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Labor Watch

Locke Box:
Supreme Court Case Threatens Big Labor's Legal Slush Fund

By Stefan Gleason

***Summary*:** *The U.S. Supreme Court has ruled that employees not protected by Right to Work laws still have the right to refrain from formal union membership. Union officials may charge nonmembers for union activities such as collective bargaining that relate to their jobs. However, unions cannot force them to pay for non-bargaining activities like union politics and lobbying. On October 6, National Right to Work Foundation attorneys will make their fourteenth trip to the Supreme Court for oral arguments in* Daniel Locke v. Edward Karass. *The Court will determine where and how to draw the line: It will set criteria for determining whether an employee can be forced to fund Big Labor's lawsuit machine.*

Daniel Locke and 19 Maine state employees discovered their union dues were being used to finance litigation that had nothing to do with their own jobs, and didn't like it one bit. They're hoping the Supreme Court will uphold their right to refuse.

The U.S. Supreme Court has so far refused to recognize that all compulsory union dues, no matter how they are spent, violate workers' First Amendment rights and that no compelling state interest exists to justify subverting these rights. However, the Court has concluded that forced union dues for certain union expenditures violates nonmembers' First Amendment rights. U.S. Supreme Court rulings have established that union officials cannot compel nonmembers to support union lobbying, political activities and other forms of ideological expression.

On behalf of Daniel Locke and 19 other current and former Maine state employees, NRTW Foundation attorneys will argue this month that because litigation is also inherently expressive, unions cannot compel nonmembers to pay for it. Moreover, because litigation regarding a union's affiliates in another state does not affect the union's own collective bargaining process, there should be a bright line drawn to ensure that no extra-unit litigation is ever subsidized by objecting nonmembers.

Union lawyers insist workers must pay for litigation activities that unions undertake outside their own bargaining unit using a pooling arrangement that union bosses analogize to insurance. If union bosses get their way, unions will be permitted to seize

October 2008

dues from members and nonmembers alike – even from employees who never wanted a union's "representation" – and pool them together in a giant slush fund to subsidize Big Labor's lawsuit machine.

Big Labor a $20 Billion Business

Under federal and state labor law, a union certified as a bargaining unit's exclusive representative – or monopoly bargaining agent – has a so-called "duty of fair representation." This means that union officials must fairly and without discrimination represent in good faith all employees in the bargaining unit, including those who would prefer to bargain for themselves or be represented by a different union, those who voted against union certification, and even those who joined the company after the union had been certified and thus never had the opportunity to vote.

Unfortunately, union officials violate this duty all the time and it is very difficult to stop them from abusing the rights of nonmembers. The court-created "duty of fair representation" is a weak standard that gives wide latitude to the union. As employees have often learned the hard way when they try to assert their rights, there is a big difference between the Supreme Court's legal rulings and the reality of how they are applied.

The Supreme Court has ruled that governments are permitted to authorize unions to exercise monopoly bargaining powers and require all employees in a bargaining unit to pay union dues – so long as the uses of those forced dues are germane to the collective bargaining process in that bargaining unit. According to estimates (previously made by the Department of Labor and now by the Bureau of National Affairs), more than eight of out every ten union contracts contain forced union dues clauses.

Each year, unions required to document their finances with the Department of Labor collect over $20 billion, and over $8 billion of that comes from forced union dues. An estimated additional $4 billion in forced union dues is collected by public sector unions, a category that falls outside of federal reporting requirements. It should be immediately clear that a large share of compulsory dues is spent not on contract negotiation and administration but on schemes to secure new union revenue sources.

As the National Institute for Labor Relations Research has pointed out, the single largest component of union spending – roughly 40 percent – is spent on payroll.

The American people know that Big Labor is heavily involved in politics. It uses forced dues to support its radical and far left political agenda. In the 2008 election cycle, organized labor's plans are as transparent as ever. In fact, union bosses frequently brag about how much money their union is spending on a particular candidate or cause.

