

WRITTEN STATEMENT OF **RAYMOND J. LAJEUNESSE, JR.,**
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ON

The National Labor Relations Board's Failure to Fully Enforce Workers' Rights under
***Communications Workers v. Beck* Not to Subsidize Unions' Political and Other**
NonBargaining Activities

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
Wednesday, February 13, 2013

Chairman Roe and distinguished Members of the Committee:

Thank you for the opportunity to testify today.

My name is Raymond LaJeunesse. I am Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to workers in almost every case litigated concerning the rights of workers not to subsidize union political and other nonbargaining activities. The most famous of these cases is *Communications Workers v. Beck*.¹

I have worked for the Foundation for more than forty years. I have represented tens of thousands of employees in cases like *Beck*, many of which were class actions. I was the lead counsel for the plaintiff workers in three such cases that I argued in the United States Supreme Court.

¹ 487 U.S. 735 (1988).

I commend you for investigating the adequacy of the National Labor Relations Board's enforcement of the individual worker rights *Beck* recognized as intended by Congress. Implementation of Harry Beck's victory in the Supreme Court is a serious problem. Many American workers are forced, due to a unique privilege Congress granted unions in the National Labor Relations Act, to contribute their hard-earned dollars to political and ideological causes they oppose.

At issue are union dues and agency fees collected from workers under threat of job loss. These monies, under federal election law, are lawfully used for registration and get-out-the-vote drives, candidate-support among union members and their families, independent expenditures concerning for or against candidates directed to the general public, administration of union political action committees, lobbying, and issue advocacy. These political expenditures by unions that must file financial reports with the Department of Labor amount to more than a billion dollars in a two-year election cycle.²

Under the National Labor Relations Act, employees who never requested union representation must accept the bargaining agent selected by the majority in their bargaining unit. Then, if not in a Right to Work state, and their employer and

² <http://nilrr.org/files/Big%20Labor%20Political%20Spending%20in%20the%202010%20Election%20Cycle.pdf>.

monopoly bargaining agent agree, the law forces these employees to pay fees equal to union dues for that unwanted representation, or be fired.

The evil inherent in compelling workers to subsidize a union's political and ideological activities is apparent. As Thomas Jefferson eloquently put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.""³ Preventing that evil, however, is difficult under current law.

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

It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national, and international unions involved. It seems to me . . . however, that . . . this formula with its attendant trial burdens promises little hope for financial

³ Quoted in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977).

recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.⁴

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

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

Employees must overcome many hurdles to exercise their *Beck* rights. Unfortunately, many of those hurdles have been sanctioned or, worse, thrown up by the National Labor Relations Board. To be blunt, the NLRB has failed to enforce *Beck* vigorously, both in processing cases and applying judicial precedent.

⁴ 367 U.S. 740, 795-96 (1961).

That problem has gotten even worse under the current Board, which the D.C. Circuit last month held in *Noel Canning v. NLRB* does not have a constitutionally valid quorum.⁵

Since the Supreme Court decided *Beck* in 1988, the NLRB's General Counsel, its Regional Offices, and the Board have failed to process expeditiously unfair labor practice charges of *Beck* violations.

Significantly, in 1994 the General Counsel's Office instructed all Regional Directors to dismiss immediately *Beck* charges they found unworthy, and not to issue complaints on worthy *Beck* charges, but to submit them to the Division of Advice in Washington, D.C.⁶ That was circumstantial evidence that the then General Counsel intended to delay the processing of *Beck* charges or spike as many as possible. As recently as 2011, current Acting General Counsel Lafe Solomon instructed Regional Directors that several *Beck* issues must be submitted to the Division of Advice, "because there is no governing precedent or . . . [they] involve a policy issue in which I am particularly interested."⁷

⁵ 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

⁶ NLRB Mem. OM 94-50 (June 13, 1994).

⁷ NLRB Mem. GC 11-11 (Apr. 12, 2011).

The Board delayed for eight years before it issued its first post-*Beck* decision, *California Saw & Knife Works*.⁸ Many other *Beck* cases languished before the Board for similar lengthy periods. The then NLRB Chairman admitted that at the end of July 1997 the sixty-five oldest cases then before the Board included twenty-one *Beck* cases.⁹ The Board later issued decisions in some of those cases only after the objecting workers petitioned for mandamus from the D.C. Circuit.¹⁰

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

In 1998, the then Acting General Counsel set up yet another roadblock. He instructed Regional Directors that *Beck* charges must be dismissed unless the nonmember "explain[s] why a particular expenditure treated as chargeable in a union's disclosure is not chargeable . . . and present[s] evidence or . . . give[s]

⁸ 320 N.L.R.B. 224 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

⁹ Letter from Chairman Gould to Rep. Tom Lantos (Oct. 15, 1997), at 3.

