

**No. 14-1185**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**LAURA SANDS**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**PETITION FOR HEARING *EN BANC* OF  
THE NATIONAL LABOR RELATIONS BOARD**

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### RULE 35(b)(1) STATEMENT

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and this Court, the National Labor Relations Board respectfully petitions for hearing en banc in the instant case so that the Court may reconsider its decisions in *Abrams v. Communications Workers of America* (Circuit Judges Silberman and Henderson; Judge Tatel dissenting),<sup>1</sup> and *Penrod v. NLRB* (Circuit Judges Williams and Randolph; Judge Tatel concurring)<sup>2</sup> with respect to the scope of the initial notice of rights that unions must provide to employees who are obliged under a collective bargaining agreement to pay union dues as a condition of employment. In both *Abrams* and *Penrod*, the Court relied on an interpretation of *Chicago Teachers Union, Local No. 1 v. Hudson*,<sup>3</sup> to hold that unions providing initial notice to employees of their right to refrain from becoming full union members and to object to paying for more than the cost of representation must also be told the specific amount of reduced fees and dues they would pay if they objected to paying for nonrepresentational expenses.

Reconsideration of *Abrams* and *Penrod* is warranted because of the exceptional importance and recurring nature of this issue, which extends beyond the private litigants in this case, and because both panel majorities erred in finding

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<sup>1</sup> 59 F.3d 1373 (D.C. Cir. 1995).

<sup>2</sup> 203 F.3d 41 (D.C. Cir. 2000).

<sup>3</sup> 475 U.S. 292 (1986).

*Hudson* controlling. As Judge Tatel explained, *Hudson* neither addressed nor decided the information that must be provided in an initial notice to employees who have yet to express any opposition to the payment of the full amount of union dues; the panels in *Abrams* and *Penrod* thus wrongly held that *Hudson* was dispositive of that issue.<sup>4</sup> The Supreme Court has instructed lower courts not to treat its decisions as authoritative on issues of law that the Court did not decide, and a panel majority's departure from this fundamental principle is a matter for rehearing en banc.<sup>5</sup>

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<sup>4</sup> *Abrams*, 59 F.3d at 1383-84 (Tatel, J., dissenting); *Penrod*, 203 F.3d at 50 (Tatel, J., concurring).

<sup>5</sup> See *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 774 (9th Cir. 2002) (en banc) (citing *Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001)).

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LAURA SANDS,	)	
	)	
Petitioner	)	No. 14-1185
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	Board Case No.
Respondent.	)	25-CB-08896
	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties and Amici***: Laura Sands (“Sands”) has filed with the Court a petition for review and was also the charging party before the Board. United Food & Commercial Workers International Union, Local 700 (“the Union), was the respondent before the Board.

B. ***Ruling Under Review***: This case involves Sands’ petition for review of the Decision and Order of the Board, issued on September 10, 2014, and published at 361 NLRB No. 39, dismissing the complaint against the Union.

C. ***Related Cases***: The Board’s ruling under review has not previously been before this Court or any other Court. As explained in the following Petition for

Hearing *En Banc*, the Court has ruled on related legal issues in *Abrams v.*

*Communications Workers of America*<sup>1</sup> and *Penrod v. NLRB*.<sup>2</sup>

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1099 14th Street, N.W.

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Dated at Washington, D.C.  
this 17<sup>th</sup> day of April 2015

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<sup>1</sup> 59 F.3d 1373 (D.C. Cir. 1995).

<sup>2</sup> 203 F.3d 41 (D.C. Cir. 2000).

## GLOSSARY

1. Act .....The National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
  
2. Board .....The National Labor Relations Board

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## STATEMENT OF THE CASE

The National Labor Relations Board (“the Board”) respectfully requests that the Court hear the above-captioned case *en banc*. In the decision on review, the Board revisited and reaffirmed its rule that a union does not violate its duty of fair representation if, in its initial notice to employees of their rights under a union security clause, the union does not advise employees of the specific amount of reduced fees and dues that would result if they exercised their right not to join the union and to object to paying for nonrepresentational expenses.<sup>1</sup> The Board acknowledges that its decision conflicts with the Court’s decisions in *Abrams v. Communications Workers of America*<sup>2</sup> and *Penrod v. NLRB*<sup>3</sup> and that application of those decisions as they stand would require granting the instant petition for review.

In *Abrams* and *Penrod*, this Court held that the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*<sup>4</sup> had already decided that unions must provide specific reduced payment information to employees in its initial notice. *Hudson*, however, neither addressed nor decided the rights of employees who are

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<sup>1</sup> *United Food & Commercial Workers Int’l, Local 700*, 361 NLRB No. 39 (Sept. 10, 2014), slip op. 1 & n.2.

<sup>2</sup> 59 F.3d 1373 (D.C. Cir. 1995).

<sup>3</sup> 203 F.3d 41 (D.C. Cir. 2000).

<sup>4</sup> 475 U.S. 292 (1986).

receiving their initial union-security-clause notice. By improperly treating *Hudson* as dispositive, the Court has displaced the Board’s authority to determine labor policy in an area that *Thomas v. NLRB*<sup>5</sup> recognized as one where the Board’s views are entitled to deference. The Board therefore petitions the Court to hear the above-captioned case *en banc*, so that it may reconsider *Abrams* and *Penrod*, correct their misapplication of Supreme Court precedent and restore to the Board its authority to craft a rule that balances the competing interests at stake.

### **1. Legal Background—Union Security Clauses**

The National Labor Relations Act imposes a duty of fair representation on a union chosen as the exclusive bargaining representative for a unit of employees. Under this duty, the union must fairly represent every employee in the bargaining unit, whether the employee belongs to the union or not.<sup>6</sup>

To better enable unions to obtain funds for carrying out their duties to represented employees, Congress specifically reserved to them the right to negotiate “union-security agreements” that require represented employees to pay union dues or an “agency fee,” the financial equivalent of union dues.<sup>7</sup> Congress

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<sup>5</sup> 213 F.3d 651, 656-57 (D.C. Cir. 2000).

<sup>6</sup> See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944).

<sup>7</sup> See 29 U.S.C. § 158(a)(3) (“[N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the

was concerned “that without such [union-security] agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts.”<sup>8</sup>

As the Supreme Court made clear in *Communications Workers of America v. Beck*,<sup>9</sup> however, the Act only permits a union to collect fees over employees’ objections for the purpose of funding the union’s collective-bargaining activities, including contract negotiation, contract administration, and grievance adjustment.<sup>10</sup> Accordingly, a union violates its duty of fair representation when, over an employee’s objection, it collects and uses a portion of fees charged nonmembers for purposes other than collective bargaining, such as political or ideological activities.<sup>11</sup>

## 2. This Court’s Decisions in *Abrams* and *Penrod*

In *Abrams*, this Court considered the adequacy of a union’s initial notice to employees of their rights and obligations under a union-security clause. The employees in that case brought an action against a union alleging that it had

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effective date of such agreement.”). *See also NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (“It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues.”) (interpreting 29 U.S.C. § 158(a)(3)).

<sup>8</sup> *Communication Workers of America v. Beck*, 487 U.S. 735, 748 (1988).

<sup>9</sup> 487 U.S. 735 (1988).

<sup>10</sup> *Id.* at 753-54.

breached its duty of fair representation by providing inadequate notice of their right to object to a mandatory agency fee. In evaluating the adequacy of the notice the union had provided to the employees, the *Abrams* Court understood the holding in *Chicago Teachers Union, Local No. 1 v. Hudson* to be controlling. In *Hudson*, the Supreme Court had addressed the right of public school teachers who had already elected not to join the union or to pay dues to receive information enabling them to intelligently decide whether to challenge the union's calculation of the reduced fee that they owe. In that context, the *Hudson* Court stated that "basic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."<sup>12</sup>

Citing that statement, the *Abrams* Court concluded that because the employees before it each possessed the "right to object to payment of any expenses beyond the financial core," they, too, were "potential objectors."<sup>13</sup> On that basis alone, *Abrams* ruled that the Supreme Court's holding in *Hudson* applied to the employees before it. This Court stated that "[a]lthough the Supreme Court addressed the issue in the context of 'information about the basis for the proportionate share' of financial core expenses, the same 'basic considerations of

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<sup>11</sup> *Id.* at 743-44, 762-63.

<sup>12</sup> 475 U.S. at 306.

<sup>13</sup> *Abrams*, 59 F.3d at 1379 & n.6 (emphasis in original).

fairness’ necessarily extend to a union’s notice to workers of their *right* to object to payment of any expenses beyond the financial core.”<sup>14</sup>

Dissenting, Judge Tatel concluded that *Hudson* does not support the majority’s conclusion. He explained that *Hudson* answered the question “only with respect to nonunion employees *who have already qualified for a reduced agency fee*, addressing the amount of information they need to determine whether to object further to the union’s specific apportionment of chargeable and nonchargeable activities.”<sup>15</sup> In *Abrams*, he observed, “unlike in *Hudson*, the issue is the amount of information necessary for nonunion employees to determine in the first instance whether to object to paying the union’s full agency fee.”<sup>16</sup> By applying *Hudson* to an issue that case did not consider, Judge Tatel concluded, the *Abrams* Court demanded “far more of the union” than *Beck* required.<sup>17</sup>

After *Abrams* was decided, the Board issued its decision in *California Saw & Knife Works*,<sup>18</sup> in which it comprehensively addressed numerous post-*Beck* issues, including the extent and timing of information unions must provide to employees consistent with their obligations under *Beck*. At stage 1, prior to

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<sup>14</sup> *Id.* at 1379 & n.6 (emphasis in original) (citation omitted).

<sup>15</sup> *Id.* at 1383 (Tatel, J., dissenting) (emphasis in original).

<sup>16</sup> *Id.* (Tatel, J., dissenting).

<sup>17</sup> *Id.* at 1384 (Tatel, J., dissenting).

<sup>18</sup> 320 NLRB 224 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

collecting any money from employees under the union-security clause, the union must give the employees an “initial *Beck* notice.”<sup>19</sup> As part of that notice, the union must inform the employees of their rights under *Beck*, including the right to remain a nonmember of the union, to object to paying for union activities not germane to the union’s duties as bargaining agent (and to receive a corresponding reduction in monies owed), and to be apprised of the procedure for filing such objections.<sup>20</sup> At stage 2, if an employee chooses to remain a nonmember and file an objection, the union must inform the “*Beck* objector” of the specific amount by which her dues will be reduced, the basis for the calculation of that reduction, and the right to challenge that calculation.<sup>21</sup> At stage 3, if an objector exercises her right to challenge the union’s calculation, the “challenger” is entitled to information that will “establish finally and definitively, with facts and figures, that [the union’s] expenditures are chargeable to the degree asserted.”<sup>22</sup>

In *Penrod*, this Court applied *Abrams* in reversing a portion of the *California Saw* framework. In *Penrod*, the Board had reaffirmed its ruling in

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<sup>19</sup> See, e.g., *Teamsters Local 738 (E.J. Brach Corp.)*, 324 NLRB 1193, 1193-94 (1997).

