

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

David W. Noble,)
)
 Plaintiff,)
)
 v.) No. 17-cv-01255-DBF
)
 National Association of Letter Carriers, AFL-CIO,)
)
 Defendant.)

OPPOSITION TO MOTION TO DISMISS COMPLAINT AS MOOT

Defendant National Association of Letter Carriers (“NALC”) has moved to dismiss the complaint as moot on the ground that, after dragging its feet for several months in response to plaintiffs’s initial request to have the union distribute his campaign literature to members of the union using the union’s email list, it has now retained a specific vendor, provided its email database to that vendor, and published the name of that vendor so that candidates may have their literature emailed to members of the union whose email addresses are on the union’s list. As the Court is aware from what Noble said as a pro se litigant at the status conference in this case on April 9, 2018, his concern is that the price charged by the vendor, \$2488 per email to the full list of members, puts the sending of repeated campaign messages over the next few months financially out of his reach.¹

Although plaintiff is responsible for bearing the expenses of having his campaign literature emailed to the electorate, a union violates section 401(c) when it imposes unduly high costs for the distribution of a candidate’s campaign literature. For example, in *Mims v. Teamsters Local 728*, 821 F.2d 1568 (11th Cir. 1987), the district court had required a union to allow members to minimize

¹ NALC’s motion to dismiss is based on an affidavit that is averred “to the best of [Mr. Renfroe’s] knowledge and belief.” Such an affidavit does not meet the evidentiary standard required to show a basis for dismissal. *Harris v. Gonzales*, 488 F.3d 442, 446 (D.C. Cir. 2007)

the cost of doing a postal mailing of campaign literature to the membership by using a mailing house that could perform mailing tasks more cheaply than the union's own secretarial staff. *Id.* at 1568-1569. The district court decision in that case, No. C-86-454A (N.D. Ga. Mar. 3, 1986), is attached to the Levy Affidavit as Exhibit A. The Eleventh Circuit held that establishment of this right created a common benefit to the union membership justifying an award of attorney fees under the doctrine of *Hall v. Cole*, 412 U.S. 1 (1973). *Mims*, 821 F.2d at 1571. Similarly, *Department of Labor v. Teamsters Local 783*, 1982 WL 2095 (W.D. Ky. July 27, 1982), held that a union violated a candidate's rights under 401(c) by overcharging for the mailing of union literature, which had the effect of deterring the candidate from sending out as much literature as he would have preferred.

Accordingly, plaintiff's section 401(c) claim was not rendered moot simply by providing access to a means of emailing campaign literature. Plaintiff is **also** entitled to litigate the terms on which email distribution is provided.

A concrete controversy remains between plaintiff and defendant, which will seek to place that issue squarely before the Court. On Tuesday, April 17, 2018, Noble asked NALC's president to be allowed to send his campaign literature by email using a well-known online email vendor, MailChimp. Noble Affidavit, Exhibit 2. The union has not granted that request. *Id.* ¶ 6. Despite the competitive bidding procedure that the union says it conducted, evidence submitted in *Dimondstein v. American Postal Workers Union*, 964 F. Supp.2d 37, 39 (D.D.C. 2013), suggests that the prices charged by Kelly Press are many times higher than the prices customarily paid by non-profits sending large amounts of email. See Levy Affidavit, ¶ 2 and Exhibit B. Those costs are considerably higher than what MailChimp would charge Noble. Noble Affidavit, ¶ 3 and Exhibit

1.²

Moreover, although NALC has explained the reasons why it chose Kelly Press as the email vendor for campaign literature distribution, Renfroe Affidavit, DN 36, ¶¶ 4-8, that choice is not relevant to the determination of whether the union is legally obligated to comply with Noble's request, and in passing on that request the Court will not be required to decide whether the union made reasonable choices in selecting its email vendor. Under the text of the statute and relevant Supreme Court precedent, the determination of this case under section 401(c) of the LMRDA depends on whether his request was reasonable, not whether the union had been proceeding pursuant to a reasonable union rule adopted by its governing bodies. *International Organization of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 475 (1991); compare *Quigley v. Giblin*, 569 F.3d 449, 457 (D.C. Cir. 2009) (in case decided under section 101(a)(2) of the LMRDA, the union need only show that it has a reasonable rule). The union has not granted Noble's request. Noble Affidavit ¶ 6.³

The procedural posture of the case is similar to *Dimondstein*. In that case, after the Court decided that the Postal Workers union had an obligation to allow candidates for union office to have the campaign literature distributed by email to the lists used by that union to communicate with its

²Although this evidence of market prices is five years old, the short time allowed for Noble to respond to the motion to dismiss did not allow him to obtain more current evidence. However, it appears that current prices are comparable. Plaintiff may also use discovery to determine whether NALC is paying nearly \$2500 each time it sends one of its own emails to its membership.

³ Under the penultimate sentence of section 401(c), a candidate is entitled to inspect the list of addresses within thirty days before the election, but not to obtain a copy of that list. It is not clear whether MailChimp would allow Noble to inspect the list before that thirty-day period begins. To protect the union against any concern that using MailChimp would enable Noble to see the list before the thirty-day period begins, or to abuse his access to the list to copy some of the addresses, Noble is prepared to retain an independent intermediary to serve as his agent to execute emailing commands on the MailChimp system, while guaranteeing the union that Noble himself will not be given access to that list. Noble Affidavit, ¶ 7.

members, the union responded, just as NALC has done here, by taking various steps to limit the right to send literature by email: hiring a vendor that charged unreasonably high prices, trying to send an email to its members encouraging them to opt out from campaign mailings, and imposing other rules that made the exercise of the right to have campaign literature sent by email more onerous. But those actions did not moot plaintiffs' claims. The plaintiffs argued that those actions interfered with their rights under section 401(c). The Court recognized the union's moves for what they were, and set a hearing to address the new claims. *Dimondstein v. APWU*, No. 1:13-cv-01228-CKK, Docket Entry No. 27. Plaintiffs also amended their complaint to allege new claims relating to emailing campaign literature. *Id.* at Docket Entry No. 28. Only then did the union recede from many of its efforts to frustrate the insurgent candidates.⁴

Noble will seek leave to amend his complaint to allege more specifically that NALC has violated section 401(c) of the LMRDA by failing to grant his reasonable request to have the union's email database provided to MailChimp to distribute his campaign literature. Plaintiff requests that he be allowed two weeks to move for leave to amend his complaint. Thereafter, plaintiff expects to move for a preliminary injunction and/or summary judgment on the amended complaint. Plaintiff reserves the possibility of seeking a modest amount of discovery about defendant's current procedures for sending email to its members before filing his motion.

CONCLUSION

The motion to dismiss the first amended complaint as moot should be denied.

Respectfully submitted,

⁴The issue of price was ultimately not submitted to Judge Kollar-Kotelly for decision. Levy Affidavit ¶ 4. Thus, contrary to the implication in the union's brief, at pages 11-12, the *Dimondstein* Court never placed its imprimatur on the Kelly Press rates as being reasonable ones.

/s/ Paul Alan Levy
Paul Alan Levy

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April 23, 2018

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CERTIFICATE OF SERVICE

I am filing this Response to Motion to Dismiss and accompanying papers using the Court's ECF system, which will effect service on all counsel.

Respectfully submitted,

/s/ Paul Alan Levy
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