NONUNION MEMBERS LIABILITY FOR EXTRA-UNIT LITIGATION COSTS BEFORE SUPREME COURT

The Supreme Court agrees to review whether a state can require public employees, who are not members of a union that represents them, to pay agency fees for litigation expenses outside of their bargaining unit. Granting a petition filed by the National Right to Work Legal Defense Foundation (NRTW Foundation) on behalf of 20 nonmembers, the Court will review a decision by the Court of Appeals for the First Circuit that the Maine State Employees Association (MSEA) did not violate the First Amendment rights of objecting nonmembers by charging them agency fees for litigation expenses related to representational activities that were incurred by the MSEA’s parent union, the Service Employees International Union (SEIU), and funded by pooled payments from all the international’s locals.

In reaching its decision, the appeals court applied Lehnert v. Ferris Faculty Assn., 500 U.S. 507 (1991), in which the Supreme Court held that chargeable expenses include “services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization,” as long as the expenses also are substantively related to representational duties. The appeals court rejected the argument of a group of nonmembers, who were represented by the NRTW Foundation, that under the Supreme Court decision in Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984), which defined germane activities as those directly related to the local unit, the extra-unit litigation expenses are not chargeable to nonmembers.

The MSEA, which represents certain executive branch employees in Maine, entered into a collective bargaining agreement with the state that required all covered employees who chose not to join the union to pay agency fees for the union’s representational activities starting in July 2005. The contract provided that nonmembers who were hired prior to July 2003 only would have to pay half the amount of agency fees until July 2006. The MSEA sent a notice to all nonmembers in July 2005 explaining that it had calculated the amount of the agency fee for the coming year—49.13 percent of the dues paid by union members—based on the union’s expenditures for chargeable activities during the 2004 fiscal year. The union classified as chargeable to nonmembers the portion of the affiliation fee paid to the SEIU that was spent on chargeable activity. Included in the chargeable expenses were litigation expenditures by the MSEA and the SEIU related to representational activity.

After certain nonmembers challenged the fee calculation, the union held the disputed amounts in an escrow account, and an arbitrator approved the fee calculation in May 2006. Before the arbitration process was over, 20 nonmembers sued the MSEA under the Civil Rights Act of 1871 alleging violation of their speech and association rights under the First Amendment. The district court for the district of Maine denied the nonmembers’ motion for a preliminary injunction and later granted summary judgment to the union, finding, among other things, that including the extra-unit litigation costs among the chargeable expenses did not violate the nonmembers’ rights and that the union’s fee calculation was acceptable. The First Circuit upheld that decision.

In seeking review, the NRTW Foundation contends that the First Circuit’s decision “directly conflicts” with Supreme Court decisions that unions may not compel employees in one bargaining unit to subsidize litigation activities for other bargaining units. The NRTW Foundation also cites a split among the appeals court on the chargeability of extra-unit litigation, with the Tenth Circuit and a “substantial minority” of judges on the Fourth Circuit finding that compelling nonmembers to subsidize extra-unit litigation violates both First and Fourteenth Amendments, while the First, Third, and Sixth circuits ruled that such forced payments are constitutional. In addition, the NRTW Foundation claims that the First Circuit’s decision conflicts with the decisions of both the Indiana and Wisconsin supreme courts. In a brief arguing against review, attorneys for the MSEA contend that there is no “live conflict in the lower courts” that warrants Supreme Court review.