<sup>20</sup> See *California Saw*, 320 NLRB at 231, 233.

<sup>21</sup> See *KGW Radio*, 327 NLRB 474, 476 (1999) (citing *California Saw*, 320 NLRB at 233, 239). See also *Teamsters Local Union No. 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166, 1167 n.6 (2007) (defining “objectors” and “challengers”).

*California Saw* that a union does not violate its duty of fair representation by failing to include specific reduced fee information in its initial notice to employees concerning their *Beck* rights.<sup>23</sup> The *Penrod* Court granted the petition for review, holding that the case before it was “squarely controlled by *Hudson* as interpreted by this court in *Abrams*.”<sup>24</sup> The decision explained that, “[s]ince *Hudson* requires that potential objectors be told the percentage of union dues chargeable to them—for how else could they ‘gauge the propriety of the union’s fee’—and since *Abrams* applies *Hudson* to new employees and financial core payors, they too must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors.”<sup>25</sup>

Concurring, Judge Tatel again expressed as he had in *Abrams* that “nothing in *Hudson* . . . required its application to” employees who have yet to object to paying the full amount of union dues.<sup>26</sup> He further observed that “*Abrams*’ extension of *Hudson* to new employees and financial core payors has foreclosed [the Court] from considering the Board’s rationale at all, requiring that we ignore

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<sup>22</sup> *Dameron Hosp. Ass’n*, 331 NLRB 48, 51 n.10 (2000). See also *Connecticut Limousine Serv., Inc.*, 324 NLRB 633, 634-35 (1997); *California Saw*, 320 NLRB at 242-43.

<sup>23</sup> *Dyncorp Support Servs.*, 327 NLRB 950, 952 (1999), reviewed *sub nom.* *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

<sup>24</sup> *Penrod*, 203 F.3d at 47.

<sup>25</sup> *Id.* (quoting *Hudson*, 475 U.S. at 306).

<sup>26</sup> *Penrod*, 203 F.3d at 49 (Tatel, J., concurring).

not just our traditional deference to the Board, but also the ‘wide range of reasonableness’ afforded unions in satisfying their duty of fair representation.”<sup>27</sup>

Judge Tatel expressed that it was “hard to think of a task more suitable for an administrative agency that specializes in labor relations . . . than crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees.”<sup>28</sup> In short, Judge Tatel viewed the consequence of *Abrams* as the “judicial usurpation of the Board’s traditional authority to determine national labor policy.”<sup>29</sup>

## ARGUMENT

### A. The Court’s Decisions in *Abrams* and *Penrod* Misapply Supreme Court Precedent

*Abrams* and *Penrod* misapplied *Hudson*. For substantially the same reasons as given by Judge Tatel in his respective dissenting and concurring opinions in those cases,<sup>30</sup> the Board believes that the Court should hear the above-captioned case *en banc* to reconsider *Abrams* and *Penrod* and correct their missapplication of *Hudson*, which otherwise is dispositive in this case.

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<sup>27</sup> *Id.* at 50 (Tatel, J., concurring) (quoting *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45 (1998)).

<sup>28</sup> *Id.* (Tatel, J., concurring) (quoting *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)).

<sup>29</sup> *Id.* at 49 (Tatel, J., concurring).

<sup>30</sup> *Penrod*, 203 F.3d at 49-50 (Tatel, J., concurring); *Abrams*, 59 F.3d at 1382-84 (Tatel, J., dissenting).

This Court’s decision in *Abrams* hinged upon the interpretation of the sentence in *Hudson* stating that “basic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.”<sup>31</sup> Misinterpreting the phrase “potential objectors,” the *Abrams* Court applied the holding in *Hudson* to a category of employees whose rights had not been at issue in that case. *Abrams* incorrectly equated the “potential objectors” before it—who were considering whether to object to paying the full amount of union dues—with the “potential objectors” before the *Hudson* Court—who were considering whether to exercise their further right to challenge the union’s calculation of the reduced fee they were compelled to pay. Ignoring the critical distinction between the two categories of employees, the Court concluded that both were entitled to “sufficient information to gauge the propriety of the union’s fee.” In doing so, *Abrams* “applied *Hudson* to an issue that *Hudson* did not consider,” as Judge Tatel pointed out in his dissent.<sup>32</sup> This error in *Abrams* directly led to the Court’s erroneous decision in *Penrod*, in which it considered itself to be foreclosed from even considering the reasonableness of the rule set out and explained by the Board in its then-recent *California Saw* decision.

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<sup>31</sup> 475 U.S. at 306.

<sup>32</sup> 59 F.3d at 1384 (Tatel, J., dissenting).

This Court's overreading of *Hudson*'s language fails to take into account the factual posture of that case. There, as noted, the Supreme Court was considering the adequacy of procedures established by a public teachers' union that sought for the first time to collect an agency fee from nonmember employees it already represented. After years of representing but not collecting any money from those nonmembers, the union negotiated an agreement with the Board of Education that permitted it to collect an agency fee from nonmembers equal to the cost of representing them in collective-bargaining; no monies used for non-collective-bargaining activities were to be included. The union determined that 95% of its expenditures were chargeable; accordingly, it determined that the agency or "fair share" fee would equal 95% of full union dues.<sup>33</sup> As part of its agency-fee collection process, the union provided each nonmember with the opportunity to file an "objection" challenging the union's calculation of the agency fee.<sup>34</sup>

Before the union ever explained to the affected employees the basis for its calculation of the agency fee, the Board of Education began to deduct the fee from nonmembers' paychecks. Four nonmembers wrote letters to the union, stating that they believed the union was using their paycheck deductions for purposes unrelated to collective bargaining and demanding that the deductions be reduced to

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<sup>33</sup> See *Hudson*, 475 U.S. at 295; *Hudson v. Chicago Teachers Union, Local No. 1*, 573 F. Supp. 1505, 1509 (N.D. Ill. 1983).

the appropriate pro rata amount. The union sent a response that sought to justify the figure but still provided no information supporting its calculation of the reduced fee. At that point, the four nonmembers, joined by an additional three nonmembers, sued the union under the First and Fourteenth Amendments.<sup>35</sup>

The Supreme Court found several faults with the union's agency-fee collection process, including the adequacy of the information provided by the union to the plaintiffs.<sup>36</sup> Specifically, the Supreme Court held that the union acted unlawfully when it deducted its agency fee from the plaintiffs' paychecks prior to providing them with information that would enable them to evaluate whether the agency fee had been properly calculated.<sup>37</sup> The Court stated, "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."<sup>38</sup>

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<sup>34</sup> *Hudson*, 475 U.S. at 296; *Hudson*, 573 F. Supp. at 1508-09.

<sup>35</sup> *Hudson*, 475 U.S. at 296-97. As the Supreme Court noted, Illinois State law did not permit the union to collect the full amount of union dues from any nonmember. *See Hudson*, 475 U.S. at 294-95 & n.1 (quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983)). Thus, by choosing nonmember status, all seven plaintiffs had acted to prevent the union from collecting the full amount of union dues from them, and the union never sought to do so.

<sup>36</sup> *Id.* at 304-09.

<sup>37</sup> *Id.* at 306-07.

<sup>38</sup> *Hudson*, 475 U.S. at 306.

As the facts in *Hudson* demonstrate, the *Hudson* plaintiffs were not exercising the same objection rights as the plaintiffs in *Abrams*, and the *Abrams* Court was wrong to equate the two. Whereas the employees in *Abrams* had yet to exercise their choice with respect to paying full union dues, the plaintiff-employees in *Hudson* were already effectively objecting nonmembers: by choosing to refrain from joining the union, these nonmembers had relieved themselves of any obligation to pay the union for its non-representational activities. Thus, when the union sought to collect money from these nonmember plaintiffs, it was doing so over their existing objection to payment of the full amount of union dues. Consistent with that contemporaneous understanding, the union only attempted to collect what it believed to be these nonmembers' "fair share," and not the full amount of union dues.

The *Abrams* Court nevertheless treated *Hudson* as controlling with respect to the *Abrams* plaintiffs, because in its view both categories of employees were "potential objectors," the shorthand phrase used by the Court in *Hudson*. As a result, the *Abrams* Court improperly conflated two distinct employee rights that implicate distinct informational concerns.

**B. The Court's Error Significantly Interferes with the Board's Role in Administering the Act and Therefore Warrants *En Banc* Correction**

Although the Supreme Court has made clear that lower courts are not to treat its decisions as authoritative on issues of law that the Supreme Court did not decide,<sup>39</sup> that is precisely what this Court has done by treating *Hudson* as dispositive of *Abrams* and, by extension, *Penrod*. The Act says nothing about when reduced fee information must be provided to nonmembers who object to paying for nonrepresentational services. Thus, but for *Abrams* and *Penrod*, the Board's decision in this case would be subject to *Chevron* review.<sup>40</sup> As Judge Tatel put it, those decisions therefore amount to a "judicial usurpation of the Board's traditional authority to determine national labor policy."<sup>41</sup>

Moreover, the instant issue is one the Board has found to have significant consequences for private-sector labor relations. The Board's decision addresses an aspect of the union's duty of fair representation in the context of negotiated agency fees. In finding that the union here did not breach that duty, the Board determined that the rule pronounced in *Abrams* and *Penrod* imposes costly and unnecessary obligations on smaller unions, and that those potentially significant costs outweigh

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<sup>39</sup> See *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 774 (9th Cir. 2002) (en banc) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001)).

<sup>40</sup> See *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

<sup>41</sup> See *Penrod*, 203 F.3d at 49 (Tatel, J., concurring).

the marginal benefit to employees from the rule.<sup>42</sup> Absent a clear command from Congress or the Supreme Court, that determination is for the Board in the first instance. This Court's erroneous conclusion that *Hudson* contains such a command raises a significant impediment to the administration of the Act and accordingly warrants *en banc* reversal.

### CONCLUSION

The Board respectfully requests that the Court hear this case *en banc* and enter a judgment denying the petition for review.

