

CASE NOS. 12-1973 and 12-1984 (Consolidated)**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Douglas Richards *et al.*,
and John Lugo,
Petitioners,

v.

National Labor Relations Board,
Respondent,

and

United Steel, Paper & Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
& Service Workers International Union and
International Brotherhood of Electrical Workers,
Intervenors.

On Petition for Review of Decisions and Orders of the
National Labor Relations Board in Case Nos. 25-CB-8891,
25-CB-9253, 25-CB-9254, 13-CB-18961 and 13-CB-18962

BRIEF AND REQUIRED APPENDIX OF PETITIONERS

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DISCLOSURE STATEMENT

1) The full name of every party that the undersigned attorneys represent in this case: Douglas Richards, David Yost, Ronald Echegaray and John Lugo.

2) The names of all law firms whose partners or associates have appeared for the parties in the case (including proceedings in the district court or before an administrative agency): No law firms have appeared for the above-listed parties. The undersigned attorneys represented these parties before the National Labor Relations Board and continue their representation before this Court. The undersigned attorneys are employed by the National Right to Work Legal Defense Foundation, a nonprofit, charitable legal aid organization that provides free legal assistance to individual employees only.

3) If the party or amicus is a corporation: Not Applicable.

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I, Glenn Taubman, certify that I am counsel of record for the above-listed parties pursuant to Circuit Rule 3(d).

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JURISDICTIONAL STATEMENT

1) The jurisdiction of the National Labor Relations Board (“NLRB” or “Board”) was invoked pursuant to Sections 10 (a)-(c) of the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 160 (a)-(c), which authorize the Board to prevent unfair labor practices. The unfair labor practice charges that initiated this case challenged two unions’ collection of compulsory union dues for political, ideological and non-representational purposes under *CWA v. Beck*, 487 U.S. 735 (1988).

2) This appeal is a consolidation of two separate NLRB cases. (Court Order of June 8, 2012).

In Case No. 12-1973, *Richards et al. v. NLRB*, the date of the initial Board Decision and Order over which review is sought is August 16, 2011, reported at 357 NLRB No. 48. (Short Appendix (“SA”) A-1)¹. On August 29, 2011, Petitioners filed a timely Motion for Reconsideration, contending that the Board’s remedial order was inadequate. On January 30, 2012, Petitioners filed a Motion to Disqualify NLRB Members Sharon Block, Richard Griffin and Terence Flynn, contending that their recess appointments were unconstitutional.

¹ The Short Appendix required by Local Rule 30(a) is paginated as SA A-1, SA A-2, etc. This is done to distinguish the Short Appendix (“SA”) from the separately bound Appendix required by Local Rule 30(b), which is paginated as App. 1, App. 2, etc.

In Case No. 12-1984, *Lugo v. NLRB*, the date of the initial Board Decision and Order over which review is sought is August 10, 2011, reported at 357 NLRB No. 45. (SA A-29). On August 24, 2011, Petitioner Lugo filed a timely Motion for Reconsideration, contending that the Board's remedial order was inadequate. On January 30, 2012, Petitioner Lugo filed a Motion to Disqualify NLRB Members Sharon Block, Richard Griffin and Terence Flynn, contending that their recess appointments were unconstitutional.

On April 18, 2012, the Board denied the Motions for Reconsideration and the Motions for Disqualifications in both the *Richards* and *Lugo* cases. (SA A-23 & SA A-38). The Board's Decisions and Orders are now "final orders" within the meaning of Section 10(f) of the NLRA, 29 U.S.C. § 160(f). The jurisdiction of this Court is invoked pursuant to NLRA Section 10(f), which authorizes the filing of petitions for review by parties aggrieved by Board decisions.

The Petition for Review in Case No. 12-1973 was filed on April 23, 2012, and the Petition for Review in Case No. 12-1984 was filed on April 24, 2012. The Petitions for Review are timely, as 29 U.S.C. § 160 places no time limit on the filing of such petitions.

STATEMENT OF THE ISSUES

1) Three NLRB Members were appointed by President Obama on January 4, 2012, as purported “recess appointments,” even though the Senate was holding pro forma sessions and was not in recess at that time, and the vacancies that were filled occurred many months prior to the purported Senate recess. The issue presented is: Were these recess appointments unconstitutional, so that the NLRB lacked a lawful and valid quorum of Members, as required by 29 U.S.C. § 153(b) and *New Process Steel, L.P. v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010), when it issued the Orders Denying Motions for Reconsideration on April 18, 2012? (SA A-23 & SA A-38).

2) If the Board had a lawful quorum to issue the two Orders Denying Motions for Reconsideration on April 18, 2012, did the Board err in denying retrospective refund remedies to the Petitioners and the similarly-situated employees whose rights were violated by the Unions?

STATEMENT OF THE CASE

I. *Richards v. NLRB*, Case No. 12-1973

On June 10, 2005, Douglas Richards filed an unfair labor practice charge against United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”) in Case No. 25-CB-8891. (App. 9). On November 17, 2008, Ronald R.

Echegaray and David Yost filed similar charges in Case Nos. 6-CB-11544 and 6-CB-11545, which were transferred to the NLRB's Indianapolis office and renumbered as 25-CB-9253 and 25-CB-9254. (App. 10-11). These charges alleged that USW's nationwide policy requiring *Beck* objectors² to annually renew their objections to supporting the USW's political activities unlawfully restrained and coerced them and other similarly-situated employees. Under USW's nationwide policy, objectors who did not annually renew their objections were "flipped" by USW to non-objector status and forced to subsidize union political and ideological activities against their will for an entire year.

On May 8, 2009, the Director of NLRB Region 25 in Indianapolis issued an amended consolidated complaint against USW's "annual renewal" policy. (App. 12). On May 19, 2009, the consolidated case was tried in Morgantown, West Virginia. On August 6, 2009, Administrative Law Judge ("ALJ") John West upheld USW's "annual renewal" policy and dismissed the complaint. (SA A-6 to SA A-22).

Petitioners filed timely exceptions. On August 16, 2011, the Board reversed the ALJ's decision and declared USW's "annual renewal" policy invalid. (357 NLRB No. 48; SA A-1). However, the Board made the remedy

² *CWA v. Beck*, 487 U.S. 735 (1988).

prospective only, providing no retrospective relief to the Petitioners or the nationwide class of employees who had been “flipped” to non-objector status and forced to pay excessive dues for a year or longer. On August 29, 2011, Petitioners filed a timely Motion for Reconsideration seeking retrospective remedies for themselves and the class of similarly-situated *Beck* objectors.

II. *Lugo v. NLRB*, Case No. 12-1984

On June 10, 2008, John Lugo filed unfair labor practice charges against the International Brotherhood of Electrical Workers and its Local 34 (“IBEW”) in Case Nos. 13-CB-18961 and 13-CB-18962. (App. 186). As with the charges in *Richards*, Lugo’s charges alleged that IBEW’s requirement that *Beck* objectors annually renew their objections to supporting IBEW’s political activities unlawfully restrained and coerced him and other similarly-situated employees.

On August 28, 2008, the Director of NLRB Region 13 in Chicago issued a consolidated complaint against IBEW’s “annual renewal” policy. (App. 188). On October 27, 2008, the case was tried in Chicago, Illinois. On December 19, 2008, ALJ William Kocol struck down the “annual renewal” policy as it related to IBEW Local 34, but dismissed the complaint as to IBEW International, holding that the International owed no duty to Lugo. (SA A-34 to SA A-37).

Petitioner Lugo filed timely exceptions. On August 10, 2011, the Board declared IBEW's nationwide "annual renewal" policy invalid. Additionally, the Board reversed the ALJ and held that IBEW International was culpable along with its Local 34. (357 NLRB No. 45; SA A-29). However, the Board made the remedy prospective only, providing no retrospective relief to the Petitioner or the nationwide class of employees who had been "flipped" to non-objector status and forced to pay excessive dues for a year or longer. On August 24, 2011, Lugo filed a timely Motion for Reconsideration seeking retrospective remedies for himself and the class of similarly-situated *Beck* objectors.

III. Proceedings Common to Both Cases

On January 4, 2012, while the Motions for Reconsideration in both *Richards* and *Lugo* were pending, President Obama gave "recess appointments" to three new NLRB Members, Sharon Block, Richard Griffin and Terence Flynn. On January 30, 2012, Petitioners in both *Richards* and *Lugo* filed separate Motions to Disqualify Members Block, Griffin and Flynn based upon the unconstitutionality of their January 4, 2012 recess appointments. Petitioners asserted, *inter alia*, that the Senate was holding pro forma sessions and was not in recess when the three Board Members' appointments were made, so the vacancies could not be filled without the

Senate's approval. *See* U.S. Const. art. II, § 2.

On April 18, 2012, the Board, with purported Member Griffin participating, denied the Motions for Reconsideration and Disqualification in both *Richards* and *Lugo*. (SA A-23 & SA A-38). The Board's Decisions and Orders are now "final orders" within the meaning of 29 U.S.C. § 160(f).

STATEMENT OF THE FACTS

I. Facts Related to the Remedial Issue

A. *Richards v. NLRB*, Case No. 12-1973

USW maintains a policy governing nonmember employees who object to supporting its political and ideological causes under *CWA v. Beck*, 487 U.S. 735 (1988). Prior to the Board's decision in *Richards*, USW unilaterally deemed any nonmember's *Beck* objection to expire on the anniversary date of his or her hiring into the bargaining unit, unless a renewed objection was made thirty (30) days prior to that hire date. (G.C. Ex. 2, Attachment F, App. 100). By this policy, USW transformed *Beck* objectors into non-objectors on an arbitrary date each year, without their consent. An employee whose *Beck* objection was cancelled was thereafter required to pay full union dues as a condition of employment—including the portion subsidizing USW's political and ideological expenses—for one year, until the next annual window period opened and the objector submitted another objection.

Petitioners Ronald Echeagaray and David Yost were employed by Chemtura Corp. in Morgantown, West Virginia. Echeagaray and Yost sent objection letters to USW so they would not have to support its political and ideological causes. The letters stated that the objections should be considered permanent and continuing. (G.C. Ex. 2, Attachments C & D, App. 94 & 96). USW responded by informing both employees that they must renew their objections each year, or they would be turned into “non-objectors” and be forced to pay full union dues for the next year. (G.C. Ex. 2, Attachments G & H, App. 105 & 107). As a result, Echeagaray and Yost renewed their objections via certified mail, solely to forestall having to support for even one year political and ideological causes they abhor. (TR 30, 36 & 48, App. 38, 44 & 56).³

Both employees testified to the burden that this annual renewal placed upon them. Neither received a notice from USW immediately preceding his renewal period as a reminder that it was time to renew. (TR 37 & 39, App. 45 & 47). Each was forced to remember an arbitrary date annually; forced to mail a letter, via certified mail because he did not trust the USW; forced to expend the time, money, and effort to physically mail these letters; and forced

³ With regard to the *Richards* case, “TR” refers to the transcript of the May 19, 2009 hearing held in Morgantown, West Virginia.

to associate and re-associate with an organization he opposes, and with which he wanted no continuing relationship. (TR 44 & 49, App. 52 & 57). Both employees testified that they signed no waivers authorizing USW to change their status from objectors to full dues paying non-objectors. (TR 26 & 41, App. 34 & 49).

Petitioner Douglas Richards, a Cequent Towing employee represented by USW in Indiana, testified in writing via a joint stipulation signed by all parties. (App. 140). His written testimony closely mirrors that of Echegaray and Yost about the effects of USW's "annual renewal" policy.

USW's annual renewal requirement was promulgated in 1979, prior to *Beck*. (TR 69-70, App. 77-78). USW does not make its members annually renew their union membership, nor does it make employees on automatic dues checkoff annually renew their dues authorization cards. (TR 60 & 62, App. 68 & 70). The annual renewal policy was included in a notice published annually by the USW in its quarterly "USW@Work" magazine. (App. 143).

USW is the exclusive bargaining representative of all USW bargaining units countrywide, and applied and enforced its "annual renewal" policy on a nationwide basis. (G.C. Ex. 2, App. 88-93). Each year USW receives hundreds of *Beck* objections from around the nation. (TR 64, App. 72; USW's witness testified that there were over 300 then-current objectors across the nation).

B. *Lugo v. NLRB*, Case No. 12-1984

As with USW in the *Richards* case, IBEW International maintained a policy governing nonmembers who object to supporting its political and ideological causes. Prior to the Board's decision in *Lugo*, IBEW's policy included an "annual renewal" requirement, whereby a nonmember's *Beck* objection automatically expired if it was not renewed yearly. (Jt. Ex. 7, App. 271). By this policy, IBEW transformed nonmembers from *Beck* objectors into non-objectors on an arbitrary date each year: December 1. As in *Richards*, any employee whose *Beck* objection was cancelled by IBEW was thereafter required to pay full union dues as a condition of employment—including the IBEW's political and ideological expenses—for at least one year.

Petitioner John Lugo was employed as a journeyman electrician out of IBEW Local 34's hiring hall, where he was represented by IBEW Local 34 and IBEW International. He became a union member because "[he] was told you had to become a member to be employed." (TR 16, App. 214).⁴ In 2008, Lugo learned, independent of IBEW, that he had a right not to be a member of IBEW and could object to subsidizing non-representational union expenses. He promptly resigned and objected. (TR 18, App. 216).

⁴ With regard to the *Lugo* case, "TR" refers to the transcript of the October 27, 2008 hearing held in Chicago, Illinois.

II. Facts Related to the Recess Appointments

Until January 3, 2012, the Board consisted of Chairman Pearce and Members Becker and Hayes. Mr. Becker's term expired on January 3, 2012.⁵ On that date, the Board was left without its requisite quorum of three members. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

On January 4, 2012, while Petitioners' Motions for Reconsideration were pending, President Obama gave "recess appointments" to three new Board Members, Sharon Block, Richard Griffin and Terence Flynn. On January 9, 2012, these putative Board Members were sworn in. However, the Senate was *not* in recess during this time, as it was holding pro forma sessions. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). Moreover, at least two of the NLRB vacancies to which President Obama made the challenged appointments happened many months prior to the alleged Senate recess.⁶ Panels consisting of Chairman Pearce, Member Hayes and purported Member Griffin denied Petitioners' Motions for Reconsideration and Motions for Disqualification in the *Richards* and *Lugo* cases on April 18, 2012. (SA A-23 & SA A-38).

⁵ *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

⁶ *Id.*

STATEMENT OF THE STANDARD OF REVIEW

I. Issue I - The Recess Appointments

As with all constitutional issues, this Court decides the constitutionality of the challenged recess appointments *de novo*. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1035 (7th Cir. 2002) (“We review . . . any questions of constitutional law under the *de novo* standard of review”).

The Board has recognized that it has no power to rule on the constitutionality of its own Members’ appointments. *See Center for Social Change, Inc.*, 358 NLRB No. 24, at *1 (Mar. 29, 2012) (“Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act.”), *appeal pending*, (D.C. Cir. Nos. 12-1161, 12-1214). *See also Chamber of Commerce v. NLRB*, ___ F. Supp. 2d ___, 2012 WL 1664028, at *7 n.2 (D.D.C. May 14, 2012) (in case challenging the existence of a quorum under *New Process Steel*, no deference was due the Board because “the question of statutory interpretation presented here both concerns the NLRB’s statutory jurisdiction and does not implicate the agency’s expertise”).

An agency whose members have been appointed in violation of the Appointments Clause of the U.S. Constitution (art. II, § 2) lacks authority to act, and private parties who are adversely affected by such *ultra vires* agency

action are entitled to judicial review and relief. *See, e.g., Ryder v. United States*, 515 U.S. 177 (1995) (individuals threatened with enforcement action by agency whose members were appointed in violation of the Appointments Clause entitled to injunction); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). This is precisely the case here, because the Board lacked a valid quorum to issue the challenged orders.

II. Issue II - The Board's Remedy

The Board has significant, though not unlimited, discretion in fashioning remedies, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002) (citations omitted) (“the Board’s discretion to select and fashion remedies for violations of the NLRA, though generally broad, is not unlimited”). Thus, this Court will not enforce orders that “do[] not effectuate the policies of the Act.” *United Steelworkers of Am. v. NLRB*, 692 F.2d 1052, 1058 (7th Cir. 1982). After a violation is found, the Board’s duty includes:

redressing the wrong incurred by an unfair labor practice . . . to make “the employees whole, and thus restor(e) the economic status quo that would have obtained but for the company’s wrongful (act).” The task of the NLRB [in creating remedies] is “to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.”

Franks v. Bowman Transp. Co., 424 U.S. 747, 769 (1976) (citations omitted).

This Court reviews the Board’s remedial orders against that standard to

determine whether they effectuate the NLRA's policies.

SUMMARY OF ARGUMENT

I. Issue I - The Recess Appointments

On December 17, 2011, the Senate agreed by unanimous consent to convene periodic pro forma sessions. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). This decision to continue in session, rather than declare a recess, was necessary to discharge the Senate's obligations under both the Twentieth Amendment and article I, section 5, clause 4 of the U.S. Constitution, which prohibits one House of Congress from adjourning for more than three days without the consent of the other. The House of Representatives did not consent to a Senate recess or adjournment of longer than three days.

Nevertheless, the President unilaterally determined that the Senate was actually in recess, and that the Senate's pro forma sessions were ineffective shams. On January 4, 2012, he made three recess appointments to the NLRB when there was no lawful recess.

The President has no authority to override the Senate's determination of its proceedings, since the Constitution explicitly declares that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. This means that the Senate has the sole authority to declare when it is, and is not,

in session. *United States v. Ballin*, 144 U.S. 1 (1892). When the Senate votes to remain in session for a period of time, and its official records indicate that it has regularly gaveled itself into session during that period, that is conclusive evidence that the Senate has been in session, not in recess. Entries in the official journals of the Senate and House of Representatives must be accepted by the other branches of government as accurate, and cannot be second guessed. If the President has the power to determine for himself when the Senate is in recess, he can make such a determination during any lunch break, weekend, or even when he believes that the senators' debate has stalled and they are not working efficiently. That would clearly violate the Constitution, which makes each congressional chamber the master of its own rules. *See* U.S. Const. art. I, § 5, cl. 2.

Moreover, the President's determination that the pro forma sessions were ineffective shams is factually and legally wrong. During one of the pro forma sessions, on December 23, 2011, the Senate passed important legislation (the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid)), which the President signed. He never protested that it was invalidly enacted due to a congressional recess.

The President's unilateral declaration that the Senate was in lengthy recess, notwithstanding the regular pro forma sessions, would, if true, render

the Senate in breach of two constitutional obligations – article I, section 5, clause 4 of the Constitution and section 2 of the Twentieth Amendment.

These respective obligations limit either chamber from adjourning for more than three days without the consent of the other, and require Congress to assemble yearly, on January 3.

Additionally, the President's position contravenes his administration's earlier representation to the U.S. Supreme Court by then-Solicitor General Elena Kagan. She stated that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period."⁷

Finally, the recess appointments are invalid for other constitutional reasons. First, the NLRB vacancies the President attempted to fill in January 2012 did not "happen" during a Senate recess, so those pre-existing vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointment power to be used only when the vacancy "happens" during a recess, not whenever a vacancy "happens to exist" during a recess. Second, the Recess Appointments Clause only allows for vacancies

⁷ Letter Brief from Solicitor General Elena Kagan to William K. Suter, Clerk of the Supreme Court at 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (U.S. Apr. 26, 2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

to be filled during an *inter*-session recess. That did not occur here.

II. Issue II - The Board's Remedy

In this case, the Board struck down as unlawful “annual renewal” policies that USW and IBEW applied to untold hundreds of nonmember employees across the nation. Under these policies, the Unions unilaterally “flipped” *Beck* objectors from objector to non-objector status against their will, and thereby forced them to pay an entire year’s worth of dues to subsidize the Unions’ political and ideological activities.

But the Board refused to provide a retroactive reimbursement remedy to the Petitioners and the classes of similarly-situated employees because it believed that some other unions’ “annual renewal” policies could be lawful, and that each case had to be decided on a “case-by-case” basis. (SA A-26-27, 41-42). The NLRB’s refusal to provide retroactive remedies on this basis unfairly penalizes the victims of the Unions’ violations and erroneously allows the wrongdoers to retain their ill-gotten gains. The limited remedial orders in this case inexplicably retreat from the Board’s normal policy, which is to fully remedy *Beck* violations. In virtually every case where the Board has found an entire class or bargaining unit injured by *Beck* violations, it has made its remedies retrospective and class-wide, to restore all discriminatees to the positions they would have been in but for the union’s illegal conduct.

ARGUMENT

I. The Board Lacked a Quorum to Issue the Orders Denying Reconsideration on April 18, 2012, Because the Three Members' Recess Appointments Were Unconstitutional

A. Introduction

The National Labor Relations Act (“NLRA”) creates the National Labor Relations Board (“Board” or “NLRB”), which “shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate.” 29 U.S.C. § 153(a). The NLRA further provides that “three members of the Board shall, at all times, constitute a quorum of the Board.” 29 U.S.C. § 153(b). In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that the Board lacks authority to act when its membership falls below the requisite quorum of three members. *See id.* at 2645. Here, the Board had only two duly appointed members when it issued the Orders Denying Motion for Reconsideration on April 18, 2012 (SA A-23 & SA A-38), although it purported to have five.

Prior to January 3, 2012, the Board consisted of Chairman Pearce, and Members Becker and Hayes. The remaining two seats had been vacant for considerable time. One of the seats became vacant in August 2010, when Peter Schaumber’s term expired. The other seat became vacant in August

2011, when Wilma B. Liebman left the Board.⁸ When Mr. Becker's term expired on January 3, 2012, the Board was left without its requisite quorum of three members.⁹

On December 15, 2011, President Obama nominated Sharon Block and Richard Griffin to fill vacancies on the Board that had been unfilled for many months.¹⁰ These nominees never received Senate confirmation.

On December 17, 2011, the Senate agreed by unanimous consent to adjourn from December 20, 2011 through January 2, 2012, but convene periodically for pro forma sessions to continue its 111th Session. The Senate simultaneously agreed to begin its 112th Session on January 3, 2012 (as required by section 2 of the Twentieth Amendment to the U.S. Constitution), and to hold additional pro forma sessions through January 23, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). This decision to continue in session was necessary to discharge the Senate's obligations under

⁸ A complete list of Board membership and terms appears on the NLRB's webpage, *Board Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

⁹ *White House Announces Recess Appointments of Three to Fill Board Vacancies* (Jan. 4, 2012), <http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies>.

¹⁰ White House Office of the Press Secretary, *Presidential Nominations and Withdrawal Sent to the Senate* (Dec. 15, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/15/presidential-nominations-and-withdrawal-sent-senate>.

both the Twentieth Amendment and the Constitution (art. I, § 5, cl. 4), which prohibits one House of Congress from adjourning for more than three days without the consent of the other.¹¹ The House of Representatives did not consent to a Senate recess or adjournment of longer than three days.

Nevertheless, only three weeks after sending the Block and Griffin nominations to the Senate—and before the relevant Senate Committee, let alone the full Senate, could take action on their nominations—the President decided to override and bypass the Senate’s advice and consent responsibilities. On January 4, 2012, he announced his intent to “recess appoint” Block and Griffin, as well as Terence Flynn, as Members of the Board.¹² On January 9, 2012, Block, Griffin and Flynn were sworn in and purported to take office as members of the Board.¹³

In the instant consolidated cases, the Board issued its Orders Denying

¹¹ The Twentieth Amendment, section 2, provides that “The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” Article I, section 5, clause 4 of the Constitution provides that “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”

¹² White House Office of the Press Secretary, *President Obama Announces Recess Appointments to Key Administration Posts* (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

¹³ *New Board Members Take Office, Announce Chief Counsels* (Jan. 10, 2012), <http://nlrb.gov/news/new-board-members-take-office-announce-chief-counsels>.

Motions for Reconsideration on April 18, 2012, well after Becker's term had expired on January 3, 2012. (SA A-23 & SA A-38). Purported Member Griffin participated in deciding each Order. Therefore, if the three putative "recess" appointments are invalid, the Board lacked a quorum under *New Process Steel* when it issued these Orders.

B. The Constitution Authorizes the Senate to Make Its Own Rules of Proceedings, and the President Must Defer to Those Rules. The Senate Was Not in Recess, and the President Was Not Entitled to Disregard the Senate's Pro Forma Sessions.

