Workers' Experiences in Attempting to Exercise Their Rights under *Communications Workers v. Beck* and Related Cases

By Raymond J. LaJeunesse, Jr., Esq.

Since the National Right to Work Legal Defense Foundation was founded in 1968, it has provided free legal aid to the plaintiffs in almost every case litigated about the rights of workers not to subsidize union political and other nonbargaining activities. The most famous of these cases is the Supreme Court's 1988 decision in *Communications Workers v. Beck*.[1]

Implementation of Harry Beck's victory in the Supreme Court is a serious problem. Many American workers are forced by virtue of a unique privilege Congress granted unions to contribute their hard-earned dollars to political and ideological causes they oppose. At issue are union dues and agency fees, collected from workers under threat of loss of job. These monies, under federal election law, are lawfully used for registration and get-out-the-vote drives, candidate-support among union members and their families, administration of union political action committees, and issue advocacy. These in-kind political expenditures amount to between 300 and 500 million dollars in a presidential election year. Unions spend many millions more on state and local elections and lobbying at all levels of government.

Under the National Labor Relations and Railway Labor Acts, employees who never requested union representation must accept the bargaining agent selected by the majority in their bargaining unit. Then, if their employer and bargaining agent agree, the law forces these employees to pay fees equal to union dues for that unwanted representation or be fired.

The evil inherent in compelling workers to subsidize a union's political and ideological activities is apparent. As Thomas Jefferson eloquently put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Preventing that evil, however, is not easy under current law.

In dissenting from the Supreme Court's first ruling on the problem, in *Machinists v. Street*, the late Justice Hugo Black articulated the difficulty well. To avoid constitutional questions, the Court held that the Railway Labor Act prohibits the use of objecting workers' forced union dues and fees for political and ideological purposes. However, the Court's majority held that the employees' remedy was merely a reduction or refund of the part of the dues used for politics. Justice Black exposed that remedy's fatal flaw:

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national, and international unions involved. It seems to me . . . however, that . . . this formula with its attendant trial burdens promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.[2]

The Supreme Court's later *Beck* decision ruled that employees covered by the National Labor Relations Act also cannot lawfully be compelled to subsidize unions' political and ideological activities. That decision should have paved the way for all private-sector employees to stop the collection of dues for anything other than bargaining activities.

However, like *Street*, *Beck* is not self-enforcing. Experience shows that Justice Black was correct. Without the help of an organization like the Foundation, no employee, or group of employees, can effectively battle a labor union and ensure that they are not subsidizing its political and ideological agenda. Even with the rulings in *Beck* and related cases, the deck is stacked against individual employees. And, even with the help of the Foundation, which cannot assist every worker who wants to exercise *Beck* rights, complicated and protracted litigation often is necessary to vindicate those rights.

Employees must overcome many hurdles to exercise their *Beck* rights.

The first obstacle is the compulsory unionism agreements. The courts have long held that actual union membership cannot lawfully be required. Yet, most unions and employers still negotiate contracts that state that "membership in good standing" or "membership" is required. In *Marquez v. Screen Actors Guild*, the Supreme Court sanctioned this misleading practice. The Court reasoned that the contracts merely use a legal "term of art" that "incorporates all of the [judicial] refinements associated with the language."[3]

The *Marquez* decision does not consider the realities of the workplace. As the then Chairman of the National Labor Relations Board ("NLRB") said in 1998, "even today, many workers and employers do not understand that 'membership' is what the United States Supreme Court has defined it to be," not what it literally and commonly means.[4] Almost every day, the Foundation receives calls and e-mail messages from employees who believe that the contract under which they work requires them to join the union.

Unions have a legal duty to inform workers that they have a right not to join and, if they do not join, a right not to subsidize political activities. However, that duty is honored more in the breach than in the observance, as Justices Kennedy and Thomas recognized in their concurring opinion in *Marquez*:

> When an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement. . . . The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them. In such a context, "member" is not a term of "art,". . . but one of deception.[5]

Union officials often tell workers that they must join or be fired. Union officials also often tell members that they will be fired if they resign. Even more commonly, unions simply fail to tell employees about their options, letting them be misled by the contract or by the common understanding in the shop that membership is required.

