

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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

Case 25-CB-8891

DOUGLAS RICHARDS,  
An Individual

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

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

RONALD R. ECHEGARAY,  
An Individual  
and

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

DAVID M. YOST,  
An Individual

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**RESPONDENT USW'S ANSWERING BRIEF  
IN SUPPORT OF ADMINISTRATIVE LAW JUDGE'S DECISION**

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## INTRODUCTION

The duty of fair representation complaint against Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (herein “USW” or “Respondent”), which, in the words of the counsel for the General Counsel, raised the “sole question of whether Respondent's requirement that employees annually renew objections to payment of full union dues pursuant to *Beck*, notwithstanding their continuing objection, violates the duty of fair representation.” (Tr. 7).<sup>1</sup>

After a hearing, Administrative Law Judge John H. West held that USW’s annual renewal procedure is lawful and does not breach the duty of fair representation. (JD-18-09; herein “ALJD”). Judge West concluded that the renewal requirement is consistent with federal court decisions that addressed annual renewal requirements in the DFR context. (ALJD at 27-28).

Charging Parties have filed eight exceptions to the Judge’s decision. In exception 1, Charging Parties argue the renewal requirement interferes with Section 7 rights and thus violates Section 8(b)(1)(A). In exceptions 2 and 3, Charging Parties argue that assuming the DFR

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<sup>1</sup>A May 19, 2009 hearing was held in Morgantown, West Virginia. The General Counsel, Charging Parties and Respondent entered into General Counsel Exhibit 2, a Stipulation setting forth the basic facts with Attachments A-S, herein cited as Exhibits. GC Exhibit 1 is the formal papers, and GC Exhibit 3 is USW’s Answer to the May 9, 2009 amended complaint. (Tr. 5). USW called Dave R. Jury (Tr. 50-76) as its witness. Charging Party Ronald Echeagaray (Tr. 19-36) and David Yost (Tr. 36-50) testified. To avoid the need for a hearing in Indiana, where charging party Douglas Richards resides, the Charging Parties and USW entered into a stipulation regarding the testimony of Douglas Richards, identified as Charging Party Exhibit 1, herein CP Ex. 1. CP Exhibit 2 is the USW magazine, called USW@Work, which contains the *Beck* or Nonmember Objection Notice.

standard applies, the USW breached its DFR because the USW Procedure was arbitrary, discriminatory and in bad faith.<sup>2</sup>

As shown ahead, the Charging Parties' exceptions lack merit. Judge West correctly concluded that the DFR standard applies in *Beck* objection cases and correctly found that USW did not breach its duties under Section 8(b)(1)(A) of the Act.

### SUMMARY OF THE CASE

1. **USW's Nonmember Objection Procedure (Ex. F)**. Since 1979, USW has maintained a written procedure called Nonmember Objection Procedure ("Procedure") which governs the reduction in dues and fees for nonmember employees who object to the payment of dues and fees for nonrepresentational activities. (Ex. F; Jury Tr. 70; ALJD at 4). The Procedure is applied to nonmember employees covered by union security provisions in USW-represented bargaining units. (Ex. F; Stip. ¶14; ALJD at 4).<sup>3</sup> Employees who object are considered "financial core fee payers" and have "none of the rights of membership." (Ex. F, p. 2).

The Procedure requires objecting nonmember employees to renew their objector status on an annual basis. Specifically, the Procedure states: "Any objection thus perfected shall expire on the next appropriate hiring anniversary date unless renewed by a notice of objection perfected as specified above." (Ex. F, Section 2, p. 2). To renew the objection, the objector merely must

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<sup>2</sup> Exceptions 4-8 relate to the Charging Parties' request for a nationwide remedy and objections to dicta. The General Counsel has not taken exceptions and thus is not seeking a remedy in this matter. Charging Parties seek the extraordinary remedy of a nationwide remedy even though the USW is not a repeat violator. Should the Board reverse the ALJ, a board order directing the rescission of the annual requirement is adequate with any notice and back pay remedy limited solely to the alleged discriminates named in the complaint. The extraordinary remedy sought by the Charging Parties is also not warranted given USW's reliance on the 1988 GC Memo and federal court cases.