¹⁰ *E.g., In re Weissbach*, No. 98-1301 (D.C. Cir. Nov. 24, 1998).

promising leads that would lead to evidence that would support that assertion.”¹¹

Regional Directors follow this instruction to this day.¹²

It is impossible for nonmembers to provide evidence or leads to evidence at the charge stage, because nonmembers do not have access to the union’s financial and other records. The General Counsel’s rule is also contrary to the Supreme Court’s admonition that “the union bears the burden of proving what proportion of expenditures went to activities that could be charge to dissenters”¹³

The Board itself has given workers little protection and relief when it finally decides *Beck* cases, in many instances refusing to follow what should be controlling Supreme Court and U.S. Court of Appeals precedent.

Unions have a legal duty to inform workers that they have a right not to join and, if they do not join, a right not to subsidize the union’s political and other nonbargaining activities.¹⁴ One major obstacle to the exercise of *Beck* rights is the obscure manner in which the NLRB permits unions to notify employees of their rights not to join and not to subsidize union political activity.

¹¹ NLRB Mem. GC 98-11, at 5 (Aug. 17, 1998).

¹² *E.g.*, *Teamsters Local 974*, No. 18-CB-082853. letter from Regional Director Osthus to Foundation Staff Attorney John Scully (July 27, 2012), at 1.

¹³ *Ellis v. Railway Clerks*, 466 U.S. 435, 457 n.15 (1984).

¹⁴ *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998).

When unions give such notice, they often hide it in fine print inside union propaganda that dissenting workers find offensive and, therefore, do not read. An egregious, but typical, example of that practice was approved by the Board in the very first post-*Beck* case it decided, *California Saw*.¹⁵ In that case the Machinists union published its notice of *Beck* rights “on the sixth page of [an] eight-page newsletter.” The first page of that newsletter was “largely occupied by an article about Democratic Presidential hopefuls.” The newsletter also contained “a number of other political articles . . . , all with a strong Democratic bias.”¹⁶ That is hardly notice designed to come to the attention of employees who oppose the union’s political activities, yet the Board still follows this outrageous ruling today.

Workers who do not want their compulsory dues and fees used for political purposes must negotiate technical procedural hurdles that unions have erected. The most significant are the requirements, imposed by most unions, that *Beck* objections be submitted during a short “window period”—typically a month or less—and be renewed every year. In *California Saw*, the NLRB approved both of these obstacles to the exercise of *Beck* rights.¹⁷ As a result, many employees are

¹⁵ 320 N.L.R.B. at 234-35.

¹⁶ *Machinists v. NLRB*, 133 F.3d 1012, 1018 (7th Cir. 1998).

¹⁷ 320 N.L.R.B. at 235-36.

forced to pay for union political activities, because their objections are considered untimely under union rules.

Why should constitutional rights be available only once a year? Employees should be free to stop subsidizing union political activity whenever they discover that the union is using their monies for purposes they oppose, not just during a short, arbitrary “window period.” Indeed, as the Supreme Court recently asked in *Knox v. SEIU Local 1000*, “[o]nce it is recognized . . . that a nonmember cannot be forced to fund a union’s political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?”¹⁸ Affirmative consent to such funding should be required, not objection, as the *Knox* Court held with regard to special assessments.

Certainly, if objection is required at all, workers should be free to make *Beck* objections that continue in effect until withdrawn, just as union membership continues until a resignation is submitted. After three federal courts declined to follow the Board on this issue,¹⁹ the Board reconsidered. But, instead of finding that annual objection requirements are per se unlawful, the Board decided to evaluate those requirements on a union-by-union basis “to determine ‘whether the

¹⁸ 132 S. Ct. 2277, 2290 (2012) (5-4 decision).

¹⁹ *Seidemann v. Bowen*, 499 F.3d 119, 124-26 (2d Cir. 2007); *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000).

union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.”²⁰

Applying that loose standard, a Board majority upheld the UAW’s annual objection requirement in 2011 without even considering the union’s purported justifications for it, finding that the burden that the requirement imposed on nonmembers was “de minimis.”²¹ However, as Member Hayes said, dissenting, the burden of objection under the UAW’s scheme “is plainly and decidedly not de minimis,” because objecting employees

still must undertake the affirmative task of writing and mailing a statement of continued objection each year; they must remember to do so before their 1-year objector term expires; and, if they fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures . . . for nonrepresentational purposes, for some period of time.”²²

Another procedural hurdle nonmembers face is finding out how the union spends their fees so that they can intelligently decide whether to object. In *Teachers Local 1 v. Hudson*, the Supreme Court held that “*potential* objectors [must] be

²⁰ *UAW Local #376*, 356 N.L.R.B. No. 164, slip op. at 1 (2011) (2-1 decision) (quoting *Machinists Local Lodge 2777*, 355 N.L.R.B. No. 174, slip op. at 1 (2010) (3-2 decision)).