What about employers? Employers have no legal duty to inform employees that they do not have to join the

union. Moreover, many employers believe that the contract requires exactly what it says, "membership." Such was the case in *Marquez*.

Even when employers are aware of the Supreme Court's technical construction of the term "membership," they do not inform employees that they have the right not to join. Employers do not want legal trouble with the union. If an employer tells employees what their rights are, it might find itself defending an unfair labor practice charge filed by the union alleging that the employer has unlawfully attempted to discourage membership.

In sum, forced union membership, and compelled financial support of union political activity, often result from misinformation and misrepresentation engendered by the contract provisions the NLRA and RLA authorize.

The second obstacle to exercising *Beck* rights is the "Hobson's choice" workers face. Under current law, only nonmembers have a right to refrain from financially supporting their bargaining agent's politics. Nonmembers must forgo important employment rights that accompany membership, such as voting on contracts and participating in selecting the representatives who negotiate their terms and conditions of employment. Under the system of exclusive representation the federal labor statutes impose, individual employees cannot negotiate for themselves. Consequently, many workers become or remain members, despite their disagreement with the union's politics, because that is the only way to have any say in determining their wages and other terms and conditions that govern their working lives.

Another obstacle to the exercise of *Beck* rights is the obscure manner in which the courts and NLRB permit unions to notify employees of their rights not to join and not to subsidize union political activity. When unions give such notice, they often hide it in fine print inside union propaganda that dissenting workers find offensive and, therefore, do not read.

When employees do learn about their right to resign and object, they often face coercion, threats, and abuse. Threats of violence sometimes occur.

Many unions use more subtle techniques of ostracism and harassment. Unions often publicly identify workers exercising *Beck* rights as pariahs to be shunned for disloyalty. Unions routinely publicize nonmembers' names, addresses and other personal information with predictable consequences.

Even if they do not face coercion, threats, and harassment, workers who object to use of their compulsory dues and fees for political purposes must negotiate technical procedural hurdles. The most significant are the requirements, imposed by most unions, that *Beck* objections be submitted during a short "window period," typically a month or less, and be renewed every year. The NLRB has approved both of these obstacles to the exercise of *Beck* rights. As a result, many employees are forced to pay for union political activities, because their objections are considered untimely under union rules.

Why should constitutional rights be available only once a year? Employees should be free to stop subsidizing union political activity whenever they discover that the union is using their monies for purposes they oppose, not just during a short and arbitrary "window period."

Workers also should be free to make objections that continue in effect until withdrawn, just as union membership continues until a resignation is submitted. Two federal courts have declined to follow the Board on this issue. However, these courts' rulings, that continuing objections must be honored, apply only in the Fifth Circuit's three states, and to the Machinists union nationwide, but only under the RLA.

Another procedural hurdle nonmembers face is finding out how the union spends their dues and fees so that they can intelligently decide whether to object. In *Teachers Local 1 v. Hudson*, the Supreme Court held that "***potential*** objectors [must] be given sufficient information to gauge the propriety of the union's fee."[6] Yet, the NLRB has ruled that unions need not disclose *any* financial information to nonmembers until *after* they object.

The Supreme Court specified in *Hudson* that "adequate disclosure surely would include the major categories of expenses, as well as verification ***by an independent auditor,***" and that disclosure must be made not only for the local collecting compulsory fees, but also for "its affiliated state and national labor organizations."[7] Yet, when unions give employees financial disclosure, it often is sketchy. Many unions refuse to disclose expenses of affiliates that receive portions of the dues and fees, claiming it is "too burdensome" to provide information for all levels of the union hierarchy. Many unions also do not provide audited financial disclosures. The NLRB has approved all these practices.