<sup>3</sup>The proviso to Section 8(a)(3) of the National Labor Relations Act allows employers and unions to enter into union-security agreements requiring employees to become "members."

send in a written notice within the 30-day period following the anniversary date of their hiring.  
(*Id.*)

By definition, nonmember objectors are not USW members and, consequently, have no other rights of membership, including the right to vote, nominate or be a candidate for office and no right to vote on contract ratification. (Ex. F, p. 2). The Procedure is derived from the USW's International Constitution, which "provides that the international secretary-treasurer is to establish a nonmember objection procedure....Historically, the international secretary-treasurer has delegated that work to the legal department, because of a variety of legal issues that are involved in reviewing and responding to inquiries and other correspondence received from bargaining unit employees who perfect objections or who purport to perfect objections." (Jury Tr. 52).

2. **Charging Party Objections in 2008.** Charging Party Richards works for Trimas Corporation d/b/a Cequent Towing in Goshen, Indiana (CP Ex. 1, ¶¶1-2, ALJD at 5) and Charging Parties Echegaray and Yost work for Chemtura Corporation in Morgantown, West Virginia. Both employers have collective bargaining agreements with the USW that contain union-security clauses. (Exs. A-B; Stip. ¶¶4-5, 7-8; ALJD at 3-4). In 2008, the Charging Parties sent letters to USW objecting, or in the case of Echegaray (Tr. 25, 28, 30) and Yost (Tr. 39, 47-48) renewing objections to the payment of dues and fees for nonrepresentational activities. (Exs. C-E; Stip. ¶¶10-12; CP Ex. 1, ¶4). Echegaray testified he became an objector because the USW supported Barack Obama for President and the USW endorses passage by Congress of the Employee Free Choice Act. (ALJD at 6; Echegaray Tr. 22-24). Echegaray added that he had opposed the organizing drive at his workplace from the beginning and had, indeed, served as the company's election observer. (ALJD at 6; Echegaray Tr. 27). Yost stated that he too "was

against unionization from the beginning” and became an objector because he did not think USW could improve his benefits (ALJD at 8) and because the “union's political activities are in conflict with -- they support and their web site shows that they are very -- they support liberal, far left agenda, very pro labor, which also happens to be antigun. I am very pro NRA.” (ALJD at 7; Yost Tr. 38). The stipulation filed on behalf of Charging Party Richards did not address the reasons why he decided initially to become an objector.

**3. USW Honors Each Employees Request and Notified Each Employee of the Annual Renewal Obligation.** USW replied by letter to each charging party to “acknowledge receipt” and to notify that each properly applied for or renewed an objection. (Exs. G-I; Stip. ¶¶15-17; ALJD at 4-5).<sup>4</sup> The USW notified each that they must renew his or her objector status on an annual basis, using the employees’ date of hire as the date upon which the employee is required to renew the objection. (Exs. G-I; Stip. ¶¶15-17). The USW letters specifically informed each charging party that the objection will expire on a date certain (“June 25, 2009”, “August 15, 2009”, “February 25, 2010”) unless renewed within the 30-day period following their identified anniversary date. (Exs. G-I). For example, Richards was told: “Please be advised that your objection will expire on February 25, 2010 unless you renew your objection by sending an individually signed letter to the International Secretary-Treasurer within the 30-day period following February 25, 2010.” (Ex. F, p. 1).

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<sup>4</sup> Neither the General Counsel nor the Charging Parties have challenged any other aspect of the USW’s administration of its Nonmember Objection Procedure or its dealings with the Charging Parties.

**4. Quarterly-Advance Reduction Payments.** Pursuant to the Procedure, each charging party (and other objectors) received letters along with an advanced reduction check every three months from the USW. (Exs. J-L; Stip. ¶¶18-20; ALJD at 8). As explained by the USW’s witness, who is responsible for supervising the Procedure: “The union's nonmember objection procedure has an element of advanced reductions. Most employers continue to withhold from nonmember objectors the full union security amount per the checkoff authorization that the objectors sign. In order to accommodate that, the union provides advanced reduction payments on a quarterly basis to each of the objectors, who are having the full amount withheld from their dues.” (Jury Tr. 53-54). Charging Parties concede that they have no problem with the advance reduction program. (Echegaray Tr. 28-29; Yost Tr. 43-44, 47).