The President's claim that a Senate recess existed on January 4, 2012 is inconsistent with the Constitution's Recess Appointments Clause, which requires that the Senate actually be in recess when such appointments are made. U.S. Const. art. II, § 2, cl. 3. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (en banc) (a "legitimate Senate recess" must exist in order to uphold a recess appointment); *see also Wright v. United States*, 302 U.S. 583 (1938) (concerning "pocket vetoes" and congressional recesses); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

Here, the Senate was not in recess, and there exists a fundamental

constitutional reason why the President lacked authority to override the Senate's determination that it was not in recess. The Constitution is explicit that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Accordingly, the Senate has the sole authority to declare when it is, and is not, in session. Relying on this provision, the Supreme Court has long recognized that where "[t]he Constitution has prescribed no method of making [a] determination" as to a question of congressional procedure, *United States v. Ballin*, 144 U.S. 1, 6 (1892), "all matters of method are open to the determination of the house [of Congress in question], and it is no impeachment of the rule [chosen by the house of Congress] to say that some other way would be better, more accurate, or even more just." *Id.* at 5.

In *Ballin*, a party challenged the legality of certain tax legislation, claiming that Congress enacted it without a valid quorum. The Supreme Court noted that the legislation was an "enrolled bill . . . found in the proper office, . . . authenticated and approved in the customary and legal form." *Id.* at 3. Citing article I, section 5, clause 3 of the U.S. Constitution regarding each House's duty to keep records of its proceedings, the Court held that Congress' official journals "must be assumed to speak the truth" regarding those proceedings, which may not be impeached in any manner. *Id.* at 4. Thus, statements in congressional journals are conclusive evidence of the

presence of a quorum and the passage of a bill, notwithstanding the possibility of an error in count. *Id.*

The application of *Ballin* to this case is straightforward. When the Senate votes to remain in session for a period of time, and its official records indicate that it was regularly gaveled into session over that period, that is conclusive evidence that the Senate has been in session—and not in recess—for that period. President Obama is not exempt from the ruling in *Ballin*. Entries in the official journals of the Senate and House of Representatives must be accepted by the other branches of government as accurate, and cannot be second-guessed by the courts or the Executive Branch. *Id.*; see also *United States v. Smith*, 286 U.S. 6, 35 (1932) (in a dispute over the effect of the Senate’s rules on a nomination, the Supreme Court stated that “It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.”).

Thus, “[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session.” 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee). The President gets to decide whether to make a recess appointment, but the Senate gets to decide whether to recess. See *Humphrey’s*

Ex'r v. United States, 295 U.S. 602, 630 (1935) (“The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.”).

Indeed, when Congress makes rules that govern its proceedings, the President must, like the courts, defer to the Legislative Branch. *See Mester Mfg. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989) (“The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress.”). Courts honor Congress’ rules under the enrolled bill rule by treating the attestations of the two houses as “conclusive evidence that [a bill] was passed by Congress,” even in the face of evidence demonstrating otherwise. *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1343 (D.C. Cir. 2007) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892)); *see also OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197 (2d Cir. 2007). This doctrine reflects “the respect due to a coordinate branch of government,” *Marshall Field*, 143 U.S. at 673, and underscores the very limited inquiry courts make where Congress’ rules of proceedings are at issue.

For similar reasons, the D.C. Circuit has held that the meaning of ambiguous congressional rules is nonjusticiable; were it otherwise, “the court would effectively be making the Rules—a power that the Rulemaking Clause

reserves to each House alone.” *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995).

Here, by unanimous consent recorded in the Congressional Record, the Senate voted to remain in session for the period December 20, 2011 through January 23, 2012. *See* 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The Senate’s schedule provided for a series of pro forma sessions at three and four day intervals. The Congressional Record indicates that those sessions actually occurred. *See* 158 Cong. Rec. S1 (Jan. 3, 2012), S3 (Jan. 6, 2012), S5 (Jan. 10, 2012), S7 (Jan. 13, 2012), S9 (Jan. 17, 2012), and S11 (Jan. 20, 2012).

This should end the matter. The Senate, the sole judge of its own proceedings under *Ballin*, unanimously declared itself to be in session. As it was not in “recess,” the President had no power to appoint federal officers without the Senate’s advice or consent under article II, section 2, clause 2 of the Constitution. The President may have been displeased that the Senate chose to overlook some of his nominations during this period, but that is its prerogative. And the President certainly had no right to declare unilaterally that the Senate’s decision not to take up his appointments for a span of a mere few weeks created a recess.

Indeed, if the President has the power to determine for himself when

the Senate is in recess, he can declare it in recess on a whim, during any lunch break, weekend, or even when he believes that the senators' debate has stalled and they are not working efficiently and effectively as a body. That would clearly violate the Constitution, which makes each congressional chamber the master of its own rules. U.S. Const. art. I, § 5, cl. 2. Because the Senate did not declare itself in recess and there exists no evidence that the House granted permission for such a recess, the Senate was not in recess. Therefore, the President's purported NLRB appointments are invalid.

The situation here underscores the Founders' wisdom in giving each House of Congress exclusive authority to make its own rules, precisely to preserve the checks and balances built into the system. Here, the President purported to tell the Senate what it must do to bring itself into session and retroactively declared a series of Senate sessions to be a constitutional nullity for purposes of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. But the Rulemaking Clause (art. I, § 5, cl. 2) does not permit such Executive Branch interference in the Senate's internal procedures any more than it would permit similar interference by the courts. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). To hold otherwise would threaten Congress' ability to function as an independent branch of government, and undermine the checks and balances that the Founders "built into the tripartite Federal Government

as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). The judiciary has “not hesitated to invalidate provisions of law which violate this [separation of powers] principle,” *Morrison v. Olson*, 487 U.S. 654, 693 (1988), citing *Buckley*, 424 U.S. at 123. The same principles must govern here. *See also Bowsher v. Synar*, 478 U.S. 714, 721-28 (1986) (discussing importance of separation of powers and checks and balances).

In conclusion, the challenged recess appointments cannot stand. The President improperly arrogated to himself the power to declare the constitutional significance of the Senate’s proceedings, notwithstanding the its prerogative to make its own rules. *See* U.S. Const. art. I, § 5, cl. 2. He then exercised that power to improperly declare that the Senate was in recess—even though that declaration would, if valid, have put the Senate in violation of two independent constitutional provisions—namely, its obligations to the House, under article I, section 5, clause 4, and to the nation, under the Twentieth Amendment. (*See* Section I.C, *infra*). These actions violate our Constitution’s most fundamental separation of powers principles, which prohibit one branch of government from overriding the determinations of another branch about its own proceedings.

C. Several Other Factors Show That the Senate Was Not in Recess When the Purported Recess Appointments Were Made, and the President Was Wrong to Determine Otherwise.

Article II, section 2, clause 2 of the Constitution provides the basic framework for federal appointments: the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other officers of the United States, whose Appointments are not herein otherwise provided for.” A joint power of appointment is thereby created. The Constitution provides a limited exception to this joint appointment power: “The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3.

Taken together, those provisions mean that the President may appoint members of the Board when the Senate is in session, provided that there is advice and consent, but only when the Senate is actually in a recess may he bypass the Senate. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (en banc) (holding that Judge William Pryor’s appointment was made “during a legitimate Senate recess”). Three distinct factors establish the President’s lack of constitutional authority to make the recess appointments challenged here.

First, and contrary to the President’s position, the Senate’s pro forma

sessions were not shams.¹⁴ During one of those sessions, on December 23, 2011, the Senate passed important legislation (the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid)). The President signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.¹⁵ Although the announcement of the pro forma sessions specified that the Senate would conduct no business, 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden), that body was free to change its position at will and, in fact, did so to enact the tax cut legislation. Thus, the Senate's pro forma session of January 3, 2012, held to meet the requirements of section 2 of the Twentieth Amendment, was every bit as valid as the session that approved the tax cuts on December 23, 2011. As such, there existed no Senate recess on January 4, 2012, when the President made the purported appointments.

The Senate's designation of a session as "pro forma" does not alter the validity of the session. The very definition of a pro forma session, as

¹⁴ The President's legal position that the Senate's pro forma sessions were shams and, therefore, were ineffective to stop a recess appointment, was set forth in a Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), *available at* <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>. This Opinion will be discussed in greater detail *infra*, in Section I.F.

¹⁵ White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 3765* (Dec. 23, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765>.

articulated by the Congressional Research Service, is a “short meeting of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House.”¹⁶ When this happens, there is no recess within the meaning of the Recess Appointments Clause.¹⁷

Second, the President’s unilateral declaration that the Senate was in a lengthy recess, notwithstanding the regular pro forma sessions, would, if true, render the Senate in breach of the Constitution’s article I, section 5, clause 4 and Twentieth Amendment, section 2. These respective obligations limit either chamber from adjourning for more than three days without the consent of the other, and require Congress to assemble on January 3 of every year. On January 3, 2012, the Senate did, in fact, hold the constitutionally-required session, only a day before the attempted recess appointments. The

¹⁶ Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 4 (updated Jan. 9, 2012), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>.

¹⁷ Senate sessions designated “pro forma” have been used in the past to specifically block recess appointments. On November 16, 2007, the Senate majority leader announced that the Senate would “be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.” 153 Cong. Rec. S14,609 (Nov. 16, 2007) (Sen. Reid). Those pro forma sessions achieved the stated intent, as President Bush made no recess appointments between the initial pro forma session in November 2007 and the end of his presidency. *Obama Tempts Fight Over Recess Appointments* (Jan. 4, 2012), <http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments/>.

President's assertion that the Senate was in recess despite its holding of this constitutionally-mandated session the day before is untenable.

Third, the President's position contravenes his administration's earlier representation to the U.S. Supreme Court by then-Solicitor General Elena Kagan. She wrote that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period."¹⁸ That is precisely what the Senate did here when it held periodic pro forma sessions. The President had no power to override the Senate's determination that it was in session.

As noted above, the Recess Appointments Clause is a *limited* exception to the normal appointment rules, which authorizes the President to make temporary appointments only where the Senate cannot do business due to an actual recess. It was not intended to enable the President to resolve a political dispute with the Senate.¹⁹

¹⁸ Letter Brief from Solicitor General Elena Kagan to William K. Suter, Clerk of the Supreme Court 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (U.S. Apr. 26, 2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

¹⁹ At the same time President Obama made the NLRB recess appointments challenged here, he also made a recess appointment of Richard Cordray to the Consumer Financial Protection Bureau. But in doing so, the President abandoned any pretense that he was acting because the Senate was "unavailable" to consider the nomination due to a recess. To the contrary, the President publicly declared that he was making that recess appointment despite the fact that the Senate had been considering Cordray's
(continued...)

Although past presidents have used their recess appointment power even during relatively short recesses,²⁰ President Obama's recess appointments here, made one day after a session that was constitutionally required, are wholly without precedent. Contrary to the President's assertion of power, the opinion of Attorney General Daugherty in 1921 established the consistently followed rule that for recess appointments to be made the recess should be of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." 33 U.S. Op. Att'y Gen. 20, 24 (1921). No such break occurred in the present circumstances, because the Senate was regularly gaveled into session,

¹⁹(...continued)

nomination for over six months. He said: "For almost half a year, Republicans in the Senate have blocked Richard's confirmation. . . . They refused to even give Richard an up or down vote" President Barack Obama, *Remarks by the President on the Economy* (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy>. The President was complaining not that the Senate was unavailable or unable to receive his messages regarding Cordray, but that the Senate *refused* to confirm him. As the President candidly proclaimed: "I refuse to take no for an answer." *Id.* In short, the President's NLRB recess appointments were driven not by concern that the Senate was "unavailable" to perform its constitutional role in the appointment of government officers, but by his determination to circumvent the Senate's role.

²⁰ See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* (Jan. 9, 2012), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%2P%20%20%0A>; Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* (Mar. 12, 2008), available at <http://www.senate.gov/reference/resources/pdf/RS21308.pdf>.

received presidential communications, and during one of its pro forma sessions enacted important tax legislation.

Finally, several Founders viewed the recess appointment power as limited, such as Edmund Randolph, the nation's first Attorney General and influential member of the Constitutional Convention.²¹ In response to a question from Thomas Jefferson about recess appointment powers, Randolph warned that the Recess Appointments Clause had to be "interpreted strictly" because it represented "an exception to the general participation of the Senate."²²

Similarly, Alexander Hamilton referred to the recess appointment power as "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (Alexander Hamilton). There was never a suggestion that the confirmation process was "inadequate" due to congressional opposition to a nominee or to a routine delay in the confirmation process. Rather, the inadequacy referenced by Hamilton was the inability to fill a vacancy that "happened" during one of the Senate's frequent

²¹ See Statement of Professor Jonathan Turley to the H. Comm. on the Judiciary, *Executive Overreach: The President's Unprecedented "Recess" Appointments* (Feb. 15, 2012), available at <http://judiciary.house.gov/hearings/Hearings%202012/Turley%2002152012.pdf>.

²² *Id.*

and lengthy absences that of necessity occurred during the nation's horse and buggy days. Hamilton stressed that the Recess Appointments Clause was designed to recognize that Congress could not be expected to remain in session continually:

The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of offices; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding [Recess Appointments Clause] is evidently intended to authorise the President singly to make temporary appointments.

Id. (emphasis added).²³ Hamilton recognized that the recess appointment power was limited, and arose only when the joint power over federal appointments could not be utilized. That is not the case here, however, where the Senate was in session and was fully capable of acting on the NLRB nominations if it chose to do so.

In short, the President's assertion of power to override the Senate's determination that it was in session, and unilaterally to deem the pro forma sessions shams, is unconstitutional because it undermines the separation of powers built into the Constitution.

²³ *Id.*

D. The Vacancies That the President Attempted to Fill Did Not “Happen” When the Senate Was in Recess in Accordance with Article II, Section 2, Clause 3 of the U.S. Constitution, So There Were No Vacancies for Which Recess Appointments Could Be Made.

The challenged recess appointments are invalid for another reason: the NLRB vacancies the President attempted to fill in January 2012 did not “happen” during a Senate recess, so those pre-existing vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointment power to be used only when the vacancy actually “happens” or occurs during a recess, not whenever a vacancy “happens to exist” during a recess.

Article II, section 2, clause 3 of the Constitution states: “[t]he President shall have Power to fill up all Vacancies *that may happen* during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” (Emphasis added). That clause does not say that the President may fill all “vacancies that may happen to exist” whenever a Senate recess occurs.

Here, “recess” appointee Block was named to a Board seat vacated by a confirmed Board member on December 16, 2004, Flynn was named to a Board seat vacated by a confirmed Board member on August 27, 2010, and Griffin was named to a Board seat that was vacated by a confirmed Board Member

on August 27, 2011.²⁴ None of those vacancies “happened” during a recess of the Senate.

The Constitution’s plain text states that a vacancy can only be filled by a recess appointment if the vacancy actually occurred “during the Recess of the Senate,” such as through death or resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose months or longer before the purported Senate recess. As they did not “happen” during any recess, the appointments are unlawful.

While some modern authorities interpret the Recess Appointments Clause to mean that recess appointments are allowed for pre-existing vacancies, *i.e.*, those vacancies that “may happen to exist” at the time of the recess, *United States v. Allocco*, 305 F.2d 704, 709-14 (2d Cir. 1962) (endorsing the “happen to exist” construction); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), those authorities are mistaken.

As in other cases, “[t]he words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary.”

Okanagan v. United States (The Pocket Veto Cases), 279 U.S. 655, 679 (1929),

²⁴ *Members of the NLRB since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited July 20, 2012).

citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). The words in the Constitution are clear: only “Vacancies *that may happen* during the Recess” can be filled without the Senate’s advice and consent. The words do not contemplate the filling of vacancies “that may happen to exist” during a recess.

Indeed, an interpretation of the Recess Appointments Clause that allows the filling of any “vacancies that may happen to exist” defeats our constitutional system of checks and balances and negates the *joint* power of appointment vested in the Executive and Legislative Branches. A “vacancies that may happen to exist” interpretation allows a President to wait for an inevitable recess, and then unilaterally appoint nominees *seriatim*, thereby permanently writing the Senate out of the confirmation process.²⁵ This is something the Founders surely opposed. *See generally Bowsher*, 478 U.S. at 721-27 (discussing importance of separation of powers and checks and balances). Precisely because the Founders wanted to diffuse governmental power and ensure the Senate’s check on the President’s appointment power, they did not grant the President the broad power to fill any vacancies that

²⁵ Here, for example, recess appointee Block was appointed in place of a prior recess appointee, Member Becker, who was himself appointed in place of a prior recess appointee, Dennis Walsh. *Id.*

“may happen to exist” during a recess.²⁶

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate’s advice and consent:

1) Congress may authorize the appointment of inferior officers by other governmental branches;²⁷ and 2) the Recess Appointments Clause, U.S.

Const. art. II, § 2, cl. 3. Precisely because these are *exceptions* to the normal joint power of appointment preferred by the Founders, they must be narrowly construed. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1501-46 (2005).

Attorney General Edmund Randolph, writing only three years after the Constitution’s ratification, concluded that the scope of the Recess Appointments Clause is limited to vacancies that arise (*i.e.*, “happen”) during a recess. *Id.* at 1518-19. Randolph, a prominent delegate to the Constitutional Convention, wrote that such vacancies arise in “a case of necessity only; as

²⁶ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Schenck v. Peay*, 21 F. Cas. 672, 674-75 (E.D. Ark. 1869) (recess appointment unlawful where the vacancy “existed, but did not happen, during the recess of the senate”); *In re Dist. Att’y*, 7 F. Cas. 731, 734-38 (D.C. Pa. 1868) (doubt cast upon such appointments because they defeat the system of checks and balances and allow the Executive Branch to aggrandize power); *but see Allocco*, 305 F.2d at 709-14 (“happen to exist” construction endorsed); *Woodley*, 751 F.2d at 1012-13 (same).

²⁷ See U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991) (Congress has authority to grant the Chief Judge of the United States Tax Court power to appoint inferior trial judges).

where the Officer has died, or resigned during the recess.”²⁸ Such presidential power must “be considered as an exception to the general participation of the Senate” because the “[s]pirit of the Constitution favors the participation of the Senate in all appointments.” *Id.*

Famed Justice Joseph Story agreed. In his *Commentaries on the Constitution*, Story focused on the causal nature of the word “happen,” and whether a newly created post could count as a “vacancy.”²⁹ Many other Founders and their disciples agreed that the recess appointment power was limited to vacancies that “happen” during the recess. Rappaport, 52 *UCLA L. Rev.* at 1518-37, citing, *inter alia*, Alexander Hamilton, St. George Tucker and George Washington.

Admittedly, while some modern commentators and courts have approved the broader “vacancies that happen to exist” interpretation, the Supreme Court has never ruled on that issue. *Woodley*, 751 F.2d at 1033 (en banc) (Norris, J., dissenting); *Evans*, 387 F.3d at 1228 (Barkett, J.,

²⁸ Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti *et al.* ed., 1990).

²⁹ 3 Joseph Story, *Commentaries on the Constitution*, § 1553, available at http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html (“By ‘vacancies’ they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word ‘happen’ had relation to some casualty, not provided for by law.”); *see also* *The Federalist* No. 67 (Alexander Hamilton) (“vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay”) (emphasis added); *Evans*, 387 F.3d at 1232 (Barkett, J., dissenting).

dissenting).

In short, a plain reading of the constitutional text and the intention of the Founders supports the narrow interpretation of “vacancies that may happen” urged here. Under this view, President Obama’s recess appointments were invalid because the vacancies he attempted to fill pre-dated by many months the existence of the purported Senate recess. Moreover, if the words “vacancies that may happen” in the Recess Appointments Clause are not given their plain meaning, then the Clause swallows the basic rule of joint appointments and allows a president to fill virtually all federal offices via *seriatim* recess appointments, without a shred of advice from, or consent of, the Senate.

E. The President’s Attempt to Fill Vacancies Without the Advice and Consent of the Senate Was Unconstitutional Because the Recess Appointments Clause Only Covers Inter-session Recesses.

The challenged recess appointments are invalid for an additional reason: the Recess Appointments Clause only allows for vacancies to be filled during an *inter*-session recess. That did not occur here.

An inter-session recess is a recess between the two annual sessions of Congress. An intra-session recess is a recess that occurs during the

congressional session.³⁰ The Constitution uses the term “adjournment” to refer both to inter-session and intra-session recesses. When the Constitution uses the term “recess,” it refers only to an inter-session recess. Rappaport, 52 UCLA L. Rev. at 1547-1573. For the Founders, “recess” corresponded to breaks between sessions, a meaning adopted from the Massachusetts Constitution. By contrast, one meaning of “adjournment” at the time the Constitution was drafted was “any break during or between sessions.” *Id.* This differentiation between “recess” and “adjournment” also makes sense of various clauses in the Constitution that use those terms. Allowing recess appointments for all adjournments, no matter when they occur and for how short a duration, would permit the President to recess-appoint for a one-day or one-hour break.

Moreover, if intra-session recess appointments are allowed, the result is that such appointments are for longer periods, possibly twice as long, as they are for inter-session recess appointments, based on the Constitution’s language that recess appointments “shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3.

³⁰ The “word ‘session’ refers to the period between the reconvening of the Senate after a sine die [*i.e.*, indefinite] adjournment and the next sine die adjournment.” Henry B. Hogue, Cong. Research Service, RS 21308, *Recess Appointments: Frequently Asked Questions* (Jan. 9, 2012), at 1, available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%2070DP%2BP\W%3B%20P%20%20%20%0A>).

Thus, allowing recess appointments for intra-session breaks makes no sense, because it gives the President power to unilaterally appoint federal officers for even longer periods of time than he would otherwise be allowed under the Recess Appointments Clause. Such a reading undermines the checks and balances built into the appointments process because it provides incentives to the President to bypass the Senate whenever possible.

For these reasons, the Court should rule that intra-session adjournments do not qualify as recesses under the Recess Appointments Clause, and the President's attempted NLRB appointments are invalid.

F. The Office of Legal Counsel's Opinion Justifying the Recess Appointments Is Erroneous.

On January 6, 2012, the Attorney General's Office of Legal Counsel ("OLC") issued a Memorandum Opinion purporting to justify the President's recess appointments.³¹ The OLC Opinion, which was not made public until January 12, 2012, declared for the first time that the Senate's convening of periodic pro forma sessions does not have the legal effect of interrupting an intra-session adjournment otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. The Opinion is wrong for numerous reasons previously stated.

³¹ See Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

For example, the OLC Opinion gives short shrift to *Ballin* and the Senate’s determination that it was in session. The Opinion, therefore, contravenes the Senate’s constitutional power to “determine the Rules of its Proceedings.” U.S. Const. art. I, § 5, cl. 2. By declaring the Senate’s on-going pro forma sessions to be a nullity—at least for purposes of the Recess Appointments Clause—the OLC Opinion implicitly declared the Senate to be in violation of the constitutional requirement that neither House shall adjourn without the consent of the other for more than three days. U.S. Const. art. I, § 5, cl. 4.³² In making this declaration, the OLC Opinion for the Executive Branch grievously disrespects the proceedings of a co-equal branch

³² Since at least 1949, the Senate has repeatedly held pro forma sessions to comply with article I, section 5’s requirement that it not adjourn for more than three days without the House’s permission. *See, e.g.*, 95 Cong. Rec. 12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); 96 Cong. Rec. 7821 (May 29, 1950); 96 Cong. Rec. 16,980 (Dec. 22, 1950); 96 Cong. Rec. 17,020 (Dec. 26, 1950); 96 Cong. Rec. 17,022 (Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); 97 Cong. Rec. 2898 (Mar. 26, 1951); 97 Cong. Rec. 10,956 (Aug. 31, 1951); 97 Cong. Rec. 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr. 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957). Congress has also used pro forma sessions to satisfy the Twentieth Amendment’s requirement that it meet at noon on January 3 to start a new session, unless a different time is specified by statute. *See* H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) (pro forma session to be held on January 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (pro forma session to be held on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (pro forma session to be held on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session to be held on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session to be held on January 3, 2012). Pro forma sessions have been widely accepted as a permissible method of fulfilling those constitutional mandates, and the Senate could not logically be in session for purposes of one constitutional provision while in recess for purposes of another.

of government.

The OLC Opinion also declares that the Senate's pro forma sessions were shams, but such a jaundiced view is directly contradicted by the actual experience of those sessions, which demonstrate that the Senate was, in fact, available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. As noted above, by unanimous consent the Senate passed important tax legislation during a pro forma session, the Temporary Payroll Tax Cut Continuation Act of 2011, *see* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid). This is the very same procedure that the Senate uses to conduct most of its business, including the vast majority of its advice and consent functions. If the President can sign tax legislation passed in the Senate by unanimous consent during a pro forma session, it is untenable to argue that the Senate is unavailable to confirm the President's nominees in the same manner at the same session.

