NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

NATIONAL RIGHT TO WORK COMMITTEE

April 14, 2008

Ms. Kay H. Oshel
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
United States Department of Labor
200 Constitution Avenue, N.W., Room N-5609
Washington, D.C. 20210

Re: Comments on the Proposed Regulations Concerning Labor Organization Annual Financial Reports, Vol. 73, No. 43, Federal Register 11754 (March 4, 2008)

Dear Ms. Oshel:

On March 4, 2008, the Department of Labor's Office of Labor-Management Standards, Employment Standards Administration, proposed rules concerning the establishment of a Form T-1. These rules would mandate public financial reporting by "trusts in which a labor organization is interested."

Please accept these comments on behalf of the National Right to Work Committee ("Committee") and the National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation").

I. National Right to Work is an expert on union disclosure and related matters.

The Committee is a coalition of 2.2 million American citizens united by one belief: No one should be forced to pay tribute to a union to get or keep a job. These citizens agree that federal labor law should not promote coercive union power – and support the protection and enactment of additional state Right to Work laws until the federal sanction for compulsory unionism is eliminated.

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their Right to Work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Since its founding in 1968, the Foundation has provided legal assistance in all of the United States Supreme Court's cases involving employees' right to refrain from joining or supporting a labor organization as a condition of employment. Davenport v. Washington Education Ass'n,

127 S. Ct. 2372 (2007); Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Many cases supported by the Foundation's litigation program directly concern the adequacy of the financial disclosure that unions provide to employees. E.g., Hudson, supra; Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997); Masiello v. US Airways, 113 F. Supp.2d 870 (WDNC 2000); Tierney v. City of Toledo, 824 F.2d 1497 (1987), further proceedings, 917 F.2d 927 (6th Cir. 1990); Wessel v. City of Albuquerque, 299 F.3d 1186 (2002), further proceedings, 463 F.3d 1138 (10th Cir. 2006); Cummings v. Connell, 316 F.3d 886 (9th Cir. 2003); Locke v. Karass, 498 F.3d 49 (1st Cir. 2007), cert. granted, Case No. 07-610, 128 S.Ct. 1224 (Feb. 19, 2008).

Through the litigation of these cases, the Foundation's Staff Attorneys have developed a wealth of expertise in reviewing union books and records, and in ferreting out the waste, fraud and corruption that are common in these largely unregulated organizations, which are propped up with numerous government-granted special privileges. See Bromley v. Michigan Educ. Association-NEA, 82 F.3d 686, 696 (6th Cir. 1996) (commenting on the "wealth of relevant experience" the Foundation-provided expert witness brought to the case); Miller v. Air Line Pilots Ass'n, 108 F.3d 1415 (D.C. Cir. 1997) (Foundation-provided expert raised a genuine issue of material fact about the union's financial records).

II. Union corruption is rampant.

Even a cursory review of the Department's website of criminal enforcement actions, **http://www.dol.gov/esa/regs/compliance/olms/enforc_actions.htm,** shows pervasive embezzlement and fraud in labor unions and union pension funds. A large part of this corruption is the result of the lack of accountability inherent in government-imposed compulsory unionism. This problem is exacerbated by the fact that employees are regularly kept "in the dark" about their union's expenditures, Hudson, 475 U. S. at 306, and have little realistic way of forcing accurate disclosure. Moreover, those employees who uncover union corruption or oppose union dictates often face threats and coercion by the very union bosses whose corruption is exposed. James F. Jackson v. Local 705, IBT, 2002 WL 460841 (N.D.Ill. 2002) (pervasive campaign of racial

harassment by top union officials); Murphy v. International Union of Operating Engineers, Local 18, 774 F.2d 114 (6th Cir. 1985) (employees' opposition to union leadership and formation of a dissident group subjected them to intimidation and violence and deprived them of job referrals).

Indeed, union officials have gotten "rich, fat and happy" off the current system of government-granted special privileges, compulsory union dues, and minimal disclosure and regulation, precisely because they know that the average employee–who has slight contact with the union other than to pay his $800 (on average) forced dues bill–lacks the persistence or financial ability to hire accountants and lawyers to monitor the union's activities and finances. For most employees, it is simply easier to go along quietly and pay the dues, a situation in which corrupt union officials thrive because employees cannot engage in effective oversight.

The Department of Labor made some headway through its recent revisions of the LM-2 reporting. But far more must be done, especially when union officials control billions of dollars of employees' money in their pension and other trust funds. For these reasons, the current Department of Labor proposals are one small, but generally positive, step in that direction. Only by forcing union trust funds to disclose their finances more transparently, and posting those financial reports on the internet, is there even a glimmer of a chance that employees will be able to adequately monitor and control the unions that purport to represent them. Thus, the Committee and the Foundation generally support the proposed T-1 regulations.

III. Union trust funds are widely misused and squandered.

Union trust funds have long served as slush funds for union officials to hide poor investments and corrupt spending. (See Daily Labor Reporter, 9/13/02, concerning the Department of Labor's lawsuit against the trustees of the United Association of Plumbers and Pipe Fitters national pension fund, seeking to remove the trustees and to recover unspecified losses in connection with what the Department charged is "imprudent management" of the plan's investment in a speculative and wasteful hotel and resort venture).