The USW chooses to use an advance reduction program rather than a reduced deduction program because there is a “burden in having employers withhold dues that are reduced to amount, a burden of policing to make sure that the employers are actually following through on their undertakings and correctly withholding dues at a reduced amount perhaps for one or two persons in a bargaining unit where the rest of the bargaining unit is having dues withheld at the full constitutional amount.” (Jury Tr. 67; ALJD at 8).

**5. USW Sends Out Annual Beck Notice and Complies With the 1988 GC Memo.** In the first quarter of the calendar year, the USW sends an annual *Beck* notice and other documents to objectors. (Exs. N-P; Stip. ¶¶21-22; Jury Tr. 54-55; Echagaray Tr. 29; Yost Tr. 47).

“Annually, the international union prepares a new report of its chargeable and nonchargeable expenditures based upon its actual expenditures in a prior year.” (Jury Tr. 54).<sup>5</sup> Jury testified:

After we calculate the revised percentage of chargeable and nonchargeable expenditures, we provide notice to nonmember objectors by sending them a letter, sometimes shortly thereafter, in which we include a number of documents relevant to that calculation.

We provide a copy of the report of the international secretary treasurer. We provide relevant excerpts from the union's audit, financial audit. We provide a copy of the audited report of our outside auditors affirming our calculation of chargeable and nonchargeable expenditures.

We also provide nonmembers with the text of a simple one page notice, that will be -- that is published in our membership magazine. The union's magazine "USW at Work".

And we also in that mailing provide the nonmember objector with a copy of our nonmember objection procedure, even though we likely have provided the objector with copies of that procedure on one or more occasions in the past. (Jury Tr. 55; see ALJD at 9-10).

The Notices and documents received by each objector are:

Nonmember Objection Procedure (Ex. F)  
Twenty-Sixth Report of the International Secretary-Treasurer (Ex. N)  
Independent Auditors' Report (Ex. O)  
Notice to All Employees Covered by a Union Security Clause (Ex. P).  
(See also Jury Tr. 56).

Employees also receive the USW magazine. (Echegaray Tr. 23-24, 33).

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<sup>5</sup>*United Steelworkers (George E. Failing Co.)*, 329 NLRB 145, 145 (1999) (“The parties have stipulated that the Respondents have established and maintained a procedure implementing employee rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988). The procedure provides for annual notice to bargaining unit employees of their right under *Beck* to object to the Respondents' expenditure of funds collected under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. This *Beck* notice is contained in the January/February issue of the Respondents' publication, *Steelabor*, which is mailed to all bargaining unit employees.”)

**6. Objectors Are Merely Required To Mail Annually A Renewal Of Their Objection.** Each of the Charging Parties complains that the requirement of sending a single letter annually to the USW to renew objection status is a burden. Each states his own reasons why such a mailing is burdensome to him individually.

Echegaray testified that mailing an objection letter once a year is a problem because he has “three daughters, a wife. My daughter is involved in several things. I am involved in several things.” (Echegaray Tr. 25-26; ALJD at 6). He also states that he should only be required to state his objection once, such as when he resigned from the Boy Scouts. (Echegaray Tr. 26). Despite claiming that sending a single letter to the USW is burdensome, Echegaray conceded that he uses the internet, email and regular mail every month for other matters. (Echegaray Tr. 34-35).

Yost testified he was a “father of seven,” works full time and carries a “full-time college load” so he believes that it is a ‘burden’ to mail a letter to USW once a year. (Yost Tr. 40; ALJD at 7-8). Yost, however, has worked in “information technology (‘IT’)” for seven years and admits that he uses computers and email all the time. (Yost Tr. 46-47). Nevertheless, according to Yost, mailing a letter once a year is “very burdensome” and very expensive. (Yost Tr. 48). Richards asserted in his stipulated testimony only that it is burdensome to renew annually but failed to offer a reason why he believed that sending a single letter is burdensome. (CP Ex. 1, ¶7; ALJD at 5-6).

**7. Reasons For USW Annual Renewal Requirement.** Associate General Counsel David R. Jury is currently responsible for administering the Procedure. (Jury Tr. 52; ALJD at 8-11). Jury explained the reasons the USW requires an annual renewal. (Jury Tr. 57-60).