Besides the large sums of money organized labor spends on its favored politicians and candidates – well over $1 billion during this election cycle when you take into account state and local races as well as money from political action committees – the nation's top union coalitions also are instructing their operatives to buy large blocks of television time for political ads; they are sending out millions of pieces of mail endorsing political candidates and ballot initiatives; and they are deploying thousands of union activists to go door-to-door on behalf of union candidates and causes.

The 30 Percent Solution

According to most polls, Democrats expect to pick up more U.S. House and Senate seats, if not the White House. Unions see this as an encouraging sign, and hope that their hard work will pay dividends in the form of important legislation taken up by the next Congress.

In the past, a union usually obtained its power to negotiate for all employees after it won a secret ballot election supervised by the National Labor Relations Board. Because union organizers in recent years have found it harder to muster the 30 percent of employee support to obtain an election, and majority employee support to win it, unions have pursued other methods that diminish employee choice in the matter.

Under the current federal labor law governing most employees in the private sector, an employer may opt to accept a union as the monopoly bargaining agent of its employees if union organizers present "union authorization cards" arguably signed by a majority of the workers. This process (known as "card check") opens the door for the harassment and intimidation of employees who are targeted by union organizers seeking their signatures. "Card check" is tantamount to having a union official accompany you into the voting booth – someone who won't leave you alone until you vote the way they want.

Fortunately, many employers resist the intrusion on worker privacy and the elimination of the private ballot. They often rebuff union pressure and insist that their employees get a secret ballot election. So, the organized labor hierarchy has been pressing Congress to pass the misleadingly titled Employee Free Choice Act, which would force an employer to recognize and bargain with any union that presented signed cards from a majority of its employees. Passage of this legislation could help Big Labor corral more than a million workers each year into union ranks.

The card check bill, H.R. 800**,** swept through the U.S. House of Representatives last year**.** Fortunately, Senate Republicans have thus far managed to block the bill.

With all its forced dues revenue, Big Labor has the resources to impose card check agreements on employers by other, non-legislative means. As prior *Labor Watch*

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Labor Watch is published by Capital Research Center, a non-partisan education and research organization classified by the IRS as a 501(c)(3) public charity. Reprints are available for $2.50 prepaid to Capital Research Center.

articles have documented, union bosses frequently unleash heavy-handed "corporate campaigns" to achieve this end. Tactics range from smearing the employer in the press, encouraging boycotts, stirring up regulatory and political problems, filing unfair labor practice charges, and inciting trouble with a company's customers or stockholders.

Workers Forced to Pay "Unfair Share"

Union bosses have another weapon at their disposal in corporate campaigns: lawsuits. Union lawsuits are often used to bully employers into greasing the rails for more coercive card check organizing drives, and ultimately more forced union dues. What is at stake in *Locke* is whether forced dues seized from workers in one bargaining unit can be used to fund union lawsuits everywhere else.

The object of the current case before the Supreme Court is the Maine State Employees Association (MSEA), an affiliate of the powerful Service Employees International Union (SEIU). MSEA "represents" approximately 10,000 employees, mostly state government workers. Until 2005, only voluntary members paid any union fees.

But then union officials used their political clout to cut a deal with Maine's legislature and governor, inserting a forced dues clause into the state's contract with the union. This compelled nearly 3,000 nonmembers to pay union fees for the first time. As one employee told local media, "It was suddenly sprung upon us." Nonmembers including Daniel Locke objected to being forced to pay union dues and sought legal aid from the National Right to Work Foundation

In the Foundation-won case *Abood v. Detroit Board of Education* (1977), the U.S. Supreme Court ruled that although such an "agency shop" system is constitutionally permissible, a public sector union "cannot constitutionally spend [forced dues paid by nonmembers] for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." Many unions still flagrantly violate this law and continue spending forced dues of nonmembers on activities unrelated to collective bargaining.