Moreover, the OLC Opinion concedes that the Constitution empowers the Senate to block all recess appointments simply by refusing to recess.³³

³³ As noted earlier, the Solicitor General also recognizes that the Senate can entirely foreclose the President's recess appointment authority by choosing to remain in session. Letter Brief from Solicitor General Elena Kagan to William K. Suter, Clerk of the Supreme Court at 3, *New Process Steel, L.P. v. NLRB*, No. 08-1457 (U.S. Apr. 26, 2010), *available at* <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

The validity of the President's January 4 recess appointments thus depends on his judgment that the Senate unsuccessfully exercised its power. But, as one Senator said in response to these recess appointments, "[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session." 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee).

As Alexander Hamilton explained in *The Federalist* No. 76, the Founders denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. The prospect of an intransigent Senate that refuses to confirm the President's nominees is an unavoidable corollary of the Founders' decision to "divid[e] the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991).

The OLC Opinion ignores these principles and fails to recognize the importance of the *joint* appointment power, which was designed by the Founders precisely to avoid one branch becoming dictatorial. See *In re District Attorney*, where the court struck down a recess appointment and stated:

Under a complicated political system of mutually counteracting checks, like the government of the United States, the continuance of our freedom could not be maintained without incessant caution to guard against both executive and legislative encroachments. Either of them

tends towards usurpations of despotic power, and the tendency may be so gradual as to be almost imperceptible. The dangers from such encroachments would be more serious than from the occasional suspension or inefficiency of governmental functions through temporary vacancies in office.

Id., 7 F. Cas. at 735.

The OLC Opinion is correct that the Recess Appointments Clause was intended to provide “an auxiliary method of appointment,” as Alexander Hamilton stated in *The Federalist* No. 67, for filling “Vacancies that may happen during the Recess of the Senate,” when the Senate is unavailable to perform its advice-and-consent function. But even accepting at face value the Opinion’s “practical construction” of the Recess Appointments Clause, the President’s January 4 recess appointments cannot reasonably be justified on the ground that the Senate was unavailable or otherwise unable to perform its advice and consent function. Rather, the Senate was *unwilling* to provide its advice and consent regarding the President’s controversial nominees on his timetable. It is therefore untenable for the Opinion to claim that the President acted to fill these vacancies because the Senate was not “capable of exercising its constitutional function of advising and consenting to executive nominations.” OLC Opinion at 12 (citation omitted).

Rather than furthering the checks and balances underlying the joint appointment process, the OLC Opinion allows the President to subvert the

Senate's authority to withhold its consent when it believes a nominee should not be confirmed. As with every branch of our government, there is a "hydraulic pressure" within the Executive Branch "to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The OLC Opinion stretches logic and the Founder's intentions to the breaking point. Regardless of whether the President has sought to exceed his power for good or ill, it is for this Court to maintain the proper balance between the Executive and Legislative Branches of government by striking down the recess appointments.

II. The Board's Remedial Orders Are Inadequate as a Matter of Law. They Depart from Past Precedent Without a Reasoned Basis, and Do Not Further the Purposes of the NLRA. The Remedies Harm Petitioners and the Class of Similarly-Situated Discriminatees and Allow the Wrongdoers to Keep Ill-gotten Gains Seized from Hundreds of Employee Victims.

If the Court finds the recess appointments valid, it must then review the merits of the Board's remedial decision challenged here.³⁴

In this case, the Board struck down as unlawful "annual renewal" policies that USW and IBEW ("Unions") applied to untold hundreds of

³⁴ If the Court agrees that there existed no valid quorum when the Board issued the challenged remedial decision, then it need not consider the propriety of the remedial issue raised herein. In that event, the Court should simply remand the cases for reconsideration by a new Board, when a proper and lawful quorum is established.

nonmember employees across the nation. (SA A-1 & SA A-29). Under these policies, the Unions unilaterally “flipped” *Beck* objectors from objector to non-objector status against their will, and thereby forced them to pay an entire year’s worth of excessive dues to subsidize the Unions’ political and ideological activities. (App. 100 & 271). But for these illegal policies, the Unions would not have collected from objecting nonmembers any funds used for the “propagation of political or ideological views that they oppose.”

Chicago Teachers Union v. Hudson, 475 U.S. 292, 305 & n.15 (1986), citing Thomas Jefferson and James Madison; *see also Knox v. SEIU Local 1000*, ___ U.S. ___, 132 S. Ct. 2277 (2012) (questioning any requirement that nonmembers must “opt out” of union political expenditures). Indeed, notwithstanding the aberrant and short-lived victory USW won before the ALJ in its case (SA A-6), the Unions were on notice since at least August 27, 2010 (if not earlier) that their annual renewal policies were unlawful.

Nevertheless, they persisted in applying them. *See International Ass’n of Machinists (L-3 Comm’ns, LLC)*, 355 NLRB No. 174 (Aug. 27, 2010) (NLRB issues its first decision striking down a union’s “annual renewal” policy);³⁵ *see*

³⁵ Despite USW’s temporary victory before the ALJ in the *Richards* case, at least five other ALJ decisions had struck down annual renewal policies prior to the Board doing so in *L-3 Communications*, and no other ALJ had ever upheld them. *Teamsters Local 952 (Albertsons Inc.)*, No. 21-CB-13609, JD(SF)-30-06 (May 30, 2006); *L-3 Comm’ns* (continued...)

also *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 849 (7th Cir. 2000) (questioning the validity of “annual renewal” policies as far back as 2000, noting that they “place[] an additional burden on objectors. No sooner does the objector complete one round than, like Sisyphus with his rock, he must begin anew with another.”) (citation omitted).

Despite numerous NLRB and federal court cases condemning annual renewal policies over many years,³⁶ the Unions “rolled the dice” and persisted with their coercive policies even after they became legally indefensible. But the Board, in turn, refused to provide a retroactive remedy because it believed that some other unions’ “annual renewal” policies could be lawful, and that each case had to be decided on a “case-by-case” basis. (SA A-26-27, 41-42). The NLRB’s refusal to provide retroactive remedies on this basis unfairly penalizes the victims of the Unions’ violations and erroneously allows the wrongdoers to retain their ill-gotten gains.

³⁵(...continued)

Vertex Aerospace, No. 15-CB-5169, JD(ATL)-02-08 (Jan. 9, 2008); *UAW (Colt’s Mfg. Co.)*, No. 34-CB-2631, JD(NY)-06-08 (Mar. 3, 2008); *CWA & Local 4309 (AT&T Midwest)*, No. 8-CB-10487, JD-1-09 (Jan. 9, 2009); *IBEW and Local 34*, No. 13-CB-18961, JD(SF)-51-08 (Dec. 13, 2008). The Unions, while clearly on notice that their annual renewal policies were indefensible and likely to be found unlawful, persisted in applying them anyway, for their own financial gain.

³⁶ In addition to this Court’s decision in *Tavernor*, 226 F.3d at 849, other federal courts have condemned annual renewal policies. See *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Seidemann v. Bowen*, 499 F.3d 119 (2d Cir. 2007).

A. The Board Departs from Past Precedent Without a Reasoned Justification.

The remedial orders in this case (SA A-4 and SA A-32) inexplicably retreat from the Board's normal process of remedying *Beck* violations. In virtually every case where the Board has found *Beck* violations affecting an entire class or bargaining unit, it has made its remedies retrospective and class-wide, to restore all discriminatees to the positions they would have been in but for the union's illegal conduct. *E.g.*, *California Saw & Knife Works*, 320 NLRB 224, 255-56 (1995) (retroactive class-wide reimbursement remedy ordered); *Rochester Mfg. Co.*, 323 NLRB 260, 262-63 (1997) (class-wide retroactive reimbursement remedy ordered in *Beck* case); *Teamsters Local 738 (E.J. Brach Corp.)*, 324 NLRB 1193, 1194 (1997) (same); *UFCW Local 1099 (Kroger, Inc.)*, 327 NLRB 1237, 1238 (1999) (retroactive class-wide reimbursement remedy ordered to all unit employees, not just the charging party); *Teamsters Local 492 (United Parcel Serv., Inc.)*, 346 NLRB 360, 365-67 (2006) (same). The ALJ in the leading "annual renewal" case, *International Association of Machinists (L-3 Communications, Inc.)*, 355 NLRB No. 174 (Aug. 27, 2010), expressly followed then-existing Board precedent and ordered a class-wide retroactive refund remedy.³⁷

³⁷ In *L-3 Communications*, the ALJ ordered the union to "reimburse, with interest, (continued...)"

In *Rochester Manufacturing*, the Board explicitly recognized its duty when devising a remedy in cases like this:

It is the Board's practice to remedy violations of the Act by restoring, to the extent feasible, the status quo ante, reconstructing the circumstances that would have existed but for the unlawful conduct. As the Supreme Court has observed, "our task in applying Section 10(c) is to take measures designed to recreate the relationships that would have been made had there been no unfair labor practice." *Franks v. Bowman Transportation*, 424 U.S. 747, 769 (1976).

323 NLRB at 263. Yet that is precisely what the Board did *not* do in this case, when it refused to grant retrospective remedies to the Petitioners and the nationwide classes of similarly-situated discriminatees.

Even outside the context of nonmembers' *Beck* rights, the Board regularly orders class-wide retroactive reimbursement remedies in cases where unions abuse their powers under "union security" clauses. *See, e.g., Jackson Eng'g Co.*, 265 NLRB 1688 (1982), *enforced sub nom. Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1404 (D.C. Cir. 1984) (union and employer ordered to reimburse all employees for all dues paid under

³⁷(...continued)

any other objecting nonmember whose request for continuing objector status was not recognized since November 2004, because of the annual renewal requirement, for any fees collected in excess of those required for representational activities." 355 NLRB No. 174, at *23. Although the Board there affirmed the ALJ in striking down the annual renewal, it did not adopt his class-wide retroactive remedy. Charging Party Robert Prime appealed that remedial decision to the Eleventh Circuit, No. 10-14357-F, but because the case was eventually settled, the appellate court rendered no decision on the propriety of the remedial order.

unlawful and corrupt union security clause, holding that “[t]he reimbursement remedy is another way of dissipating the effects of unlawful labor practices, and also restores to employees that which was unlawfully taken from them”); *Teamsters Local 886 (Unit Parts Co.)*, 119 NLRB 222, 224 (1957) (Board orders dues refund to all employees coerced into signing dues check off authorizations); *Polyclinic Med. Ctr.*, 315 NLRB 1257, 1263 (1995) (same); *Raymond Interior Sys.*, 354 NLRB No. 85 (Sept. 30, 2009), *order on reconsideration*, 357 NLRB No. 166 (Dec. 30, 2011) (where union enforced a “union security clause” even though it did not have majority support, all dues ordered refunded to all employees).

The Board has long recognized that where there exists a widespread pattern of unlawful activity, the appropriate relief should include a remedy for the named discriminatees and all other individuals “similarly situated.” *Iron Workers Local 433*, 298 NLRB 35 (1990); *Plumbers Local 198 v. NLRB*, 747 F.2d 326, 332-34 (5th Cir. 1984) (upholding broad relief against union that had unlawfully operated a hiring hall, in spite of admitted difficulty in locating all of the discriminatees).

The Board’s prospective-only remedy in the instant cases does not meet the standards of numerous prior Board decisions, and the Board did not adequately explain this discrepancy. “It is ‘axiomatic that an agency

adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.” *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001) (citation omitted). The Board has never directly addressed the remedial issue raised in the Exceptions and Motions for Reconsideration, and has offered no reasoned basis for refusing a retrospective class-wide remedy and allowing the Unions to keep ill-gotten gains seized from untold hundreds of innocent nonmember objectors. This is especially egregious where, as here, the Board must concede that the Unions were on notice for a full year (if not a decade) that their annual renewal policies were coercive, burdensome and legally indefensible.

B. The Remedial Order Does Not Further the Act’s Purposes.

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976), the Supreme Court held that NLRA Section 10(c), 29 U.S.C. § 160(c), authorizes remedies “redressing the wrong incurred by an unfair labor practice . . . to make ‘the employees whole, and thus restor(e) the economic status quo that would have obtained but for the company’s wrongful (act),” citing *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). The NLRB’s task in applying Section 10(c) is “to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.” *Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 657

(1961) (Harlan, J., concurring). In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941), the Court noted that the Board's decisions effectuate public policy when they "require[] not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."

Manifestly, this was not done here, where the Board is allowing the labor law tortfeasors to keep their wrongfully seized gains and refusing to provide a reimbursement remedy for untold numbers of discriminatees. The policies of the NLRA are not furthered by these crabbed remedial decisions. The Court should reverse the Board's remedies as inadequate.

Even courts applying a narrow standard of review over Board remedies recognize that the remedies must "effectuate the policies of the Act and [be] tailored to the nature of the particular unfair labor practice in question."

Road Sprinkler Fitters Local Union No. 669 v. NLRB, 789 F.2d 9, 16 (D.C. Cir. 1986). Here, the Board's prospective-only remedies fail because they are not at all "tailored to the nature of the particular unfair labor practice in question." *Id.*

Although the Board has broad discretion to adapt its remedies to the needs of particular situations, *Phelps Dodge Corp.*, 313 U.S. at 194, it must

use that discretion to ensure that the “victims of discrimination” are treated fairly and not arbitrarily. *Id.* But what happens in situations where, as here, the Board refuses to ensure that the victims of discrimination be treated fairly? The federal courts frown upon such erroneous remedies and do not hesitate to overturn them.

For example, this Court has recognized that, despite its deference to the Board, it will not enforce remedial orders that “do[] not effectuate the policies of the Act.” *United Steelworkers of Am. v. NLRB*, 692 F.2d 1052, 1058 (7th Cir. 1982); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002) (citations omitted) (“the Board’s discretion to select and fashion remedies for violations of the NLRA, though generally broad, is not unlimited”); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257–58 (1939) (discussing limits on the Board’s remedial discretion). Can the Board state with a straight face that allowing the Unions to keep ill-gotten gains used to fund political campaigns over the nonmembers’ objections *further*s the policies enunciated in *Beck* and the NLRA’s “right to refrain” under 29 U.S.C. § 157? Petitioners think not, especially since the Unions were on notice for a full year (if not a decade) that their annual renewal policies were coercive, burdensome and legally indefensible.

At the very least, the Court should remand these cases and require the

Board to reconsider the remedy and explain its departure from past precedent. *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 10 (1974).

CONCLUSION

The Petitions for Review should be granted. The Board's April 18, 2012 Orders Denying Motions for Reconsideration should be reversed because the recess appointments to the NLRB were unconstitutional and, therefore, no lawful quorum existed to issue the Orders. The cases should be remanded to the Board for decisions by a lawful quorum of Members.

Alternatively, if the Court finds that a lawful quorum existed, it should find the Board's remedial Orders inadequate and reverse and remand them for entry of proper and adequate remedies.

Respectfully submitted,

/s/ Glenn M. Taubman

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July 30, 2012

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

I, Glenn M. Taubman, hereby certify that this Brief complies with the type-volume limitations set forth for principal briefs in Federal Rule of Appellate Procedure 32(a)(7). Said Brief is printed in 13-point Century Schoolbook font (12-point for footnotes). Including headings, footnotes, and quotations, the Brief contains 13,112 words, as calculated by the WordPerfect Version 11 word count function.

Respectfully submitted,

/s Glenn M. Taubman

Glenn M. Taubman

DATED: July 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, I electronically filed the foregoing Brief and Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Glenn M. Taubman

Glenn M. Taubman

REQUIRED SHORT APPENDIX

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Circuit Rule 30(d) Statement

I, Glenn M. Taubman, certify that the Required Short Appendix attached to Petitioners' Brief and the accompanying separately bound Appendix contain all the materials required by Circuit Rule 30(a) and (b).

Dated: July 30, 2012

s/ Glenn M. Taubman

Glenn M. Taubman
Attorney of Record for
Petitioners

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Trimas Corporation d/b/a Cequent Towing Products) and Douglas Richards

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Chemtura Corporation) and Ronald R. Echegaray

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Chemtura Corporation) and David M. Yost. Cases 25-CB-8891, 25-CB-9253 (Formerly 6-CB-11544), and 25-CB-9254 (Formerly 6-CB-11545)

August 16, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,
PEARCE, AND HAYES

The issue presented is whether the Respondent Union (hereafter Respondent) violated its duty of fair representation by requiring employees it represents who are not union members and who seek objector status under *Communications Workers of America v. Beck*¹ to assert their objection on an annual basis. In *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010),² the Board announced the standard by which it will evaluate the propriety of a union's annual *Beck* renewal requirement. Applying that standard here, we find that the Respondent has failed to present a legitimate justification for its annual renewal requirement sufficient to justify the burden the requirement imposes on an individual seeking to extend an objection. We accordingly find, contrary to the judge, that the annual renewal requirement here is arbitrary under the duty of fair representation, and that in imposing it on the Charging Parties—and refusing to honor their specific request that their *Beck* objections be permanent and continuing in nature—the Respondent has violated Section 8(b)(1)(A) of the Act.³

¹ 487 U.S. 735 (1988).

² Petition for review dismissed 2010 WL 4340436 (D.C. Cir. 2010).

³ On August 6, 2009, Administrative Law Judge John H. West issued the attached decision. The Charging Parties filed exceptions and a

I. FACTUAL BACKGROUND

The three Charging Parties in this case—Douglas Richards, Ronald R. Echegaray, and David M. Yost—are members of a bargaining unit represented by the Respondent. The Respondent and the Charging Parties' employer have entered into collective-bargaining agreements that have included a union-security clause.⁴

The Respondent maintains a procedure for processing objections (under *Beck*) to supporting the Respondent's activities unrelated to collective bargaining, contract administration, and grievance adjustment.⁵ The Respondent's *Beck* policy requires that *Beck* objectors renew their objections annually, within 30 days of the anniversary of their hire date. Failure to do so results in the employee not being classified as an objector for the next year and being charged full dues for that year.

Upon receiving an objection, the Respondent sends an acknowledgement letter, which also states that the objection will expire 1 year hence on the anniversary of the employee's hire date, absent renewal by the objector within the subsequent 30-day window period. The Respondent thereafter annually sends each objector a copy of the Respondent's *Beck* procedure, which again sets forth the annual renewal requirement, along with other *Beck*-related financial information, including the amount to be charged objectors in the upcoming year and the basis for that calculation.

In 2008, each of the three Charging Parties separately notified the Respondent in writing, within the specified window period, that he sought *Beck* objector status, and each specifically requested that his objection be considered "permanent and continuing in nature." The Respondent in reply notified each of them of its annual renewal requirement for *Beck* objections, and that their objections would expire in 1 year. The Respondent did not recognize the objections as continuing.

II. THE JUDGE'S DECISION

The judge found that the Respondent did not breach its duty of fair representation by maintaining its annual re-

supporting brief. The General Counsel and the Respondent Union filed an answering brief, and the Charging Parties filed a reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

⁴ Richards is employed by Cequent Towing Products. Echegaray and Yost are employed by Chemtura Corporation. None of them is a member.

⁵ Under *Beck*, a union may not, over the objection of nonmember employees it represents, expend funds collected from such objectors under a union-security agreement on activities unrelated to collective bargaining, contract administration, and grievance adjustment. 487 U.S. at 752-754.

newal requirement and applying it to the Charging Parties by refusing to honor their request for a continuing *Beck* objection. A union breaches its duty of fair representation if its actions affecting employees whom it represents are arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The judge first found that the Respondent's annual renewal requirement was not arbitrary because the Union demonstrated legitimate justifications for the requirement. The judge further found that the requirement was not discriminatory vis-a-vis the Respondent's treatment of union members—whom it does not require to annually renew membership—because the differing treatment was based on differences in governing law rather than animus. Finally, the judge found that the annual renewal requirement was not undertaken in bad faith, absent evidence showing dishonest action by the Respondent.

The Charging Parties have excepted to each of these findings. For the reasons set forth below, we find that the Respondent's annual renewal requirement is arbitrary under the duty of fair representation, and thus unlawful.⁶

III. DISCUSSION

A. Arbitrary Conduct Under The Duty of Fair Representation

The legality of union procedures designed to implement *Beck* is measured using the duty-of-fair-representation standard. See *California Saw & Knife Works*, 320 NLRB 224, 230 (1995), *enfd.* sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied* sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998); *Machinists Local Lodge 2777 (L-3 Communications)*, supra, 355 NLRB No. 174, slip op. at 2–3. A union's actions are considered arbitrary under the duty of fair representation “only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.” *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). The wide range of reasonableness affords a union discretion to account

⁶ We agree with the judge, for the reasons set forth by him and in our prior decision in *Machinists Local Lodge 2777 (L-3 Communications)*, supra, 355 NLRB No. 174, slip op. at 3, that the requirement was not imposed in bad faith. See *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994) (bad faith prong of duty of fair representation requires proof of fraud, or deceitful or dishonest action). Bad faith is negated here by the Respondent's clear notice to *Beck* objectors of the annual renewal requirement. We further find, as discussed *infra*, that the requirement is not discriminatory under the duty of fair representation as construed in *Machinists Local Lodge 2777 (L-3 Communications)*.

for conflicting interests of the employees it represents. See *Humphrey v. Moore*, 375 U.S. 335, 349–350 (1964).

In *Machinists Local Lodge 2777 (L-3 Communications)*, supra, the Board addressed whether a union's annual renewal requirement constitutes arbitrary conduct violative of the duty of fair representation. The Board held that in applying the arbitrary standard in this context, it “consider[s] the balance between the competing interests: the legitimacy of the union's asserted justifications for its procedures and the extent to which they burden employees' assertion of a *Beck* objection.” 355 NLRB No. 174, slip op. at 2. The Board explained that in analyzing the union's proffered rationales for the annual renewal requirement:

we consider the fact that the annual renewal requirement poses some burden, albeit a modest one, on potential objectors. Those individuals must send a statement of their objection to the Unions each year during the 1-month period specified in the Unions' procedure. While the simple mailing of an objection poses a minimal burden, remembering to do so is also a burden and, further, the failure to remember engenders a burden of more import . . . loss of the opportunity to object for 11 months (until the renewal period recurs). While the requirement does not pose a significant burden, equivalent, for example, to job loss, and has been viewed as *de minimis* by some courts,⁷ we must ask whether the Unions have articulated a legitimate justification for the imposition of the burden, considering the wide range of reasonableness accorded them under the duty of fair representation. [355 NLRB No. 174 slip p. at 3–4.]

In *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB No. 164 (2011), the Board applied the standard announced in *L-3 Communications*, but found that the unions' annual *Beck* renewal requirement was lawful because the unions there had taken steps to significantly minimize the burden the requirement imposed on objectors. The Board, citing the multiple notice and reminders given to objectors of the annual renewal requirement, and that the annual renewal may be filed at any time, held that “the burden imposed on potential objectors under the Unions' *Beck* procedures is so minimal that the annual renewal rule here cannot be held to violate the duty of fair representation.” 356 NLRB No. 164, slip op. at 1. In light of the Board's finding that the burden imposed by the requirement was *de minimis*, the Board found it un-

⁷ *Nielsen v. IAM*, 94 F.3d 1107, 1116–1117 (7th Cir. 1996). See *Abrams v. Communications Workers*, 59 F.3d 1373, 1381 (D.C. Cir. 1995).

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necessary to reach the weight given to the union's proffered justifications for the requirement. *Id.* slip op. at 3.

The Union's *Beck* procedure in the instant case, in contrast, does not furnish objectors with multiple notices and reminders, and does not permit the annual renewal to be filed at any time. Thus, the burden imposed here on objectors who fail to renew within the window period is the loss of objector status for the entire next year. That burden may not be characterized as *de minimis*, as in *Colt's Mfg. Co.*, but is analogous to the burden imposed on objectors in *L-3 Communications*. Accordingly, we turn to an evaluation of the Union's proffered justifications for its annual renewal requirement.

*B. The Respondent's Justifications
For Its Annual Renewal Requirement*

The Respondent advances several justifications for the requirement at issue here. The Respondent asserts that the annual renewal requirement is justified because it provides objectors annually with revised *Beck* information, including changes in the amount charged to objectors. The Respondent asserts that it is thus reasonable to ask objectors to inform the Respondent annually whether they wish to continue objecting in light of the revised *Beck* data.