First, the USW's International Secretary-Treasurer has delegated the operations of the Procedure to its legal department. (Jury Tr. 52). The union seeks to operate in conformity with the law and believes its annual renewal requirement is "lawful." (Jury Tr. 58). Jury testified "that several federal district courts in construing the National Labor Relations Act have concluded that annual renewal requirements are lawful, because as we understand the reasoning of those courts, including the D.C. Circuit in *Abrams versus Communication Workers*, continuing to dissent is not to be presumed. So we operate with our understanding of those cases as well as our understanding of the position of the NLRB General Counsel circa 1988, GC Memorandum 88-14, which suggested an annual renewal requirement is lawful. We have acted in reliance upon that memo, as well as existing authority." (Jury Tr. 58; ALJD at 8-11).

Second, USW "provide[s] objectors annually with revised data, revised calculation as to the union's chargeable and nonchargeable expenditures," and "it is reasonable to ask the objector to advise whether or not he or she wishes to continue objecting for the following year. (ALJD at 9). The USW's witness added, "The union's expenditures change [each year]. And we believe it is appropriate to ask an objector to bear that in mind." (Jury Tr. 57-58; Exs. F, N-P).

Third, the renewal requirement ensures that an employee knowingly waives important rights. "A nonmember objector is by definition someone who is not a member of the union." (Jury Tr. 58; ALJD at 9). Because an objector must be a nonmember, he forfeits important rights, which are spelled out in paragraph 3 of the Procedure:

As noted in Paragraph 1, objectors cannot be members of the United Steelworkers of America, and they have **no right of membership**. Historically, under the International Constitution, the United Steelworkers of America has accorded membership rights, such as the **right to vote, nominate for office**, hold office or be a candidate for office in the Local Union or International Union, the right to **participate** in or even **attend** Local Union meetings or any functions of the Local Union or International Union, and the **right to vote** when contracts are submitted to the membership for ratification, only to full members in good standing. This

means that all **financial core** fee payers, including objectors under the Procedure, **have none** of these rights of membership. (Ex. F, p. 2; bold added).

Because a *Beck* objector as a nonmember will “forgo important rights”, the USW policy permits them to “renew annually to make certain that it continues to be their intentions.” (Jury Tr. 65; ALJD at 9). USW believes “an annual renewal requirement is appropriate in light of the rights that a nonmember objector gives up....A person who is not a member of the union has no right to attend local union meetings, to vote on collective bargaining agreements, when new collective bargaining agreements are presented for ratification. A nonmember has no right to vote in local union or international union elections. And indeed, a nonmember has no right to run for union office or to seek to be a delegate to the union's constitution. We think these are significant rights that a nonmember knowingly gives up. And we believe that in light of those rights and in light of changes that could occur in the work place, that it is reasonable for us to ask a nonmember to renew.” (Jury Tr. 58-59; ALJD at 9-10).

Fourth, the “annual renewal requirement is of some assistance” to the “administration of the nonmember objection procedure” because the USW “pays advance quarterly reduction payments to objectors.” (ALJD at 10). As in the case of Echegaray, who was laid off for a period earlier this year, “annual renewal requirements allows the union” “to make certain that when we send advance reduction payments to objectors, that they are still actually in the work force and have not either retired, resigned, been laid off or out of work on some long term basis, thus [they] no longer have union security fees withheld from them.” (Jury Tr. 59, 74).

## ARGUMENT

### I. THE LAW OF DUTY OF FAIR REPRESENTATION, *BECK* AND THE ANNUAL RENEWAL REQUIREMENT.

#### A. *Beck* and the 1988 GC Memorandum

Contrary to the Charging Party's exceptions, the Board applies a duty of fair representation standard to assessing a union's conduct under its *Beck* procedures. Applying the DFR standard, *Communications Workers v. Beck*, 487 U.S. 735, 738 (1988), held a union's expenditure of agency fees "over the objections of [fee]-paying nonmember employees...on activities unrelated to collective bargaining, contract administration, or grievance adjustment...violate[s] the union's duty of fair representation." A union "breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1988); *California Saw & Knife Works*, 320 NLRB 224, 230 (1995) ("[W]e shall apply to cases involving *Beck*-type issues the duty-of-fair-representation standards set forth by the Supreme Court," i.e., "that a union breaches its duty of fair representation if its actions are arbitrary, discriminatory, or in bad faith.").