In 1986 in another Foundation-won case, *Chicago Teachers Union v. Hudson*, the Court established procedural safeguards to attempt to protect public sector employees' First Amendment rights. Before they can collect any forced dues, union officials must provide an adequate breakdown of union expenditures, verified by an independent auditor, and nonmembers must be able to challenge the basis of the portion of the dues charged to them.

These principles are difficult to enforce because they leave intact the core union privilege—its power to collect forced dues. The burden is put on the employees to try to secure a return of *some* of their money. More than 20 years later, union bosses are still trying to retain as much as possible from nonmembers' dues.

In the past, union political spending has received the vast share of the public's – and the Court's – attention. But union lawyers continue to argue that other non-bargaining activities, such as costly extra-unit litigation and organizing expenses, are "chargeable" to nonmembers.

While Big Labor may consider litigation an important component of their plan to force millions of workers into unions all across the country, the High Court has already ruled against the chargeability of such expenses *twice*.

First, in the Foundation's 1984 Supreme Court victory known as *Ellis v. Railway Clerks*, the Court unanimously held that railroad and airline employee unions, which are covered by the Railway Labor Act, cannot charge nonmembers for organizing, or for the portion of union publications that report on nonchargeable activities, or for extra-unit litigation.

In the Foundation's *Lehnert v. Ferris Faculty Association* victory in 1991, which produced a messy decision of multiple opinions, the Court reaffirmed its holding in *Ellis* and applied *Ellis*' reasoning to public sector unions.

In 2005, Daniel Locke and the other nonmembers – who had already been forced to accept the MSEA's "representation" -- learned that they were now being forced to pay dues. At first, MSEA officials provided the employees with deficient Hudson-required notices explaining the basis of the dues.

Then the union's amended notices revealed a troubling fact: MSEA officials were treating as "chargeable" expenses money that they paid to their parent union, the SEIU, to fund its own and its affiliates' litigation slush fund. Locke and his fellow public servants objected to being forced to subsidize litigation not concerning their own bargaining units. The employees rightfully call this an "unfair share."

The *Locke* Case

With free legal aid from the National Right to Work Foundation, the Maine nonmember employees filed suit in federal court against the MSEA. The trial court, unfortunately, virtually ignored the unanimous *Ellis* precedent and latched onto the confused *Lehnert* decision, which lacked an explicit majority opinion concerning extra-unit litigation, and relied instead on Third and Sixth Circuit rulings which sidestepped *Ellis*.

Foundation attorneys appealed to the U.S. Court of Appeals for the First Circuit. The appeals court acknowledged *Ellis*' ruling but perceived an inconsistency between *Ellis* and *Lehnert*. *Lehnert*, the court ruled, concerned the chargeability of pooling arrangements – in which various local unions pool some of their funds through a national affiliate, which in turn distributes the money to fund litigation all over the country. *Ellis*, the First Circuit held, only prevents one local union from sending nonmembers' forced dues to another local to subsidize litigation which does not directly impact the nonmembers' own bargaining unit.

As Foundation attorneys explain in their brief and argued before the Supreme Court this October, *Ellis* did, in fact, concern pooling arrangements, and the union in *Ellis* made a pooling arrangement. In the *Ellis* decision the Supreme Court unanimously held then that all extra-unit litigation is

nonchargeable, thus rejecting the pooling argument.

Forcing nonmember workers in one bargaining unit to fund another unit's litigation forces them to associate themselves with workers far across the country, in other jobs and industries no less, and worse, compels them to subsidize their litigation (which is undeniably expressive activity), regardless of whether the subsidy is direct or through pooling.

Extra-unit litigation does not relate to the union's statutory authority as exclusive bargaining agents. Moreover, as Foundation attorneys note, extra-unit litigation may directly conflict with the interests of nonmember employees, particularly in the realm of public sector unions.

