



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MUR 6206
BASF Corporation)	
BASF Corporation Employees Political Action)	
Committee)	

STATEMENT OF REASONS

**VICE CHAIR CYNTHIA L. BAUERLY
COMMISSIONER ELLEN L. WEINTRAUB**

This matter involves a corporation's failure to respond to a union's request to make a payroll deduction program used by the corporation equally available to union workers. By failing to respond to this request for approximately two years – a period spanning a Presidential election – BASF Corporation ("BASF") denied the United Steelworkers ("USW") and the union's members the opportunity to express their political views through contributions to their union's political action fund and thus to participate fully in the election.

BASF is the American subsidiary of BASF SE, a global chemical company headquartered in Germany. BASF established a separate segregated fund ("SSF"), BASF Corporation Employees Political Action Committee ("BASF PAC"), in 1998. Members of BASF's restricted class have contributed to BASF PAC using payroll deductions since 1999, the year after the SSF was established. Indeed, a review of BASF PAC's reports to the Federal Election Commission suggests that the vast majority of restricted class contributions to the SSF have taken the form of payroll deductions.

In the latter half of 2007, USW made a written request to implement a payroll deduction program for unionized workers' contributions to USW's Political Action Fund. The Federal Election Campaign Act ("FECA") and the Commission's regulations provide that any corporation "that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions," such as a payroll deduction program, must "make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation." 2 U.S.C. § 441b(b)(6); *see also* 11 C.F.R. § 114.5(k).

BASF did not respond to USW's written request until June 2009, when the corporation acknowledged its obligation to provide USW with access to an equivalent payroll deduction

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program. BASF's only explanation for the delay was that it had not received the relevant cost information from its third party payroll administrator, Fidelity.¹ Notably, BASF does not say when it requested the information.

There is no dispute that after the union requested access to BASF's payroll deduction program, a period of between 19 and 24 months elapsed before BASF responded.² These facts are sufficient to support a finding of reason to believe that BASF did not "make available such method, on written request...to a labor organization representing any members working for such corporation." 2 U.S.C. § 441b(b)(6). To determine whether BASF's conduct violated this provision, we supported an extremely limited investigation to find out the answer to one simple question: What took so long? Respondents are in possession of these facts. We do not know, and the complainant is not in a position to know, what, if anything, respondents were doing during this time to comply with the request. If we had been able to discover that BASF was making reasonable efforts to obtain and supply the required information, but was delayed in fulfilling that obligation for reasons beyond its control, we would have determined that a violation did not occur. But to fail even to ask the question sends the damaging message that a corporation may, with impunity, be dilatory in facilitating the political rights of its union employees.

In order to find out whether the allegations had merit, we voted to find reason to believe that BASF and BASF PAC violated section 441b(b)(6) and 11 C.F.R. § 114.5(k) and to authorize a limited investigation.³ When this motion failed, we supported a motion to dismiss the matter and send the respondents a letter of caution, addressing their responsibilities under the law. While this approach would not have resolved the ultimate question of what happened here, it would have at least reminded the respondents of their obligations under the FECA, and also would have been consistent with our prior practice in a case involving a shorter time frame. Specifically, in MUR 5932 (Freightliner LLC), the Commission admonished the respondent for refusing to provide a payroll deduction program for two months, far less than the period USW was denied here.⁴ The motion to dismiss the complaint against BASF with a letter of caution, however, failed.⁵

BASF asserts: "The Act does not set forth a period of time within which a payroll deduction program must be implemented. The mere passage of time is neither a refusal nor a

¹ MUR 6206 (BASF Corporation, *et al.*), Response at 2.

² The request was made at some point during negotiations that took place between June and November, 2007, but the Commission does not know the precise date of the request. MUR 6206 (BASF Corporation, *et al.*), Complaint at 1.

³ Then-Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively; then-Vice Chairman Petersen and Commissioners Hunter and McGahn dissented. See MUR 6206 (BASF Corporation, *et al.*), Certification dated December 15, 2009.

⁴ MUR 5932 (Freightliner LLC) Factual and Legal Analysis at 8-9.

⁵ Then-Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively; then-Vice Chairman Petersen and Commissioners Hunter and McGahn dissented. See MUR 6206 (BASF Corporation, *et al.*), Certification dated December 15, 2009.

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failure to act.”⁶ Our colleagues agree, and argue that in the absence of a specific time limit in the regulations, making any inquiries at all into BASF’s efforts to comply with their legal obligation would be “speculative” and an exercise in “rulemaking *via* MUR.”⁷ But the requirement to make payroll deduction available to the union PAC if the corporate PAC uses it is absolute. 2 U.S.C. § 441b(b)(6); *see also* 11 C.F.R. § 114.5(k). It is not qualified in any way. Although we would not support penalizing a corporation under this law until after a time for reasonable implementation had passed, the statute contains no such parameters on the starting time frame once a request is made.

Surely, the corporation would not be in compliance with the statute if it responded to the union’s request by saying, “yes, payroll deduction will be made available, but not this election cycle.” Effectively, that is what this corporation did. Despite BASF’s assertion that it did not fail to act, in fact, it quite clearly did fail to act for a period of approximately two years. How long must a union be denied access to a payroll deduction program for a violation of section 441b(b)(6) to result? If two years is inadequate, would four years be enough? Would ten? Or may a corporation entirely exempt itself from the reach of section 441b(b)(6) by simply failing to respond to a request? Merely acknowledging the responsibility to provide payroll deduction is not enough to comply with the law; the service must actually be provided.

During the roughly two years between the time of USW’s request until BASF’s response, USW and its members were prevented from fully participating in Presidential primary and general elections, as well as elections for one third of the United States Senate and the entirety of the House of Representatives, through their payroll deductions to the union’s political action fund. By contrast, BASF PAC, drawing upon contributions from its restricted class made by payroll deduction, contributed over \$275,000 to federal candidates and other committees in 2008 alone.

With respect to political contributions through payroll deduction, the political rights of union members are within their corporate employer’s control. For a corporation to fail to take reasonable steps to respond promptly to a union’s request for access to this mechanism of collecting contributions impedes the First Amendment rights of the union members and is an abuse of power. If that is what happened here (and we emphasize the “if,” since the Commission was precluded from determining what actually happened), then a penalty would have been warranted, both to penalize the corporation for denying the union’s First Amendment rights in the 2008 election and to deter other corporations from impairing the rights of other union members. Managers have many responsibilities, and labor-management relations are often fractious. Nonetheless, the statute mandates the protection of union members’ right to

⁶ MUR 6206 (BASF Corporation, *et al.*), Response at 4.

⁷ Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6206 (Jan. 13, 2010), at 2.

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participate fully in the political process through payroll deduction contributions when a corporation employs such a system. We would have thought that protecting the First Amendment rights of employees was a goal on which we could all agree.


Cynthia L. Bauerly, Vice Chair

1/13/2010
Date


Ellen L. Weintraub, Commissioner

1/13/10
Date

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