²¹ *Id.*, slip op. at 3.

²² *Id.*, slip op. at 4.

given sufficient information to gauge the propriety of the union’s fee.”²³ Yet, the NLRB ruled in the *Penrod* case that unions need not disclose *any* financial information to nonmembers until *after* they object.²⁴ Despite being reversed by the D.C. Circuit, the Board continues to follow its *Penrod* ruling.²⁵

The Supreme Court also specified in *Hudson* that “adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor.*”²⁶ Yet, when unions give objecting employees financial disclosure, they often do not give them an auditor’s verification. The current Board approved that practice in *United Nurses & Allied Professionals*, in which the union merely told objecting nonmember Jeanette Geary that a certified public accountant had verified its major categories of expenses.²⁷

The Board majority in *United Nurses* explicitly declined to follow a directly contrary holding of the Ninth Circuit, *Cummings v. Connell*.²⁸ The majority, including two purported Members whose appointments were held invalid in *Noel*

²³ 475 U.S. 292, 306 (1986) (emphasis added).

²⁴ *Teamsters Local 166*, 327 N.L.R.B. 950, 952 (1999), *petition for review granted sub nom. Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *see California Saw*, 320 N.L.R.B. at 233.

²⁵ *E.g., United Food & Commercial Workers Local 700*, No. 25-CB-8896, JD-14-08, slip op. at 6 (Mar. 7, 2008).

²⁶ 475 U.S. at 307 n.18 (emphasis added).

²⁷ 359 N.L.R.B. No. 42, slip op. at 1-4 (Dec. 14, 2012) (3-1 decision).

²⁸ 316 F.3d 886 (9th Cir. 2003).

Canning, argued that unions’ conduct under *Beck* “is properly analyzed under the duty of fair representation,” not “a heightened First Amendment standard” as in public-sector cases such as *Hudson* and *Cummings*.²⁹ However, the D.C. Circuit had already that argument in an earlier Board case.

In *Ferriso v. NLRB*, the D.C. Circuit reversed the Board’s ruling that unions need not provide an objecting nonmember “with an independent audit of their major categories of expenditures.”³⁰ The *Ferriso* court explicitly reaffirmed its earlier holding in *Abrams v. Communications Workers* that *Hudson*’s holding on notice and objection “procedures applies equally to the statutory duty of fair representation.”³¹ Regrettably, it is the Board’s practice “to ignore precedent from federal appellate courts in favor of its own interpretations” of the law.³²

In reversing the Board in *Ferriso*, the D.C. Circuit explained why “[b]asic considerations of fairness”³³ require disclosure to objecting employees of an independent audit of a union’s calculation of its chargeable expenses: “nonmembers cannot make a reliable decision as to whether to contest their agency fees

²⁹ 359 N.L.R.B. No. 42, slip op. at 2-3.

³⁰ 125 F.3d 865, 866-70 (D.C. Cir. 1997).

³¹ 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995); *accord Ferriso*, 125 F.3d at 868-70.

³² *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980).

³³ *Hudson*, 475 U.S. at 306.

without trustworthy information about the basis of the union’s fee calculations, and . . . an independent audit is the minimal guarantee of trustworthiness.”³⁴

The Board also has refused to follow Supreme Court precedent as to what activities are lawfully chargeable to objecting nonmembers. In *Beck*, the Court concluded “that § 8(a)(3) [of the NLRA], *like its statutory equivalent, § 2, Eleventh of the RLA*, authorizes the exaction of only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,’” quoting *Ellis v. Railway Clerks*.³⁵ Moreover, *Beck* ruled that decisions in this area of the law under the RLA are “*controlling*” under the NLRA.³⁶

In *Ellis*, the Supreme Court held that union organizing is not lawfully chargeable under the RLA, because it has only an “attenuated connection with collective bargaining.”³⁷ In *Beck* itself, the Fourth Circuit followed *Ellis* in ruling that organizing expenditures “were not allowable charges against the objecting employees.”³⁸ Despite the Supreme Court’s clear mandate in *Beck* that decisions

³⁴ 125 F.3d at 869-70 (citations omitted).

³⁵ 487 U.S. at 762-63 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)) (emphasis added).

³⁶ *Id.* at 745 (emphasis added).