The Board in *Machinists Local Lodge 2777 (L-3 Communications)* considered this same justification and found it wanting. The Board observed that *Beck* objectors may indeed change their mind, in light of changes in the amount objectors are charged or in the purposes of the underlying union expenditures. 355 NLRB No. 174, slip op. at 4-5. The Board explained, however, that:

[t]he ability of objectors to change their position is not meaningfully advanced by an annual renewal requirement . . . They are free to do so with or without the requirement. . . . Affording employees the opportunity to change their mind is thus as easily accomplished under a system which honors a continuing objection of the type [sought here] as under the Unions' current system . . . The Unions retain, under either approach, the ability to attempt to persuade employees, through noncoercive means, to become full members of the union. *California Saw*, 320 NLRB at 233 fn. 51. We find no rational relationship between the legitimate interest in permitting employees to change their minds and requiring annual renewal of expressly continuing objections. [*Id.* at 5.][Footnote and citation omitted.]

Likewise unpersuasive is the Respondent's related contention that the requirement serves as a reminder of the union membership rights that nonmember *Beck* objectors forego. The Respondent's ability to remind objectors of those rights

remains unfettered and in no way hinges on an annual renewal requirement.

The Respondent further asserts that the annual renewal requirement gives it "reasonable assurance that only employees who are moved (and continue to be moved) by an objection to providing financial support to activities not germane to collective bargaining will be entitled to pay a reduced fee." Conserving union funds is undoubtedly a legitimate objective.⁸ But the Respondent has failed to establish any correlation between the requirement and any potential savings. The Respondent has presented no empirical evidence indicating how many objectors change their minds over time, how many communicate as much to the Unions, or how many would confirm a change of mind by not renewing their objections. Further, to the extent the Respondent's argument relates to testing the motive or good faith of the original objection, we rejected procedural requirements imposed for that reason in *California Saw & Knife Works*, supra, 320 NLRB at 237.

The Respondent additionally asserts it was justified in maintaining the requirement because it relied on court cases upholding similar annual renewal requirements,⁹ and because the requirement was consistent with the *Beck* guidelines issued by the NLRB General Counsel prior to his issuance of the complaint in this case.¹⁰ The Board considered and rejected this same justification in *Machinists Local Lodge 2777 (L-3 Communications)*, explaining that the General Counsel's earlier exercise of prosecutorial discretion in declining to issue complaint does not insulate the requirement from subsequent Board scrutiny upon issuance of complaint. *Id.* slip op. at 5. The Board further explained that the court cases relied on by the Respondent--to which the Board was not a party--do not preclude our independent assessment of the issue, because it is the Board that is vested with the primary responsibility to establish national labor policy. See

⁸ See *California Saw*, 320 NLRB at 243 (protecting individual *Beck* rights "without compromising the collective interests of union members in protecting limited funds").

⁹ Several courts have upheld the requirement in a variety of contexts. See *Gorham v. Machinists*, 733 F.Supp.2d 628 (D.Md. 2010)(NLRA); *Abrams v. Communications Workers*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995)(NLRA); *Kidwell v. Transportation Communications Union*, 731 F.Supp. 192, 205 (D. Md. 1990), *affid.* in part and *revd.* on other grounds, 946 F.2d 283 (4th Cir. 1991), *cert. denied* 503 U.S. 1005 (1992) (Railway Labor Act); *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) (public sector). Several other courts have found the requirement to be unlawful. See *Seidemann v. Bowen*, 499 F.3d 119, 125 (2d Cir. 2007) (public sector); *Lutz v. IAM*, 121 F.Supp.2d 498, 506-507 (E. D. Va. 2000) (Railway Labor Act); *Shea v. Machinists*, 154 F.3d 508, 517 (5th Cir. 1998) (same).

¹⁰ See GC Memorandum 88-14 at 3 (Nov. 15, 1988) ("a union can require nonmembers to file new objection . . . each year"); GC Memorandum 01-04 (April 6, 2001) (same).

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990). “While we evaluate the Unions’ conduct ‘in light of the factual and legal landscape at the time of the union’s actions,’ prior nonbinding precedent is not a substitute for a valid union rationale for the annual renewal requirement.” *Machinists Local Lodge 2777 (L-3 Communications)*, supra, slip op. at 5, quoting *Airline Pilots Assn. v. O’Neill*, supra, 499 U.S. at 67.¹¹

Finally, the Respondent asserts that the requirement provides some assurance that it is not making advance rebates under its *Beck* rebate-payment system to individuals who are no longer employed in a bargaining unit represented by the Respondent.¹² As stated, conserving union funds is a legitimate objective. The Respondent, however, adduced no evidence as to the frequency with which it might make such mistaken rebates to former employees but for the annual renewal requirement, and we are thus hesitant to assign any weight to this justification. Nor has the Respondent explained why it cannot rely on information concerning separation from employment it is entitled periodically to receive from employers that are parties to the agreements pursuant to which dues and fees are deducted. The Respondent certainly has not advanced any argument that this alternative, or other available means for achieving its goal—such as verifying employment with objectors themselves, are less efficacious, more costly, or more administratively burdensome than the annual renewal requirement. We are thus unpersuaded on the record before us that the Respondent’s legitimate desire to avoid unwarranted rebate payments provides a rational explanation for its annual renewal requirement. See *Machinists Local Lodge 2777 (L-3 Communications)*, supra, slip op. at 4 (union failed to provide a rational explanation for choosing among admittedly available alternatives).

As we explained above, the annual renewal requirement here imposes some burden, albeit a modest one, on potential objectors. See *Machinists Local Lodge 2777 (L-3 Communications)*. We find that the Respondent has failed to articulate a legitimate justification for the imposition of that burden here.¹³

¹¹ The Respondent’s additional assertion, that its choice of annual renewal date—the anniversary of the employee’s date of hire—is reasonable, likewise cannot serve as a justification for the annual renewal requirement itself.

¹² The Respondent sends objectors an advanced dues reduction check on a quarterly basis, effectively reducing their total payments by the appropriate amount, then charges objectors full monthly dues.

¹³ We find, however, that the annual renewal requirement does not discriminate between union members and nonmember objectors under the duty of fair representation, as we held in *Machinists Local Lodge 2777 (L-3 Communications)*. Union members and nonmembers are not similarly situated with respect to the Respondent’s administration of its contractual union-security provisions under *Beck*. For example, mem-

ORDER

The National Labor Relations Board orders that the Respondent, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL–CIO, CLC, Pittsburgh, Pennsylvania, its officers, agents and, representatives, shall

1. Cease and desist from

(a) Requiring nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under the Union’s existing annual renewal procedure.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

(b) Notify nonmember employees who are subject to a union-security clause that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the Respondent’s magazine.

(c) Recognize Ronald R. Echegaray as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

(d) Recognize David M. Yost as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

(e) Recognize Douglas Richards as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

bers have no right to object—only nonmembers do—and even nonmembers must affirmatively object. Thus, membership is a relevant consideration in this context, and the Respondent was accordingly free to design, and in fact could not avoid designing, different procedures applicable to each category of employee. *Id.*, slip p. at 7. Absent any evidence before us of animus by the Respondent toward nonmembers or objectors, there is no basis for finding discrimination here under the duty of fair representation. *Id.*

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(f) Within 14 days after service by the Region, post at its union office in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means.¹⁵ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Sign and return to the Regional Director sufficient copies of the notice for posting by Cequent Towing Products and Chemtura Corporation, if willing, at all places where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 16, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues that the Respondents' rule requiring *Beck* objectors to renew their objections annually was arbitrary and thus breached their duty of fair representation in violation of Section 8(b)(1)(A). I would further find, for the reasons fully set out in my dissent in *Colt's Mfg. Co.*, 356 NLRB No. 164, slip op. at 4-6 (2011), that the annual renewal requirement in-

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁵ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

fringes on employees' fundamental Section 7 right to refrain from assisting a union and must therefore be analyzed under Section 8(a)(3) and 8(b)(1)(A) rather than under the more deferential duty-of-fair-representation standard applied here by the majority. Finally, for the reasons set out in the dissenting opinions in *L-3 Communications*, 355 NLRB No. 174, slip op. at 12-14 (2010) and in *Colt's Mfg.*, slip op. at 6, I dissent from my colleagues' finding that the Respondent's annual renewal requirement for *Beck* objectors was not discriminatory.

Dated, Washington, D.C. August 16, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting in part.

Although I agree with the majority that the appropriate legal framework for analyzing this case is the duty of fair representation under Section 8(b)(1)(A), for the reasons set forth in my dissenting opinion in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174, slip op. 14-16 (2010), I would dismiss the 8(b)(1)(A) allegation that the Union breached its duty of fair representation by requiring the Charging Parties to renew their *Beck*¹ objections annually.

Because the General Counsel bears the burden of proving that the Union's action was arbitrary, discriminatory, or in bad faith, and as the Union's annual-renewal requirement rationally serves its legitimate interests and was well supported by legal precedent at the time of its actions, I find that this burden has not been met. Indeed, as in *L-3 Communications*, I find that it is manifestly unjust to find a violation here.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 16, 2011

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

¹ *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under our existing annual renewal procedure.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

WE WILL notify nonmember employees who are subject to a union-security clause that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in our magazine.

WE WILL recognize Ronald R. Echegaray as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

WE WILL recognize David M. Yost as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

WE WILL recognize Douglas Richards as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS INTER-
NATIONAL UNION, AFL-CIO, CLC

Patricia H. McGruder, Esq. for the General Counsel.
John G. Adam, Esq. (Martens, Ice, Klass, Legghio & Israel, P.C.), of Royal Oak, Michigan, for the Respondent.

William L. Messenger, Esq. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for Charging Party Douglas Richards.

Glenn M. Taubman, Esq. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for Charging Parties Ronald Echegaray and David Yost.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Morgantown, West Virginia, on May 19, 2009. Charges¹ were filed and, as here pertinent, an amended consolidated complaint (complaint) was issued on May 8, 2009 alleging that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Respondent or Union) has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended (Act), in violation of Section 8(b)(1)(A) of the Act in that (1) at all material times Respondent has maintained a procedure governing the reduction in dues and fees for nonmember employees covered by the Union Security Provisions who object to the payment of dues and fees for nonrepresentational activities, (2) the Procedure requires that objecting nonmember employees renew their objector status on an annual basis, and (3) collectively, on specified dates Respondent applied the Procedure to Charging Parties Richards, Echegaray, and Yost, notifying each of them that they must renew their objector status on an annual basis. As set forth in the complaint General Counsel seeks an Order requiring Respondent to take the following action with respect to all bargaining units represented by Respondent in which there is a union security clause:

(1) rescind and cease giving effect to any rule that requires objecting nonmember employees to renew their objector status on an annual basis; and (2) provide written notification to all bargaining unit employees in those bargaining units that Respondent has rescinded and cease giving effect to such rule.

Respondent denies that it has violated the Act in any way and Respondent objects to the remedy sought by the General Counsel since it seeks relief as to "all bargaining units represented by Respondent" not just the two units at issue in this case.²

¹ On June 10, 2005 the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party Douglas Richards in Case 25-CB-8891. On November 17, 2008 the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party Ronald R. Echegaray in Case 6-CB-11544, which on February 2, 2009 was renumbered 25-CB-9253. And on November 17, 2008 the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party David M. Yost in Case 6-CB-11545, which on February 2, 2009 was renumbered 25-CB-9254.

² The response is dated May 18, 2009. By letter dated March 18, 2009, Respondent's attorney advised the Regional Director for Region 25 of the National Labor Relations Board (Board) in part as follows:

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In her opening at the trial herein, Counsel for General Counsel indicated as follows:

These cases raise the sole question of whether Respondent's requirement that employees annually renew objections to payment of full union dues pursuant to *Beck* [*Communication Workers of America v. Beck*, 487 U.S. 735 (1988)], notwithstanding their continuing objection, violates the duty of fair representation because it [(a)] places an unreasonable burden on objecting nonmembers without serving any legitimate interest and [is] thus arbitrary [(b)] unnecessarily and arbitrarily infringes on the right of an employee to become and remain a *Beck* objector ... [(c)] permits [R]espondent to presume that employees will make a different value judgment than the prior year regarding their [continuing] objection. (transcript pages 7, 8, and 9)

Counsel for General Counsel also indicated in her opening that the Board has not yet ruled on the legality of an annual objection requirement; that the legal issue presented is novel; that based upon factual considerations these cases may be dismissed; that the primary argument against the finding of a violation is that an annual objection requirement satisfies the union's obligation under the duty of fair representation because it serves a legitimate purpose and cannot be said to be arbitrary, discriminatory or in bad faith; that several courts have upheld annual objection requirements on the premise that the status is not presumed and the burden of objecting lies with the employee; that this gives nonmembers the opportunity to make a conscious decision on an annual basis about whether to object; that an annual requirement may allow a union to maintain a workable system for keeping track of its obligations to objectors; and that "no violation may be established, if Respondent articulates a reasonable basis for [an] annual renewal requirement that outweighs the burden placed on the charging parties to annually renew objections." (transcript page 10)

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, Respondent, and the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that Trimas Corporation d/b/a Cequent Towing Products (Cequent), a corporation, is engaged in the manufacture of towing products at its facility in Goshen, Indiana, where during the 12 months before the complaint issued it purchased and received goods valued in excess of \$50,000 directly from points outside the State of Indiana. Respondent admits and I find that Cequent is an employer engaged in com-

merce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits that Chemtura Corporation (Chemtura), a corporation, is engaged in the manufacture of specialty liquid, solid and flaked chemicals at its facility in Morgantown where during the 12 months before the complaint issued it purchased and received goods valued in excess of \$50,000 directly from points outside the State of West Virginia. Respondent admits and I find that Chemtura is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

All of the parties, including General Counsel - who indicates that the relevant facts are not in dispute, signed and entered into a stipulation regarding the majority of the background information, General Counsel's Exhibit 2. As here pertinent, it reads as follows:

....

4. At all material times since about March 22, 2004, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of the following employees of Cequent ... as set forth in Article 1 of the most recent collective bargaining agreement between Respondent and Cequent.

5. At all material times since about May 16, 2006, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of certain employees of Chemtura ... as set forth in Article 1 of the most recent collective bargaining agreement between Respondent and Chemtura.

6. At all material times, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of employees of various Employers throughout the United States, herein called the Bargaining Units.

7. At all material times since about March 12, 2008, Respondent and Cequent have maintained and enforced a collective-bargaining agreement ... covering the Cequent Unit and containing the following conditions of employment, herein called the Cequent Union Security Provision as set forth in Article 3 of the collective bargaining agreement between Respondent and Cequent.

8. At all material times since about October 2, 2007, Respondent and Chemtura have maintained and enforced a collective-bargaining agreement ... covering the Chemtura Unit and containing the following conditions of employment, herein called the Cequent Union Security Provision as set forth in Article 2 of the collective bargaining agreement between Respondent and Chemtura.

9. At all material times, Respondent and various Employers throughout the United States have maintained and enforced a collective-bargaining agreements covering Bargaining Units and containing as a condition of employment union security provisions that obligate bargaining unit employees to maintain membership in the Union as in the Chemtura Union Security Provision and the Cequent Union Security Provision (hereinafter referred to as the Union Security Provisions).

In response to Mr. Taubman's March 17 [2009] letter to you and Chief Judge Giannasi and to expedite the matter and avoid a 'traveling' hearing, USW has no objection if the CGC [Counsel for General Counsel] and/or charging party want to offer just one or two of the charging parties to present representative testimony. We are willing to discuss holding the hearing at one location, if feasible. [General Counsel's Exhibit 1(p)]

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

10. On or about August 26, 2008, Ronald R. Echegaray notified Respondent [by letter³] that he objected to the payment of dues and fees for nonrepresentational activities.

11. On or about June 11, 2008, David M. Yost notified Respondent [by letter⁴] that he objected to the payment of dues and fees for nonrepresentational activities.

12. On or about November 7, 2008, Douglas Richards notified Respondent [by letter⁵] that he objected to the payment of dues and fees for nonrepresentational activities.

13. Respondent admits receipt of said notifications by Echegaray, Yost, and Richards as set forth in clauses 10 - 12 of this Stipulation.

14. At all material times, Respondent has maintained a procedure governing the reduction in dues and fees for nonmember employees who object to the payment of dues and fees for nonrepresentational activities, herein called the Procedure. The Procedure, which speaks for itself, requires that objecting nonmember employees renew their objector status on an annual basis. The Procedure is applied to nonmember employees covered by the Union Security Provisions in the Bargaining Units.

15. On or about June 26, 2008, Respondent [by letter] applied the Procedure to Yost and notified him that he must renew his objector status on an annual basis. Yost admits receipt of the letter along with the Procedure.

16. On or about September 9, 2008, Respondent [by letter] applied the Procedure to Echegaray and notified him that he must renew his objector status on an annual basis. Echegaray admits receipt of the letter along with the Procedure.

17. On or about January 26, 2009, Respondent [by letter] applied the Procedure to Richards and notified him that he must renew his objector status on an annual basis. Richards admits receipt of the letter along with the Procedure. the Twenty-Fifth Report of the International Secretary-Treasurer the 2006 Independent Auditors' Report [the] Twenty-

Sixth Report of the International Secretary-Treasurer the 2007 Independent Auditors' Report, and the Notice to All Employees Covered by a Union Security Clause

18. On or about August 27, 2008 and November 24, 2008, Respondent sent letters along with checks to Yost. These checks were issued pursuant to Respondent's administration of the Procedure. Yost admits receipt of these letters and checks.

19. On or about February 23, 2009 and April 28, 2009, Respondent sent letters along with checks to Richards. These checks were issued pursuant to Respondent's administration of the Procedure. Richards admits receipt of these letters and checks.

20. On or about September 15, 2008 and November 24, 2008, Respondent sent letters along with checks to Echegaray. These checks were issued pursuant to Respondent's administration of the Procedure. Echegaray admits receipt of these letters and checks.

21. In late February 2009, Respondent sent Yost a letter dated February 20, 2009, related to the Procedure. Attached to the letter was Respondent's Nonmember Objection Procedure, the Twenty-Sixth Report of the International Secretary-Treasurer, the 2007 Independent Auditors' Report, and the Notice to All Employees Covered by a Union Security Clause

22. In late February 2009, Respondent sent Echegaray a letter dated February 20, 2009, related to the Procedure. Attached to the letter was Respondent's Nonmember Objection Procedure, the Twenty-Sixth Report of the International Secretary-Treasurer, the 2007 Independent Auditors' Report, and the Notice to All Employees Covered by a Union Security Clause

The Charging Parties and the Respondent entered into a stipulation regarding the testimony of Richards. Counsel for General Counsel indicated that she did not object. As here pertinent, the stipulation, Charging Parties' Exhibit 1, reads as follows:

[P]arties hereby stipulate that if called to testify at trial, Douglas Richards would testify that:

1) I am an employee of Trimas Corp. d/b/a Cequent Towing Products. I am the Charging Party in NLRB Case No. 25-CB-8891.

2) I am employed within a bargaining unit represented by ... [Respondent] (hereinafter "USW").

3) I am not a member of the USW.

4) On or around November 7, 2008, I sent a letter to the USW stating my objections to paying dues and fees for nonrepresentational purposes. The letter states that my objection is permanent and continuing in nature. A true and correct copy of the letter I sent is attached to the General Counsel's Stipulation as Attachment E.

5) In a letter dated January 26, 2009, the USW notified me that, pursuant to its Agency Fee Objection Procedure, I must renew my objector status on an annual basis during a specified thirty-day window period. It is my understanding that, if I do not renew my objection, the USW will revoke my objector status and I will have to pay full union dues for at least one

³ The letter contains the following:

Finally, please consider this objection to be permanent and continuing in nature. I stated this is my original objection letter but you still notified me that I had to file an annual objection. The annual objection requirement places an unnecessary burden upon me and is unlawful. Please notify me immediately whether you accept my objection as a permanent and continuing objection or whether you will require me to file an annual objection letter. [Attachment C to General Counsel's Exhibit 2]

⁴ The letter reads in part as follows:

Originally, I told you to consider this objection to be permanent and continuing in nature. If I am required to notify the Union annually, please state so specifically as I intend to file an unfair labor practice to address this issue if necessary. This issue has been resolved in Florida and I have been offered assistance by National Right to Work Committee to fight this for the West Virginia workers that are being held hostage to this unfair practice. I did not need or want to be a part of your Union - but you won that fight - for now. We will see if we will remain union on the third anniversary of the contract. [Attachment D to General Counsel's Exhibit 2]

⁵ The letter reads in part as follows: "Finally, please consider this objection to be permanent and continuing in nature." [Attachment E to General Counsel's Exhibit 2]

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year until the next window period. A true and correct copy of the letter I received from the USW is attached to the General Counsel's Stipulation as Attachment I. I received a copy of the USW's Agency Fee Objection Procedure along with the USW letter dated January 26, 2009. A true and correct copy of the Agency Fee Objection Procedure is attached to the General Counsel's Stipulation as Attachment F.

6) I have never signed any document or waiver that provides that USW with authority to control if, when, or for how long I shall object to paying dues and fees for nonrepresentational purposes.

7) I believe that it is burdensome for me to have to annually renew my objection, to keep track of the renewal dates,⁶ and thereafter mail an annual renewal of my objection. I believe that it is unfair that I and others have to pay full union dues for one year if the renewal period is missed. I believe that the USW's annual objection policy lacks a legitimate justification.

Conclusion: All parties stipulate that, if called to testify at trial, Douglas Richards would testify to these facts and opinions. All parties expressly waive all further ability to examine or cross-examine Douglas Richards, and all parties ask that the Administrative Law Judge accept this stipulation in lieu of Douglas Richards' live testimony.

The Richards stipulation is signed by the attorneys for the Charging Parties and the Respondent.

Echegaray testified that he has worked for Chemtura in Morgantown for 15 years; that Respondent has had a collective bargaining agreement to represent the bargaining unit employees for about one and a half years; that he did not become a member of the Union; that he does not agree with the Respondent's support of Barak Obama and the Employee Free Choice Act; that he used to receive the Respondent's magazine; that in his original objection letter to the Union he indicated that his objection should be considered permanent and continuing in nature because he did not believe that his opinion is ever going to change but if it did, he was sure that the Union would be happy to accept his phone call at any time; and that he considers it a burden to annually renew his objection because

It is in such that I have three daughters, a wife. My daughter is involved in several things. I am involved in several things.

My anniversary date, I must admit, I think of it on my fifth year anniversary, on my 10th year I thought of it, on my 15th year anniversary I thought of it, because we are allowed to choose a trinket out of a magazine celebrating our milestone anniversary.

It is an arbitrary date to me.

In everyone's busy lives, it is one more thing that I have to -- it puts a burden on me. [transcript pages 25 and 26]

Echegaray further testified that he has never signed any documents waiving or changing his permanent objection.

⁶ The 30-day renewal period is linked to just one date, namely the employee's hire date.

On cross-examination Echegaray testified that he openly opposed the Respondent's union organizing drive from the beginning; that he served as the Employer's observer at the Board election; that he has never participated in any union matter even prior to the Respondent's organizing drive; that since he filed his objection letter he has received advanced reduction of dues payments every 3 months from the Respondent; that after he became an objector, he received a letter from the Respondent advising him that he had to renew his objection annually; that he is aware that under the collective bargaining agreement seniority governs for layoffs, recall, vacation, filling vacancies, forced overtime, and temporary shifts; that he knows what his date of hire is; that he understands that the annual objection letter simply has to state "I want to continue to object"; that while he does not believe that he is required to send the objection letter certified, he takes this approach to insure that the letter is received; that he sent his initial objection letter to the wrong location but eventually it was tracked down and his objector status was recognized; that he uses the mail to send personal letters, the payment of bills, and Christmas cards; that since he became a nonmember objector he was laid off for three and one half months and he continued to receive the advance reduction check from Respondent; that he assumed that the Union did not know that he was laid off; that he did not advise the Union that he was out for three and one half months; and that this was taken into account in future reductions.

On redirect Echegaray testified that he has never received notice from the Respondent right before his renewal period reminding him that it was time to object; and that the notice comes with the packet the Respondent sends after he objects.

Yost testified that he has worked for Chemtura for 19 years in Morgantown; and that he does not support the Respondent because

[t]he union's political activities are in conflict with -- they support and their web site shows that they are very -- they support liberal, far left agenda, very pro labor, which also happens to be antigun.

I am very pro NRA.

To me, it is a very clear conflict of interest with what the union stands for with my own views. [transcript page 38]

Yost further testified that the only mailings he gets from the Union are the annual dues calculation notice and rebate checks; that he has never received a notice from the Union reminding him that the time to object is approaching; that in his original objection letter he indicated that his objection should be considered to be permanent and continuing because he does not believe that his political views are going to change; and that he considers it to be a burden to annually renew his objection every year in that

I am the father of seven children.

