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

Advice Memorandum

DATE: December 20, 2002

TO : Dorothy L. Moore-Duncan, Regional Director
Daniel E. Halevy, Regional Attorney
John D. Breese, Assistant to Regional Director
Region 4

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

SUBJECT: Teamsters Local 401
(Sears Logistics Services)
Cases 4-CB-8905, 8906

This Bill Johnson's[1] case was submitted for advice as to whether the Union's lawsuit seeking a "fair share" of dues from a non-member violates Section 8(b)(1)(A), where the collective-bargaining agreement between the Employer and the Union does not contain a union security clause.[*FOIA Exemptions 2 and 5*

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We conclude that the Union's lawsuit has an unlawful object, and that the Region should issue a Section 8(b)(1)(A) complaint absent settlement. [*FOIA Exemptions 2 and 5*

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FACTS

The Employer operates a warehouse which stores and distributes products for Sears, Roebuck and Company. The Union represents the Employer's shipping and receiving employees. There is a collective-bargaining agreement in effect through May 31, 2003. That agreement does not contain a union security clause.

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[1] Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

[2] This case was also submitted as to the propriety of Section 10(j) injunctive relief. That issue will be addressed in a separate memorandum.

On October 1, 2001, the Union sent a "Notice to Non-Members on Agency Fee/Fair Share Objections" to all employees in the unit. The notice stated that employees covered by a union-security clause could be required to become "financial core payers." The Notice also stated that financial core payers had the right to object to paying for activities not germane to collective-bargaining or grievance adjustment, described the Union's internal procedure for filing objections, and provided a summary of the Union's expenditures.

Employee Jeffrey Shinko has worked for the Employer as an order filler and forklift operator since 1993. He never joined the Union and has never paid dues.

On June 19, 2002, the Union filed a complaint in Luzerne County district court seeking Shinko's "fair share" of Union dues. After a hearing on this matter, during which the judge asked Shinko why he "thought he could get a free ride," the court granted judgment for the Union and required Shinko to pay "dues owed" in the amount of $182.32 and $49.50 in court costs.

Shinko appealed the district court judgment to the Court of Common Pleas which, pursuant to Pennsylvania law, will conduct a de novo hearing on a re-filed complaint. That hearing has not yet been scheduled. The Union's complaint states that: (1) Shinko was included in the bargaining unit; (2) Shinko was not a Union member and did not pay any dues or fees to the Union; (3) Shinko directly benefited from the Union's activities as collective-bargaining representative; (4) although the employees represented by the Union are not required to become members, they are required to pay their fair share of the costs of operating the Union; (5) the employees were notified of that policy on October 1, 2001; and (6) Shinko would be "unjustly enriched" if he were allowed to retain benefits resulting from the work and services performed by the Union without having to make a "fair share" or reasonable payment for the value of the benefits he received. In its request for relief, the Union seeks judgment in the amount of $182.32 plus unspecified "fair share" payments for continuing services provided by the Union, court costs and attorney's fees.[3]

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[3] On November 14, 2002, the Union filed additional state court lawsuits against four other non-member employees in this unit seeking the payment of a "fair share" contribution to Union expenses. The Union has issued a memorandum to employees threatening non-members with lawsuits for failing to pay "fair share" contributions.

Thus far, Shinko has missed a day of work to attend court proceedings, and the Employer, which is defending the suit on Shinko's behalf, has paid attorney's fees of approximately $2000. Shinko has not paid the district court judgment and need not do so unless his appeal is denied.

ACTION

We conclude that the Union violated Section 8(b)(1)(A) by filing and maintaining a lawsuit to recover dues and fees which Charging Party Shinko cannot be obligated to pay in the absence of a contractual union security clause. The lawsuit may be enjoined by the Board because it has an objective that is illegal under Federal law. [*FOIA Exemptions 2 and 5*

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The Supreme Court reaffirmed in Bill Johnson's that the Board may enjoin a state court lawsuit which is preempted by the Act or which has an objective that is illegal under Federal law.[4] Such a lawsuit enjoys no special constitutional protection, and can be condemned as an unfair labor practice if it is unlawful under traditional NLRA principles.

In Golf Officials (PGA Tour),[5] the Board held that a suit to recover dues and fees in the absence of a union security clause had an unlawful object. With regard to the union's "unjust enrichment" argument, the Board stated that "no matter how reasonable it may seem that [the employees] should have to pay their fair share of collective-bargaining expenses, the union's contention must be rejected." The Board noted that an employee has the right to refrain from assisting a union of which the employee is not a member, except to the extent that he must make union-security payments under a contractual union-security clause. The Board found that the union's claim was based on the notion that "no person should be a 'free rider,'"

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[4] 461 U.S. at 737, fn. 5. We agree with the Region that BE&K Construction v. NLRB, 122 S.Ct. 2390 (2002) - which deals with the question of under what, if any circumstances, the Board may find a reasonably based, concluded suit unlawful - does not disturb this aspect of Bill Johnson's.

[5] 317 NLRB 774 (1995).

and held that "[t]his argument was expressly considered by Congress when it passed the 1947 amendments to the Act and the result was a compromise provision that allowed unions to charge nonmembers for costs associated with collective-bargaining only where a contract requiring union membership as a condition of employment had been negotiated."[6] Since the union sought through its lawsuit to recover dues and fees that it was not permitted to charge, the suit had an unlawful object and was enjoinable notwithstanding Bill Johnson's.

Here, as in PGA Tour, there is no contractual provision permitting the Union to require the payment of dues by nonmembers. The October 2001 Notice was an appropriate Beck notice, but the requirements stated therein are applicable only where a lawful union-security clause has been negotiated as part of a collective-bargaining agreement. The Union's lawsuit thus has an unlawful object under Federal law.

[*FOIA Exemptions 2 and 5*

.][7] [*FOIA Exemptions 2 and 5*

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[*FOIA Exemptions 2 and 5*

][9] [*FOIA Exemptions 2 and 5*

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[6] 317 NLRB at 778, citing Electrical Workers IUE Local 444 (Paramax Systems), 311 NLRB 1031, 1033-1036 (1993).

[7] [*FOIA Exemptions 2 and 5*

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[8] [*FOIA Exemptions 2 and 5*

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[9] [*FOIA Exemptions 2 and 5.*]

]10[*FOIA Exemptions 2 and 5*
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Accordingly, absent settlement, the Region should issue a Section 8(b)(1)(A) complaint consistent with the foregoing.

B.J.K.

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10 [*FOIA Exemptions 2 and 5*

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