In *Ferriso v. NLRB*, one United States Court of Appeals reversed the Board's holding that a union's allocation of chargeable and nonchargeable expenses disclosed to nonmembers need not be verified by an independent auditor.[8] In *Penrod v. NLRB*, the same court rejected the Board's positions that objectors need not be given a detailed explanation of how the union allocated its expenses, a full auditor's report, and an explanation of how the union's affiliates used their part of the money, and that only objectors must be given financial disclosure.[9] However, the Board will not necessarily follow *Ferriso* and *Penrod* in other cases, because it is the Board's practice "to ignore precedent from federal appellate courts in favor of its own interpretations" of the law.[10]

Disclosure of a union's calculation of its chargeable expenses, and an independent audit, are necessary, because only "the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated."[11] The problem is that, unless an employee undertakes litigation to challenge the fee, the unions themselves determine what expenses are lawfully chargeable. Obviously, it is in a union's self-interest to maximize the fees it collects, so what we have is the proverbial "fox guarding the hen house."

The independent audit *Hudson* requires provides some check on the union's calculation of its chargeable expenses. Unfortunately, that constraint is not now what it should be, because the lower federal courts have held that the auditor need not verify that the union has *correctly* allocated its expenses as chargeable or not. That cramped view of the auditor's function in this context is consistent with neither accounting practices nor the Supreme Court's *Hudson* decision.

Another major obstacle workers face is the NLRB's failure to enforce *Beck* vigorously, both in processing cases and applying judicial precedent. Since the Supreme Court decided *Beck* in 1988, the NLRB's General Counsel and the Board have failed to process expeditiously unfair labor practice charges of *Beck* violations. The Board delayed for eight years

before it issued its first post-*Beck* decision. Many other *Beck* cases languished before the Board for similar lengthy periods. The then NLRB Chairman admitted that at the end of July 1997 the sixty-five oldest cases then before the Board included *twenty-one Beck* cases.[12] The Board later issued decisions in some of those cases only after the objecting workers petitioned for mandamus from the D.C. Circuit.

Many *Beck* cases do not even reach the Board. The General Counsel has settled many *Beck* charges with no real relief for the employees. The Board's Regional Directors have refused to issue complaints and dismissed many other charges at the General Counsel's direction.

Significantly, in 1994 the General Counsel's Office instructed all Regional Directors to dismiss immediately *Beck* charges they found unworthy, and not to issue complaints on worthy *Beck* charges, but to submit them to the Division of Advice.[13] This memorandum is circumstantial evidence that the General Counsel intended to delay the processing of *Beck* charges or spike as many as possible.

In 1998, the General Counsel set up yet another roadblock. The then Acting General Counsel instructed that *Beck* charges must be dismissed unless the nonmember "explain[s] why a particular expenditure treated as chargeable in a union's disclosure is not chargeable . . . and present[s] evidence or . . . give[s] promising leads that would lead to evidence that would support that assertion."[14] This is impossible at the charge stage, because nonmembers do not have access to the union's financial and other records.

The Board itself has given workers little protection and relief when it finally decides *Beck* cases. As already discussed, the NLRB has permitted unions to give "notices" calculated not to be seen by potential objectors, approved technical requirements that make it more difficult to object, and weakened procedural protections for nonmembers that the Supreme Court found constitutionally required for public employees.

The Board also has refused to follow Supreme Court precedent as to what activities are lawfully chargeable. In *Beck*, the Court concluded "that Section 8(a)(3) [of the NLRA], *like its statutory equivalent, Section 2, Eleventh of the RLA*, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'" quoting *Ellis v. Railway Clerks*.[15] Moreover, *Beck* ruled that decisions in this area of the law under the RLA are *"controlling"* under the NLRA.[16] In *Ellis*, the Supreme Court held that union organizing is not lawfully chargeable under the RLA.[17] Despite the Court's clear mandates, the Board has held that organizing is chargeable to objecting nonmembers under the NLRA.[18]

Workers under the NLRA who wish to vindicate their right not to subsidize union politics can avoid the Board by suing their bargaining agent in federal court for breach of the duty of fair representation. Workers under the RLA *must* bring such an action, because no agency has jurisdiction over claims by railroad and airline employees against their exclusive representative. That brings us back to Justice Black's prediction that the refund and reduction remedy adopted in *Machinists v. Street* is inherently inadequate.