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<sup>42</sup> *United Food & Commercial Workers Int'l, Local 700*, 361 NLRB No. 39 (Sept. 10, 2014), slip op. 7-9.

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**Abrams v. Communications Workers of America, 59 F.3d 1373 (1995)**

149 L.R.R.M. (BNA) 2928, 313 U.S.App.D.C. 385, 130 Lab.Cas. P 11,389...

59 F.3d 1373  
United States Court of Appeals,  
District of Columbia Circuit.

Kenneth ABRAMS, et al., Appellants  
Cross-Appellees

v.

COMMUNICATIONS WORKERS OF AMERICA,  
An unincorporated Labor Organization, Appellee  
Cross-Appellant.

Nos. 93-7171, 93-7172. | Argued Nov. 21, 1994. |  
Decided July 21, 1995.

Nonmember employees brought action against union alleging breach of duty of fair representation in connection with mandatory agency fees. The United States District Court for the District of Columbia, [Lamberth, J.](#), granted in part and denied in part employees' motion for summary judgment, [818 F.Supp. 393](#), and subsequently denied union's motion for reconsideration, [830 F.Supp. 17](#), and clarified order. Employees appealed and union cross-appealed. The Court of Appeals, [Karen LeCraft Henderson](#), Circuit Judge, held that: (1) nonmembers were entitled to certification of class and subclass; (2) union's notice to nonmembers of right to object to payment of full dues was inadequate; (3) union's method of accounting for chargeable expenses furnished reliable basis for determining mandatory agency fees; (4) providing limited period to make objection to fees and requiring annual renewal of objection did not breach duty of fair representation; and (5) requiring objecting nonmembers to exhaust union-provided arbitration violated duty.

Affirmed in part, reversed in part, and remanded.

[Tatel](#), Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (16)

<sup>[1]</sup> **Labor and Employment**  
🔑Duty to Act Impartially and Without  
Discrimination; Fair Representation

Union's status as exclusive bargaining representative includes statutory obligation to

serve 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; those obligations are referred to as "duty of fair representation."

[2 Cases that cite this headnote](#)

<sup>[2]</sup> **Labor and Employment**  
🔑Duty to Act Impartially and Without  
Discrimination; Fair Representation

Claim that union has breached its duty of fair representation ordinarily is evaluated to determine whether union's conduct toward member of collective bargaining unit is arbitrary, discriminatory, or in bad faith.

[3 Cases that cite this headnote](#)

<sup>[3]</sup> **Labor and Employment**  
🔑Non-Members; Fair Share

Union's fair representation duty in context of mandatory agency fees hinges on its compliance with NLRA provision making it an unfair labor practice to discriminate against employees based on nonmembership in union. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, [29 U.S.C.A. § 158\(a\)\(3\), \(b\)\(2\)](#).

[Cases that cite this headnote](#)

<sup>[4]</sup> **Labor and Employment**  
🔑Non-Members; Fair Share  
**Labor and Employment**  
🔑Fair representation

Federal courts had jurisdiction to evaluate nonmember employees' breach of duty of fair representation claim against union in connection with mandatory agency fees, even though

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National Labor Relations Board (NLRB) had primary jurisdiction. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[Cases that cite this headnote](#)

<sup>[5]</sup>

#### **Federal Civil Procedure**

🔑 [Employees](#)

Nonmember employees were entitled to certification, in their breach of duty of fair representation action against union in connection with mandatory agency fees, of class consisting of all nonmembers required to pay fees as condition of employment, even though some members of class were potential, rather than actual, objectors to fees; all nonmembers shared common interest in challenging adequacy of union's notice alerting them to right to object to full payment of union dues, and if notice were inadequate, all nonmembers would be entitled to injunctive and declaratory relief. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[8 Cases that cite this headnote](#)

<sup>[6]</sup>

#### **Federal Civil Procedure**

🔑 [Employees](#)

Nonmember employees were entitled to certification, in their breach of duty of fair representation action against union in connection with mandatory agency fees, of subclass, out of class of all nonmembers required to pay fees as condition of employment certified for purposes of challenging union's notice of objection rights, of those nonmembers who actually objected, for that portion of action challenging union's objection procedure. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5 Cases that cite this headnote](#)

<sup>[7]</sup>

#### **Labor and Employment**

🔑 [Dues and fees](#)

The union security clause contained in collective bargaining agreement was facially valid, notwithstanding contention that clause required nonmember employees to make payments equal to periodic dues applicable to members even though nonmembers were obligated to pay only those expenses included in financial core of membership. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[1 Cases that cite this headnote](#)

<sup>[8]</sup>

#### **Labor and Employment**

🔑 [Notice and disclosure](#)

Union's notice to nonmember employees of their right to object to full payment of union dues, which defined financial core expenses as expenditures for those activities or projects normally or reasonably undertaken to represent employees with respect to terms and conditions of employment, was inadequate as it defined financial core expenses too broadly; participating in social, charitable, and political events could fall within that definition, yet were not included in financial core, and fact that notice listed legislative activity and support of political candidates as nonchargeable expenses did not cure notice's imprecision. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[1 Cases that cite this headnote](#)

<sup>[9]</sup>

#### **Labor and Employment**

🔑 [Notice and disclosure](#)

Union's notice to nonmember employees of their right to object to full payment of union

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dues inadequately explained legal nature of right to object; notice described right to object as arising under union policy, and characterizing right as matter of “policy” could have led employees to conclude that objecting would be futile because decision to grant reduction rested entirely with union. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[1 Cases that cite this headnote](#)

[10]

**Federal Courts**

⚡ Need for further evidence, findings, or conclusions

Remand of nonmember employees’ breach of duty of fair representation action against union in connection with mandatory agency fees was warranted for further findings on issue whether notice to new employees of nonmembers’ right to object to full payment of union dues, which stated that new employees could object within 30 days of receiving notice, “retroactive to the commencement of their union security obligation,” was timely and adequate; although notice could be read as stating that new employee was charged full agency fee from time of hire until receipt of notice and could obtain rebate only if he objected and that reading rendered notice inadequate, union asserted that new employees received some further notice at time of hire. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[1 Cases that cite this headnote](#)

[11]

**Labor and Employment**

⚡ Judicial review or intervention

Union must demonstrate by preponderance of evidence that its expenses are chargeable to nonmember employees. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[Cases that cite this headnote](#)

[12]

**Labor and Employment**

⚡ Notice and disclosure

Union’s method of accounting for chargeable expenses furnished reliable basis for determining mandatory agency fees for nonmember workers; for one week of every thirteen weeks, union employees recorded their activities on time sheets according to categories, outside firm determined from time sheets how much time was spent on chargeable and nonchargeable activities, firm telephoned employees at random to verify information provided, verification discovered very few reporting errors, independent certified public accountants annually audited allocations resulting from firm’s work and issued “unqualified” opinion letters, and there was no evidence that union packed disproportionate amounts of chargeable time into monitored weeks. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

[1 Cases that cite this headnote](#)

[13]

**Labor and Employment**

⚡ Amount

**Labor and Employment**

⚡ Representation of non-members

**Labor and Employment**

⚡ Grievances in general

Union’s procedure for nonmember employees’ objections to mandatory agency fees did not violate duty of fair representation by requiring nonmembers to object within limited “window period” each year; union, as well as employees, had interest in prompt resolution of objections, and window left no doubt as to timing of requirement for making objection. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

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[2 Cases that cite this headnote](#)

union's constitution, not collective bargaining agreement. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

**<sup>[14]</sup> Labor and Employment**

Amount

**Labor and Employment**

Representation of non-members

[2 Cases that cite this headnote](#)

Union's procedure for nonmember employees' objections to mandatory agency fees did not violate duty of fair representation by requiring nonmembers to renew objections annually; renewal requirement was permissible given that nonmember dissent is not to be presumed. National Labor Relations Act, § 8(a)(3), (b)(2), as amended, 29 U.S.C.A. § 158(a)(3), (b)(2).

**\*1375 \*\*387** Appeals from the United States District Court for the District of Columbia (87cv02816).

**Attorneys and Law Firms**

[Hugh L. Reilly](#), Springfield, VA, argued the cause for the appellants/cross-appellees. On brief was [Raymond J. LaJeunesse, Jr.](#), Springfield, VA.

[3 Cases that cite this headnote](#)

[James B. Coppess](#), Washington, DC, argued the cause for the appellee/cross-appellant. On brief was [Laurence S. Gold](#), Washington, DC.

Before: [SILBERMAN](#), [HENDERSON](#) and [TATEL](#), Circuit Judges.

**<sup>[15]</sup> Labor and Employment**

Amount

Union was not required to provide six-month "window period" for nonmember employees to object to mandatory agency fees; member's objection to making payment to union above financial core expenses is not claim for breach of duty of fair representation and, thus, six-month period for such claims does not apply. National Labor Relations Act, §§ 8(a)(3), (b)(2), 10(b), as amended, 29 U.S.C.A. §§ 158(a)(3), (b)(2), 160(b).

**Opinion**

Separate opinion concurring in part and dissenting in part filed by Circuit Judge [TATEL](#).

[KAREN LeCRAFT HENDERSON](#), Circuit Judge:

[2 Cases that cite this headnote](#)

The appellants are four telephone company employees (employees) represented by the Communications Workers of America (CWA or Union) in collective bargaining with their respective employers. They are not members of the Union and have objected to paying CWA a mandatory agency fee above the amount necessary to compensate it for the costs of representing them. The employees allege that the Union has breached its duty of fair representation by providing inadequate notice to workers of their right to object and by using improper procedures to calculate the portion of its expenses attributable to collective bargaining and to processing objections. They appeal the district court's grant of summary judgment against **\*1376 \*\*388** them on all but one issue as well as the denial of their two motions for class certification.<sup>1</sup> We affirm in part and reverse in part.

**<sup>[16]</sup> Labor and Employment**

Amount

Union's procedure requiring nonmember employees who objected to mandatory agency fee, challenging allocation of chargeable and nonchargeable expenses, to exhaust union-provided arbitration violated duty of fair representation by limiting choice of forum for challenge; arbitration was provided for only in

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days of receiving the payment. Under CWA policy the objection is then referred to arbitration. JA 74.