I currently carry a full-time college load.

Raising kids like that and providing foster care, which is an increased burden over raising natural born children, given the extra emotional burdens that these children carry, my anniversary date is an arbitrary date.

It means nothing.

I mean, I currently have nine other anniversaries and birthdays and things like that to remember, that are important. [transcript page 40]

And Yost further testified that he has never signed any document or waiver that provides the Union with authority to control, if, when or for how long he can object to paying dues and fees for nonrepresentational purposes; that he has never signed any documents waiving or changing his continuing and permanent objection; and that he has never given the Union permission to change his status.

On cross-examination Yost testified that he was hired on June 25, 1989; that he understands that under the collective-bargaining agreement seniority plays an important role; that he did not participate in Respondent's organizing drive and he was against unionization from the beginning; that he never became a member of the Union and since the Union was certified by the Board he has not participated in any union activity; that he receives advance reduction money from the Union and has no complaint about that; that he does have a complaint about renewing his objection within 30 days of his date of hire, his anniversary date; that he does not use the mail at all to pay bills since he pays electronically by computer; that he has renewed his objection and he received a letter from the Union indicating "We have acknowledged your perfection of the objection" (transcript page 47); that he has received several letters from the Union related to the procedure, namely (1) a notice of the new chargeable versus nonchargeable expenditures at the end of January, (2) another copy of the notice of procedure of how to object, and (3) an audited report showing how much more or less is being spent on political activity; that he reviewed the audited report thoroughly, he decided he wanted to maintain his objection, and he sent his letter to the Union; that he does not want to send a letter in to maintain his objection status, "[i]t is very burdensome" (transcript page 48), it is too expensive, and it requires a trip to the post office; and that he makes \$29.12 an hour and sometimes works overtime.

On redirect Yost testified that he renewed his objection because the Union holds no credibility with him; that he felt that it is an absolute necessity to send the renewal objection letter by certified mail, return receipt requested to have absolute proof that they received that letter; and that he does not want to have a continuing relationship with the Union in any form.

David Jury, who is an associate General Counsel in Respondent's legal department, testified that as part of his job duties he has had the responsibility for administering the nonmember objection procedure; that attachments to the above described stipulation are letters from him to the different Charging Parties; that Respondent's international constitution provides that the international secretary treasurer is to establish a nonmember objection procedure, which was done years ago, and the international secretary treasurer has delegated the work related to the nonmember objection procedure to the legal department because of the legal issues involved; that he responds to letters from employees relating to perfecting objections, renewing objections, and simply making inquiries relative to the nonmember objection procedure; that he responded to the Charging

Parties' objections, and he sent them letters about advance reductions; that the Union's nonmember objection procedure has an element of advanced reductions since most employers continue to withhold from nonmember objectors the full union security amount per the checkoff authorization that the objectors sign, and in order to accommodate that, the union provides advanced reduction payments on a quarterly basis to each of the objectors who are having the full amount withheld from their dues; that the Union makes estimates about what the objector may pay in the upcoming quarter and sends the objector a letter explaining the basis of the Union's calculation and encloses a check as an advanced reduction; that the Union subsequently determines whether its estimates of the dues withheld were correct and, if necessary, adjusts accordingly quarter by quarter, generally; that annually the international Union prepares a new report of its chargeable and nonchargeable expenditures based upon its actual expenditures in a prior year; that he works with Respondent's auditing and finance department, and with Respondent's outside auditors who review Respondent's calculations and produce a certified report; that someone who is already an objector receives an annual notice in the form of (a) the report of the international secretary treasurer, (b) excerpts from the Union's financial audit, (c) a copy of the outside auditor's report affirming the Union's calculation of chargeable and nonchargeable expenditures, (d) a one-page notice that would be published in the upcoming edition of the Union's newspaper or magazine (i.e., Charging Parties' Exhibit 2), and (e) a copy of the Union's nonmember objection procedure; that this is generally done in the beginning of each year; that the Union typically completes its calculation of chargeable and nonchargeable expenditures in December and it sends this data, along with the other information he described above, to the nonmember objectors in the first quarter of the following year; and that the Union requires annual renewal for the following reasons:

The steelworkers union has had an annual renewal requirement in its nonmember objection procedure for a number of years.

We believe there are a number of reasons that support the continuation of an annual renewal requirement.

First, because we provide objectors annually with revised data, revised calculation as to the Union's chargeable and nonchargeable expenditures, we believe that it is reasonable to ask the objector to advise whether or not he or she wishes to continue objecting for the following year.

Because the data changes each year. The union's expenditures change.

And we believe it is appropriate to ask an objector to bear that in mind.

Second, we maintain it, because we believe it is lawful.

We believe that several federal district courts in construing the National Labor Relations Act have concluded that annual renewal requirements are lawful, because as we understand the reasoning of those courts, including the

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D.C. circuit in *Abrams v. Communication Workers* continuing to ... [dissent (See transcript page 67, line 14)] is not to be presumed.

So we operate with our understanding of those cases as well as our understanding of the position of the NLRB General Counsel circa 1988, MGC memorandum 8814, which suggested an annual renewal requirement is lawful.

We have acted in reliance upon that memo, as well as existing authority.

Further, we believe that an annual renewal requirement is appropriate in light of the rights that a nonmember objector gives up.

A nonmember objector is by definition someone who is not a member of the union.

And a membe—a person who is not a member of the union, and we have informed objectors [of] this in their letters, when they perfect [their objector status].

A person who is not a member of the union has no right to attend local union meetings, to vote on collective bargaining agreements, when new collective bargaining agreements are presented for ratification.

A nonmember has no right to vote in local union or international union elections. And indeed, a nonmember has no right to run for union office or to seek to be a [union] delegate ...

We think these are significant rights that a nonmember knowingly gives up.

And we believe that in light of those rights and in light of changes that could occur in the work place, that it is reasonable for us to ask a nonmember to renew.

Finally, we believe that annual renewal requirement is of some assistance to us in our administration of the nonmember objection procedure.

As I testified, the union pays advance quarterly reduction payments to objectors.

And Charging Party Echegaray testified he has been laid off for parts of this year.

Having annual renewal requirements allows the union and some assistance to the union in administering our program to make certain that when we send advance reduction payments to objectors, that they are still actually in the work force and have not either retired, resigned, been laid off or out of work on some long-term basis, thus no longer have union security fees withheld from them.

So I think for all of these reasons, these are the reasons we continue to maintain our annual renewal obligation. [transcript pages 57–60]

On cross-examination Jury testified that the Union does not make members annually renew their membership since it does not believe that there is an obligation to require them to annually renew; that a member can resign his membership at any time; that the Union does not make employees who sign a dues checkoff card annually renew the dues checkoff card; that the dues checkoff card is written so that it automatically and continuously renews every year inasmuch as section 302(c)(4) of Taft Hartley allows for that, the Union's card is consistent with

what Congress in the 1940s permitted; that the Union represents approximately 800,000 or 850,000 in the United States, Canada, and the Virgin Islands; that there are presently about a total of 300 nonmember *Beck* objectors; that the timing of the Union's financial package to nonmember objectors is not linked to when any individual was hired or when their renewal date would be; that some employers don't withhold full dues and withhold only the reduced amount; that with employers who withhold only the reduced amount, there is a burden on the Union of policing to make sure that the employers are actually following through on their undertakings and correctly withholding dues at a reduced amount perhaps for one or two persons in a bargaining unit where the rest of the bargaining unit is having dues withheld at the full constitutional amount; that he believed that the United States Supreme Court indicated that dissent is not to be presumed; that notwithstanding what the Charging Parties objections letters state, the Union maintains a policy, beginning with the view that dissent is not to be presumed, which has an annual renewal requirement; that the objection letters of the Charging Parties appear to state their then current views but he had no way of knowing what their views would be in the future; that the annual renewal policy was promulgated in 1979 in response to then recent case authority in the public and then private sector which held that unions should adopt policies to address the interests of nonmember objectors covered by union security clauses; that he did not know what the actual motives were in 1979 when the nonmember objection procedure was first adopted; that technically if an objecting nonmember misses the window period, he remains a nonmember but has to pay full union dues, but as a practical matter when an employee belatedly renews his or her objection the Union has tended to renew that objection status prospectively from the renewal; that a nonmember nonobjector cannot participate in internal union affairs such as voting on the contract or voting in union elections; that one's membership status and one's objection status are two separate obligations but in order to become an objector, one must by definition resign his or her membership or never have become a member in the first place; that it is possible for someone to opt not to be a member but not opt for objector status for reasons known but to them; that to participate in internal union affairs the nonmember objector would have to reconsider and change both his objector and membership status; that with respect to the Union receiving information from employers as to who is actually still employed and not employed in the Union's various bargaining units, the Union represents 8,000 or more bargaining units in the United States and Canada and he could not speak to the information that is furnished in all 8,000 of those bargaining relationships; and that, with respect to the question of Charging Party Richard's attorney, whether the Union could "just require a nonmember send a letter each year, if they happen to retire or move on or not be employed" (transcript page 75) while that is possible, he did not know how persons like Charging Parties would view that as an impediment or burden.

Contentions

On brief Counsel for General Counsel submits that while the Board has not ruled on the legality of an annual objection re-

quirement, Federal courts have considered this issue and have split in their outcome; that the annual objection requirement has been upheld by the D.C. Circuit⁷ and the Sixth Circuit⁸ United States Courts of Appeals but it was not upheld by the Second Circuit⁹ and the Fifth Circuit¹⁰ United States Courts of Appeals; that the Second and Fifth Circuits in finding the annual objection requirement unlawful were constrained to apply the strict principles of the First Amendment to the United States Constitution rather than the duty of fair representation standard; that although the Fifth Circuit, in the alternative, did apply the duty of fair representation standard, the Fifth Circuit continued to infuse First Amendment principles into its analysis of the Unions' duty of fair representation; that a union's obligations under *Beck* flow from a duty of fair representation, under which unions are allowed a "wide range of reasonableness" in serving the employees they represent¹¹; that unions must not act arbitrarily, discriminatorily, or in bad faith toward unit employees¹²; that the issue here is whether Respondent's requirement that *Beck* objectors annually renew their objections is arbitrarily, discriminatorily, or in bad faith; that until 2003 the General Counsel had never taken the position that an annual renewal requirement for nonmember *Beck* objectors violated the Act; that Counsel for General Counsel's primary argument in support of finding a violation is that the annual objection requirement violates the Union's duty of fair representation because it places an unreasonable burden on objecting nonmembers without serving any legitimate interest, and thus is arbitrary; that none of the aforementioned Federal court cases which did not uphold the annual objection requirement arose under the Act; that under a duty of fair representation analysis, the annual objection is arbitrary because it places an unreasonable burden on employees who have chosen to object, and it serves no legitimate purpose; that absent a proper and persuasive justification the annual objections requirement is arbitrary; that contrary to those cases which found that the unions involved therein did not provide a sound reason for an annual objection requirement, here Respondent provides several reasons for utilizing the annual renewal requirement; that the courts in *Tierney*, supra, and *Abrams*, supra, relied on the annual reporting obligations imposed on unions to justify an annual renewal requirement; that the Board has stated that unions are not required to provide nonmembers with annual notice of their *Beck* rights¹³; and that

⁷ *Abrams v. Communication Workers of America*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995).

⁸ *Tierney v. City of Toledo*, 824 F. 2d 1497, 1506 (6th Cir. 1987). The annual objection requirement was also upheld in *Kidwell v. Transportation Communications Intl. Union*, 731 F. Supp. 192, 205 (D. Md. 1990), aff'd. in part, rev'd. on other grounds 946 F. 2d 283 (4th Cir. 1991), cert. denied 112 S. Ct. 1760 (1992).

⁹ *Seidemann v. Bowen*, 499 F.3d 119 (2d Cir. 2007).

¹⁰ *Shea v. IAM*, 154 F.3d 508, 515 (5th Cir. 1998). A Virginia Federal District court also ruled against the annual objection requirement in *Lutz v. IAM*, 121 F. Supp. 2d 498, 506-507 (E.D. Va. 2000).

¹¹ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

¹² *Faca v. Sipex*, 386 U.S. 171, 177, 190 (1967).

¹³ *Steelworkers Local 4800 (George E. Failing Co.)*, 329 NLRB 145, 146 (1999); *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995).

Applying the above considerations to the instant case, no violation should be found, as Respondent has articulated a reasonable basis for its annual renewal requirement, and whatever slight burden [is] suffered by Richards, Echegaray, and Yost in having to annually renew their objection is outweighed by the [Respondent's] justifications [Counsel for General Counsel's brief, page 21]

The Charging Parties on brief argue that the Union's annual renewal is unlawful because (a) the Union lacks the substantive authority to transform a *Beck* objector into a non-objector against his will, and (b) it is procedurally arbitrary, discriminatory and in bad faith; that the Union's justifications for its policy are spurious, and the majority of courts and administrative law judges who have considered this issue have struck down annual renewal policies for these reasons¹⁴; that the Union's annual renewal policy is procedurally arbitrary and constitutes a breach of the duty of fair representation; that a union's conduct is arbitrary if it is so far outside a wide range of reasonableness as to be irrational; that the Union's annual renewal policy is procedurally discriminatory and constitutes a breach of the duty of fair representation; that the Union does not make union members annually renew their membership or their dues deduction authorization; that the Union's annual renewal policy is in bad faith and constitutes a breach of the duty of fair representation; that the Union is burdening the Charging Parties' exercise of their § 7 rights for the sole purpose of dissuading them from exercising these very rights and options; that the Union's justifications for its annual renewal policy are spurious since (a) the fact that each year the Union sends the objectors information regarding chargeable and nonchargeable expenditures, the objector notification procedure, etc., does not justify requiring that the objector write back to the Union indicating whether he or she renews their objection because the Union's legal obligation to provide annual notices does not logically justify imposing a burden on employees, (b) the it is lawful because it is lawful justification (1) relies on a minority of court decisions which upheld the annual renewal with little analysis or factual record, and a 20-year old General Counsel Memorandum, G.C. Memorandum 88-14 which is not Board law or binding on the Board, and (2) must be viewed in light of the fact that there is no Board precedent on which the Union could legitimately rely, and even if there were Board law on the subject, that is not justification in and of itself because the Board is free to overrule its own precedent and reevaluate its decisions as industrial conditions change, (c) with respect to the Union's tracking the employee's status justification, the Union has other ways to find out whether employees have retired, resigned, or been laid off without the objector's annual renewal requirement

¹⁴ The Charging Parties cite *Shea v. Machinists*, 154 F. 3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Seidemann v. Bowen*, 499 F. 3d 119 (2d Cir. 2007); *Teamsters Local 952 (Albertsons, Inc.)*, 2006 WL 1525828, Case No. 21-CB-13609, JD(SF)-30-06 (May 30, 2006); *L-3 Communications Vertex Aerospace*, Case No. 15-CB 5169, JD(ATL)-02-08 (Jan. 9, 2008); and *UAW (Colt's Manufacturing Co.)*, Case No. 34-CB-2631, JD(NY)-06-08 (March 3, 2008)

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in that (1) there would be a cessation of dues payments from a nonmember who may no longer be employed in the involved unit, (2) the Union can ask the Employer for the names of the newly retired, resigned, or laid off nonmembers, and (3) the Union "could simply send a letter to the small number of objectors (estimated to be 300 by the union's witness, TR 64) asking them to verify their status as active workers instead of being 'retired, resigned, or laid off,'" (Charging Parties' brief, pages 23 and 24),¹⁵ and (d) the fact that the Union is not required to but it has chosen to use a needlessly complex quarterly refund procedure does not justify requiring objectors to annually renew their objector status; and that the remedy in these cases must be a nationwide expungement, notification, and a reimbursement for any employee who, within the § 10(b) period has had his status flipped from objector to non-objector as a result of his silence.

The Respondent on brief contends that a union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith; that "[a] union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation," *Marquez v. Screen Actors Guild, Inc.* 525 U.S. 33, 44, 45 - 46 (1988); that just after the 1988 *Beck* decision was issued, the General Counsel announced its position in November 1988, stating that "a union can require nonmembers to file new objections ... each year," GC Memorandum 88-14, p. 3 (November 15, 1988); that in *California Saw & Knife Works*, the Board indicated that the "requirement that *Beck* objectors be registered annually is not alleged to be unlawful by the General Counsel, [and] [w]e note that courts have approved the annual objection requirement in the NLRA, RLA, and public sector context"¹⁶; that the legal analysis in ascertaining a duty of fair representation breach is different from an analysis of a violation of a Section 7 right in that the former, as noted above, affords a union a wide range of reasonableness, *Marquez and Vaca v. Sipes*, 386 U.S. 171, 177 (1967); that by framing the complaint as a duty of fair representation breach, General Counsel concedes that the Section 7 right to become and remain a *Beck* objector is qualitatively different from the Section 7 right to resign from membership; that the right to resign membership is an unfettered right, while the right to be a *Beck* objector may be limited so long as the restrictions are not arbitrary, discriminatory or imposed in bad faith; that Federal courts have ruled that the annual renewal requirement does not breach the duty of fair representation; and that the Sixth Circuit in *Tierney* at 1506 stated as follows:

¹⁵ This argument appears to mean that Charging Parties' attorneys do not view the physical writing of a letter or the physical filling out of a form by the Charging Parties and mailing it to the Union to be a burden since this is what they are recommending as an alternative. That being the case, apparently the Charging Parties' attorneys are arguing that the burden on the Charging Parties is limited to keeping track of their hire date and a 30-day period which is linked to the hire date anniversary.

¹⁶ 320 NLRB 224, 236 n. 62, enfd. sub nom. *Machinists v. NLRB*, 133 F. 3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). The Board cited *Abrams*, *Kidwell*, and *Tierney*, supra.

Since *Hudson* [*Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986)] places the burden of objection upon the employees (as contrasted to burden of proof), we do not consider unreasonable the plan's provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.

Respondent further contends that the court in *Abrams* at 1381 and 1382 citing *Tierney* and *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961) stated that "[t]he annual renewal requirement is permissible in light of the Supreme Court's instruction that 'dissent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee'; that the court at 1382 in *Abrams*, citing *Tierney*, stated that "we do not consider unreasonable the provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made"¹⁷; that other Federal courts have found the annual requirement unlawful in non-duty of fair representation cases and in different legal contexts; that *Shea v. IAM*, 154 F.3 508 (5th Cir. 1998), *Seidemann*, and *Lutz v. IAM*, 121 F. Supp. 2d 498, 506 (E.D. Vir. 2000) rest on scrutiny under the First Amendment which is significantly more rigorous and less differential than a duty of fair representation review; that because the First Amendment does not apply to agency fee objection procedures under the NLRA, *White v. Communication Worker, Local 13000*, 370 F. 3d 346 (3d Cir. 2004), the Board has rejected the proposition "that precedent under public sector labor law and the RLA grounded in constitutional considerations are binding in the context of the NLRA," *California Saw* at 227; that consequently federal judicial precedent supports Respondent's procedure; that Respondent cannot be accused of bad faith for following an annual objection procedure that had been expressly approved by the Office of the General Counsel and the courts, *I.U.E. v. NLRB*, 41 F.3d 1532, 1538 (D.C. Cir. 1994); that despite the protestations of the Charging Parties, the burden of sending one letter annually, at a date that has been clearly identified, is minimal, if not inconsequential; that *California Saw* sanctions 30-day window periods in the regulation of the filing of employee *Beck* objections; that the "gotcha" argument lacks merit in that objectors are clearly advised of the date for renewing an objection, they are given ample time to renew their objections, and as Jury testified in practice when an employee belatedly renews his or her objection the Union has tended to renew that objection status prospectively from the renewal; that Respondent's procedure cannot be found arbitrary when Respondent follows the guidelines established in GC Memorandum 88-14 which prescribed an annual objection procedure - a procedure whereby the Union annually recalculates the amount charged to objectors, annually provides objec-

¹⁷ Respondent cites *Price v. UAW*, 722 F. Supp. 933, 938, 940 (D. Conn. 1989), aff'd. 927 F. 2d 88 (2d Cir.), cert. denied, 502 U.S. 905 (1991) where the court upheld an annual renewal requirement noting that "[t]he Union's new objection procedures, . . . closely track guidelines established in a recent internal NLRB memorandum (Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck*, NLRB Office of the General Counsel, Nov. 15, 1988)."

tors with notice of the objection right, and, as an integral component of this annual objection procedure, "require[s] nonmembers to file new objections ... each year;" GC Memorandum 88 - 14, p.3; that the Board cannot fault the Respondent for using a procedure that was upheld long before the General Counsel changed its position, *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46 (1998); that a union's reliance on prior decisions or other precedent cannot be viewed as arbitrary conduct, at least not until the Board has ruled on the issue; that because Respondent gives an annual *Beck* notice to existing objectors, along with information such as audits and reports, it is not unreasonable to require the objector to mail in a letter once a year; that by providing for an annual objection, the Respondent's procedure gives it reasonable assurance that only employees who are moved by an objection to providing financial support to activities not germane to collective bargaining will be entitled to pay a reduced agency fee; that since the Respondent's expenditures change each year, it is appropriate to ask an objector to bear that in mind; that the renewal requirement provides some assurance to the Respondent to be certain that it is not paying amounts to persons who are no longer employed within covered bargaining units, whether such persons leave employment due to a plant closure, layoff, retirement, or resignation; that it is not irrational for the Respondent to seek to avoid making advanced reduction payments to persons who no longer are subject to union security fee withholding; that the Respondent's annual renewal requirement is lawful since it serves legitimate purposes; and that the Respondent's policies regarding checkoff authorization/membership versus nonmember objections are not inconsistent but based on differences in the law and how these matters are regulated.

Analysis

The issue presented here is whether the Union breached its duty of fair representation and thereby violated the Act.

In 1944 the duty of fair representation originated with *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944) under the Railway Labor Act (RLA).

In 1953 the United States Supreme Court, in ruling on the duty of fair representation for the first time under the National Labor Relations Act (NLRA or Act), indicated:

[T]he authority of bargaining representatives ... is not absolute as recognized in *Steele* Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members without hostility to any. [*Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953)]

In 1961 the United States Supreme Court in *International Association of Machinists v. S.B. Street*, 367 U.S. 740 (1961) held that that section of the RLA authorizing a union shop denies a union, over an employee's objection, the power to use his exacted funds to support political causes which he opposes. At 774 the Court indicated that "dissent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee."

In 1962 the Board, in *Miranda Fuel Co.*, 140 NLRB 181 (1962) first recognized that a breach of the duty of fair repre-

sentation was an unfair labor practice, as here pertinent, under Section 8(b)(1)(A) of the Act.¹⁶

In 1967 the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) ruled that:

[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct

....

In 1986 the United States Supreme Court in *Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 306 (1986) indicated:

In *Abood*, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Abood [v. Detroit Bd. of Edu.]*, 431 U.S. at 239 - 240, n. 40, ... [unofficial citation and citation of the original source of the quoted language omitted] (1963).¹⁶

16. The nonmember's "burden" is simply the obligation to make his objection known. See *Machinists v. Street*, 367 U.S. [740] at 774 (1961) ... ("[D]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee") ... [unofficial and additional citation omitted]

In 1987 the United States Sixth Circuit Court of Appeals in *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987), a case involving nonunion member police officers who did not want part of their required service fees to the union to be contributed to political candidates and causes unrelated to the union's duty as exclusive bargaining representative, concluded that:

Since *Hudson* places the burden of objection upon the employees (as contrasted to burden of proof), we do not consider unreasonable the plan's provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.

In June 1988 the United States Supreme Court in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) held that, as here pertinent, that section of the NLRA which permits an employer and a union to enter into an agreement requiring all employees in a bargaining unit to pay periodic union dues and initiation fees as condition of continued employment,

¹⁶ The United States Second Circuit Court of Appeals reversed the Board at 326 F. 2d 172 (2d Cir. 1963), without ruling on whether the Board was correct in finding that a breach of the duty of fair representation was a violation of the Act. Over 20 years later, the Second Circuit in *NLRB v. Teamsters Local 282*, 740 F. 2d 141 (2d Cir. 1984) found that a union's breach of the duty of fair representation violates Section 8(b)(1)(A) of the Act.

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whether or not employees otherwise wish to become union members, does not also permit the union, over objections of dues-paying nonmember employees to expend funds so collected on activities unrelated to collective bargaining activities.

In November 1988 the General Counsel issued a memorandum, GC Memorandum 88-14, and on page 3 thereof indicated "a union can require nonmembers to file new objections ... each year."

