

LINES OF SEPARATION

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Overview

- Legal Background - Why We Must Maintain Separation
- JATC Involvement in Union Matters
 - Nashville Cautionary Tale
- Maintaining Separation - Membership, Dues, Discipline
- Best Practices
 - Adopt Confidentiality Agreements, Where Possible
 - Maintain Quality Minutes

LEGAL BACKGROUND



Background

- Section 302 of the Labor-Management Relations Act of 1947 (Taft-Hartley)
 - Makes it unlawful for employers to pay money or anything of value to employee representatives (union, union leaders, etc.).
 - BUT exceptions for certain employee benefit funds.
 - Section 302(c)(6) is the exception applicable to apprenticeship funds.

Background

- Under Section 302(c)(6), payments to Apprenticeship Fund are permissible if:
 - Payments required by a collective bargaining agreement;
 - Money is paid into a trust fund;
 - The trust fund is administered by an equal number of management and employee representatives;
 - The trust is audited annually; and
 - The results of the audit are available for inspection by interested parties.

Background

- IBEW Collective Bargaining Agreements:
 - Create/Continue Local JATC;
 - Provide for equal number of management and union committee members; and
 - Provide that these members shall also serve as trustees for the training trust.
 - Also, provide that separate minutes shall be maintained for committee and trust business.

Background

- Employee Retirement Income Security Act of 1974 (ERISA)
 - Applies to "employee welfare benefit plans," which includes "apprenticeship or other training programs."
 - Imposes a **fiduciary obligation** on trustees, committee members, and all individuals exercising discretion in the administration of the program.

Background

FIDUCIARY OBLIGATIONS

- Act solely in the interest of plan participants;
- Carry out duties prudently;
- Follow plan documents;
- Pay only reasonable plan expenses.

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Background

- Taft-Hartley and the CBA set up apprenticeship trusts to include both management and labor trustees/committee members.
- ERISA imposes fiduciary duties on those individuals to act solely in the interest of the participants in the apprenticeship program.

Background

- Raises a Question: Are trustees/committee members representatives of the party that appoints them when acting as a trustee/committee member?
- Answer: No! *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)

Background

NLRB v. Amax Coal Co., 453 U.S. 322 (1981)

- Court explained that ERISA “vests the ‘exclusive authority and discretion to manage and control the assets of the plan’ in the trustees alone, and not in the employer or the union.”
- Court also explained that “an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.”

Background

- Question:
 - Do union and management trustees also have a duty to the union or NECA chapter that appoints them?
 - Yes.

Background

- Committee members and trustees wear two hats.
 - Fiduciary Hat
 - Union/Management Hat
- ERISA requires "that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000).



Questions?



Nashville JATC

- Nashville IBEW Local Union and NECA Chapter set up the JATC under the CBA.
- JATC had an equal number of management and union representatives as trustees and committee members.
- JATC hired a training director.

Nashville JATC

- Training director assisted the local union in collecting dues from the apprentices.
- Union sent monthly updates about delinquent apprentices.
- Training director's responsibility included informing apprentices about their delinquencies.
- Business Manager acknowledged that the union collects apprentices' dues through the training director.

Nashville JATC

- Danny Page was enrolled in the apprenticeship program.
- Page made his dislike of the union known, and he routinely fell behind in his dues.
- After being confronted by the training director about his delinquency, Page's dad paid his dues for 6 months.
- Page once again fell behind while working at his father's company.

Nashville JATC

- Training director scheduled a special committee meeting where he proposed that Page be rotated out of his father's shop.
- Three committee members voted in favor of rotating Page.
- During the vote, an employer member of the JATC said, "Hell, yes, it's about [dues]."

Nashville JATC

- Page resigned from union membership.
- The JATC rescinded Page's rotation.
- The JATC then disciplined Page by delaying his promotion to the next level for 6 months, allegedly because of his conduct during the controversy over his rotation.

 Nashville JATC

What's wrong here?

Why?

 Nashville JATC

- Page filed an unfair labor practice charge against the Local Union and the Nashville JATC.
- Page claimed that the union and the JATC violated Section 8(b)(1) and (2) of the NLRA by rotating and disciplining him.

 Nashville JATC

- NLRB ultimately found that both the union and JATC violated the NLRA. *Nashville JATC*, 357 NLRB 332 (2011).
- Finding against the JATC was based on the fact that it was acting as the agent of the union when it disciplined Page.

Nashville JATC

- Union and JATC:
 - Bore costs of litigation (case went to the NLRB twice and the court of appeals once); and
 - Owed Page backpay.

Nashville JATC

- Key takeaways:

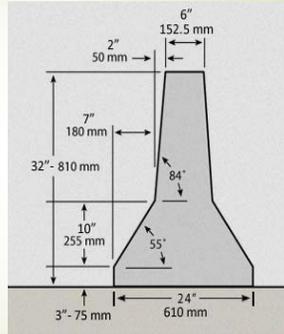
“The Union’s dues-collection and membership interests are wholly irrelevant to the administration of the JATC and the training of apprentices.”