For example, if the High Court does not follow its precedents in support of the employees, a nonmember could be compelled to fund litigation concerning employees in a unit of local government in the municipality in which he or she resides. In that case, the nonmember may be funding litigation against his or her own interests as a citizen, taxpayer, and competitor for scarce public resources.

The Supreme Court has long recognized the inherent conflict between the First Amendment and forced agency fees. It should reconcile the conflict using what is called a "strict scrutiny" test. In holding that any agency fees are permissible despite the First Amendment, the Court has already found that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" (*Burson v. Freeman*, 1992).

In its 1977 *Abood* ruling, the Court drew a constitutional line between a union's activities which are closely related to its privileges as the exclusive collective bargaining agent. Union political activism, for instance, does not correspond to any compelling state interest. The unanimous *Ellis* Court implicitly applied this standard to extra-unit litigation.

The *Lehnert* opinions have caused considerable confusion that the court can now clear up. Justice Blackmun, writing for a four-Justice plurality, devised a three-part test for the chargeability of various union expenses not directly concerning the bargaining unit. According to Blackmun's opinion**,** the expenses must be germane to the collective bargaining process and "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

Even if expenditures do not directly tie into the particular bargaining unit, Justice Blackmun concluded, they are chargeable

so long as they would be chargeable for the local union. For any activity a local union may charge its nonmembers, it may also charge them for similar activities by its state and national affiliates.

Here is where the issue of extra-unit litigation could get tricky. Certain litigation *can* be a chargeable expense. But, citing *Ellis*, Justice Blackmun specifically exempted *extra-unit* litigation – and union publications promoting such activities – from this reasoning. Moreover, in his partial concurrence, Justice Scalia quoted the *Ellis* holding on extra-unit litigation and concluded that "there is good reason to treat [*Ellis*] as reflecting the constitutional rule."

Foundation attorneys hope that the Court will not only apply its own prior rule but will also revise and clarify the standard for all extra-unit expenditures. Not doing so would require nonmembers to have the resources and wherewithal to track all sorts of expenditures by the union's affiliates. It would open the floodgates to more union financial shell games.

To allow nonmembers to be charged for a union's extra-unit litigation would ignore the fact that the government has no vital policy interest in such activities. As the Court ruled in 2007 in the Foundation-won *Davenport v. Washington Education Association*, unions have no constitutional right to collect any fees from nonmembers. The power to do so is based entirely on statute, in this case, Maine's State Employees Labor Relations Act.

Bush Administration's Meddling

Foundation attorneys naturally expect opposition from Big Labor's lawyers. Of course, the SEIU local has filed its own brief with the Court, in which its lawyers argue that most union expenditures would be chargeable under a so-called "bona fide pooling arrangement." They argue that because the local union contributes to a giant fund under the national union's control, the national union has the resources to fund litigation concerning the local's bargaining units.

What is surprising is that the Bush Administration jumped into the case, asserting arguments that would expand the compulsory dues power of organized labor.

Last year, Solicitor General Paul Clement had already sided with the AFL-CIO and the Washington Education Association union on the most important legal question before the court in *Davenport*. Clement participated in oral arguments in *Davenport* and parroted union talking points concerning the union objection requirement imposed on employees wishing to reclaim some of their forced union dues.

Just days before resigning in May, Clement took another swipe at employee freedom by filing an *amicus* brief in *Locke*, joined by the solicitor of the Department of Labor, among others. The administration's brief mirrors many of Big Labor's arguments. In fact, SEIU's brief favorably cites the government's brief no fewer than 14 times.

In late July, Acting Solicitor General Gregory Garre filed an abortive motion with the Court to participate in oral arguments in *Locke* – and to cut into time already allocated to Foundation attorneys.

Seeking to best represent Daniel Locke and the other employees, Foundation attorneys opposed the government's motion, citing the government's continued failure to demonstrate its own interest in the case, which involves no federal statute or agency.

Fortunately, the Court has issued an extremely rare and embarrassing rebuke of the Bush Administration by denying its motion, indicating that the federal government has no basis to insert itself into the *Locke* case.