If employees manage to learn their rights, withstand the subtle and not so subtle pressures on dissenters, leap the many procedural hurdles, and challenge their union's calculation of the amount charged them, they encounter the problems Justice Black recognized in *Street*. They must hire lawyers, accountants, and statisticians to rebut the union's claims (or be lucky enough to have the National Right to Work Legal Defense Foundation's help). Then, the workers must spend years fighting procedural motions by the union and engaging in discovery, reviewing its books and records, and endure protracted trials and appeals. These cases typically take a decade or more to litigate.

In sum, the experiences of the workers who have testified today are not isolated examples of abuse of the law, but part of a systemic problem. The National Labor Relations and Railway Labor Acts, as written by Congress and interpreted by the courts and the National Labor Relations Board, do not adequately protect the constitutional and statutory right of workers to not subsidize union political, ideological, and other nonbargaining activities. The only federal labor laws that do adequately protect that fundamental right are the Federal Labor Relations Act and the statute that covers postal employees, both of which prohibit agreements that require workers to join or pay union dues to keep their jobs.[19]

This article is an edited excerpt of Raymond J. LaJeunesse, Jr.'s Thursday, May 10, 2001 testimony before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections. Mr. LaJeunesse is Vice President and Legal Director with the National Right to Work Legal Defense Foundation, Inc., where he has represented thousands of employees in cases like Beck, including three cases which he argued before the U.S. Supreme Court. For a more comprehensive discussion of this subject, Mr. LaJeunesse's written statement submitted to the Committee can be found on the Committee's website.

Footnotes

[1] 487 U.S. 735 (1988).
[2] 367 US. 740, 795-96 (1961).
[3] 525 U.S. 33, 47 (1998).
[4] *Group Health, Inc.*, 325 N.L.R.B. 342, 346 (1998) (Gould, Chairman, concurring), *petition for review denied sub nom. Bloom v. NLRB*, 209 F.3d 1060 (8th Cir. 2000).
[5] 525 U.S. at 53 (Kennedy, J., concurring) (quoting *Bloom v. NLRB*, 153 F.3d 844, 850-51 (8th Cir. 1998), *vacated*, 525 U.S. 1133 (1999)).
[6] 475 U.S. 292, 306 (1986) (emphasis added).
[7] *Id.* at 307 n.18 (emphasis added).
[8] *Ferriso v. NLRB*, 125 F.3d 865, 869-73 (D.C. Cir. 1997).
[9] *Penrod v. NLRB*, 203 F.3d 41, 45-48 (D.C. Cir. 2000).
[10] *Mary Thompson Hosp. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980).
[11] *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).
[12] Letter from Chairman Gould to Rep. Tom Lantos of 10/15/97, at 3.
[13] NLRB Mem. OM 94-50 (June 13, 1994).
[14] NLRB Memorandum GC 98-11, at 5 (Aug. 17, 1998).
[15] 487 U.S. at 762-63 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)) (emphasis added).
[16] *Id.* at 745 (emphasis added).
[17] 466 U.S. at 451-53.
[18] The Board's decision was reversed by a three-judge panel of the United States Court of Appeals for the Ninth Circuit on May 17, 2001. *Food & Commercial Workers Local 1036 v. NLRB*, 249 F.3d 1115 (9th Cir. 2001). However, the court granted rehearing *en banc* on September 14, 2001, id., 265 F.3d 1079 (9th Cir. 2001), and the case was reargued before an eleven-judge panel on December 11, 2001.
[19] *See* 5 U.S.C. Section 7102 (guaranteeing federal employees the right to refrain from "form[ing], join[ing], or assist[ing] any labor organization"); 39 U.S.C. Section 1206(c) (same for postal employees).