

United States Government
NATIONAL LABOR RELATIONS BOARD

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April 25, 2008

Mary C. "Ketty" Monzon
2103 S. 12th Street West
Missoula, MT 59801

**Re: Blackfoot Telephone Cooperative
Case 19-UD-599**

Dear Ms. Monzon:

The above-captioned case, petitioning for a secret-ballot election under Section 9(e) of the Act to determine whether certain of the employees of Blackfoot Telephone Cooperative ("Employer") wish to withdraw the authority of IBEW Local 768 ("Union") to require, under its agreement with their employer, that employees make certain lawful payments to the Union in order to retain their jobs, has been carefully reviewed and considered.

As a result of the investigation, I find that further proceedings are unwarranted as the investigation disclosed that the contract between the Employer and Union does not contain a union security clause as contemplated by the proviso to Section 8(a)(3) of the Act. Accordingly, as explained in detail below, I am dismissing the petition in this matter.

The relevant facts, as presented by the Parties in response to my April 11, 2008 Order to Show Cause are undisputed. In 2007, the Employer and Union entered into negotiations for a new collective bargaining agreement ("Agreement"). The Union proposed to include a union security clause in the Agreement which would condition the employment of employees on the payment of dues or representational fees to the Union. The Employer refused to agree to such a clause. However, the Employer and Union agreed to include Section 2.3 in the Agreement under which unit employees "must become members of the union or pay a representation fee in an amount lawfully determined by the Union" within 30 days after the effective date of the Agreement or within 30 days of the date of hire of any employee hired after the effective date.¹ The Parties,

¹ Section 2.3 in full states:

In recognition of the Union's duty to fairly represent all of the members of the bargaining unit, in further recognition that the duty to represent members of the bargaining unit has a cost to the union and in further recognition that all employees covered by this agreement, receive certain benefits because of this Agreement, the parties agree that within 30 days after the effective date of this Agreement (for existing employees) and within 30 days of the date of hire of any employee hired after the effective date of this Agreement, all employees covered by this Agreement must become members of the union or pay a representation fee in an amount lawfully determined by the Union. The parties agree that

however, specifically agreed during negotiations that an employee's continued employment was not to be conditioned on Union membership or financial support to the Union. As such, the Agreement states that "union membership, the payment of union dues, or the payment of representation fees, are not conditions of employment. The parties agree that it is solely the Union's right and responsibility to enforce this provision and that in enforcing this provision, the Union may not demand, and the Cooperative has no obligation, to discharge or take any other action with regard to any employee who is not in compliance with this provision."

The evidence also reveals that since the effective date of the Agreement, January 1, 2008, 40 of the 79 employees in the bargaining unit have become members of the Union, and only 35 currently pay dues. Despite the language in the Agreement, however, neither the Union nor the Employer has taken any action against unit employees who are not members or who are not paying representational dues and the Union has not requested the Employer take any action.

Section 8(a)(3) of the Act states in relevant part that:

"nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a *condition of employment* membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later (i) if such labor organization is the

union membership, the payment of union dues, or the payment of representation fees, are not conditions of employment. The parties agree that it is solely the Union's right and responsibility to enforce this provision and that in enforcing this provision, the Union may not demand, and the Cooperative has no obligation, to discharge or take any other action with regard to any employee who is not in compliance with this provision. In addition, this section of the Agreement, or any action taken by the Union to enforce this section of the Agreement, are not subject to the Agreement's grievance provision. Instead the parties agree that any dispute between the Union and a member of the bargaining unit concerning compliance with this provision shall be submitted to binding arbitration under the following procedures:

1. The Union must notify the affected employee in writing of the employee's obligation under this provision and his or her failure to comply with this provision;
2. If the employee fails to comply with this provision after receiving such written notice, the employee and the Union must select an arbitrator to hear any dispute about whether dues or fees are owed by the employee to the Union and if so, in what amount. The arbitrator shall be selected by the employee and the Union using the procedures for selecting an Arbitrator as provided for in Section 13.3, Step 3 of this contract.
3. The Union shall pay the entire fee of the Arbitrator.
4. The Arbitrator's decision concerning the amount of dues or fees owing to the Union by the Employee (if any) shall be final and binding.
5. The Cooperative shall be notified of such proceedings, but shall have no obligation to participate in such proceedings

representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership... (emphasis added)