## I. BACKGROUND

As the district court recognized, “[t]he facts of this case are long and complicated. They are, however, not in dispute.” *Abrams v. Communications Workers of Am.*, 818 F.Supp. 393, 395 (D.D.C.1993). In summary, the Union is the appellants’ exclusive representative under the National Labor Relations Act (NLRA). 29 U.S.C. § 159(a). The NLRA authorizes the Union to require as part of its collective bargaining agreement with employers that all nonmember employees represented by it “shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members.” 29 U.S.C. § 158(a)(3); see Joint Appendix (JA) 172. To opt out of subsidizing union expenses unrelated to worker representation, a nonmember employee must affirmatively object each year to paying an amount equivalent to the dues paid by member employees.

CWA informs nonmembers of their right to object by a notice distributed yearly to all employees. The notice appears in the Union newsletter, the *CWA News*. JA 74. The notice provides a general description of the Union’s procedure for receiving and handling objections and the classes of expenses it considers both “chargeable” (related to collective bargaining and other employee representation activities) and “nonchargeable” (related to other union activities). *Id.* The Union distributes the notice in March and objectors may file at any time through mid-June. CWA’s fee year begins in July. The Union accepts late objections only from new employees or those with a “reasonable excuse.” 818 F.Supp. at 397. At the beginning of the fee year an objector receives from the Union an “advance reduction” payment equal to the amount attributable to nonchargeable expenditures that will be deducted from his paychecks during the coming year. Along with the payment the Union provides a detailed accounting of its expenses and a description of the expenses it considers chargeable and nonchargeable. The description is more detailed than the one included in the Union’s general notice. JA 75–91.

The amount of advance reduction payment is calculated by an outside accounting firm. The firm bases its calculation on the portion of time Union employees spent on activities not related to collective bargaining during the preceding year. It obtains the data underlying its calculation from timesheets distributed to the Union staff once every thirteen weeks. Any employee who challenges the amount of the advance reduction must do so within 30

In October 1987 the employees brought suit against CWA in district court. JA 38. Their complaint alleged that the Union’s objection procedures violated its duty of fair representation arising under the NLRA. The district court initially denied the employees’ request for class certification of

nonmembers of the CWA employed by employers in interstate commerce who are subject to collective bargaining arrangements made under color of NLRA § 8(a)(3) ... and § 9(a) ... which require them to pay fees to CWA as a condition of employment.

JA 9 (D.D.C.1989). It subsequently denied the employees’ motion to certify two subclasses, one comprised of objectors, the other of “free-riders,” whom the district court described more simply as one of “potential objectors.” JA 13 (D.D.C.1991).

The employees’ claims fall into three categories. First, they challenge the Union’s notice of its objection procedures, asserting that the notice is premised on an overbroad definition of chargeable expenditures and does not adequately notify the employees of their rights. Second, they argue that the Union’s accounting methods are unreliable and inaccurate. Third, they challenge the CWA’s system for receiving objections and \*1377 \*\*389 processing refunds, maintaining that the Union can neither limit the period for objectors to object, including on an annual basis, nor require arbitration of fee disputes. The district court granted summary judgment to the Union on all claims except CWA’s arbitration policy. 818 F.Supp. at 400–07. The employees appeal the summary judgment as well as the denial of their class certification requests and CWA cross-appeals the district court’s ruling on its arbitration policy.

## II. DISCUSSION

[1] [2] [3] [4] The Union’s status as an exclusive bargaining representative “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.” *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903,

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910, 17 L.Ed.2d 842 (1967). These obligations are referred to as the duty of fair representation. *See id.* A claim that a union has breached its duty of fair representation ordinarily is evaluated to determine whether “a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” *Id.* at 190, 87 S.Ct. at 916. A union’s fair representation duty in the context of a mandatory agency fee hinges on its compliance with section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). *Communications Workers of Am. v. Beck*, 487 U.S. 735, 742–44, 108 S.Ct. 2641, 2647–48, 101 L.Ed.2d 634 (1988).<sup>2</sup>

“Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the ‘membership’ that may be so required has been ‘whittled down to its financial core.’ ” *Id.* at 745, 108 S.Ct. at 2648 (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963) (footnote omitted)).<sup>3</sup> The Supreme Court has defined the types of expenses within the financial core that a union can lawfully require nonmember employees to pay and has outlined procedures necessary to protect the rights of objectors. *See, e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (delineating permissible expenses under section 2, Eleventh of the Railway Labor Act); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (describing adequate procedures to protect objectors). This case requires us to decide whether CWA correctly designated the expenses within the financial core and whether CWA’s objection procedures are authorized under Supreme Court precedent.

**A. Class Certification**

<sup>151</sup> We initially consider whether the district court erred in denying the employees’ \*1378 \*\*390 requests for class certification. The employees sought under Fed.R.Civ.P. 23 to certify a class comprised of “themselves and all other nonmembers of the CWA employed by employers ... who are subject to collective bargaining agreements made under or under color of [the NLRA], which require them to pay fees to CWA as a condition of employment.” JA 40. The district court denied certification, reasoning, first, that no cause of action existed for a “potential” objector because a worker’s dissent cannot be presumed and, second, that the plaintiffs had not shown that their claims for relief are typical of all nonmembers, whether “potential” objectors or “actual” objectors who had expressed their dissent. JA 10. We conclude, however, that all agency shop employees can assert a common

interest for the purpose of class certification in challenging the adequacy of the union’s notice alerting them to their right to object to full payment of union dues.

It is irrelevant to the notice issue whether an agency shop employee *later* becomes an “actual” objector or remains a “potential” objector since the union must provide notice *in advance* of an employee’s decision to object.<sup>4</sup> All members of the class sought to be certified have an interest in requiring the Union to fully inform them of their objection rights so they can decide whether to exercise them. The district court’s concern that the relief sought might not be typical of all class members is answered by the same analysis. If the Union’s notice were found to be inadequate, all workers would be entitled to injunctive and declaratory relief.

Despite the district court’s suggestion to the contrary, *see* JA 10, no court has held that a class consisting of all agency shop employees may not be certified for the purpose we have described. Although an employee’s dissent “is not to be presumed,” *International Ass’n of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1802–03, 6 L.Ed.2d 1141 (1961), this mandate does not control where the class seeks to vindicate its right to notice, directly affecting whether an employee will *become* an “affirmative dissenter.” *Compare id.* (finding class inappropriate in suit for injunctive relief against political expenditures and for restitution because all members of proposed class had not “specifically objected to the exaction of dues for political purposes.”); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963) (same). In misapplying the holdings in *Street* and *Allen*, the district court committed reversible error. *Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1456 (D.C.Cir.1988) (denial of class certification may be reversed “only if it resulted from the application of incorrect legal criteria or if it constituted an abuse of discretion.”)

<sup>161</sup> The district court similarly erred in denying the employees’ subsequent motion to certify a subclass of “true dissenters” who have objected to paying full agency fees. JA 13–14. The district court did little more than restate its earlier reasoning even though the proposed class fully met the concerns expressed by the Supreme Court. In *Street* the Court concluded that the action was “not a true class action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes.” 367 U.S. at 774, 81 S.Ct. at 1802. The employees have made the attempt here and the subclass of actual objectors can, and should, be certified for the portion of the lawsuit

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challenging CWA's objection procedure.<sup>5</sup>

### **B. Notice to Employees and Definition of Chargeable Expenses**

<sup>[7]</sup> The next question is whether the Union provides adequate notice to workers of their right to object and of the nature of the expenses they are required to pay. The employees initially challenge the facial validity of the union-security clause contained in the collective bargaining agreement between \*1379 \*\*391 their employers and CWA inasmuch as it requires workers to make payments "equal to the periodic dues applicable to members" even though workers are obligated to pay only those expenses included in the financial core. In *International Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. NLRB (IUE)*, 41 F.3d 1532, 1538–39 (D.C.Cir.1994), we recently rejected an identical argument regarding a clause which on its face mandated union membership and we need not revisit that question here.

<sup>[8]</sup> <sup>[9]</sup> More troubling is the side notice the Union provides to workers informing them of their right to object. The notice, which restates the Union's objection policy, provides in part:

*Under the Communications Workers of America policy on agency fee objections, employees who are not members of the Union, but who pay agency fees, may request a reduction in that fee based on their objection to certain kinds of Union expenditures....*

The policy provides an objection period each year during May, followed by a reduction in the objector's fee for the twelve months beginning with July and running through June the following year.

Briefly stated, CWA's objection policy works as follows:

1. The agency fee payable by objectors will be based on the Union's expenditures *for those activities or projects normally or reasonably undertaken by the Union to represent the employees in its bargaining units with respect to their terms and conditions of employment.*

JA 74 (emphasis added). In *Hudson* the Supreme Court held that "[b]asic considerations of fairness ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."<sup>6</sup> 475 U.S. at 306, 106 S.Ct. at 1076.<sup>7</sup> We conclude that CWA's notice is inadequate because it defines financial core expenses too

broadly and because it fails to adequately inform employees of their *right* to object.

*Beck* answered in the negative the question "whether [the] 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745, 108 S.Ct. at 2648. In *Hudson* the Court found the union's disclosure "inadequate" where

[i]nstead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers.

475 U.S. at 306–07, 106 S.Ct. at 1076 (emphasis added). The definition of chargeable expenses included in CWA's notice as activities undertaken to represent employees "with respect to their terms and conditions of employment" does not adequately notify the employees of their right to object or of the legitimate scope of chargeable expenses under *Beck*. While in *Ellis*, on which the *Beck* decision relied, the Court stated that "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *id.* 466 U.S. at 448, 104 S.Ct. at 1892, the *Beck* opinion appears to embrace a more restrictive formulation of the test. *See* 487 U.S. at 745, 108 S.Ct. at 2648 ("financial core" of employee obligations \*1380 \*\*392 owed to union representatives may not include support for activities "beyond those germane to collective bargaining, contract administration, and grievance adjustment."). The Court also stated that it was "construing both § 8(a)(3) and § 2, Eleventh as permitting the collection and use of only those fees germane to collective bargaining," *id.* at 754, 108 S.Ct. at 2653, and noted that the legislative history of § 8(a)(3) "is consistent with the view that Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective bargaining activities." *Id.* at 759, 108 S.Ct. at 2656.