In 1990 a United States District court in *Kidwell v. Transportation Communications International Union*, 731 F. Supp 192, 205 (D. Md. 1990) indicated as follows:

The Court finds that the requirements for the annual renewal of objections and the 30-day window for making objections are not unduly restrictive of plaintiffs' rights. These are reasonable requirements of notice, since objections are not to be presumed on an on-going basis. The employee has the burden of notifying the union of his or her objection. See *Street*, 367 U.S. at 774 ... ("[D]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee.") Moreover, an employee who previously objected may have a change of heart and choose not to exercise his or her right to object in future years. See *Tierney*, 824 F.2d at 1506 (annual objection requirement not unreasonable).

When this decision was appealed, the United States Fourth Circuit Court of Appeals at 946 F. 2d 283 (4th Cir. 1991) reversed the district court's conclusion as to the right of a union member in an agency shop to pay less than full dues but affirmed the district court's disposition of the remaining issues. The Fourth Circuit at 285 noted that:

[T]he union ... in an agency shop may arrange to collect the costs of collective bargaining from all employees, but may not compel objecting nonmember employees to pay for union activities other than those related to collective bargaining. The union thus must have an objection procedure with respect to noncollective bargaining activities available to nonmembers.

For example, under the union's current procedure, in each calendar year, for thirty days after receiving an April notice, nonmember employees may object to the expenditure of their fees on activities unrelated to collective bargaining.

At 286 the Fourth Circuit noted that "[t]he judge also held that the union's procedure for handling objections was permissible ..." At 287 the court noted that "[t]he plaintiffs ... have not appealed from the judge's conclusion that the procedures did not violate the union's duty of fair representation." And finally at 306 the Fourth Circuit indicated:

The judgment is REVERSED as to whether a union member can object to paying the portion of union dues attributable to noncollective bargaining activities, and otherwise AFFIRMED.

In March 1991 the United States Supreme Court in *Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65, 67 (1991) indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 ... (1967) - that a union breaches its duty of fair rep-

resentation if its actions are either "arbitrary, discriminatory, or in bad faith" - applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 ... (1953), as to be irrational.

In 1993 a United States District court in *Abrams v. Communication Workers of America*, 818 F. Supp. 393, 399 (D.D.C. 1993), indicated:

CWA's duty of fair representation is a duty that is judicially implied from its statutory duty-under 29 U.S.C. §§ 158(a)(3), 159 to represent all bargaining unit employees of a particular employer. See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 ... (1944). This duty requires a union to "represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective bargaining agreements." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 ... (1979)

A breach of a union's duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 ... (1967); *Price v. Int'l Union, UAW*, 927 F.2d 88, 92 (2nd Cir. 1991). This standard applies to a union's contract administration, enforcement, and negotiation, as well as any other instances where a union acts in a representative role. *Air Line Pilots v. O'Neill*, 499 U.S. 65 ... (1991). Under this standard, the court's review of CWA's actions must be highly deferential. *Id.* The court can find a breach of this duty only if CWA's actions "can be fairly characterized as so far outside a 'wide range of reasonableness,' ... that [those actions] are wholly 'irrational' or 'arbitrary.'" (citation omitted).

....

In *Hudson*, the Supreme Court applied a higher, constitutional standard of scrutiny to the procedures that the union there used to exact funds from nonmembers, but the Supreme Court did so because the employees involved worked in the public sector. The union involved was the Chicago Teachers Union, and it had the approval of the Chicago Board of Education to be the exclusive collective bargaining agent for the Board's educational employees. *Hudson*, 475 U.S. at 294 As this court already has concluded, no such state action exists in this case. 702 F. Supp. at 921 - 23. In the absence of state action, the court has no basis for imposing *Hudson's* heightened constitutional review.

At 400 the court indicated:

The duty of fair representation allows a wide range of reasonableness. *O'Neill* Such a reasonableness standard is not equivalent to "the stringent tests applied in the First Amendment context." *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982) [footnote omitted.]

And at 403 the court indicated:

[The] ... fourth argument is that CWA violates its duty of fair representation by requiring nonmembers to object to the agency fee each year and by limiting the objection period to just a few months. Plaintiffs rely on *Hudson* and *Railway Clerks v. Allen* [373 U.S. 113 (1963)] for this position. The cases plaintiffs rely upon for this position are inapposite at best.

Hudson does not support plaintiffs' claim. If anything *Hudson* supports CWA's position that nonmembers have the obligation of making their objection known. *Hudson* 475 U.S. at 306 The footnote that plaintiffs cite to in *Hudson* ... states that "[d]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee." 475 U.S. at 306 ... citing *Railway Clerks v. Allen*, 373 U.S. at 119 This statement suggests that CWA is within its rights to require annual objections.

In *Railway Clerks v. Allen*, the Supreme Court stated that by filing a complaint against the union the nonmembers sufficiently had made their objection known. 373 U.S. at 119 n. 6 Plaintiffs also try to use this statement in support of their claim. In *Allen*, however, the union had not established an objection system and the filing of a legal action was the nonmembers only recourse. That factual distinction makes *Allen* unsupportive of plaintiff's position.¹⁰

CWA's requirement that nonmembers repeat their objections every year during a specific time period provides an efficient yet fair system for objection. Because objection is not to be presumed, *Street*, 367 U.S. at 774 CWA has a valid basis for requiring yearly objections. Nor can the objection period be never ending if CWA wishes to resolve nonmembers' disputes, tally its budget, and put the advance reduction process into motion. [footnote omitted] CWA's procedure is not arbitrary but reasoned, and its basis in law shows the procedure also is not discriminatory or in bad faith. The court concludes that CWA's requirement of annual objections during a limited window period does not violate its duty of fair representation.

¹⁰ If anything, *Allen* supports CWA's requirement of repeated objections because there the Supreme Court concluded that those who filed the complaint had to repeat those objections through testimony if their objections were to survive to the end of the action. 373 U.S. at 119

In 1994 a United States District court in *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), in reviewing a Board order holding that a union breached its duty of fair representation by in bad faith maintaining a union security agreement which the Board viewed as ambiguous retroactively after the Board reversed longstanding NLRB policy, indicated at 1534:

[W]e find no substantial evidence, indeed no evidence whatsoever, to support the Board's conclusion that the union acted

in bad faith merely by maintaining a union-security provision that was in conformity with longstanding, well-established Board precedent. Because there is no evidence in the record to support the Board's finding of bad faith, we find no basis for a duty-of-fair representation violation in this case.

The Board is free to reconsider its policy regarding the permissible scope of union-security agreements, with an eye toward requiring unions to give full disclosure to employees regarding their right to decline union "membership." In fact, from this date forward unions are on notice that they risk breaching their duty of fair representation if they adopt union-security provisions of the sort at issue here without appropriate "notice" to employees who are covered by such provisions. In the instant case, however, we hold that no violation occurred because the Union's actions were fully consistent with established law.

At 1537 and 1538 the court indicated:

A bad-faith violation of the duty of fair representation "requires a showing of fraud, or deceitful or dishonest action." *Mock v. T.G. & Y. Stores Co.* 971 F.2d 522, 531 (10th Cir. 1992). Courts have applied a "demanding standard" for finding bad faith under the duty of fair representation, *Swatts v. United Steelworkers*, 808 F.2d 1221, 1225 (7th Cir. 1986), requiring a union's actions toward unit employees to be "sufficiently egregious or so intentionally misleading [as] to be invidious;" *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F. 2d 1199, 1203 (5th Cir. 1991) (internal quotation omitted); see also *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990) (requiring for bad-faith violation of duty of fair representation "serious misrepresentations that lack rational justification or are improperly motivated").

In June 1995 a United States District court in *Nielsen v. International Association of Machinists & Aerospace Workers, Local Lodge 2569*, 895 F. Supp. 1103, 1114 - 1115 (N.D. Ind. 1995) indicated:

Further support for the Union Defendant's position is found in *Kidwell v. Transportation Com Intern. Union*, 731 F. Supp. 192 (D. Md. 1990), in which the court held that the annual renewal of objections and the thirty-day window for objecting to the Union's proposed fee were not "unduly restrictive of plaintiffs rights." *Id.* at 205

The court granted the Union's motion for Summary Judgment holding that a window period does not violate the union's duty of fair representation. Plaintiff Nielsen's Motion for Summary Judgment was denied.

In July 1995 a United States Court of Appeals in *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1381 - 1382 (D.C. Cir. 1995) indicated:

Finally, the employees argue that CWA's objection procedure violates its duty of fair representation by requiring them to object within a limited "window period" each year and to renew their objections annually. As did the district court and other courts considering similar union procedures,¹¹ we find neither procedure unduly burdensome. Regarding the window period, "[t]he union, as well as the employees, have an inter-

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est in the prompt resolution of obligations and disputes. The ... window facilitates prompt resolution and leaves no doubt as to the timing of the requirement for an objection.” *Kidwell v. Transportation Communications Int’l Union*, 731 F.Supp. 192, 205 (D. Md. 1990), aff’d in part and rev’d in part on other grounds, 946 F.2d 283 (4th Cir. 1991), cert. denied, 503 U.S. 1005 ... (1992). [Footnote omitted] Similarly, the annual renewal requirement is permissible in light of the Supreme Court’s instruction that “dissent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee.” *Street*, 367 U.S. at 774 “We do not consider unreasonable the [policy] provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.” *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987).

11 818 F.Supp. at 403

In 1995 the Board in *California Saw & Knife Works*, 320 NLRB 224, 236 n. 62 (1995) indicated:

The IAM’s [International Association of Machinists and Aerospace Workers, AFL-CIO] requirement that *Beck* objections be registered annually is not alleged to be unlawful by the General Counsel. We note that courts have approved the annual objection requirement in the NLRA, RLA, and public sector context. See *Abrams v. Communication Workers*, supra, 59 F.3d at 1381; *Kidwell v. Transportation Communications Union*, supra, 731 F.Supp. at 205; *Tierney v. City of Toledo*, 824 F.2d at 1506.

There the Board concluded that, as alleged by General Counsel, the window period involved in that case - as it applied solely to individuals who resign their union membership after the expiration of the window period, effectively operated as an arbitrary restriction on the right to be free to resign from union membership.

In 1996 the United States Seventh Circuit Court of Appeals in *Nielsen v. International Association of Machinists & Aerospace Workers, Local Lodge 2569*, 94 F.3d 1107, 1116 - 1117 (7th Cir. 1996), in affirming the judgment of the aforementioned district court in its entirety, utilized some language which in the situation at hand may be instructional. The court indicated:

It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. Life is full of deadlines and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. Other courts that have considered “window periods” have come to the same conclusion. See *Abrams*, 59 F.3d ... ; *Tierney* ... 824 F.2d ... ; ...: *Kidwell* ... 731 F.Supp.

The Board’s position in this respect has been inconsistent. In the *General Counsel’s Guidelines Concerning CWA v. Beck* it stated clearly that “if the union has a ‘time window’ for filing objections, the notice must set forth that information and the time period must be reasonable.” The obvious implication of this statement is that at least some “window periods” are permissible. In its more recent decision in *California Saw and Knife Works*, however, the Board found that the IAM’s January “window period” operated as an arbitrary restriction on the right to be free to resign from union membership and this violated the duty of fair representation. 320 NLRB ... [224] (1995). The Board’s position in *California Saw and Knife*, however, gives no weight at all to the union’s legitimate administrative needs - indeed, it almost requires the union to find the system that imposes the least restriction on *Beck* rights possible. Such exacting scrutiny is inconsistent with *Vaca* and *O’Niell*, which require us to uphold the union’s actions as long as they fall within a generous range of reasonableness. Because the IAM has offered valid administrative justifications for its system here, we conclude that it has not violated its duty of fair representation by imposing an annual “window period” for registering fee objections. [emphasis added]

In January 1997 the United States Sixth Circuit Court of Appeals in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1243 - 1244 (6th Cir. 1997) indicated:

In 1990, the Supreme Court ruled that prohibiting corporations, but not labor unions, from making political expenditures from their general treasuries does not violate the Constitution. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660-66 ... (1990).

The Chamber [Michigan Chamber of Commerce] then shifted its focus from litigation to legislation, seeking to have the statutory restrictions on corporate political expenditures applied to unions as well. With the Chamber’s support, Michigan’s legislature in May of 1994 enacted Public Act 117, amending its Campaign Finance Act, Mich. Comp. Laws Ann. §§ 169.201 - .282 (West 1996). See 1994 Mich. Pub. Acts 117.

The involved union plaintiffs, as here pertinent, challenged labor unions being required to obtain affirmative consent at least once a year from members making contributions to a separate segregated fund by means of an automatic payroll deduction. As here pertinent, the court ruled that the statute requiring labor unions to obtain affirmative consent at least once per year from members utilizing automatic payroll deduction to make contributions to a political contribution fund did not violate the First Amendment, under an intermediate scrutiny analysis.

In September 1998 the United States Fifth Circuit Court of Appeals in *Shea v. International Association of Machinists and Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998), which involved airline employees subject to RLA, ruled against the involved union with respect to the requirement that an objector annually renew his or her objection status. In taking this action

the Fifth Circuit reversed the lower Federal court, the United States District Court for the Northern District of Texas, which found that IAM's procedures do not violate the union's duty of fair representation and had entered summary judgment in favor of the union. The Fifth Circuit at 514 indicated that "since *Abood* [*v. Detroit Bd. of Edu.*, 431 U.S. 209 (1977)] it is clear that there is no legal reason to require more than a written, continuing objection to all expenditures or activities not germane to collective bargaining." At 515 the court indicated

The objection procedure at issue in this case fails to meet the *Hudson* standard [*Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)]; it does not minimize the infringement. The current procedure is cumbersome to both the union and the objecting employees because it requires annual computer entries. If the IAM recognized continuing objections made expressly and in writing, the employee would notify the union only once and neither the union nor the individual would be bothered with the annual database entries.

....

Certainly the procedure that least interferes with an employee's exercise of his First Amendment rights is the procedure by which an employee can object in writing on a continuing basis.

The court went on to explain why it did not agree with the Sixth Circuit in *Tierney*, the D.C. Circuit in *Abrams*, the Maryland District court in *Kidwell*, and the Seventh Circuit in *Nielsen* (apparently to the extent that that court relied on the duty of fair representation to decide that case). Also, the court indicated that both *Nielsen* and *California Saw & Knife Works* are distinguishable from the current case because they were decided under the NLRA; and that some Supreme Court decisions may have arguably indicated that under the NLRA there is not sufficient state action to trigger constitutional protections. At 516 and 517 the court in *Shea* indicated:

Because the RLA is subject to constitutional limits, a reviewing court may properly invoke the protections of the First Amendment and need not rely on the arguably weaker DFR [duty of fair representation] standard. For this reason we apply the *Hudson* First Amendment standard rather than the DFR standard.

The district court in this case, however, did not follow *Hudson*, and instead reviewed the objection procedures under the DFR standard. Under the DFR, the court found that the objection procedure must be upheld because it is not arbitrary, discriminatory, or in bad faith towards the objecting nonunion employees. The lower court's reliance on the DFR standard is misplaced. First the DFR standard is not the appropriate standard of review in this case, and second, even if the DFR were the appropriate standard, the annual objection requirement violates it.

Since the union can give no justification of this annual objection procedure, and since it is more cumbersome and less efficient than a system that allows continuing written general objections, the procedure is unreasonable and arbitrary. It is an unnecessary and arbitrary interference the

employees' First Amendment rights that fails to meet the union's duty of fair representation as it has been defined in *Vaca* and *O'Neill*.

More fundamentally, we remain unconvinced that the union's objection procedures should even be reviewed under the DFR standard. Even though other union shop cases have been decided under the DFR, we will not apply the DFR standard in this case.

....

But this is a dispute between the union and the objecting employees that does not require us to second-guess the union's judgment Rather we are called upon to protect the free speech rights of objecting employees from intrusive union procedures.

....

We hold that the IAM's procedure violates *Hudson's* requirements that the First Amendment infringement be minimized. Alternatively, we hold that the annual objection requirement violates the IAM's duty of fair representation.

In November 1998 the United States Supreme Court in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998), which involves the issue of whether a union breached its duty of fair representation merely by negotiating a union security clause that tracks the language of § 8(a)(3) of the NLRA, indicated:

That our holding in *Beck* did not alter the standard for finding conduct "arbitrary" is confirmed by our decision in *Air Line Pilots*. In this case, decided three years after *Beck*, we specifically considered the appropriate standard for evaluating conduct under the "arbitrary" prong of the duty of fair representation. We held that under the "arbitrary" prong, a union's actions breach the duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78 ... (quoting *Ford Motor Co. v. Huffman*, supra at 338 ...). This "wide range of reasonableness" gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.

In 2000 the United States District Court for the Eastern District of Virginia in *Lutz v. International Association of Machinists and Aerospace Workers*, 121 F.Supp. 498 (E.D. Va. 2000), which involved airline nonunion employees subject to RLA challenging union policy requiring nonmembers to submit their objections to paying fees unrelated to costs of collective bargaining each year rather than permitting continuing objections, indicated that the IAM rejected continuing objections and would not even accept them as an objection for the year they were submitted.¹⁹ At 504 and 505 the court indicated:

The threshold merits determination is whether the annual objection procedure is subject to scrutiny under the First Amendment or the DFR. This is not an inconsequen-

¹⁹ It appears that IAM elevated form over substance.

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tial determination as scrutiny under the First Amendment is significantly more rigorous and less deferential than DFR review. [footnote omitted]

At 507 the court indicated:

In sum, the annual objection requirement fails First Amendment scrutiny because the requirement is without valid justification and imposes an undue burden that creates a risk that funds “will be used ... to finance ideological activities unrelated to collective bargaining.” *Hudson*, 475 U.S. at 305²⁷ Accordingly, because the procedure is in violation of the nonmembers’ First Amendment rights, summary judgment should be granted in favor of the [employee] plaintiffs.

²⁷ The IAM also argues that the annual objection requirement is justified because the Supreme Court placed the burden of objecting on the employee. See *Street*, 367 U.S. 740 This argument fails because there is an important difference between placing the burden of objection on an employee and imposing yet a further restriction that makes the burden onerous. An employee’s burden to make an affirmative objection may easily be satisfied through submission of a continuing objection.

General Counsel indicates on brief that “[u]ntil 2003, the General Counsel had never taken the position that an annual renewal requirement for nonmember *Beck* objectors violated the Act.” General Counsel’s brief, page 12.

In 2007 the United States Second Circuit Court of Appeals in *Seidemann v. Bowen*, 499 F.3d 119, 124 (2nd Cir. 2007), which involved a professor suing a public sector union, and the United States District Court for the Eastern District of New York granting the union summary judgment, indicated:

This Circuit has mandated that unions use “narrowly drawn” objection procedures to protect the First Amendment rights of agency fee payers, while allowing unions and government to pursue their needs in “establishing a rational system to consummate labor negotiations.” *Andrews v. Educ. Ass’n of Cheshire*, 829 F.2d 335, 339 (2nd Cir. 1987). Although we have not required that objection procedures be the “least restrictive” means available, they must, nonetheless, be “narrowly drawn” to comply with the strictures imposed by *Hudson*. *Andrews* ... at 339-40; cf. *Price v. Int’l Union UAW*, 927 F.2d 88, 92 (2nd Cir. 1991) (distinguishing cases involving private employee unions from public sector union cases, where constitutional concerns warrant the *Hudson* safeguards). The issue of principal concern to us in this case is whether requiring agency fee holders to object annually to payment of expenses other than for costs of collective bargaining meets this mandate.

At 126 the court indicated “[w]e hold the annual objection requirement imposed by PSC in this case is an unnecessary burden on an employee’s exercise of First Amendment rights. See *Hudson*, 475 U.S. at 303”

As indicated above, this case will be decided under the duty of fair representation standard. Of all the Federal courts which

have considered the annual renewal requirement, only three, *Shea* (the Fifth Circuit since the Federal District court in that case found in favor of the union under a duty of fair representation standard), *Lutz*, and *Seidemann* (the Second Circuit since the Federal District Court in that case granted the union summary judgment) have found against the unions involved in those cases. As pointed out by General Counsel on brief, none of those three cases arose under the Act. Two of those three, *Lutz* and *Seidemann*, decided the issue on the basis of the more rigorous First Amendment standard which is not applicable in the situation at hand. Only the Fifth Circuit in *Shea*, in deciding this issue using the First Amendment standard, in the alternative, spoke to the duty of fair representation standard. But as General Counsel on brief points out, the Fifth Circuit in *Shea* “continued to infuse First Amendment principles into its analysis of the union’s duty of fair representation” in that the court at 517 stated that the annual objection procedure is an “unnecessary and arbitrary interference with the employees’ First Amendment rights that fails to meet the union’s duty of fair representation” Brief of General Counsel, page 19. I agree with General Counsel. Additionally, as noted above, the Fifth Circuit indicated at 517: “[s]ince the union can give no justification of this annual objection procedure, and since it is more cumbersome and less efficient than a system that allows continuing written general objections, the procedure is unreasonable and arbitrary.” The Fifth Circuit at 517 goes on to indicate that in duty of fair representation cases

A highly deferential standard of review is appropriate ... because the court is being called upon to review the union’s performance of union functions and should not substitute its own judgment of how a union should conduct its affairs. To avoid over-reaching, courts must give great leeway to unions in cases concerning such disputes. But this is a dispute between the union and the objecting employees that does not require us to second-guess the union’s judgment as exclusive bargaining representative. Rather we are called upon to protect the free speech rights of objecting employees from intrusive union procedures.

The Fifth Circuit does not explain how the fact that in the court’s opinion the union’s system is cumbersome and less efficient equates with arbitrary under the duty of fair representation standard, namely the union’s behavior is so far outside a wide range of reasonableness as to be irrational. While the Fifth Circuit professes not to second guess the union, this appears to be exactly what it did with respect to the duty of fair representation. In view of the above, it is questionable whether the Fifth Circuit’s reasoning with respect to the duty of fair representation can serve as precedent. If the position of the Fifth Circuit in *Shea* is not considered precedent regarding the duty of fair representation, then it has not been shown that any Federal court has found against a union, with respect to the annual renewal requirement, utilizing the duty of fair representation standard.²⁰

²⁰ It is noted that the Second Circuit in *Seidemann* on remand directed the district court to address the issue of the state law duty of fair representation claim.

As pointed out by the parties, a number of Administrative Law Judges have issued decisions on this issue. However, the Board has not yet decided a case on this issue, and it has not ruled on the exceptions to any of these Administrative Law Judges' decisions. Therefore, the judges' decisions are not precedent. Additionally, four of the five cited Administrative Law Judge decisions concluded that the union involved did not show a legitimate justification for the annual renewal requirement. As General Counsel points out on brief, in the instant case the union did show a justification for the annual renewal requirement. More specifically, Counsel for General Counsel on brief indicates:

Applying the above considerations to the instant case, no violation should be found, as Respondent has articulated a reasonable basis for its annual renewal requirement, and whatever slight burden suffered by Richards, Echegaray, and Yost in having to annually renew their objection is outweighed by the [Respondent's] justifications [Counsel for General Counsel's brief, page 21]

As indicated by Administrative Law Judge Biblowitz in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local Union #376 (Colt's Manufacturing Company, Inc.)*, 34-CB-2631, JD(NY)-06-08 (March 3, 2008), the Board in denying cross motions for summary judgment, remanded the proceeding for a determination of the extent of the burden that the annual renewal requirement places on objectors and the legitimacy of the union's asserted business justification for the annual renewal requirement.

The United States Supreme Court, as noted above, in *Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65, 67 (1991) indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171 ... (1967) - that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith' - applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 ... (1953), as to be irrational. [emphasis added]

Taking the last first, namely bad faith, the Charging Parties argue that the union is burdening their exercise of their § 7 rights for the sole purpose of dissuading them from exercising these very rights and options; that this is the very epitome of an action taken in bad faith by an exclusive representative; and that the annual renewal requirement only makes it difficult for a member to exercise the right to withdraw from the union. Respondent submits on brief that it cannot be found to have acted in bad faith for following an annual objection procedure that has been expressly approved the Office of General Counsel and the courts.²¹ As found below, the burden on the Charging Parties

²¹ While the position of General Counsel may not be binding on the Board, unless and until the Board finalizes its position with respect to the annual renewal requirement, the fact that the Board may not be

bound by the position of General Counsel in and of itself does not mean that a union acted in bad faith or arbitrarily.

ties of the annual renewal is, at best, insignificant. The annual renewal requirement does not make it difficult for a member to exercise the right to withdraw from the union. As noted above, the court in *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO v. NLRB*, 41 F.3d 1532, 1537 and 1538 (D.C. Cir. 1994), in reviewing a Board order holding that a union breached its duty of fair representation by acting in bad faith, indicated:

A bad-faith violation of the duty of fair representation "requires a showing of fraud, or deceitful or dishonest action." *Mock v. T.G. & Y. Stores Co.* 971 F.2d 522, 531 (10th Cir. 1992). Courts have applied a "demanding standard" for finding bad faith under the duty of fair representation, *Swatts v. United Steelworkers*, 808 F.2d 1221, 1225 (7th Cir. 1986), requiring a union's actions toward unit employees to be "sufficiently egregious or so intentionally misleading [as] to be invidious," *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1203 (5th Cir. 1991) (internal quotation omitted); see also *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990) (requiring for bad-faith violation of duty of fair representation "serious misrepresentations that lack rational justification or are improperly motivated").