Nashville JATC

- JATC subjected itself to NLRB’s jurisdiction because it acted as the local union’s agent.
- NLRB’s agency finding was based on:
 - JATC’s role in collecting apprentice dues; and
 - JATC’s discipline of Page for his failure to maintain his union membership and pay dues.
- In short, the NLRB found that the committee members failed to take off their union hats while conducting JATC business.

Nashville JATC

What does the
Nashville JATC
case teach us?



Questions?

JATC Involvement in Union Matters

What are the key trouble areas where a JATC should not get involved in union business?

- Union Membership
- Union Dues Collection
- Union Discipline

JATC Involvement in Union Matters

- National Labor Relations Act provides that unions and employers may require union membership as a condition of employment.
- Under the NLRA, a union may terminate a worker's membership for non-payment of dues.
- AND union may demand that employer terminate the employment of anyone whose membership has been terminated for non-payment of dues if in the CBA.
- Agreements are called a Union Security Clause.

JATC Involvement in Union Matters

- Union Security Clause in the IBEW pattern agreement states:

All employees covered by the terms of this agreement shall be required to become members of the Union as a condition of employment from and after the eighth day following the date of this agreement, whichever is later.

JATC Involvement in Union Matters

- BUT Taft-Harley Act in 1947 added Section 14(b):

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

JATC Involvement in Union Matters

There are now 26 states with so-called right-to-work laws, which prohibit union security clauses.



JATC Involvement in Union Matters

- Hypothetical:
- Local Union notifies your JATC that Sally Apprentice has resigned from membership in the union, and that she will no longer pay union dues.
- What do you do?
 - It depends.

JATC Involvement in Union Matters

- Right-to-Work State
 - Union cannot require membership/dues payments.
 - Union cannot link job referrals to dues payment in right-to-work state.
 - JATC cannot link job placement to union membership or dues payment.
- Union should try to re-organize Sally Apprentice, but JATC and Union cannot take any adverse employment action against her.

JATC Involvement in Union Matters

- Normal/Non-Right-to-Work State
- Union can enforce security clause, but it must do so carefully.
 - Unions "seeking to enforce valid union-security provisions . . . have a strict fiduciary duty to advise employees of their contractual obligations . . . before initiating any adverse action against them." *Helmley-Spear, Inc.*, 275 NLRB 262 (1985).
- Union must provide NOTICE and an OPPORTUNITY TO PAY before invoking union security clause.

JATC Involvement in Union Matters

- Reasonable notice must include:
 - Statement of precise amount and months for which dues are owed;
 - Statement of the method used to calculate amount;
 - Deadline for payment of amount owing;
 - Notice that failure to pay will result in discharge from employment.
- See Carpenters Local 296*, 305 NLRB 822, 827 (1991).

JATC Involvement in Union Matters

- Opportunity to Pay
 - Employee must be given a reasonable amount of time to pay.
 - No definitive rule, but 10 days or less is NOT considered reasonable. *See Local Union 99, IBEW*, 312 NLRB 613 (1993).

JATC Involvement in Union Matters

- If the union follows these procedures, it may invoke the union security clause, and the employer has a contractual obligation to honor the union's demand that it discharge the employee.
- BUT

JATC Involvement in Union Matters

- An employer violates the NLRA if it discharges an employee even though it had "reasonable grounds" to believe that the union did not afford the employee her due process rights, or that the union invoked the union security clause for reasons other than non-payment of dues. See *California Saw & Knife Works*, 320 NLRB 224 (1995).
- Same standard would likely apply to JATC/AJATC.

JATC Involvement in Union Matters

- In a normal/non-right-to-work state, can the union enforce its union security clause against Sally Apprentice?
 - Apprentices are covered by union security clauses.
 - Apprentices are employees for the purpose of the CBA, and they are bargaining unit members who are bound to pay dues under the CBA's union security clause.
 - Union may invoke union security clause and demand that employer dismiss an apprentice from employment.

JATC Involvement in Union Matters

- Should the JATC be involved in enforcing the union security clause against Sally Apprentice?
 - NO! See *Nashville JATC*, 357 NLRB 332 (2011).
 - Don't collect dues or "punish" apprentice who is not paying dues.
- Practical Questions:
 - May the JATC refuse to refer an apprentice against whom the union has lawfully invoked a union security clause?
 - May the JATC terminate the apprentice from the program?

JATC Involvement in Union Matters

- JATC's response must be consistent with its fiduciary obligation to act in the interest of the apprentices and apprenticeship program.
- If JATC refers an apprentice out several times, and the apprentice is turned around because the union is enforcing the union security clause, the JATC could reasonably stop referring the apprentice as an administrative convenience.
- JATC may do so only if:

JATC Involvement in Union Matters

- The union has notified the JATC in writing that it has invoked the union security clause against the apprentice;
AND
- The JATC has no "reasonable grounds" to believe that the Union has not acted appropriately.

JATC Involvement in Union Matters

- What about terminating the apprentice from the program?
 - JATC could terminate the apprentice if it becomes certain that apprentice will not rectify her delinquencies with the union, and thus will not be able to complete OJT.
 - If JATC believes there is possibility that apprentice will resolve dues issue in time to complete OJT, the JATC would be justified in retaining apprentice.