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The objectors in both *Beck* and *Ellis* challenged the expenditure of agency fees for activities that included “participating in social, charitable, and political events,” *id.* at 740, 108 S.Ct. at 2646; yet the same activities could fall within the scope of the phrase “represent[ing] employees ... with respect to their terms and conditions of employment” contained in the CWA policy. JA 74. The fact that the CWA notice lists “legislative activity” and “support of political candidates” as non-chargeable expenses does not cure the imprecision, and therefore overbreadth, of the notice.<sup>8</sup> The *Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for such activities, and, in our view, additionally require that the Union notice not use language which might lead workers to conclude that such activities are chargeable.<sup>9</sup>

We also conclude that the CWA notice inadequately explains the nature of a worker’s right to object to payment of the full agency fee. The notice describes the right to object as arising “[u]nder the Communications Workers of America policy” instead of from the restrictive interpretation placed on the Union’s statutory authority by the *Beck* Court. In light of our determination in *IUE* that the union-security clause in the collective bargaining agreement need not alert workers to their right, we believe that an adequate side notice under *Hudson* must alert an employee to his *legal* right to object to payment of a full agency fee. Characterizing the right as CWA “policy” could lead an employee to conclude that objecting would be futile because the decision to grant a reduction rests entirely within the Union’s discretion. 475 U.S. at 306, 106 S.Ct. at 1075–76.

<sup>[10]</sup> Finally we address the adequacy of the information the Union gives to new employees. The CWA notice provides that “agency fee payers who are new to the bargaining unit may object within thirty days of receiving this notice (retroactive to the commencement of their union security obligation and for the duration of the annual objection period).” JA 74. One reading of the notice is that a new employee is charged a full agency fee from the time of his hire until receipt of the notice and can obtain a rebate in fees only if he objects. If so read, the policy is clearly inconsistent with *Ellis*, which held that “by exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place ... the union obtains an involuntary loan for purposes to which the employee objects.” 466 U.S. at 444, 104 S.Ct. at 1890. Although CWA represented at oral argument that new \*1381 \*\*393 employees receive some further notice at the time of hiring, we cannot determine from the policy language or elsewhere in the record whether the notice is timely and adequate. Accordingly, we will remand to the district court for further findings on this issue.

### C. Accounting for Chargeable Expenses

<sup>[11]</sup> <sup>[12]</sup> The employees further contend that CWA’s method of accounting for its chargeable expenses does not furnish a reliable basis for calculating the fees they must pay. “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.” *Allen*, 373 U.S. at 122, 83 S.Ct. at 1163. The union must demonstrate by a preponderance of the evidence that its expenses are chargeable. *Ellis*, 466 U.S. at 457 n. 15, 104 S.Ct. at 1897 n. 15. Although the parties vigorously dispute the issue, we agree with the district court that CWA has met its burden.

For one week of every thirteen weeks CWA employees record their activities on time sheets according to one of twenty-four categories. JA 252. An outside firm, Westat, Inc., determines from the time sheets how much time is spent on chargeable and non-chargeable activities. Westat also randomly telephones employees to verify the information provided. Its verification has discovered few reporting errors that resulted in a chargeable activity being reclassified as nonchargeable. 818 F.Supp. at 405. Independent certified public accountants annually audit the allocations resulting from Westat’s work. Each year they have issued “unqualified” opinion letters, the strongest assurances available, concluding that the allocations fairly represented the CWA’s chargeable and nonchargeable expenses.<sup>10</sup> *Id.* at 404. The employees counter with a report prepared by a professor of accounting and auditing at Harvard Business School who concluded that the Union’s method allows CWA employees to skew time reporting toward chargeable activities. The report primarily asserts that advance notice of the reporting period allows CWA personnel to bunch chargeable time during that period. JA 191. The employees argue that only contemporaneous daily time reports “with an expanded comment section requiring specific identification of the activities performed and recorded” can ensure accuracy. JA 198.

The record supports the district court’s determination that CWA met its burden of proof. The Union’s evidence established that Westat’s verification discovered few discrepancies between the time reported on the time sheets and the information gathered during its telephone checks and that the overall data did not support an inference of systematic misreporting. JA 106–08 (DiGaetano Decl. ¶¶ 13–14). In response, the employees offered no evidence that CWA in fact packed

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disproportionate amounts of its chargeable time into the monitored weeks. Accordingly, we uphold the district court on this issue.

**D. Objection Procedures and Arbitration**

<sup>113]</sup> <sup>114]</sup> <sup>115]</sup> 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,<sup>11</sup> we find neither procedure unduly burdensome. Regarding the window period, "[t]he union, as well as the employees, have an interest 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 making 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*, \*1382 \*\*394 503 U.S. 1005, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992).<sup>12</sup> 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, 81 S.Ct. at 1803. "[W]e 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).

<sup>116]</sup> We also affirm the district court's ruling that CWA's procedure requiring an objector who challenges the allocation of chargeable and non-chargeable expenses to exhaust Union-provided arbitration violates its duty of fair representation by limiting the choice of forum for the challenge.<sup>13</sup> "The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974). Nothing in the collective bargaining agreement requires arbitration; it is provided for only in CWA's constitution. JA 172, 175. CWA contends that it has not in fact breached its duty inasmuch as it merely raised the arbitration issue as an affirmative defense below. The employees' challenge, however, is to the *facial* validity of the CWA policy and on that score there is little doubt that the CWA's fair representation duty has been breached.<sup>14</sup>

For the foregoing reasons, we reverse the judgment of the district court regarding the Union's notice to employees of their objection rights as well as the Union's definition

of chargeable expenses. We also reverse the district court's denial of class certification. We remand for further proceedings consistent with this opinion regarding the Union's notice to new employees of their right to object. In all other respects, we affirm.

*So ordered.*

TATEL, Circuit Judge, concurring in part and dissenting in part:

I agree that neither CWA's method of accounting for expenses chargeable to nonunion employees nor its requirement that objecting employees lodge their objections annually during a prescribed window violates the duty of fair representation. I also agree that CWA violates its duty of fair representation by requiring nonunion employees challenging CWA's allocation of chargeable and nonchargeable activities to exhaust union-provided arbitration. I therefore concur in parts II.C and D of the court's opinion. I respectfully dissent from part II.B because I believe that CWA's notice adequately informs employees of their right to object to funding nonrepresentational activities.

In rejecting CWA's notice, the court concludes that some employees who might otherwise \*1383 \*\*395 object may choose not to do so out of a mistaken sense of futility because they erroneously believe that "the decision to grant a reduction rests entirely within the Union's discretion." Maj. Op. at 392. Yet CWA's notice clearly states that "[t]he agency fee payable by objectors *will* be based on the Union's expenditures" for representational activities. Joint Appendix (J.A.) at 74 (emphasis added). And of critical importance, nothing in the record establishes or even suggests that CWA's notice has ever led any employees in any way to misunderstand their rights after the Supreme Court decided *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). I therefore do not believe that CWA's use of this particular notice is arbitrary, discriminatory, or in bad faith, as is required to constitute a breach of the duty of fair representation. See *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916-17, 17 L.Ed.2d 842 (1967).

As I read *Beck* and its progenitors, I also believe that CWA's notice adequately informs potential objectors of the type of union activities that they are obligated to fund. The notice states that objectors must pay only for "those activities or projects normally or reasonably undertaken by the Union to represent employees in its bargaining units with respect to their terms and conditions of employment." J.A. at 74. To me, this definition is

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equivalent to what the Supreme Court in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984), called “the test” of chargeable expenses: “whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”

Acknowledging both the *Ellis* formulation and the Supreme Court’s subsequent reliance on this formulation in *Beck*, my colleagues conclude that *Beck* adopted “a more restrictive formulation of the test” by limiting chargeable expenses to “those germane to collective bargaining, contract administration, and grievance adjustment.” Maj. Op. at 1380 (quoting *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648–49). With all due respect, I can find nothing in *Beck* or elsewhere indicating that this alternative formulation is any more restrictive than the *Ellis* test. While the phrase “collective bargaining, contract administration, and grievance adjustment” appears repeatedly in *Beck*, in my view it is but a shorthand reference to exactly the same class of activities described in the *Ellis* test. Had the Supreme Court adopted a more restrictive test in *Beck*, I doubt that it would have reiterated the *Ellis* formulation as its concluding paragraph. See 487 U.S. at 762–63, 108 S.Ct. at 2657–58. To my ear, moreover, the language of CWA’s policy—“activities or projects normally or reasonably undertaken by the Union to represent the employees in its bargaining units with respect to their terms and conditions of employment”—sounds like the very definition of the term “collective bargaining.” In fact, section 8(d) of the National Labor Relations Act defines collective bargaining in part as “confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d) (1988).

Nor do I think that *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), will sustain the court’s conclusion that CWA’s notice provided “‘potential objectors’” with insufficient information. Maj. Op. at 391–393 (quoting *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075–76). Although I agree with the proposition that potential objectors to a union security

clause must always receive “sufficient” information about their rights, see Maj. Op. at 391 n. 6, the issue before us is what constitutes sufficient information. *Hudson* answered this question only with respect to nonunion employees who have already qualified for a reduced agency fee, addressing the amount of information they need to determine whether to object further to the union’s specific apportionment of chargeable and nonchargeable activities. See 475 U.S. at 306–07, 106 S.Ct. at 1075–76. Here, unlike in *Hudson*, the issue is the amount of information necessary for nonunion employees to determine in the first instance whether to object to paying the union’s full agency fee. (Again, no evidence in the record suggests that any nonunion \*1384 \*\*396 employees lacked sufficient information to understand that by objecting to CWA’s full agency fee they would be charged a reduced fee that excluded nonrepresentational expenses.) Were the appellants here challenging the sufficiency of the information that CWA provides at the second stage of its objection policy, when CWA promises objectors “a full explanation of the basis for the reduced fee,” J.A. at 74, *Hudson* would be relevant, but this is not appellants’ challenge. The court has thus applied *Hudson* to an issue *Hudson* did not consider, demanding far more of the union than *Beck* and *Ellis* require.

I too have some concerns about the adequacy of notice initially given new employees. But because no new employees have claimed that they received inadequate notice at the time of their hire, and because the record does not contain evidence that any new employees have been prejudiced, I would be comfortable affirming on this record. My view would be different if new employees had made such a claim and the facts were not as the union represented at oral argument.

I would affirm the district court in all respects.

**Parallel Citations**

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**Footnotes**

<sup>1</sup> The court previously affirmed an order dismissing the employees’ first amendment claim and denying them preliminary injunctive relief. *Abrams v. Communications Workers of America*, 702 F.Supp. 920 (D.D.C.1988), *aff’d*, No. 88–7234, 1989 WL 76740 (D.C.Cir. July 13, 1989).