The Charging Parties have not made such a showing. The Charging Parties' claims regarding bad faith have no merit.

With respect to whether the annual renewal requirement for objectors is discriminatory, the Charging Parties argue that this is the situation in that members do not have to annually renew their membership or dues checkoff authorizations. Respondent on brief submits that the duty of fair representation affords a union a wide range of reasonableness while it makes it clear that the right to resign is unfettered; that a claim of inconsistency is not sufficient to make out a breach of the duty of fair representation when dealing with different matters; that union membership/checkoff is not similarly situated to *Beck* objections when viewed "in light of the factual and legal landscape," *Air Line Pilots v. O'Neill*, supra; that union membership is regulated by the Labor Management Reporting and Disclosure Act, which specifically forbids a union to summarily terminate an employee's membership for any reason other than nonpayment of dues, 29 U.S.C. § 411(a)(5); that checkoff authorization cards are expressly regulated by Section 302(c)(5) of the Labor Management Relations Act, which specifically states the period for which a dues authorization may be treated as irrevocable, 29 U.S.C. § 186(c)(5); that "[t]he union chooses to do exactly what Congress permits in Section 302(c)(4)," transcript page 63; that *Beck* objections are regulated by the duty of fair representation, which has, so far, been interpreted to allow unions to handle objections on an annual basis; that the union's conduct has been fully consistent with the governing law as articulated by the authorities responsible for enforcing it; that any "inconsistency" must, therefore, be attributed to the authoritative articulations of the law and not to the union; that the union's policies regarding checkoff authorization/membership versus nonmember objections are not inconsistent but are based

bound by the position of General Counsel in and of itself does not mean that a union acted in bad faith or arbitrarily.

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on differences in the law and how these matters are regulated; and that the allegation of inconsistency is a red-herring and is not a basis to find a duty of fair representation breach. For the reasons given by Respondent, it has not been shown that Respondent's annual renewal requirement of objector status is discriminatory under the duty of fair representation standard.

Before embarking on an analysis of whether the union's annual renewal requirement for objections is arbitrary, in light of all that has gone before, it appears that it is advisable to reiterate this aspect of the duty of fair representation standard. As noted above, the United States Supreme Court in *Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65, 67 (1991) indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171 ... (1967) - that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith' - applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness.' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 ... (1953), as to be irrational. [emphasis added] ²²

The Charging Parties argue that the union's action requiring objectors to annually renew their objection is arbitrary since, as an administrative matter, it is easier for the union to accept one continuing objection and charge only reduced financial core fees than to send out multiple quarterly mailings and refund checks in exchange for an annual objection; that the arbitrary nature of the policy is made particularly apparent by the existence of a 30-day window period and the use of the employee's hire date since, with respect to the former why couldn't the window be 45, 60, 90, or 120 days, and, with respect to the latter, the different hire dates of each employee must surely be a burden on the union (as well as employees) to coordinate all of these disparate renewal dates; that the choice of the hire date is arbitrary; that the Board in *California Saw and Knife Works*, 320 NLRB 224 (1995) struck down a window period that limited employees' objections to a single calendar month, regardless of when they resigned; and that the same rationale applies here. The Board at 236 in *California Saw and Knife Works*, indicated that it agreed with the allegation of General Counsel that the window period in that case violated the Act as applied solely to employees who resigned their membership following the expiration of the window period in that proceeding. There is no such allegation in this proceeding. Indeed, there is no show-

²² As noted above, the Supreme Court at 45 and 46 in *Marquez v. Screen Actors Guild, Inc.* subsequently indicated:

[A] union's actions breach the duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78 ... (quoting *Ford Motor Co. v. Huffman*, supra at 338 ...). This "wide range of reasonableness" gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.

This slight change in the language, which was previously utilized by the Court at one point in *Air Line Pilots*, does not alter the standard.

ing that this is the case in the instant proceeding. With respect to the remaining arguments of the Charging Parties on brief regarding whether the union's procedure is arbitrary, while the Charging Parties may think that there are better approaches, this amounts to nothing more than an attempt to substitute judgment and does not demonstrate that the union has acted arbitrarily, breaching of the duty of fair representation.

With respect to whether its actions are arbitrary, Respondent on brief submits that the Charging Parties' burden of sending a letter annually at a date that has been clearly identified is minimal, if not inconsequential; that the renewal date is linked to the employee's hiring anniversary date, which is a reasonable time-frame; that the annual renewal requirement has been upheld by several Federal courts thus precluding any finding of arbitrariness; that Respondent acted in reliance upon existing authority; that while General Counsel no longer adheres to its original and longstanding position approving a procedure requiring nonmembers to file new objections each year, Respondent's reliance on prior decisions and other precedent cannot be viewed as arbitrary conduct, at least not until the Board - as opposed to the General Counsel - has ruled on this issue; that by providing for an annual objection, the union's procedure gives the union reasonable assurance that only employees who object will be entitled to pay a reduced agency fee; that because annually Respondent sends out information such as audits and reports, the chargeable versus nonchargeable data changes each year, and the objector is giving up important rights, Respondent believes that it is appropriate to ask an objector to bear this in mind and annualize his or her objections; that the union provides advanced reduction payments on a quarterly basis to those objectors whose employers withhold the union security fee at the full amount of regular dues, and the renewal requirement provides some assurance to the union to be certain it is not paying amounts to persons who are no longer employed within covered bargaining units, whether such persons leave employment due to a plant closure, layoff, retirement, or resignation; that surely it is not irrational for the union to seek to avoid making advanced reduction payments to persons who no longer are subject to union security fee withholding; and that Respondent's annual renewal requirement is lawful since it serves legitimate purposes.

For the reasons given above, the Respondent has shown that it has legitimate justifications for its annual renewal requirement. As already noted, General Counsel agrees. With respect to the burden on the Charging Parties, the burden of an annual renewal requirement has been described as minimal, and as slight as in the cost of mailing a letter or postcard every year to the union and keeping themselves aware of when they have to do that.²³ The Seventh Circuit Court of Appeals at 1116 in *Nielsen* in addressing the window period indicated that "[i]f there is full of deadlines and we see nothing particularly onerous about

²³ The Charging Parties who testified herein indicate that they send their annual renewal notice to the union by certified mail. There is no requirement that the annual renewal be forwarded to the union by certified mail. Indeed, such a requirement was found to be unlawful in *California Saw & Knife Works*. This approach is voluntary on the part of the Charging Parties. They did not show that there was any need for this approach.

this one." The only burden is for the objector to annually renew in writing his or her objection within a 30-day period which is linked to his or her hire date. If the objector does not annually renew his objector status there is a consequence. But technically the consequence is not part of the burden in that if the objector complies and submits to the union his annual objection, there is no consequence. The union controls the action which imposes the burden - the annual renewal requirement. The objector controls whether or not there is a consequence.

As noted above, the Charging Parties attorneys at one point in their brief indicate that, as an alternative to Respondent's procedure, the Union "could simply send a letter to the small number of objectors (estimated to be 300 by the union's witness, TR 64) asking them to verify their status as active workers instead of being 'retired, resigned, or laid off,'" (Charging Parties' brief, pages 23 and 24) Apparently Charging Parties' attorneys do not view the physical writing of a letter or the physical filling out of a form by the Charging Parties and mailing it to the Union to be a burden since this is what they are recommending as an alternative. That being the case, apparently the Charging Parties' attorneys are arguing that the burden on the Charging Parties is limited to keeping track of their hire date and a 30-day period linked to the hire date. As one ages, one tends to want to forget his or her birth date, which at a certain stage of life is just a reminder of how old one is. But if one were to be rewarded monetarily for remembering the date, then there would be an incentive not to forget. All things considered, it is no real burden to remember one's hire date and a 30-day period linked to the hire date. The burden of writing and mailing a one-line note is insignificant. It has not been shown "in light of the factual and legal landscape at the time of the union's actions. [that] the union's behavior is so far outside a 'wide range of reasonableness.' Ford Motor Co. v. Huffman, 345 U.S. 330, 338 ... (1953), as to be irrational. [emphasis added]

It has not been shown that Respondent in any way breached its duty of fair representation.²⁴ Accordingly, on these findings

²⁴ Although it is not a consideration in determining whether the union here breached its duty of fair representation, there are some practical problems with taking a continuing objection approach or variations thereof. One of the Charging Parties in one of the Administrative Law Judge decisions cited by the parties herein, *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local Union #376 (Colt's Manufacturing Company, Inc.)*, 34-CB-2631, JD(NY)-06-08 (March 3, 2008), wanted his objection to be valid for three years. Such an objection would not be an annual renewal or a continuing objection. If objectors can assert fixed periods for their objections, i.e. 2, 3, 4, or 5 years, or a number of months, or for the life of the current collective bargaining agreement, it could become an administrative nightmare. Also, if objectors can have a continuing objection and if, as ruled by the Sixth Circuit regarding Michigan, unions are required to annually obtain consent from union members who do not object to political expenditures by the union, does this give rise to a disparity? Additionally, although it is not an issue here, the fact that a United States Circuit Court of Appeals, utilizing the First Amendment requires a union in a non-NLRA case to accept continuing objections does not, in my opinion, in and of itself mean that a union is acting arbitrarily when it continues its annual renewal requirement in

of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 6, 2009.

NLRA situations where the duty of fair representation standard applies (instead of the First Amendment standard). The Federal courts which have ruled on annual renewal requirements indicate that the First Amendment standard is more rigorous (*Hudson's* requirements that the First Amendment infringement be minimized) than the duty of fair representation standard (that the action not be arbitrary, discriminatory or taken in bad faith). That being the case, in my opinion, the fact that a union might, after a court ruling, accept continuing objections under the RLA or in a public sector situation (both of which are subject to Constitutional limitations) while continuing to require annual renewal under the NLRA, which is not subject to review under the First Amendment, would not in and of itself justify a finding of a breach of the duty of fair representation. A number of Federal courts have ruled in favor of unions regarding annual renewal requirements. The First Amendment standard and the duty of fair representation standards differ. Unless and until this matter is resolved, any perceived inconsistency would not, in my opinion, justify a finding of a breach of the duty of fair representation standard. If a finding of arbitrary in a duty of fair representation case is based solely on the fact that the union also accepts continuing objections in a non-NLRA situation after a court ruled against the union on First Amendment grounds, then, in effect, the First Amendment is being utilized improperly to decide the NLRA case. As mentioned above, one should also consider in the mix the fact that unions, at least in one state (Michigan) of a United States Circuit Court of Appeals' jurisdiction, are required to obtain annually the authorization of members, who have dues deductions, to expend funds on political matters.

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

NOT TO BE PUBLISHED
IN BOUND VOLUMES

PHG
Goshen, IN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC
(Trimas Corporation d/b/a Cequent
Towing Products)

and

Case 25-CB-8891

DOUGLAS RICHARDS

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC
(Chemtura Corporation)

and

Case 25-CB-9253
(formerly 6-CB-11544)

RONALD R. ECHEGARAY

and

Case 25-CB-9254
(formerly 6-CB-11545)

DAVID M. YOST

ORDER DENYING
MOTION FOR RECONSIDERATION

On August 16, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding.¹ The Board found that the Respondent violated its duty of fair

¹ 357 NLRB No. 48.

representation by requiring nonmembers whom it represents and who seek objector status under *Communications Workers of America v. Beck*² to assert their objections on an annual basis. The Board ordered the Respondent to rescind its annual renewal requirement and to recognize the three Charging Parties as continuing objectors until they revoke their objections or the Respondent implements a lawful annual renewal requirement, whichever occurs first.

On August 29, 2011, the Charging Parties filed a Motion for Reconsideration. On September 12, 2011, the Respondent filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.³

The Charging Parties request reconsideration of the Board's remedy, arguing that it should encompass all current and past *Beck* objectors represented by the Respondent nationwide. They argue that the Respondent

² 487 U.S. 735 (1988).

³ The Charging Parties have filed a motion to disqualify Members Block, Griffin and Flynn from ruling on this case, arguing that their recess appointments to the Board by the President exceeded his authority under Section 3(a) of the National Labor Relations Act and Article II, Section 2 of the United States Constitution. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (March 29, 2012), we reject the Charging Parties' argument. Accordingly, the motion is denied.

should be ordered to recognize all such objectors as continuing objectors and to provide them with make-whole relief, including reimbursement of all dues and fees collected from them for nonrepresentational activities. Alternatively, the Charging Parties assert that such relief should encompass all individuals represented by the Respondent who have filed *Beck* objections since August 27, 2010, the date on which the Board issued its lead decision addressing the validity of a *Beck* annual renewal requirement. See *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010).

Under Section 102.48(d) of the Board's Rules and Regulations, a motion for reconsideration must be justified by "extraordinary circumstances." For the reasons set forth below, the Charging Parties have failed to make this showing.

The Board in *L-3 Communications*, supra, specifically declined to "announc[e] a per se rule" that annual renewal requirements are unlawful. Rather, the Board stated that it would proceed on a case-by-case basis "to inquire into a union's *Beck* procedures when they are challenged to determine whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential

objectors.” *Id.*, slip op. at 1. The Board found in *L-3 Communications* that the unions had failed to present a legitimate justification for their annual renewal requirement sufficient to justify even the modest burden the requirement posed on an individual seeking to make an objection. *Id.*⁴ The Board granted prospective remedial relief only, however, because the unions could reasonably have believed that their requirement was lawful in light of court approval of the requirement, the lack of any contrary indication by the Board, and the General Counsel’s previous advice approving the requirement. *Id.*, slip op. at 8. The Board thus ordered the unions to rescind their annual renewal requirement, but did not order make-whole relief, and directed the unions to recognize the charging party only – not all *Beck* objectors represented by the unions nationwide – as a continuing objector.

The Charging Parties’ request for make-whole relief here is inconsistent with the decision in *L-3 Communications*, in which the Board specifically declined to give retroactive application to its ruling. Likewise, the

⁴In contrast, in *Auto Workers Local 376 (Colt’s Mfg. Co.)*, 356 NLRB No. 164 (2011), the Board applied the standard announced in *L-3 Communications* to find that the unions’ annual *Beck* renewal requirement was not unlawful, because the unions there had taken steps to minimize the burden the requirement imposed on objectors.

Charging Parties' request that remedial relief be extended to all nonmembers represented by the Respondent exceeds the limited prospective relief granted in *L-3 Communications*.

In addition, contrary to the Charging Parties' contention, the issuance of the Board's decision in *L-3 Communications* did not immediately render the Respondent's annual renewal requirement unlawful and trigger a remedial obligation by the Respondent. Rather, the Board explained that it would proceed on a case-by-case basis to evaluate the validity of a union's annual renewal requirement based on the specific factors presented.⁵

The Board having considered the matter,

⁵ Moreover, in arguing that its annual renewal requirement was not arbitrary, the Respondent here relied on at least one aspect of its procedure not present in *L-3 Communications*. In the instant case, each objector received an advanced dues reduction check on a quarterly basis, and the Respondent argued that its annual renewal requirement was needed to minimize the risk of unnecessarily paying advance rebates to individuals who are no longer employed in a bargaining unit represented by the Union. 357 NLRB No. 48, slip op. at 4. The administrative law judge (although ultimately reversed by the Board) relied in part on this justification in finding that the Respondent's procedure was not unlawful. *Id.*, slip op. at 21. Thus, the issuance of the Board's decision in *L-3 Communications* would not necessarily have put the Respondent in the present case on notice that its annual renewal requirement was unlawful.

IT IS ORDERED that the Motion for Reconsideration is denied.⁶

Dated, Washington, D.C. April 18, 2012.

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr. Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁶ We reach the same conclusion and issue a similar order today with respect to the motion for reconsideration in *Electrical Workers Local No. 34, 357* NLRB No. 45 (2011).

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**International Brotherhood of Electrical Workers,
Local Union No. 34, AFL–CIO and International
Brotherhood of Electrical Workers, AFL–
CIO and John Lugo.** Cases 13–CB–18961 and
13–CB–18962

August 10, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,
PEARCE, AND HAYES

On December 19, 2008, Administrative Law Judge William G. Kocol issued the attached decision. The Respondents, International Brotherhood of Electrical Workers Local 34 (Local 34), and International Brotherhood of Electrical Workers (IBEW or the International), and the Charging Party, John Lugo, filed exceptions and supporting, responding, and reply briefs, and the General Counsel filed a responding brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that Local 34 violated its duty of fair representation and Section 8(b)(1)(A) of the Act by maintaining and enforcing a requirement that nonmember employees represented by the Union renew annually their objections filed under *Communications Workers of America v. Beck*.² In this respect, we find that the case is governed by *L-3 Communications*, 355 NLRB No. 174 (2010), which issued after the judge's decision. We find, however, that the judge erred in dismissing the complaint, sua sponte, with respect to IBEW. Contrary to the judge, we find that IBEW is jointly liable for the violation. We address these two issues in turn.

I. THE ANNUAL RENEWAL REQUIREMENT

After setting out the material facts and the parties' arguments, we explain why the annual renewal requirement here was unlawful.

¹ Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), we have accepted both Lugo's postbrief letter calling our attention to recent case authority and the Unions' letter response.

² 487 U.S. 735 (1988).

A.

In nearly all material respects, the Unions' *Beck* objection procedure is similar to that at issue in *L-3*. Represented employees are obligated to pay dues (or agency fees) to their local unions pursuant to the union-security provisions in the locals' respective collective-bargaining agreements. Full dues include \$11 per month for the International and an additional amount for the local.

Pursuant to *Beck*, the Unions have a procedure—established by the International, and binding on IBEW local unions—for nonmember represented employees to object to the spending of their dues money for any purpose unrelated to collective bargaining or contract administration. Employees who send timely written objections to the International receive a proportional reduction of their dues. The procedure requires objectors to renew their objections annually with IBEW each November in order for the objection to remain effective for the following calendar year.

The International publishes an annual notice of *Beck* rights, including the annual November renewal obligation, in its October newspaper, which is mailed to all members and nonmembers who pay dues or fees. Locals provide the same information to new hires at the time they become part of a bargaining unit.³ The International informs each local of all objections and timely renewals it receives from the local's jurisdiction. When an objector's local is informed of his objection, the local sends the objector an acknowledgment and a copy of the objection procedure, referencing the November renewal requirement and enclosing a copy of the previous October notice from the International's newspaper.

In one respect emphasized by the Unions, their objection procedure differs from the one found unlawful in *L-3*. When an objector files a timely objection or renewal, the International sends him an advance refund equal to the total reduction in dues paid to the International the objector would receive if he remained employed and paid reduced *Beck* fees for the duration of the forthcoming calendar year. This advance refund permits the local to lawfully collect the same amount of monthly per capita dues to the International during that year from objectors as from nonobjectors. However, by opting for this approach the Unions run the risk of refunding too much money to objectors who leave represented employment during the year and thereby cease to be covered by an IBEW union-security clause.

³ The procedure also permits an employee to file a *Beck* objection up to 30 days after first being hired or after resigning membership and to receive a proportional dues reduction for the rest of the calendar year before becoming subject to the November renewal requirement.

IBEW's local unions have their own procedures for refunding the nonchargeable portion of their share of incoming dues. Some, including Local 34, follow the International's procedure and provide advance refunds for the year, while others ask the objectors' employers to reduce objectors' monthly deductions from the objectors' pay.

After working as an IBEW member for 14 years, Lugo resigned his membership and filed a *Beck* objection with the International on June 8, 2007, requesting that his objection be treated as "permanent and continuing [in] nature." His objection was recognized and processed and, after communication with the International that included notice of the annual renewal requirement, the International refunded the appropriate amount of his per capita dues for the period running back to his resignation date and forward to the following November. Local 34 sent a similar refund from its share of his dues for the same period. The International reminded Lugo, however, that his objection was subject to the annual renewal requirement.

Thereafter, Lugo filed charges alleging that the Unions' imposition of the annual renewal requirement on him violated his Section 7 rights and the Unions' duty of fair representation under Section 8(b)(1)(A) of the Act. The General Counsel's complaint alleged the same.

With respect to the Unions' justification for the annual renewal requirement, an IBEW official who directs the Union's per capita department testified without contradiction:

We need to know that the individual still wants to receive the per capita reduction [and] that the individual is still employed and paying dues and fees. And we want to verify the individual's address. But most importantly, the up front annual reduction is, or should I say the renewal requirement is closely tied to the fact that we pay them up front. The two are interrelated and they work as one plan.

Asked to explain what he meant in referring to whether an objector "still wants to receive the per capita reduction," the IBEW official elaborated:

My experience, and I've spoken with a lot of people because they call in and ask how to do the process and the telephone calls are referred to me, my experience is that many of these people change their mind for various reasons. Either they want to be a member or they want to vote, contract, or they just want to be involved in the collective bargaining process with their peers, or they don't care to receive the payment anymore.

With respect to confirming an objector's employment status, the IBEW official said that IBEW receives the

locals' monthly per capita reports "at least one month later . . . [a]nd by the time all of the reports are received, several months have transpired. So, an individual could have left the unit and we wouldn't know about it for two to three months." He noted that "some of these people have [objected] after they retired." It would not be efficient for IBEW to attempt to obtain confirmation of continued employment and current address from the locals at the end of each year, he continued, because

we have so many different locals of so many different sizes. And people change addresses constantly. . . . So, the problem would come in with the smallest of the local unions, and these are the ones we have to be concerned with not replying to our correspondence in time to honor the individual's request.

The Unions also argue that the annual renewal requirement is justified by legal authority prior to *L-3*, which stated or suggested that the requirement is lawful.⁴

The General Counsel's complaint alleges that the Unions' annual objection renewal requirement "constitutes an arbitrary restriction on an employee's right to refrain from union membership and from supporting nonrepresentational expenditures."⁵

B.

L-3 reaffirmed that the Board applies the duty-of-fair-representation standard in *Beck* cases. (355 NLRB No. 174, slip op. at 2.) A union breaches that duty if its actions affecting employees whom it represents are "arbitrary, discriminatory, or in bad faith." *Id.* at 3. An action is arbitrary, in turn, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Id.*, quoting *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991). With respect to annual renewal requirements, the *L-3* Board did not "announc[e] a per se rule," but chose instead to "proceed on a case-by-case basis." *Id.* at 1. As *L-3* and our subsequent decision in *Colt's Mfg.*, 356 NLRB No. 164, slip op. at 3 (2011), illustrate, if the burden imposed on employees by an annual renewal requirement is more than de minimis, the Board evaluates a union's proffered justifications for the requirement, considered in the context of the particular *Beck* procedures involved.

1. It is clear that the annual renewal requirement at issue here, like that involved in *L-3*, and unlike that in *Colt's*, imposes more than a de minimis burden on objec-

⁴ E.g., *Abrams v. Communications Workers*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995).

⁵ The General Counsel does not contend that the Unions' annual renewal requirement is "discriminatory" or in "bad faith" in violation of their duty of fair representation.

tors. As in *L-3*, an objector must remember to mail a statement of renewed objection to the IBEW each year during a designated 1-month period specified in the Unions' procedure. A failure to send a timely renewal results in the loss of opportunity to receive a dues reduction for 11 months, until the renewal period recurs. Further, the *Beck* procedure in the instant case does not furnish objectors with multiple notice and reminders of the annual renewal requirement, as was the case with the *Beck* procedure at issue in *Colt's Mfg.* It was those features that led the Board in *Colt's Mfg.* to find that the burden imposed by the requirement there was de minimis, and that it was hence unnecessary to weigh the union's proffered justifications for the requirement. (356 NLRB No. 164, slip op. at 3.)

2. Accordingly, absent procedures to minimize the burden imposed on objectors similar to those in *Colt's Mfg.*, we turn to the Unions' proffered justifications for requiring annual renewal. None are sufficient to save the requirement.