Root Problem: Forced Union Dues

The Supreme Court should uphold its own precedents and deem extra-unit litigation nonchargeable to workers who exercise their right to refrain from union membership. Unfortunately for those employees who remain employed by the state of Maine – or for any other workers across the country who labor under monopoly bargaining and forced unionism – a reaffirmation of *Ellis* will not fully vindicate these workers' rights.

Maine is one of 28 states without Right to Work protections, which would ensure that employees like Locke are not forced to pay union dues as a condition of their employment. Under current Maine state law, employees like Locke have no choice but to pay their unfair share to a union for "representation" they neither need nor want.

Over the past couple of years, many Maine state workers have joined forces to launch a decertification election and replace the MSEA with an independent – and voluntary – employee association. But labor laws entrench incumbent unions, making decertifying one a difficult task.

It is the position of the Foundation that no worker should be compelled by law to pay tribute to a union he or she does not want. A victory for Daniel Locke at the Supreme Court would be another step towards recognizing that compulsory unionism is a violation of employees' fundamental rights, but, unfortunately, not the leap necessary to end completely that pernicious practice.

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LaborNotes

"Dear Mr. Palin" began the September 4 open letter from **National Right to Work Legal Foundation** President **Mark Mix**. The recipient was Alaska's "First Dude" **Todd Palin**, an oil production operator for BP (on leave) and husband of the governor-vice presidential sensation **Sarah Palin**. She had touted husband's union membership in her address to the GOP convention the night before. Mix noted that the **United Steel Workers** had "endorsed Barack Obama for president" and "pledged to support his campaign using funds collected from union members." Fortunately, "employees have the right to resign from formal union membership and, as nonmembers, cannot be lawfully forced to fund union political activities." Mix offered Mr. Palin "free legal assistance" should he wish to "exercise your legal rights not to financially support your wife's electoral defeat."

The percentage of union jobs in the overall U.S. job market, which had been thought to be on a long, slow decline, is suddenly shooting up. UCLA's **Institute for Research on Labor and Employment** reports that the number rose half a percent from 2007 in the first half of this year, to 12.6 percent. These gains were much greater than 2007's unexpected tenth of a percent increase. Study authors **Ruth Milkman** and **Bongoh Kye** also crunched the numbers specifically for the Golden state, finding that the 2008 rate of unionization "is 17.0 percent in the L.A. metropolitan area (up from 15.9 percent in 2007) and 17.8 percent in California (up from 16.7 percent in 2007)."

On the eve of the August Democratic National Convention, **Change to Win** chairwoman **Anna Burger**, announced the seven unions that finance her tax-exempt "527" independent electioneering group, "will spend tens of millions of dollars and commit thousands of volunteer hours to contact members at their worksites and in their communities every day between now and November 4th to make sure Barack Obama is elected president and pro-worker majorities are put in the United States Congress."

According to the **Center for Responsive Politics'** OpenSecrets.org website, the union campaign fund was number five list of top 20 "state focused" 527s, in terms of funds received in 2006, but quite a ways down the list in terms of expenditures on the midterm elections. Many 527s spent nearly all of the money that they took in on campaigns. The **American Federation of State and County Municipal Employees** spent $13,378,570 of the $15,510,151 it took in that year. Change to Win spent only $3,199,943 of its $8,661,714. Curious.

During the Democratic convention, spectators witnessed a rare spectacle. *Slate* blogger **Mickey Kaus** reported on an **Ed Challenge for Change** panel where Newark Mayor **Cory Booker** had "attacked teachers unions specifically – and there was applause. In a room of 500 people at the Democratic Convention!" Booker said he'd been warned "his political career would be over if he kept pushing school choice." Prominent Democrats, including D.C. Mayor **Adrian Fenty**, also told teachers union-related horror stories. Kaus wrote, "John Wilson, head of the NEA itself, was… there. Afterwards, he seemed a bit stunned."