<sup>2</sup> In *Beck* the Supreme Court confirmed the jurisdiction of federal courts to evaluate section 8(a)(3) claims “insofar as such a decision is necessary to the disposition of [a] duty-of-fair-representation challenge” even though primary jurisdiction lies in the National Labor Relations Board. 487 U.S. at 743, 108 S.Ct. at 2647–48. Here, as in *Beck*, the employees “claim that the union

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failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs.” *Id.*; see Complaint ¶¶ 5–8 (reprinted in JA 40–42). CWA, again as in *Beck*, defends “on the ground that the statute authorizes precisely this type of agreement.” 487 U.S. at 743, 108 S.Ct. at 2647–48; see CWA Br. at 17.

3 Section 8(a)(3) makes it an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing ... shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein.... *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms or conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

The provision applies to the union through 29 U.S.C. § 158(b)(2), which makes it an unfair labor practice for a labor organization or its agents “to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section.”

4 Moreover, an “actual” objector in one year becomes a “potential” objector the next year as a result of CWA’s policy requiring workers to renew their objections annually.

5 We need not consider the other proposed subclass of “free riders” or “potential objectors” since the only interest of that subclass, that of receiving adequate notice of its objection rights, is included in the interest pursued by the class of all agency shop employees.

6 The dissent takes issue with our interpretation of *Hudson* but the quoted language makes clear that *potential* objectors must be given adequate notice. Although the Supreme Court addressed the issue in the context of “information about the basis for the proportionate share” of financial core expenses, 475 U.S. at 306, 106 S.Ct. at 1075, the same “basic considerations of fairness” necessarily extend to a union’s notice to workers of their *right* to object to payment of any expenses beyond the financial core.

7 Although in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake.” 475 U.S. at 306, 106 S.Ct. at 1076.

8 We disagree with the employees’ contention that CWA must demonstrate that chargeable expenses provide an “actual benefit” to nonmembers. As the district court declared, “[p]laintiffs want CWA to have to prove that all charged expenses, no matter how squarely those expenses fall with the Supreme Court’s definition of chargeable ones, actually benefit them. There is no basis for such a requirement in Supreme Court precedent or in CWA’s statutory duty of fair representation.” 818 F.Supp. at 404.

9 In *Ellis* the Court stated that objectors can be required to pay “not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities ... employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.” 466 U.S. at 448, 104 S.Ct. at 1892. The statement derives from the recognition that Congress permitted mandatory agency fees in order to ensure that a union could recover its expenses from employees “on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof.” *Id.* Because the union’s function under the NLRA is to “be the exclusive representative [ ] of all the employees ... for the purposes of collective bargaining,” 29 U.S.C. § 159(a), the *Ellis* language is no more than a restatement of the established proposition that expenses must be “*germane* to collective bargaining.” *Allen*, 373 U.S. at 121, 83 S.Ct. at 1163 (emphasis added).

10 The accountants do not audit the underlying data generated by Westat, accepting the data as “a recognized statistical group” and Westat’s sampling methods as “recognized procedures.” JA 248 (Beans Dep.).

11 818 F.Supp. at 403 and cases discussed *infra*.

12 The holding in *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), which the employees rely on to assert that a six-month limitations period is the applicable period within which to assert a claim based on the union’s duty of fair representation, is inapposite to the window period issue for two reasons. First, *DelCostello* considered only whether the state or federal statute of limitations contained in section 10(b) of the NLRA applies to a claim of breach of the duty of fair representation. *Id.* at 154, 103 S.Ct. at 2285. Second, an employee’s annual objection to making payments to CWA above the financial core is not a claim for breach of a union’s duty of fair representation.

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- 13 As the district court made clear in denying the Union's motion for reconsideration, CWA's policy is "*if* a nonmember chose to challenge CWA's fee determination before some impartial decisionmaker, the nonmember had to do so through arbitration rather than through suit in federal court, before the National Labor Relations Board, or in some other forum." 830 F.Supp. 17, 18 (D.D.C.1993) (emphasis in original). Nevertheless we believe, as did the district court, that the CWA policy is facially invalid inasmuch as "arbitration 'is the *only avenue* CWA provides objectors to challenge the CWA calculation,' and ... this 'arbitrary forum choice' violates CWA's duty of fair representation." *Id.* at 18 (quoting 818 F.Supp. at 407) (emphasis in original).
- 14 *Communications Workers of Am. v. American Tel. & Tel. Co.*, 40 F.3d 426 (D.C.Cir.1994), relied on by the union, is inapposite. The case involved the exhaustion requirement contained in the Employee Retirement Income Security Act.  
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Penrod v. N.L.R.B., 203 F.3d 41 (2000)

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203 F.3d 41  
United States Court of Appeals,  
District of Columbia Circuit.

Robert PENROD, et al., Petitioners,  
v.  
NATIONAL LABOR RELATIONS BOARD,  
Respondent.  
International Brotherhood of Teamsters, Local  
166, Intervenor.

No. 99-1121. | Argued Jan. 7, 2000. | Decided Feb.  
22, 2000.

Employees petitioned for review of an order of the National Labor Relations Board (NLRB), 1999 WL 170689, ruling that union provided employees with adequate information regarding their right under *Communications Workers of America v. Beck* to pay only that portion of union dues attributable to collective bargaining, contract administration, and grievance adjustment. The Court of Appeals, Tatel, Circuit Judge, held that: (1) NLRB did not engage in reasoned decisionmaking in determining that list of general expenditure categories provided by union, in response to *Beck* objection, was sufficient to allow employees to determine whether to challenge reduced fee calculation; (2) union was required to explain how its affiliated unions used money that union considered chargeable to *Beck* objectors; and (3) initial *Beck* notice given by union to new employees and financial core payors, i.e., those employees who are not full union members, must identify percentage reduction in dues that would result from a *Beck* objection.

Review granted.

Tatel, Circuit Judge, filed concurring opinion.

West Headnotes (10)

<sup>[1]</sup> **Labor and Employment**  
🔑 Non-Members; Fair Share

Under NLRA, unions may negotiate union security provisions allowing them to collect dues from all members of a bargaining unit, including those who decline full union

membership, and employees who choose not to become full union members are called “financial core payors.” National Labor Relations Act, § 8(a)(3), as amended, 29 U.S.C.A. § 158(a)(3).

Cases that cite this headnote

<sup>[2]</sup> **Labor and Employment**  
🔑 Use of Funds in General

Unlike full union members and non-member financial core payors, employees who object to funding union’s nonrepresentational activities, called “*Beck* objectors,” pay reduced dues, and *Beck* objectors are also known as “potential challengers” because they have a right to challenge union’s calculation of the reduced dues. National Labor Relations Act, § 8(a)(3), as amended, 29 U.S.C.A. § 158(a)(3).

2 Cases that cite this headnote

<sup>[3]</sup> **Labor and Employment**  
🔑 Amount

Union bears the burden of justifying its calculation of reduced dues in response to *Beck* objector’s challenge to union’s calculation, reflecting reduction for nonrepresentational activities. National Labor Relations Act, § 8(a)(3), as amended, 29 U.S.C.A. § 158(a)(3).

Cases that cite this headnote

<sup>[4]</sup> **Labor and Employment**  
🔑 Duty to Act Impartially and Without Discrimination; Fair Representation

The judicially created duty of fair representation reflects the principle that a union’s status as exclusive representative of employees in a bargaining unit includes a statutory obligation to

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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. National Labor Relations Act, § 9(a), as amended, 29 U.S.C.A. § 159(a).

[Cases that cite this headnote](#)

<sup>15]</sup>

**Labor and Employment**

🔑Duty to Act Impartially and Without Discrimination; Fair Representation

**Labor and Employment**

🔑Actions for Breach of Duty

Unions breach their duty of fair representation when their conduct toward members of a bargaining unit is arbitrary, discriminatory, or in bad faith. National Labor Relations Act, § 9(a), as amended, 29 U.S.C.A. § 159(a).

[Cases that cite this headnote](#)

<sup>16]</sup>

**Labor and Employment**

🔑Determination

National Labor Relations Board (NLRB) did not engage in reasoned decisionmaking in determining that list of 19 general expenditure categories provided by union, in response to *Beck* objectors' request for reduced union dues to avoid any spending on nonrepresentational activities, was sufficient to allow objectors to determine whether to challenge reduced fee calculation, where Board simply cited to Seventh Circuit case that was factually distinguishable. National Labor Relations Act, §§ 8(a)(3), 9(a), as amended, 29 U.S.C.A. §§ 158(a)(3), 159(a).

[2 Cases that cite this headnote](#)

<sup>17]</sup>

**Labor and Employment**

🔑Notice and Disclosure

In its response to *Beck* objectors' request for reduced union dues to avoid any spending on nonrepresentational activities, union was required to explain how its affiliated unions used money that union considered chargeable to objectors, where union disclosed that over 90% of the amount paid to its affiliates, representing almost 25% of union's total expenditures, was chargeable to *Beck* objectors. National Labor Relations Act, §§ 8(a)(3), 9(a), as amended, 29 U.S.C.A. §§ 158(a)(3), 159(a).

[1 Cases that cite this headnote](#)

<sup>18]</sup>

**Labor and Employment**

🔑Notice and Disclosure

**Labor and Employment**

🔑Amount

Initial *Beck* notice given by union to new employees and financial core payors, i.e., those employees who choose not to become full union members, must identify the percentage reduction in dues that would result from a *Beck* objection, by which objectors would assert their right to pay only that portion of union dues attributable to collective bargaining, contract administration, and grievance adjustment. National Labor Relations Act, §§ 8(a)(3), 9(a), as amended, 29 U.S.C.A. §§ 158(a)(3), 159(a).

[Cases that cite this headnote](#)

<sup>19]</sup>

**Labor and Employment**

🔑Notice and Disclosure

New employees and financial core payors, i.e., those employees who choose not to become full union members, must be given the same information as *Beck* objectors who assert their right to pay only that portion of union dues attributable to collective bargaining, contract administration, and grievance adjustment. National Labor Relations Act, §§ 8(a)(3), 9(a), as amended, 29 U.S.C.A. §§ 158(a)(3), 159(a).

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Cases that cite this headnote

<sup>[10]</sup> **Labor and Employment**  
🔑 Notice and Disclosure

Particular challenge to initial *Beck* notice provided by union regarding nonmembers' right to pay only that portion of union dues attributable to collective bargaining, contract administration, and grievance adjustment, by which petitioners challenged method used to calculate reduced fee, could not be raised on petition for review in Court of Appeals, since petitioners failed to raise method of calculation issue in proceedings before National Labor Relations Board (NLRB), where unfair labor practice charge and General Counsel's complaint referred only to financial information designed for *Beck* objectors, not to initial *Beck* notice given to new employees and financial core payors. National Labor Relations Act, §§ 8(a)(3), 9(a), as amended, 29 U.S.C.A. §§ 158(a)(3), 159(a).