The Unions argue that the annual renewal requirement is necessary to confirm objectors' employment status and their current addresses, but we rejected a similar argument in *L-3*. (See 355 NLRB No. 174, slip op. at 4–5.) Here, the Unions claim to have a heightened stake in knowing that objectors remain employed due to their advance rebate system. But the annual renewal requirement is a poor instrument for achieving the asserted objective. Objectors who quit or otherwise leave employment at any time after renewing their objection and before the next annual renewal date will receive an advance rebate some part of which they are not due even with the annual renewal requirement in place. Moreover, at any time during the year or periodically throughout the year, the Unions can request a list of current or, alternatively, separated employees from employers and the employers will have a legal obligation to supply the list in a timely fashion. In fact, at the end of the year and before paying the advance rebates, the Unions could ask the employers to confirm that all objectors who previously expressed a continuing objection remain employed. As in *L-3*, therefore, the Unions have provided no evidence to show that the annual objection requirement is the most cost-effective or otherwise efficient means of obtaining such information. *Id.*

L-3 is also dispositive of the Unions' contention that the annual requirement is justified by preexisting legal authority. We noted there that the General Counsel's choice in *California Sav & Knife Works*, 320 NLRB 224

(1995),⁶ not to argue that an annual renewal requirement was unlawful did not insulate such requirements from subsequent Board scrutiny. (355 NLRB, slip op. at 5.) As we observed, the Board has the primary responsibility for establishing national labor policy, and court cases—to which the Board was not a party—do not preclude our independent assessment of the issue presented here. *Id.*

Next, the Unions advance a slight variation of an argument made in *L-3*. The Unions' argue that the annual renewal requirement serves the Unions' interest in ensuring that they do not give the *Beck* reduction to employees who no longer want it, and thus ensures that they are not unnecessarily paying advance rebates. In essence, this is the same argument advanced and rejected in *L-3*, that the annual renewal requirement is justified by the fact that some objectors change their minds after the passage of time. *L-3*, supra, slip op. at 5. Moreover, here, the Unions have failed to establish a factual basis for this justification. The IBEW official's testimony that some objectors change their minds over time was based on direct experience with employees who communicated their change of mind to IBEW and asked to be restored to full dues status. Those employees demonstrated by their actions that an annual renewal requirement was not necessary to preclude their receiving, and the Unions paying, unwanted advance reductions. Rather, the evidence showed that many employees who change their mind directly contact the IBEW and affirmatively inform it that they no longer wish to receive reduced dues under *Beck*. The Unions did not present evidence that a significant number of objectors change their minds but do not choose to communicate this to IBEW. The Unions would benefit from the annual requirement only with respect to such individuals.⁷ Moreover, the Unions remain free to ask nonmembers who have registered a continuing objection whether they wish to withdraw the objection after a year or, indeed, at any time.

For these reasons we find that the Unions have failed to establish a reasonable basis for the annual *Beck* renewal requirement. Because the requirement is arbitrary, it violates the Unions' duty of fair representation and Section 8(b)(1)(A) of the Act.

⁶ Enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

⁷ Nor, contrary to the Unions' assertion, is the "unwanted reduction" justification supported by the fact that the Unions provide an advance refund of the total amount of the following year's *Beck* reduction to objectors. The Unions are under no legal requirement to pay an advance refund. Their choice of this mechanism assumes the risk of giving an advance reduction to some employees who no longer want it. It cannot justify imposing the annual renewal requirement on all objectors.

II. LIABILITY OF IBEW

On his own initiative, the judge dismissed the complaint with respect to the IBEW, reasoning that only Local 34, as the sole collective-bargaining representative of employees here, had a duty of fair representation.⁸ We disagree, for the reasons that follow.⁹

It is undisputed that at least since 1992, the IBEW has been primarily responsible for establishing and implementing the *Beck* procedure involved in this case, and that IBEW locals, including Local 34, rely on the IBEW to satisfy their duties under *Beck* and, indeed, are required to conform to the IBEW's procedures.

Under settled precedent, this role and relationship suffice to make the IBEW liable here. In *California Saw & Knife Works*, supra, in which the Board established the essential standards for implementing *Beck's* requirements, the Board found that the international union, along with several of its local unions, had acted unlawfully with respect to their *Beck* procedure, even though "[i]n most cases, the [local unions] are the entities that are certified as the exclusive representatives of the members." 320 NLRB at 230. Cf. *Allen v. Allied Plant Maintenance Co. of Tennessee, Inc.*, 881 F.2d 291, 297 (6th Cir. 1989) (International assumed duty of fair representation by fulfilling local's functions in contractual grievance-arbitration process).¹⁰

We therefore find that the judge erred in dismissing the complaint with respect to IBEW, and that IBEW is jointly liable for the violation we have found with respect to the Unions' annual renewal requirement.¹¹

ORDER

The Respondents, International Brotherhood of Electrical Workers, Local Union 34, AFL-CIO, CLC, and the

⁸ As the judge observed, the complaint alleged that Local 34 was "the exclusive collective-bargaining representative [which] has maintained and enforced collective-bargaining agreements with various electrical contractors." Local 34 was the only union signatory to the agreement that appears in the record.

⁹ The Unions did not contend before the judge that the International bore no responsibility for the *Beck* administrative procedure at issue. Moreover, the Unions did not move or argue for dismissal of the International at any time before the judge issued his decision. And while the International argues before the Board in support of the judge's ruling, it also concedes that it assumed the duty of treating objectors fairly: "the International made a considered decision to assume the responsibility to ensure that, regardless of the administrative capacity of their respective local unions, all objectors were treated fairly."

¹⁰ The cases relied upon by IBEW do not involve the lawfulness of *Beck* procedures established and implemented by an international union and conformed to by a local union.

¹¹ We will substitute an order requiring the remedial notice to be posted at Local 34's office and hiring hall, in the absence of record evidence identifying relevant employers at whose facilities the notice could be posted.

International Brotherhood of Electrical Workers, AFL-CIO, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Requiring nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under the Union's existing annual renewal procedure.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

(b) Notify nonmember employees who are subject to a union-security clause, by publication in the International's newspaper, that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded.

(c) Recognize John Lugo as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondents implement a lawful annual renewal requirement, whichever occurs earlier.

(d) Within 14 days after service by the Region, post at its union office in Milton, Florida, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means.¹³ Reasonable steps shall be taken by the

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹³ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

ELECTRICAL WORKERS LOCAL NO. 34

5

Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director sworn certifications of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 10, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring.

I agree with my colleagues that the Respondents' rule requiring *Beck* objectors to renew their objections annually was arbitrary and thus breached their duty of fair representation in violation of Section 8(b)(1)(A) of the Act. I would also find, for the reasons fully set out in the dissenting opinions in *L-3 Communications*, 355 NLRB No. 174, slip op. at 12-14 (2010) and in my dissent in *Colt's Mfg. Co.*, 356 NLRB No. 164, slip op. at 4-6 (2011), that the Respondent's rule was discriminatory. As also stated in my dissent in *Colt's Mfg.*, I would further find that the annual renewal requirement infringes on employees' fundamental Section 7 right to refrain from assisting a union and must therefore be analyzed under Section 8(a)(3) and 8(b)(1)(A) rather than under the more deferential duty of fair representation standard applied here by the majority. *Id.*, slip op. at 6.

Dated, Washington, D.C. August 10, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting.

Although I agree with the majority that the appropriate legal framework for analyzing this case is the duty of fair representation under Section 8(b)(1)(A), for the reasons set forth in my dissenting opinion in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174, slip op. 14-16 (2010), I would dismiss the 8(b)(1)(A) allegation that the Union breached its duty of fair repre-

sentation by requiring the Charging Parties to renew their *Beck*¹ objections annually.

Because the General Counsel bears the burden of proving that the Union's action was arbitrary, discriminatory, or in bad faith, and as the Union's annual-renewal requirement rationally serves its legitimate interests and was well supported by legal precedent at the time of its actions, I find that this burden has not been met. Indeed, as in *L-3 Communications*, I find that it is manifestly unjust to find a violation here.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 10, 2011

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT require nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under our existing annual renewal procedure.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

WE WILL notify nonmember employees who are subject to a union-security clause, by publication in the In-

¹ *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

ternational's newspaper, that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded.

WE WILL recognize John Lugo as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO AND ITS
LOCAL UNION NO. 34, AFL-CIO

Kevin McCormick, Esq., for the General Counsel.

Victoria L. Bor, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig, P.C.), of Washington, D.C., for the Respondents.

Matthew C. Muggeridge, Esq. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 27, 2008. The charges were filed by John Lugo, an individual (Charging Party) on June 10, 2008,¹ and the order consolidating cases, consolidated complaint, and notice of hearing (complaint) was issued August 28. The complaint as amended at the hearing alleges that the International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO, CLC (Respondent Local) and the International Brotherhood of Electrical Workers, AFL-CIO, CLC (Respondent International) (and jointly Respondents) violated Section 8(b)(1)(A) of the Act by informing employees subject to a union-security provision that in order to become and remain a *Beck* objector nonmember employees must renew their objections annually during November of the preceding calendar year, thereby breaching the fiduciary duty they owe to represented employees. Respondents' answer admits the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, labor organization and agency status, and the maintenance of collective-bargaining agreements by Respondent Local with union-security provisions. Respondents also admit that each advised nonmember employees of their obligation to renew their *Beck* objections annually in November but denied that this violated the Act.

I note that there is no allegation in the complaint that Respondent International represents any employees or has any collective-bargaining agreements with employers that include union-security provisions. This fact becomes important in assessing whether Respondent International owes a duty of fair representation to any employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondents, and the Charging Party, I make the following.

¹ All dates are in 2008 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Oberlander Electric Company, Inc., a corporation, performs electrical work out of its facility in East Peoria, Illinois, where it annually purchases and receives goods and materials valued in excess of \$50,000 from other enterprises located within the State of Illinois, each of which enterprises receives those goods and materials directly from points outside Illinois. The Respondents admits and I find that Oberlander is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Respondent Local and Respondent International each is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

There are about 906 local unions affiliated with Respondent International; the local unions vary in size from 7 to 30,000 members. Some local unions have full-time paid officers and staff while others have part-time officers who are paid very little. The local unions are charged with the responsibility of collecting all dues and enforcing the union-security provisions in collective-bargaining agreements. Members pay \$11 per month to Respondent International and the local unions determine what additional amounts should be added as local dues.

Respondents spend money collected under union-security provisions contained in collective-bargaining agreements on matters not germane to their representational duties. Respondents have procedures for nonmember employees who exercise their rights under *CWA v. Beck*, 487 U.S. 735 (1988), to pay only that portion of dues Respondents spend on representational duties. These procedures require objecting nonmember employees to annually renew their objections during November to be effective for the following year. The annual renewal procedures apply to all of Respondent International's affiliated local unions in the United States. Respondent International publishes an annual notice in its newspaper that it mails to all members and nonmembers who pay dues or fees to any local union. This annual notice advises the employees among other things, of their *Beck* rights, including the obligation to annually renew their objection during November. Local unions provide the same information to every new employee who becomes part of a bargaining unit.

Dmytro Halkyn is director of per capita department for Respondent International. Halkyn explained that before 1992 Respondents' procedures required *Beck* objectors to file their objections with the local unions as well as Respondent International in order to get a reduction in the dues of the local union and international, respectively. But after a series of complaints issued by the General Counsel against local unions the procedures were revised pursuant to a settlement agreement to provide for only a single notice in order to get reductions for both the international and local portions of the dues. The revised procedures provided for objections to be filed with Respondent International to assure a measure of uniformity in the manner in which the objections were processed. But the annual renewal

part of the objector procedures existed before the settlement and continued to remain in effect afterwards; they were not part of the litigation. Under Respondent International's dues reduction procedures each January objectors are sent checks for the amount of reduction for an entire year. This allows Respondent International to collect the same amount of dues during that year from objectors and nonobjectors alike. The downside, however, to this procedure is that employees may not remain covered by the union-security provision for the entire year and may therefore receive the partial dues remission when the employees did not pay dues. The local unions are allowed to create their own procedures concerning how they return non-chargeable portions of dues to *Beck* objectors. Some local unions provide upfront reductions while others reduce the payments made by objectors.

Lugo works as a journeyman electrician and has used the Respondent Local's hiring hall to obtain employment with various employers who are signatories to collective-bargaining agreements with it. On about June 8, 2007, Lugo exercised his *Beck* rights. The Respondents eventually recognized Lugo's *Beck* objections and refunded to him a portion of the dues he had paid.²

B. Arguments and Analysis

In his brief the General Counsel states that the complaint does not challenge Respondents use of the November window period but argues that:

The Respondents' requirement that nonmember *Beck* objectors renew their objections every year constitutes an arbitrary restriction on an employee's right to refrain from union membership and from supporting nonrepresentational expenditures.

The Board has yet to address this specific issue but there have been a number of court cases that have addressed this matter; they have come down on both sides of this issue. Those cases are described by Judge Biblowitz in his decision in *United Auto Workers (Colt's Mfg. Co.)*, JD (NY)-06-08 (March 3, 2008), and need not be repeated here. In that case Judge Biblowitz concluded that the annual renewal obligation violated Section 8(b)(1)(A). In *IAM, Local Lodge 2777(L-3 Communications Vertex Aerospace)*, JD (ATL)-02-08, Judge Marcionese also concluded the union there violated Section 8(b)(1)(A) by requiring annual *Beck* objections. Finally, in *General Truck Drivers, Local No. 952 (Albertson's)*, JD (SF) 30-06 (May 30, 2006), I concluded in a different factual setting that the annual renewal obligation violated Section 8(b)(1)(A).

The General Counsel points by analogy to restrictions found unlawful by the Board in *California Saw and Knife Works*, 320 NLRB 224 (1995),³ such as requirements that *Beck* objectors file their objections individually and by certified mail. In *Poly-mark Corp.*, 329 NLRB 9 (1999), rev'd in part on other grounds sub nom. *Mahat v. NLRB* 248 F.3d 1150 (6th Cir.

2000), the Board specifically affirmed its conclusion in *California Saw* that a union violates its duty of fair representation when it imposes a window period limitation on an employee who recently resigned his membership in a union and who had also filed *Beck* objections.

I next emphasize the narrowness of the complaint allegations. The complaint does not allege that Respondents directly restrained or coerced employees in the exercise of their Section 7 right to become and remain *Beck* objectors. Rather, the complaint alleges only that Respondents breached their duty of fair representation by requiring annual renewal of *Beck* objections. As Respondents point out in their brief, the legal analysis in ascertaining a breach of a duty of fair representation is different from the analysis of a violation of a Section 7 right. The test for the former affords a union a wide range of reasonableness. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 45 (1998); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). By framing the complaint as he does the General Counsel is implicitly conceding the Section 7 right to become and remain a *Beck* objector is qualitatively different from the Section 7 right to resign from membership in a union. The latter is an unfettered right, *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), *Machinist Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984); the former may be encumbered so long as the encumbrances are not arbitrary or invidious. The Board has not yet differentiated between in this area between the Section 7 right to become and remain a *Beck* objector and notice requirements concerning this right that emanate from the duty of fair representation. So I test the annual renewal requirement under the duty of fair representation. I therefore do not apply what might otherwise have been persuasive arguments made in the Charging Party's brief concerning why the right to become and remain a *Beck* objector should be treated the same as the right to resign from union membership.

Having identified the legal analysis I will apply in this case, I note that the Respondents argue that it is the local unions, and not Respondent International, that has the duty of fair representation. In this regard the complaint supports this contention as it only alleges that Respondent Local represents employees. It does not allege, nor is there evidence, that Respondent International represents any employees, jointly with the local unions or otherwise. Neither the General Counsel nor the Charging Party explains in this case how a duty of fair representation applies to Respondent International. It follows that the complaint must be dismissed as it pertains to Respondent International.

I now turn to address whether the yearly renewal requirement breaches Respondent Local's duty of fair representation. Respondents argue that the annual renewal requirement should be viewed in context of their overall framework for handling *Beck* objections and that those overall procedures easily fall within a careful exercise of their duty of fair representation. One may concede that Respondents' *Beck* procedures are generally an acceptable exercise of a duty of fair representation. But this does not shield component parts of those procedures from examination. Stated differently, Respondents may not imbed an arbitrary procedure in an otherwise reasonable program and expect the arbitrary procedure to escape scrutiny.

² There is no allegation that manner in which Respondents processed Lugo's *Beck* objections was unlawful.

³ Enfd sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Next, Respondents argue:

[T]he procedures that the IBEW and its local unions have put in place to administer fee objections including the annual renewal requirement are neither unfair, arbitrary nor invidious. Instead, the procedures were adopted by the International and made applicable to all of its local unions as a way of best assuring that in this large union with autonomous local unions of every size and level of staff, the rights of objecting non-members are honored. Thus, the International developed a plan which was designed to assist local unions in fulfilling their obligations to represent non-members that it believed would best assure that objectors receive the information and the reductions to which they are entitled in a systematic and dependable way.

To support this argument Halkyn testified that Respondents maintain the annual requirement because:

We need to know that the individual still wants to receive the per capita reduction. We need to know that the individual is still employed and paying dues and fees. And we want to verify the individual's address. But most importantly, the up front annual reduction is, or should I say the renewal requirement is closely tied to the fact that we pay them up front. The two are interrelated and they work as one plan.

But it is Respondent Local that owes the duty of fair representation in this case; it can not pass off that duty to Respondent International. As the Charging Party points out in his brief, the:

[A]dministrative rationales offered by Respondent dealt with the Union's need to verify the objector's job and contact information. It can be conceded that some administrative purpose may exist for requesting and obtaining such information. What cannot be explained, however, is how the mandatory annual renewal of objection policy furthers or is related to the administrative need to maintain accurate employment and contact information for the represented employees.

Certainly Respondent Local is in a position to easily ascertain whether a unit employee continues to be employed and to maintain, so far as possible, current address information without maintaining the annual renewal requirement. Indeed, Respondent International has address and employment status information that it uses to satisfy its *Beck* and *General Motors* notice requirements yet it does not explain why this same information is not adequate concerning its dues remissions. Halkyn's testimony says little concerning why Respondent Local, who after all collects both the local and international portion of the dues, needs the annual renewal provision for any purpose other than challenging the continuing nature of the *Beck* objection. By this requirement Respondent Local limits *Beck* objector status to a period of one year per objection even absent any indication that the objector desired to place any time limitation on the objection. A *Beck* objector is not a member of a union, and as such the Supreme Court has stated "[T]he union has no more control over the former member than it has over the man in the street." *NLRB v. Granite State Joint Board, Local 1029*, 409 U.S. 213, 217 (1972). Because the annual renewal procedure serves no legitimate purpose it is arbitrary and breaches Respondent Local's duty of fair representation.

CONCLUSIONS OF LAW

By informing *Beck* objectors that they must annually renew their objections, Respondent Local violated Section 8(b)(1)(A).

REMEDY

Having found that the Respondent Local Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Charging Party argues that to remedy the violation Respondents should be required to reimburse all dues collected from *Beck* objectors who did not annually renew their objections. However there is no evidence that Respondent Local has actually collected full dues from *Beck* objectors who failed to annually renew their objections. Moreover, in his brief the General Counsel does not request any make whole remedy; instead he requests only a cease and desist order and notice posting. Certainly if there was evidence that Respondent Local actually collected full dues from the non-members who did not annually renew their objections the General Counsel would have sought a make whole remedy. Under these circumstances I conclude there is no factual basis in this case to support a make whole remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following order recommended.⁴

ORDER

The Respondent Local, the International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO, CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Informing *Beck* objectors that they must annually renew their objections.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union offices and hiring halls in Illinois, copies of the attached Notice marked "Appendix."⁵ Copies of the Notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ELECTRICAL WORKERS LOCAL NO. 34

9

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since December 11, 2007.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 19, 2008

APPENDIX
NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT inform employees covered by a union-security provision who object to paying full membership dues that they must file those objections annually.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION No. 34, AFL-CIO, CLC

NOT TO BE PUBLISHED
IN BOUND VOLUMES

PHG
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
LOCAL UNION NO. 34, AFL-CIO

and

Case 13-CB-18961

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

and

Case 13-CB-18962

JOHN LUGO

ORDER DENYING
MOTION FOR RECONSIDERATION

On August 10, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding.¹ The Board found that the Unions violated their duty of fair representation by requiring nonmembers whom they represent and who seek objector status under *Communications Workers of America v. Beck*² to assert their objections on an annual basis. The Board ordered the Unions to rescind their annual renewal requirement and to recognize the Charging Party as a continuing objector until he revokes his

¹ 357 NLRB No. 45.

² 487 U.S. 735 (1988).

objection or the Unions implement a lawful annual renewal requirement, whichever occurs first.

On August 24, 2011, the Charging Party filed a Motion for Reconsideration. On September 15, 2011, the Unions filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.³

The Charging Party requests reconsideration of the Board's remedy, arguing that it should encompass all current and past *Beck* objectors represented by the Unions nationwide. He argues that the Unions should be ordered to recognize all such objectors as continuing objectors and to provide them with make-whole relief, including reimbursement of all dues and fees collected from them for nonrepresentational activities. Alternatively, the Charging Party asserts that such relief should encompass all individuals represented by the Unions who have filed *Beck* objections since August 27, 2010, the date on which

³ The Charging Party has filed a motion to disqualify Members Block, Griffin and Flynn from ruling on this case, arguing that their recess appointments to the Board by the President exceeded his authority under Section 3(a) of the National Labor Relations Act and Article II, Section 2 of the United States Constitution. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (March 29, 2012), we reject the Charging Party's argument. Accordingly, the motion is denied.

the Board issued its lead decision addressing the validity of a *Beck* annual renewal requirement. See *Machinists Local Lodge 2777 (L-3 Communications)*, supra.

Under Section 102.48(d) of the Board's Rules and Regulations, a motion for reconsideration must be justified by "extraordinary circumstances." For the reasons set forth below, the Charging Party has failed to make this showing.

The Board in *L-3 Communications*, supra, specifically declined to "announc[e] a per se rule" that annual renewal requirements are unlawful. Rather, the Board stated that it would proceed on a case-by-case basis "to inquire into a union's *Beck* procedures when they are challenged to determine whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors." *Id.*, slip op. at 1. The Board found in *L-3 Communications* that the unions had failed to present a legitimate justification for their annual renewal requirement sufficient to justify even the modest burden the requirement posed on an individual seeking to make an objection. *Id.*⁴ The Board granted prospective remedial

⁴ In contrast, in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB No. 164 (2011), the Board applied the standard

relief only, however, because the unions could reasonably have believed that their requirement was lawful in light of court approval of the requirement, the lack of any contrary indication by the Board, and the General Counsel's previous advice approving the requirement. *Id.*, slip op. at 8. The Board thus ordered the unions to rescind their annual renewal requirement, but did not order make-whole relief, and directed the unions to recognize the charging party only – not all *Beck* objectors represented by the unions nationwide – as a continuing objector.

The Charging Party's request for make-whole relief here is inconsistent with the decision in *L-3 Communications*, in which the Board specifically declined to give retroactive application to its ruling. Likewise, the Charging Party's request that remedial relief be extended to all nonmembers represented by the Unions exceeds the limited prospective relief granted in *L-3 Communications*.

In addition, contrary to the Charging Party's contention, the issuance of the Board's decision in *L-3 Communications* did not immediately render the Unions' annual renewal requirement unlawful and trigger a remedial

announced in *L-3 Communications* to find that the unions' annual *Beck* renewal requirement was not unlawful, because the unions there had taken steps to minimize the burden the requirement imposed on objectors.

obligation by the Unions. Rather, the Board explained that it would proceed on a case-by-case basis to evaluate the validity of a union's annual renewal requirement based on the specific factors presented.⁵

The Board having considered the matter,

IT IS ORDERED that the Motion for Reconsideration is denied.⁶

Dated, Washington, D.C., April 18, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁵ Moreover, in arguing that their annual renewal requirement was not arbitrary, the Unions here relied on at least one aspect of their procedure not present in *L-3 Communications*. In the instant case, each objector received an advanced dues reduction check on an annual basis, and the Unions argued that their annual renewal requirement was needed to minimize the risk of unnecessarily paying advance rebates to individuals who are no longer employed in a bargaining unit represented by the Union. 357 NLRB No. 45, slip op. at 1, 3 & fn. 7. Thus, the issuance of the Board's decision in *L-3 Communications* would not necessarily have put the Unions in the present case on notice that their annual renewal requirement was unlawful.

⁶ We reach the same conclusion and issue a similar order today with respect to the motion for reconsideration in *Cequent Towing Products*, 357 NLRB No. 48 (2011).