JATC Involvement in Union Matters

- Discipline of Apprentices
 - May a JATC discipline an apprentice?
 - Sure - Hold an apprentice back for failing to complete classroom or OJT training; rotate an apprentice due to problems within scope of JATC's role; etc.
 - Decision must be based solely issues directly related to apprenticeship.

JATC Involvement in Union Matters

- Discipline of Apprentices
 - May a JATC discipline an apprentice for union-related issues, *e.g.*, failure to pay dues, anti-union statements.
 - NO! Nashville JATC violated the NLRA where Page's "dues delinquency and antiunionism were motivating factors in the Committee's" decision to rotate Page and then delay his promotion. *Nashville JATC*, 357 NLRB 332 (2011).

JATC Involvement in Union Matters

Review Questions

- May a JATC make union membership a condition of apprenticeship?
- May a JATC discipline an apprentice for non-payment of dues?
- Should a JATC let an apprentice know if she has fallen behind on her dues payments?
- Who should address these issues?

JATC Involvement in Union Matters

Review Questions

- In a right-to-work state, should a JATC be involved in dues collection or union membership matters?
 - NO!
- In a right-to-work state, should the JATC stop referring an apprentice if the union tells the JATC, in writing, that it has enforce a union security clause against the apprentice?
 - NO!

JATC Involvement in Union Matters

- Are these answers different in a normal state?
 - Not really.
 - JATC still should still not be involved, but it make take appropriate action if union notifies JATC that it has enforced union security clause against an apprentice.

JATC Involvement in Union Matters

Summary:

- "The Union's Dues Collection and membership interests . . . [are] wholly irrelevant to the administration of the JATC and the training of apprentices." *Nashville JATC*, 357 NLRB 332 (2011)
- If the JATC does try to get involved it will be jointly responsible with the union for any of the union's unlawful acts if the JATC is found to have been acting as the union's agent.
- JATC committee members and trustees may also be found to have violated their fiduciary duties.

JATC Involvement in Union Matters

QUESTIONS?

Best Practices for Maintaining Separation

- Confidentiality Resolutions/Agreements
- Maintaining Quality Minutes

Best Practices for Maintaining Separation

- The 2011 Model Standards provide:
 - That the Committee shall adopt a resolution regarding confidentiality and disclosure of plan information.
 - A model confidentiality agreement is located in Appendix H to the 2011 Standards.
 - That JATC meetings are “closed meetings” due to confidential nature of apprenticeship records and issues.

Best Practices for Maintaining Separation

- Model Confidentiality Agreement:
 - Between the JATC and all Committee Members, Trustees, and JATC employees.
 - Also can be applied to Local Union officers, NECA chapter representatives, service providers, etc. to the extent these individuals need access to confidential information.

Best Practices for Maintaining Separation

- Confidential information includes:
 - Information known by the party in connection with his/her relationship with the JATC:
 - That is generally NOT known to people outside the JATC, and
 - Is related to:
 - The JATC;
 - Its participants;
 - The IBEW local union;
 - The NECA chapter;
 - The Alliance, contributing employers, service providers, etc.

Best Practices for Maintaining Separation

- Examples of Confidential Information include:
 - Certain financial information;
 - Trustee deliberations;
 - Committee deliberations
 - Trustee and Committee meeting minutes; and
 - Participant information.

Best Practices for Maintaining Separation

- Examples of information that is not confidential includes:
 - Information that is publicly available;
 - Information that becomes available on a non-confidential basis from a source other than the JATC; and
 - Information already known to the bound party prior to relationship with JATC.

Best Practices for Maintaining Separation

- Bottom Line:
 - Confidentiality resolutions and agreements reinforce idea that JATC's business must be kept separate from local union/NECA chapter business.
 - Parties that need access to the information still have access.

Best Practices for Maintaining Separation

Written Meeting Minutes

- Category I CBA language requires minutes for committee and trustee meetings.
- Model Standards provide that the JATC "minutes shall reflect all nominations, re-nominations, resignations, and terminations of JATC members/trustees."

Best Practices for Maintaining Separation

- Keeping written minutes important for purposes of our discussion today because:
 - Encourages formality in operation of JATC; and
 - Creates a record that committee members and trustees are properly performing their functions.

Best Practices for Maintaining Separation

- Tips for Keeping Minutes
 - Have the same person keep the minutes for each meeting (Secretary of the Committee or designee) using the same format;
 - Follow the Agenda;
 - Keep separate minutes for committee and trustee meetings;
 - Be concise;
 - Don't include editorial comments in minutes;
 - Be sure to include final action on all issues (e.g., motion seconded and passed)

Best Practices for Maintaining Separation

- If draft minutes are circulated between meetings:
 - Mark them as confidential and treat them as such; and
 - Distribute only to Members/Trustees.

Best Practices for Maintaining Separation

- Minutes should be approved at next meeting, and each meeting's minutes should note that approval.
- Keep minutes with other formal documents.
- Keep minutes permanently.

LINES OF SEPARATION

QUESTIONS?

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