Given this rampant corruption, it is shameful that AFL-CIO boss John J. Sweeney has vehemently denounced such regulations as "punitive" and onerous, designed to weaken unions. (Daily Labor Reporter, 12/24/02). Does full and transparent financial disclosure to union members, forced dues payors and the public weaken unions? Mr. Sweeney apparently thinks so. Thus, the very unions that wallow in corruption and scandal–the ULLICO scandal, the Ironworkers-Thomas Havey & Co. scandal, and the Washington Teachers Union/AFT scandal being recent examples–are the quickest to denounce even common-sense reforms. The Department of Labor should not be deterred by such vehement and shameless attacks.

IV. Unions should not be granted a loophole to hide "sensistive information".

The Department of Labor must go further than what has been proposed. More specifically, the Committee and the Foundation urge the Department of Labor to reject the provisions concerning the "Protection of Sensitive Information." This "sensitive information" exception to full disclosure is simply a loophole allowing union and trust fund officials to unilaterally determine what disclosure must be made public, and then hide a vast array of questionable expenditures. Financial reports of trust fund operations and expenditures can never be considered "confidential" information, because this money is owned by the employees, not the union or trust fund officials. Fiduciary agents have no right to maintain secret records or engage in secret transactions that are purposefully hidden from the principals – the employees who are the actual owners of the funds. As the Department of Labor's own proposed regulations note, "The searchlight of publicity is a strong deterrent."

In the civil law context, union and trust fund officials have no "sensitive information" exemption from discovery or disclosure. Indeed, courts regularly decline invitations to create new blanket privileges for union activity, because privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974); see also United States v. Porter, 986 F.2d 1014, 1019 (6th Cir. 1993)

For example, no "privilege" exists when unions seek to shield internal strategy from discovery in proceedings before the National Labor Relations Board ("NLRB").[1] There is "no substantial authority for the notion that a bargaining party's strategy records enjoy some special, categorical insulation from discovery in an unfair labor practice prosecution where the party's strategy is a relevant subject." Taylor Lumber & Treating, Inc., 326 NLRB 1298, 1300 (1998).

Similarly, there is no blanket protection of union "negotiation and organizing" strategies. The NLRA contains numerous provisions restricting many common union organizing tactics, see e.g., 29 U.S.C. §§ 158 (a)(2), (b)(1)(A), (b)(4), (b)(7), union negotiating tactics, see e.g., 29 U.S.C. §§158(b)(3), and (d), and the legality of certain contractual provisions sought by unions, see 29 U.S.C. §§158(a)(3) and (e). Thus, when the NLRB adjudicates whether a union's organizing tactics are coercive, or whether the union has negotiated in bad faith, it of necessity investigates the union's bargaining strategies and tactics, and such things are not shielded from discovery or disclosure.

Moreover, characterizing some union activity as "negotiating" or "organizing" does not make it inherently "favored" by the NLRA and thereby exempt from disclosure. See e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003) (NLRB inquiry into union violations of the NLRA for receiving illegal employer assistance with organizing); Merk v. Jewel Food Stores, 945 F.2d 889, 895 (7th Cir. 1991) (secret deal between employer and union held to be "in derogation of national labor policy"); Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993) (same). To say that all of these underhanded union actions, characterized as "negotiating or organizing," are so "favored" as to permanently shield them from discovery or disclosure is absurd.

Union organizing or negotiating tactics can be unlawful under 29 U.S.C. § 302 as well. Section 302 is itself an integral component of federal labor law, enacted by Congress specifically to govern the conduct of unions and corrupt union officials. See

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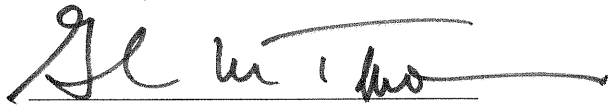
[1] In fact, because the NLRA and the LMRDA supposedly exist solely to protect employee rights, the policies underlying these Acts strongly favor the production of relevant information to employees, not the withholding of such information. See Lechmere Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers").

Arroyo v. United States, 359 U.S. 419, 425-26 (1959). The provision expressly governs agreements that unions negotiate with employers, and has been applied to employer payments made to affect union organizing. See, e.g., United States v. Pecora, 798 F.2d 614 (3d Cir. 1986); Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp., 634 F.2d 258 (6th Cir. 1981) (provision in collective bargaining agreement requiring employer to contribute to industry steward fund unlawful under §302).

The "sensitive information" loophole is not ameliorated by the proposal to allow union members to personally "examine" any books and records that union and trust fund officials deem to be "too sensitive" for public disclosure. Few employees are going to have the knowledge, wherewithal or persistence to secure disclosure from union and trust officials intent on hiding it. Subtle and not-so-subtle pressure can be brought to bear on such employees. No employee should be forced to publicly stick his or her neck out and ask for disclosure from the very union or trust fund officials who have determined that it must be hidden. Instead, all financial information should be publicly disclosed and made available to employees without the need for a specific request.

In sum, the Committee and the Foundation believe that the Department's proposal is a small, but positive step, in curbing some of the abuses of compulsory unionism, and, with the suggestions and comments noted herein, support the proposal.

Sincerely,



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