3 Cases that cite this headnote

\*43 \*\*173 On Petition for Review of an Order of the National Labor Relations Board.

**Attorneys and Law Firms**

Glenn M. Taubman argued the cause and filed the briefs for petitioners.

Jill A. Griffin, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Peter D. Winkler, Supervisory Attorney. John D. Burgoyne, Deputy Associate General Counsel, entered an appearance.

James B. Coppess argued the cause for intervenor. With him on the brief was Gary S. Witlen.

Before: WILLIAMS, RANDOLPH and TATEL, Circuit Judges.

**Opinion**

Opinion for the Court filed by Circuit Judge TATEL.

Concurring opinion filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

This petition to review a decision of the National Labor Relations Board requires us to consider what information a union's duty of fair representation requires it to give employees about their right under *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), to pay only that portion of union dues attributable to "collective bargaining, contract administration, and grievance adjustment." *Id.* at 745, 108 S.Ct. 2641. The Board held that unions have no obligation to tell employees who have not yet exercised their *Beck* rights what percentage of dues are spent on nonrepresentational activities. The Board also ruled that the union in this case had given employees who had chosen to exercise their *Beck* rights sufficient information to satisfy its duty of fair representation. Finding a portion of the Board's decision unsupported by reasoned decisionmaking and the remainder in conflict with Supreme Court and circuit precedent, we grant the petition for review.

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<sup>[1]</sup> <sup>[2]</sup> <sup>[3]</sup> Section 8(a)(3) of the National Labor Relations Act gives unions the right to negotiate union security provisions allowing them to collect dues from all members of a bargaining unit, including those who decline full union membership. 29 U.S.C. § 158(a)(3); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 119 S.Ct. 292, 296, 142 L.Ed.2d 242 (1998). Employees who choose not to become full union members are called "financial core" payors. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963). In *Beck*, the Supreme Court held that section 8(a)(3) does not obligate employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745, 108 S.Ct. 2641. Unlike full union members and financial core payors, employees who object to funding nonrepresentational activities, called "*Beck* objectors," pay reduced dues. *Beck* objectors are also

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known as “potential challengers” because they have a right to challenge the union’s calculation of the reduced dues; in response to such challenges, the union bears the burden of justifying its calculation. *See California Saw & Knife Works*, 320 NLRB 224, 240, 1995 WL 791959 (1995).

Petitioners Robert Penrod, Nadine Penrod, and Clement Wierzbicki, long-time employees of DynCorp Support Services Operations, resigned from their union, International Brotherhood of Teamsters, Local 166, and exercised their *Beck* rights. Petitioner John Burnham never became a full member of the union, instead informing Local 166 shortly after being hired that he wished to be a financial core payor.

Having received no information from Local 166 about their *Beck* rights, all four petitioners filed unfair labor practice charges against the union. Pursuant to an agreement settling these charges, Local 166 promised to give all new employees and financial core payors initial *Beck* notices outlining their *Beck* rights and describing how to exercise them. The union also sent letters to the *Beck* objectors informing them that they must pay 93.6 percent of union dues and describing procedures for challenging that calculation. Attached was a letter from an independent auditor confirming the accuracy of the reduced fee calculation. The auditor in turn attached a handwritten worksheet listing nineteen categories of expenditures, such as “salaries,” “benefits paid,” “legal expenses,” and “auto expenses.” For each expenditure category, the auditor identified the amount and percentage “chargeable” and “nonchargeable” to *Beck* objectors. The worksheet referred to a “breakdown” and to “schedules,” but they were not attached. The auditor’s worksheet is attached to this opinion as Appendix A.

Complaining that the information furnished by Local 166 and its auditor was inadequate, petitioners renewed their unfair labor practice charges. In response, the NLRB’s General Counsel filed a formal complaint charging Local 166 with failing to include in the initial *Beck* notice the percentage by which dues would be reduced for new employees and financial core payors who exercise their *Beck* rights. The General Counsel also charged that the financial information given to *Beck* objectors was “too vague to permit each of these employees to decide whether to challenge any of the expenditures listed in the Statement of Expenses.”

The Board rejected the General Counsel’s charges. *International Bhd. of Teamsters, Local 166, AFL-CIO*, 327 NLRB No. 176, 1999 WL 170689 (1999). Although agreeing that the duty of fair representation required

Local 166 to provide initial *Beck* notices to new employees and financial core payors, the Board determined that the union had not violated its duty by failing to include the percentage by which dues would be reduced. Citing the time and expense needed to make such calculations, and explaining that the duty of fair representation affords unions a “wide range of reasonableness,” the Board concluded that the decision to furnish the percentage was a “judgment call” within the union’s discretion. *Id.*, slip op. at 3. With respect to employees who had exercised their *Beck* rights, the Board found that the auditor’s information was sufficient for them to determine whether to challenge the reduced fee calculation. *Id.*, slip op. at 4-5.

Petitioners challenge the Board’s decision on three grounds. The first two concern the information given *Beck* objectors. The one-page handwritten list of expenditures, they say, neither explained nor justified the union’s determination that *Beck* objectors would be required to pay 93.6 percent of dues. Their second challenge focuses on the approximately twenty-five percent of total expenditures that Local 166 paid to its affiliates. *See* Appendix A. The third challenge relates to new employees and financial core payors; according to petitioners, such employees are entitled to know the precise amount by which their dues would be reduced were they to exercise their *Beck* rights. Local 166, defending the Board’s conclusion that it satisfied its duty of fair representation, has intervened.

## II

<sup>141</sup> <sup>151</sup> Grounded in section 9(a) of the NLRA, 29 U.S.C. § 159(a), the judicially created duty of fair representation reflects the principle that a union’s status as exclusive representative of employees in a bargaining 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.” *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Unions breach their duty of fair representation when their conduct toward members of a bargaining unit is “arbitrary, discriminatory, or in bad faith.” *Id.* at 190, 87 S.Ct. 903.

The Supreme Court fleshed out the duty of fair representation in the *Beck* context in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In that case, the Court established procedures that unions must follow to protect objectors and described the financial

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information that unions must give to potential objectors. “Basic considerations of fairness, as well as concern for the First Amendment rights at stake,” the Court held, “dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.” *Id.* at 306, 106 S.Ct. 1066. While *Hudson* involved public employees and arose under the First Amendment, this circuit has applied its requirements to nonpublic unions such as Local 166. See, e.g., *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1379 n. 7 (D.C.Cir.1995). With this framework in mind, we turn to petitioners’ three challenges.

### **General Disclosure to Beck Objectors**

<sup>61</sup> With respect to their first claim—that the list of nineteen expenditure categories was insufficient to allow them to determine whether to challenge the reduced fee calculation—petitioners complain that the single sheet “contains no notes or other written explanation concerning *how* that union’s overall 93.6% chargeable, 6.4% nonchargeable calculation was made.” That lack of explanation, petitioners contend, was compounded by the “vague and unexplained” line items and the absence of referenced schedules and breakdowns.

The Board ruled that the *Beck* objectors had no need for schedules, breakdowns, or better-defined categories of expenses to determine whether to challenge the reduced dues calculation. Addressing the *Beck* objectors’ most fundamental argument—that the single page of financial information failed to explain *how* the union arrived at its 93.6 percent chargeable figure—the Board relied entirely on a decision of the Seventh Circuit, *Gilpin v. \*46 American Fed’n of State, County, and Mun. Employees, AFL-CIO*, 875 F.2d 1310, 1316 (7th Cir.1989): **\*\*176** “As the Seventh Circuit Court of Appeals has remarked in response to the same kind of argument, ‘if it did [include the disclosure petitioners requested], the notice would be as long and complicated as an SEC prospectus.’ The court discerned no reason for imposing such a requirement, and neither do we.” 327 NLRB No. 176, slip. op. at 5 (citing *Gilpin*, 875 F.2d at 1316).

The union’s disclosure in *Gilpin* was more extensive than Local 166’s. In addition to listing thirty-five different types of expenditures (comparable to the nineteen categories provided by Local 166), the notice in *Gilpin* identified thirty-five specific union activities, indicating for each whether the union considered it “wholly chargeable,” “wholly unchargeable,” or “mixed.” *Gilpin*, 875 F.2d at 1316. For example, the notice identified

publishing a union newsletter as “mixed” and adjusting grievances as “wholly chargeable.” *Id.* For a payment of \$1.50, each employee could also obtain an arbitrator’s “detailed ruling” said to sustain the union’s expense allocations. *Id.* According to the Seventh Circuit, this information “should be enough ... to allow the employee to decide whether there is any reason to mount a challenge.” *Id.*

By comparison, the *Beck* objectors in this case were given only general categories of expenditures. See Appendix A. To be sure, two of these categories—“contributions” and “organizing”—were quite specific, but both were totally “nonchargeable.” The union offered no separate list of activities and provided no opportunity to obtain a detailed explanation of how the union calculated the allocation of expenses. In addition, the *Beck* objectors never received the “schedules” and “breakdown” said to be attached to the auditor’s report.

The information provided in *Gilpin*, as the Seventh Circuit found, gave objectors a basis for objecting to the union’s calculation of reduced dues. For example, they could have reviewed the newsletter and made their own judgment about whether to challenge the union’s determination that newsletter costs were partially chargeable. Could *Beck* objectors in this case have made a similar judgment about the general categories of expenditures supplied by the auditor? For example, how could they have evaluated the union’s determination that “salaries” were partially chargeable to *Beck* objectors in view of the fact that the only other information they were given about salaries was the gross amount? Instead of answering this question, the Board simply cited *Gilpin* as though the case dealt with the same type of disclosure. Because it did not, we think the Board’s decision reflects a classic case of lack of reasoned decisionmaking. See *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165, 168 (D.C.Cir.1999) (The Regional Director’s “rationale was the antithesis of reasoned decisionmaking, and as such was arbitrary and capricious.”) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

### **Information about Payments to Affiliates**

<sup>71</sup> Petitioners’ second complaint about the union’s financial disclosure focuses on the information about Local 166’s payments to affiliated unions. Representing almost twenty-five percent of the union’s total expenditures, payments to affiliates were 90.8 percent chargeable to *Beck* objectors. See Appendix A. In addition

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to arguing that Local 166 should have explained this calculation, petitioners claim that they are entitled to know which affiliates received funds and how those affiliates used those funds. They rely on the following language from *Hudson*: “[E]ither a showing that none of [the money paid to affiliates] was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.” 475 U.S. at 307 n. 18, 106 S.Ct. 1066.