"A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez*, 525 U.S. at 45-46; see also *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) ("[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time...the union's behavior is so far outside a wide range of reasonableness...as to be irrational.") (internal citations omitted).

Just after the 1988 *Beck* decision was issued, the General Counsel announced its position in November 1988, stating "a union can require nonmembers to file new objections...each year." GC Memorandum 88-14, p. 3 (Nov. 15, 1988); see GC Memorandum 01-04 (April 6, 2001).

Likewise, without deciding the issue, *California Saw & Knife Works* noted the GC's position annual objection procedure is lawful. 320 NLRB 224, 236 n. 62 (1995) (observing that the "requirement that *Beck* objections be registered annually is not alleged to be unlawful by the General Counsel" and recognizing "that courts have approved the annual objection requirement").

The legal analysis in ascertaining a DFR breach is different from the analysis of a violation of a Section 7 right. As noted, the DFR breach affords a union a wide range of reasonableness. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 45 (1998); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). By framing the case as a DFR breach, the General Counsel conceded that the Section 7 right to become and remain a *Beck* objector is qualitatively different from the Section 7 right to resign from membership. The right to resign membership is an unfettered right, *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), *Machinist Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984); while the right to be a *Beck* objector may be limited so long as the restrictions are not arbitrary, discriminatory or imposed in bad faith. (See Argument II). Charging Parties, however, ignore this distinction.

**B. Federal Courts Have Ruled the Annual Renewal Requirement Does Not Breach DFR.**

As Judge West detailed, federal courts that have considered the annual renewal requirement have found no DFR breach. (ALJD at 15-25). As noted, the General Counsel acknowledged before Judge West: "Several courts have upheld annual objection requirements on the premise that the status is not presumed and the burden of objecting lies with the employee." (Tr. 16; ALJD at 15-25).

The Sixth Circuit in *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987), a case involving public sector employment, held an annual renewal requirement ‘not...unreasonable’ and lawful. The Court stated:

“Since *Hudson* places the burden of objection upon the employees (as contrasted to burden of proof), we do not consider unreasonable the plan's provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.”  
824 F.2d at 1506.<sup>6</sup>

Likewise, in a case construing the NLRA, *Abrams v. CWA*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995), citing *Tierney* and *International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961), stated: ‘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.’ *Abrams* stated: “[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.” 59 F.3d at 1382 (citing *Tierney*).<sup>7</sup>

Judge West correctly noted that other federal courts found the annual requirement unlawful in non-DFR cases and in different legal contexts. (ALJD at 21-24). See (1) *Shea v. IAM*, 154 F.3d 508, 515 (5th Cir. 1998) (involving Railway Labor Act, the court held the “current procedure is cumbersome to both the union and the objecting employees because it

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<sup>6</sup> Charging Parties complain that the court in *Tierney* addressed the annual renewal requirement only in *dicta*, (see Charging Parties’ exceptions at page 27). However, re-characterizing *Tierney* ignores the plain language of the decision.

<sup>7</sup>See *Price v. UAW*, 722 F.Supp. 933, 938, 940 (D. Conn. 1989), *aff'd*, 927 F.2d 88 (2d Cir.), *cert. denied*, 502 U.S. 905 (1991) (upholding an annual renewal requirement and noting that “[t]he Union's new objection procedures, which closely track guidelines established in a recent internal NLRB memorandum (Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck*, NLRB Office of the General Counsel, Nov. 15, 1988”).