³⁷ 466 U.S. at 451-53.

³⁸ *Beck v. Communications Workers*, 776 F.2d 1187, 1211 (1985), *aff’d on other grounds* (continued...)

concerning forced union fees under the RLA are controlling under the NLRA, the Board has held that “organizing within the same competitive market” is chargeable to objecting nonmembers under the NLRA because of differences as to other aspects of the two statutes.³⁹

The current Board further eviscerated employees’ *Beck* rights in *United Nurses*. There the majority held that “[s]o long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors,” even if the bills lobbied “would not provide a direct benefit to members of the” objectors’ bargaining unit.⁴⁰ Worse, the majority, two of whom were unconstitutionally appointed, proposed a “rebuttable presumption of germaneness” for legislation, such as minimum wage legislation, that “would directly affect subjects of collective bargaining.”⁴¹

The *United Nurses* majority thus again ignored the Supreme Court’s *Beck* holding that decisions concerning forced union fees under the RLA are controlling under the NLRA. *Street* was the very first case to decide what limits the RLA imposes on forced union fees. At the very point at which the Supreme Court held

³⁸ (...continued)
en banc, 800 F.2d 1280 (4th Cir. 1986), *aff’d*, 487 U.S. 735 (1988).

³⁹ *United Food & Commercial Workers Locals 951, 7 & 1036*, 329 N.L.R.B. 730, 733-38 (1999) (4-1 decision), *enforced in pertinent part*, 307 F.3d 760 (9th Cir. 2002).

⁴⁰ 359 N.L.R.B. No. 42, slip op. at 5-8.

⁴¹ *Id.*, slip op. at 9.

that the RLA does not authorize unions to use objecting employees’ “exacted funds to support political causes,” the Court inserted a footnote that lists “lobbying purposes, for the promotion or defeat of legislation,” as a “use of union funds for political purposes.”⁴²

In *Miller v. Airline Pilots Ass’n*, the union, like the Board majority in *United Nurses*, contended that under the RLA lobbying government agencies concerning “issues that animate much of its collective bargaining . . . should be regarded as germane to that bargaining.”⁴³ The D.C. Circuit emphatically rejected that argument: “if the union’s argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world.”⁴⁴

The Supreme Court made the same point itself last year in *Knox*. There a state employee union contended that its expenditures to defeat a ballot proposition were “germane” because the proposition would have affected future implementation of its bargaining agreements. The Court rejected that argument: “If we were to accept this broad definition of germaneness, it would effectively eviscerate the

⁴² *Machinists v. Street*, 367 U.S. 740, 769 & n.17 (1961).

⁴³ 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff’d on other grounds*, 523 U.S. 866 (1998).

⁴⁴ *Id.* at 1422-23.

limitation on the use of compulsory fees to support unions' controversial political activities.”⁴⁵

The *United Nurses* Board majority also ignored what should have been dispositive precedent under the NLRA. In *Abrams v. Communications Workers*, the D.C. Circuit noted that the union's *Beck* notice to nonmembers “lists ‘legislative activity’ and ‘support of political candidates’ as non-chargeable expenses.” The court agreed that the “*Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for such activities” and, consequently, held that the notice was inadequate because it contained other “language which might lead workers to conclude that such activities are chargeable.”⁴⁶

In sum, there is a systemic problem. Since *Beck* was decided in 1988, the National Labor Relations Board has dismally failed to protect adequately the statutory rights of workers not to subsidize union political, ideological, and other nonbargaining activities. Indeed, the current Board, despite its lack of a constitutional quorum, seems bent on totally eviscerating those rights.

As the D.C. Circuit has recognized, nonmembers' *Beck* rights are “First Amendment-type interests.”⁴⁷ As such, they deserve effective protection. The only

⁴⁵ 132 S. Ct. at 2294-95; *accord id.* at 2296-97 (Sotomayor, J., concurring in pertinent part).

⁴⁶ 59 F.3d 1373, 1380 (D.C. Cir. 1995) (emphasis added).

⁴⁷ *Miller*, 108 F.3d at 1422.

federal labor statutes that effectively protect those fundamental rights are the Federal Labor Relations Act and the statute that covers postal employees, both of which prohibit agreements that require workers to join or pay union dues to keep their jobs.⁴⁸ The National Right to Work Act, S. 204, introduced by Senator Rand Paul on January 31, 2013, would provide the same effective protection for employees covered by the National Labor Relations Act.

⁴⁸ See 5 U.S.C. § 7102 (guaranteeing federal employees the right to refrain from “form[ing], join[ing], or assist[ing] any labor organization”); 39 U.S.C. § 1206(c) (same for postal employees).