As such, the Act permits a labor organization and an employer to enter into a union security clause requiring membership in a union as a condition of employment under the specific guidelines set forth in Section 8(a)(3). However, the Act also provides an escape valve for employees who seek to rescind a union security clause. Section 9(e) of the Act states that if there is a union security clause between an employer and union that meets the criteria of Section 8(a)(3), employees may petition for a secret ballot election to determine if a majority of employees in the unit wish to rescind the clause.² As stated, the statutory language contemplates that such a clause affects the continued employment of the unit employees. This concept is carried forth throughout the deauthorization process, including during the election itself. Thus, the secret ballot presented to voters asks, "Do you wish to withdraw the authority of your bargaining representative to require under its agreement with the employer that employees make certain lawful payments to the union *in order to retain your jobs?*" CHM Section 11512 (emphasis added).

Here, the uncontroverted evidence shows that the Employer and Union did not intend Section 2.3 to affect the continued employment of unit employees. Thus, Section 2.3 specifically expresses the parties' understanding that Union membership and payment of Union dues or representation fees are not conditions of employment. Further, the Section acknowledges that only the Union can seek to enforce the expected obligations and that the Union may not

² Section 9(e) of the Act states in part: **[Secret ballot; limitation of elections]** (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

demand, and the Employer has no obligation, to take any action with regard to any employee not in compliance with the Section.

I do recognize however that Section 2.3 purports to obligate employees to “become members of the union or pay a representation fee in an amount lawfully determined by the Union.” Thus, the Section does contain one essential attribute of a union security clause.³ On the one hand, the arbitration system designed to enforce Section 2.3 could be viewed as a functional equivalent to the customary union security enforcement mechanism. However, on balance, I conclude that the parties’ express disavowal that the clause creates a condition of employment, coupled with the other reservations in the clause, makes a UD petition inappropriate, at least at this time. In support of this conclusion, I also note that the ballot question which would be presented to voters in the election sought by this petition raises a question not applicable to these circumstances, as job retention is not impacted by Section 2.3. Without such intent, Section 2.3 appears to not fall within the realm of the proviso to Section 8(a)(3) of the Act. Consequently, the election process set forth in Section 9(e) cannot be implemented. Therefore, I am dismissing the instant petition.⁴

Pursuant to the National Labor Relations Board’s Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570. A copy of such request must be served on the Regional Director and each of the other parties to the proceeding. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. The request for review (eight copies) must be received by the Executive Secretary of the Board in Washington, DC by close of business on May 9, 2008, at 5:00 p.m. (ET). You should be advised that Section 102.114 of the Board’s Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, however, the Board may grant special permission for a longer period within which to file.

A request for review may also be submitted by electronic filing. See the attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency’s website at www.nlr.gov for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. On the home page of the Board’s website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, either by mail or by electronic filing. A request for extension of time should be submitted to the Executive Secretary of the Board in Washington, DC, and a

³ I am unaware of any precedent addressing whether the specific, unique provisions of Section 2.3 constitute a union security clause within the meaning of Section 8(a)(3) of the Act.

⁴ As noted, there is no evidence that the Union has taken any action or requested any action be taken against employees who fail to become members or who fail to financially support the Union. If such action takes place and a UD petition is filed, or if an unfair labor practice charge is filed, the Region will revisit the issues involving Section 2.3.

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copy of any such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. The request for review and any extension of time for filing must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding, and a copy must be served in the same or faster manner as that utilized in filing the request with the Board. When filing with the Board is accomplished by personal service, however, the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail.

Very truly yours,

/s/ Richard L. Ahearn

Richard L. Ahearn
Regional Director

Enclosures

cc: National Labor Relations Board, Attn: Executive Secretary, 1099 - 14th Street N.W.,
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