collect "full dues" under the union-security clause. 9/

Requirements Imposed on Union

If a union has a union-security clause covering statutory employees, and if it expends part of the funds collected thereunder on non-representational activities, that union has an obligation to notify nonmember employees: (1) that a stated percentage of funds was spent in the last accounting year for non-representational activities; (2) that nonmembers can object to having their union-security payments spent on such activities; and (3) that those who object will be charged only for representational activities. In addition, the union must notify the nonmembers that, if they object, the union will provide detailed information concerning the breakdown between representational and non-representational expenditures.

The aforementioned notice must be given at least once a year, as soon as practicable after the close of the union's prior accounting year. In this regard, we note that, as set forth infra, the calculations for a given year can be based on the financial data from the preceding accounting year. For similar reasons, a union can require nonmembers to file new objections, as discussed below, each year.

In addition, if the union has a "time window" for filing objections, the notice must set forth that information and the time period must be reasonable.

If a new employee (who is not a member) joins the unit after the notice or if a member resigns after the notice, a separate notice and opportunity to object must be given to these employees.

Upon receipt of a nonmember's objection to expenditures of monies for non-representational purposes, the union must refrain from charging the employee for those non-representational

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subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

9/ Id.

functions. 10/ Thus, for example, if the figures for the last accounting year show 80 percent of the union's expenditures were for representational functions and 20 percent for non-representational functions and if the monthly dues are $10 per month, the union can charge the objecting employee only $8 after the employee objects.

Also upon receipt of a nonmember's objection, the union must provide that objector with information setting forth the union's major expenditures during the previous accounting year, distinguishing between representational and non-representational functions. 11/ While "absolute precision" cannot "be expected or required," the information must inform the employee of the major categories of expenses (e.g., national convention, organizing, etc.), whether the union considers that expense to be representational or non-representational, the total sum of expenditures, and the percentages thereof that were representational and non-representational. 12/ This financial information must be verified by an independent accounting firm.

If the objecting employee disagrees with the union's determination of the appropriate percentage, that employee must be given an opportunity to challenge that determination or the use of monies for particular purposes. One of the ways in which an employee can make such challenges is to file a charge with the NLRB. In that event, as with any other case, the Office of the General Counsel will determine the legality of the Union's allocation of monies into representational and non-representational purposes and will either issue complaint, absent settlement, or dismiss the charge, absent withdrawal, as appropriate. 13/

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10/ The union may not follow a "charge and rebate" system. That would amount to an "involuntary loan" for non-representational purposes. See Ellis, supra at 443-444.

11/ Hudson, supra at 306-307.

If the union is a local of an international and a portion of union-security money is sent to the international, both the local and the international must provide the relevant information.

12/ Hudson, supra at 307.

13/ Until further notice, such cases must be submitted to Advice.

The union may, if it wishes, establish a system of neutral arbitration to resolve the employee's challenge. 14/ Assuming that the system is modeled on that set forth in Hudson, 15/ the Region should hold the charges in abeyance, pending the results of such arbitration. 16/ If the arbitrator agrees with the employee, and the union complies, the charge can be dismissed, absent withdrawal, on grounds of mootness. If the arbitrator disagrees with the employee, the Region should submit to Advice the issue of deferral to the arbitral decision. 17/

In all cases in which an employee disagrees with the union's determination, the union is required to place the amount in dispute into an interest-bearing escrow account while the matter is being resolved. Non-disputed amounts can be legitimately collected under the union-security clause of the collective bargaining contract.

Classification of Expenditures

As noted above, there is an important distinction between expenditures for representational activities and those for non-representational activities. "Congress understood Section 8(a)(3) simply to enable unions to charge nonmembers only for those activities that actually benefit them." Beck, supra, 128 LRRM at 2738. It is clear that representational activities which are chargeable to nonmembers include:

a. Collective bargaining, contract administration, and grievance-arbitration.

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14/ I recognize that Hudson imposes an arbitration requirement. However, that requirement was based upon constitutional considerations. In addition, an employee covered by the NLRA can have his/her challenge resolved, free of charge, by neutral public officials.

15/ Under Hudson, the selection of the arbitrator must not be the union's unrestricted choice, even if the choice is from a neutral list. Hudson, supra at 308, n. 21.

16/ If there is any attempt by a union to cause the discharge of the employee while the arbitration is pending, the Region should promptly notify Advice.

17/ If the union has a system of arbitration, and the employee declines to use it, the case should be submitted to Advice.

b. The expenses of litigation incident to negotiating and administering the contract, settling grievances and disputes arising within the bargaining unit, fulfilling the duty of fair representation to the unit, handling jurisdictional disputes with other unions, and conducting other litigation before administrative agencies or courts concerning bargaining unit employees. 18/

c. National conventions. 19/

d. Union business meetings and social activities open to member and nonmember employees. 20/

e. Union publications to the extent that they report on the union's representational activities. 21/

f. Costs of union benefits available to members and nonmembers alike. 22/

Non-representational, and therefore non-chargeable, activities include:

a. Union organizing activities, either in the represented unit or outside of it. 23/

b. Expenses of litigation that do not "directly concern" the bargaining unit. 24/

c. Union publications to the extent that they report on non-representational activities. 25/

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18/ Ellis, supra at 453.

19/ Id. at 448-449.

20/ Id. at 449-450.

21/ Id. at 450-451.

22/ Id. at 452, n. 14.

23/ Id. at 451-453.

24/ Id. at 453.

25/ Id. at 450-451.

d. Costs of union benefits that are not available to nonmembers. 26/

e. Costs of a union building fund. 27/

f. Lobbying. 28/

g. Promotion or defeat of legislation. 29/

h. Political campaigns. 30/

i. Advertising relating to non-chargeable matters. 31/

Cases involving expenditures not listed above should be submitted to Advice.

Submissions to Advice

If a union does not conform to these guidelines, so that a case must be litigated, the Region should contact Advice for assistance in the litigation and briefing of the precise matter(s) at issue.

The fact that a given issue is not discussed herein does not mean that there is no Beck obligation as to that issue. Rather, such issues will be resolved on a case-by-case basis.

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26/ Id. at 452, n. 14.

27/ Id.

28/ Machinists v. Street, supra at 768-69.

29/ Id.

30/ Id.

31/ Id.

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