In concluding that Local 166’s disclosure was adequate, the Board distinguished \*47 \*\*177 *Hudson*: “In that case, the union paid more than half its income to affiliated organizations, but informed nonmembers only that they were required to pay 95 percent of full dues. It did not inform them of the basis on which it was charging them that amount or, apparently, anything regarding how the amounts transferred to affiliates were spent or what percentages were chargeable and nonchargeable.” 327 NLRB No. 176, slip. op. at 5.

The Board’s basis for distinguishing *Hudson* is curious. To begin with, two of the deficiencies in the *Hudson* notice that the Board said made *Hudson* different from this case were also deficiencies in Local 166’s disclosure. The union in *Hudson*, the Board said, “did not inform [the employees] of the basis on which it was charging them that amount or, apparently, anything regarding how the amounts transferred to affiliates were spent.” *Id.* Yet this is precisely the information that Local 166 failed to provide and that petitioners seek in this case.

So the Board’s conclusion that *Hudson* differs from this case boils down to two distinctions. In *Hudson*, the union spent fifty percent of its budget on affiliates; here, it spent twenty-five percent. In *Hudson*, the union failed to identify the percentage of payments to affiliates chargeable to *Beck* objectors; here, the union said such payments were ninety percent chargeable. Nothing in *Hudson* suggests that the level of required disclosure turns on such factors. *Hudson*’s directive is quite simple: unless a union demonstrates that “none of [the amount paid to affiliates] was used to subsidize activities for which nonmembers may not be charged,” then “an explanation of the share that was so used [is] surely required.” 475 U.S. at 307 n. 18, 106 S.Ct. 1066. Because Local 166 disclosed that over ninety percent of the amount paid to its affiliates was chargeable to *Beck* objectors, *Hudson* requires that the union explain how its affiliates used the money.

### Payors

<sup>18]</sup> This brings us to petitioners’ challenge to the Board’s ruling that the initial *Beck* notice given to new employees and financial core payors need not identify the percentage reduction in dues that would result from a *Beck* objection. Explaining its decision, the Board observed that calculating the reduced fee “can be an expensive and timeconsuming undertaking” and emphasized the “wide range of reasonableness” afforded unions in serving the employees they represent. 327 NLRB No. 176, slip op. at 3. We need not consider whether to defer to such reasoning, for this issue is squarely controlled by *Hudson* as interpreted by this court in *Abrams*.

In *Hudson*, the Supreme Court held that “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.” 475 U.S. at 306, 106 S.Ct. 1066. *Abrams* expressly applies *Hudson*’s requirements to new employees and financial core payors. 59 F.3d at 1379. Since *Hudson* requires that potential objectors be told the percentage of union dues chargeable to them-for how else could they “gauge the propriety of the union’s fee”—and since *Abrams* applies *Hudson* to new employees and financial core payors, they too must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors.

The Board and Local 166 nevertheless insist that *Hudson* applies only to employees who have elected to exercise their *Beck* rights, not to new employees and financial core payors. But *Abrams* could not have been clearer. Like the Board and Local 166, the dissent in *Abrams* argued that *Hudson*’s requirements do not apply to new employees and financial core payors. *Abrams*, 59 F.3d at 1383-84 (Tatel, J., concurring in part and dissenting in part). *Abrams* ruled to the contrary: “The dissent \*48 \*\*178 takes issue with our interpretation of *Hudson* but the quoted language makes clear that *potential* objectors must be given adequate notice. Although the Supreme Court addressed the issue in the context of ‘information about the basis for the proportionate share’ of financial core expenses, the same ‘basic considerations of fairness’ necessarily extend to a union’s notice to workers of their *right* to object to payment of any expenses beyond the financial core.” *Abrams*, 59 F.3d at 1379 n. 6 (internal citation omitted).

<sup>19]</sup> The Board and Local 166 point out that *Abrams* concerned the wording of the initial *Beck* notice, not whether the union must disclose the percentage reduction. In order to conclude that the wording was inadequate, however, *Abrams* had to hold that *Hudson* applies to new

### Initial Notice to New Employees and Financial Core

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employees and financial core payors, and *Hudson* carries with it the requirement that unions give employees “sufficient information to gauge the propriety of the union’s fee”—*i.e.*, the percentage reduction (*see supra* at 47). 475 U.S. at 306, 106 S.Ct. 1066. We recognize that this means that new employees and financial core payors must be given the same information as *Beck* objectors, but *Abrams* is the law of this circuit.

<sup>[10]</sup> Petitioners challenge the initial *Beck* notice for a second reason. They contend that the initial notice must not only identify the amount of the reduced fee but also explain the method used to calculate the fee. According to the Board, petitioners failed to raise this issue before the Board and so cannot raise it for the first time on appeal. We agree with the Board.

The two record excerpts petitioners point to—a paragraph in the petitioners’ final unfair labor practice charge and three paragraphs in the General Counsel’s fourth amended complaint—cannot fairly be read to raise the issue. Both refer only to the financial information designed for *Beck* objectors, not to the initial *Beck* notice given to new employees and financial core payors. Rejecting petitioners’ contention that the method of calculation is “implicit” in the issue of disclosure of the fee itself, we conclude that we may not consider petitioners’ claim that

the initial *Beck* notice must include an explanation of the method used to calculate the fee. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 939 (D.C.Cir.1998).

### III

The petition for review is granted, and this case is remanded to the Board for proceedings consistent with this opinion.

*So ordered.*

\*49 \*\*179 APPENDIX A

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Local 166 1991  
Statement of Expenses

Code	Item	Total	Charge	Non Charge	% Charge	% Non Chg.	
1	2	Salaries - Pac hours Summary	709,920.92	668,744.58	351,765.44	95.10028	4.9972
2	2	Expense Allowance	2820	2,679.08	1409.21	95.10028	4.9972
3	3	Per Capita - Per Sternkovich	424,012.04	385,381.60	38,853.88	90.83166	9.1634
4	4	Contributions	111,459.44		114,920.44		100
5	5	1/8 Benefits Paid (Schedule 1)	922,271.14	212,206.73	9,920.11	95.53389	4.46661
6	6	Refund Dues	109,550.31	10,935.33		100	
7	7	Refund Init & Reinit	145,346	14,534.6		100	
8	8	Other Refunds	16,383	16,383		100	
9	9	Office Exp. (Schedule 2)	997,693.8	961,718.5	35,575.3	96.33334	3.66666
10	10	Legal Exp.	1216,351.6	10,740.14	189,532	85.98	15.98
11	11	Arbitrator Fees	124,780	12,478.00		100	
12	12	Other Professional Fees	76,751	76,751		100	
13	13	Taxes (Per Audit)	616,750	616,751		100	
14	14	Organizing Exp.	211,362		2,163.62		
15	15	Mtg. & Committee Exp.	104,748.7	99,514.2	5234.5	95.10028	4.9972
16	16	Stake Exp.					
17	17	Auto Exp.	404,743.8	384,130.9	20,205.9	95.10028	4.9972
18	18	Dates Jour Travel Exp.	381,844.4	362,281.9	19,082.5	95.10028	4.9972
19	19	Other Exp. (Schedule 3)	74,059.87	70,912.03	3,147.84	95.7496	4.2504
20	20	Total	1736,481.88	1625,641.29	110,840.59	93.6169	6.3831

TATEL, Circuit Judge, concurring:

I dissented in *Abrams* because I saw nothing in *Hudson* that required its application to new employees and financial core payors. *Abrams*, 59 F.3d at 1383-84 (Tatel, J., concurring in part and dissenting in part). This case demonstrates the consequences of *Abrams*: judicial usurpation of the Board's traditional authority to determine national labor policy.

To protect employees' *Beck* rights, the Board has crafted a three-step process, calibrating the nature and amount of information that unions must give employees to \*50 \*\*180 the decision they must make at each stage. New employees and financial core payors receive an initial *Beck* notice informing them of their *Beck* rights and how to exercise them. See *California Saw & Knife Works*, 320

NLRB at 233. *Beck* objectors are told the amount of the reduced dues as well as how that amount was calculated. See *id.* *Beck* objectors who challenge the union's calculation receive still more information, with the union bearing the burden of proving the accuracy of its calculation. See *id.* at 240. Balancing employees' need for information against the burden on unions of providing the information, this process reflects the Board's application of the duty of fair representation in the *Beck* context.

Consistent with this approach, the Board held in this case that unions were not required to disclose to new employees and financial core payors the percentage by which their dues would be reduced were they to exercise their *Beck* rights. Not only does the Board believe that new employees and financial core payors have no need for this information to decide whether to exercise their *Beck* rights, but it concluded that providing the

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information would be an “expensive and timeconsuming undertaking.” *International Bhd. of Teamsters, Local 166, 327 NLRB No. 176*, slip. op. at 3. Whether to disclose the percentage is a “judgment call,” within the “wide range of reasonableness” afforded unions in carrying out their duty of fair representation, the Board found. Local 166’s failure to disclose the percentage was not “arbitrary, discriminatory, or in bad faith.” *Id.*

Absent *Abrams*, we would evaluate the Board’s reasoning pursuant to a highly deferential standard. See *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C.Cir.1997). Yet as our opinion in this case demonstrates, *Abrams*’ extension of *Hudson* to new employees and financial core payors has foreclosed us from considering the Board’s rationale at all, requiring that we ignore not just our traditional deference to the Board, but also the “wide range of reasonableness” afforded unions in satisfying their duty of fair representation. See *Marquez*, 119 S.Ct. at 300. “It is

hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision ... into a workable system for determining and collecting agency fees.” *International Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir.1998). By commandeering a judgment that should have been left to the Board’s expertise, *Abrams* has produced a result that I doubt *Hudson* intended.

**Parallel Citations**

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## RELEVANT STATUTORY PROVISIONS

### **Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3):**

It shall be an unfair labor practice for an employer. . .

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

### **Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983):**

*Non-member proportionate share payments in lieu of dues.*

Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not

members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LAURA SANDS,	)	
	)	
Petitioner	)	No.14-1185
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	Board Case No.
Respondent.	)	25-CB-08896

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that the foregoing Petition for Initial Hearing En Banc is fifteen pages or fewer in length and contains 2,521 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 17th day of April 2015

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LAURA SANDS,	)	
	)	
Petitioner	)	No. 14-1185
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	Board Case No.
Respondent.	)	25-CB-08896
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 17th day of April 2015