requires annual computer entries.”); (2) *Seidemann v. Bowen*, 499 F.3d 119, 125 (2d Cir. 2007) (“We are persuaded by the Fifth Circuit's analysis in *Shea*, which is more in line with the Circuit's jurisprudence regarding agency fee procedures and our reading of Supreme Court precedent.”); (3) *Lutz v. IAM*, 121 F.Supp.2d 498, 506 (E.D. Vir. 2000) (“annual objection requirement imposes a burden on the First Amendment rights of nonmembers, and yet, the IAM has not offered any legitimate reason for such a requirement”). However, these three decisions rest on “scrutiny under the First Amendment,” which “is significantly more rigorous and less deferential than DFR review.” *Lutz*, 121 F.Supp.2d at 504-505. See *Seidemann*, 499 F.3d at 124 & 125 (distinguishing *Price* and *Abrams* on the ground that did not apply “First Amendment requirements”); *Shea*, 154 F.3d at 516 (“invok[ing] the protections of the First Amendment” rather than “the arguably weaker DFR standard”). And, because the First Amendment does not apply to agency fee objection procedures under the NLRA, *White v. Communications Workers, Local 13000*, 370 F.3d 346 (3d Cir. 2004), the Board has rejected the proposition “that precedent under public sector labor law and the RLA grounded in constitutional considerations are binding in the context of the NLRA,” *California Saw*, 320 NLRB at 227. Charging Parties likewise ignore this key principle.

As shown ahead, the Board should follow federal judicial precedent and find USW's Procedure to be lawful. (ALJD at 24).<sup>8</sup>

## **II. JUDGE WEST CORRECTLY RULED THAT USW'S ANNUAL RENEWAL REQUIREMENT DID *NOT* BREACH THE DUTY OF FAIR REPRESENTATION.**

In exceptions 2 and 3, Charging Parties argue that USW's annual renewal requirement breaches the DFR because it is arbitrary, discriminatory, and applied in bad faith. (Brief at 5).

### **A. Judge West Correctly Ruled the Renewal Policy is Not Arbitrary.**

Charging Parties argue that the USW Procedure is arbitrary because it serves no legitimate purpose and the 30-day window period to object, based on the employee's hiring date, is arbitrary.

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<sup>8</sup>The USW's Procedure was challenged in the 1990's because it failed to provide a separate window period for employees who resign their membership to file objections. *United Steelworkers (George E. Failing Co.)*, 329 NLRB 145, 145 (1999). The GC did not challenge the annual notice requirement. 329 NLRB at 150, fn. 1 (quoting Procedure: "Any objection thus perfected shall expire on the next succeeding hiring anniversary date unless renewed by a notice of objection perfected as specified above."). Because of the recent change in the GC's position, however, the five administrative law judges that addressed the annual renewal requirement found it breached the DFR. These cases, of course, are "not precedent." (ALJD at 25). And some cases involved justifications which differ from USW. (1) *CWA (AT&T Holdings; Sandy Ilias)*, 2009 WL 88055; Case No. 8-CB-10487 (January 9, 2009) (Judge Nations held CWA violated Act by enforcing an annual renewal requirement for *Beck* objectors"); (2) *IBEW Local 34 (John Lugo)*, 2008 WL 5397051; JD-51-08 (December 19, 2008) (Judge Kocol found that by "informing *Beck* objectors that they must annually renew their objections, Respondent Local violated Section 8(b)(1)(A)"; (3) *United Auto Workers (Colt's Mfg. Co.; George Gally)*, JD(NY)-06-08 (March 3, 2008) (Judge Biblowitz concluded annual renewal obligation violated Section 8(b)(1)(A)); (4) *IAM, Local Lodge 2777(L-3 Communications Vertex Aerospace)*, 2008 WL 123538; JD-02-08 (January 09, 2008) (Judge Marcionese concluded union violated Section 8(b)(1)(A) by requiring annual *Beck* objections); (5) *General Truck Drivers, Local No. 952 (Albertson's)*, JD(SF) 30-06 (May 30, 2006) (Judge Kocol concluded annual renewal obligation violated Section 8(b)(1)(A)). In any event, the Board has yet to decide any exceptions filed in any of the aforementioned cases.

Judge West addressed Charging Parties' claims:

The Charging Parties argue that the union's action requiring objectors to annually renew their objection is arbitrary since, as an administrative matter, it is easier for the union to accept one continuing objection and charge only reduced financial core fees than to send out multiple quarterly mailings and refund checks in exchange for an annual objection; that the arbitrary nature of the policy is made particularly apparent by the existence of a 30-day window period and the use of the employee's hire date since, with respect to the former why couldn't the window be 45, 60, 90, or 120 days, and, with respect to the latter, the different hire dates of each employee must surely be a burden on the union (as well as employees) to coordinate all of these disparate renewal dates; that the choice of the hire date is arbitrary; that the Board in *California Saw and Knife Works*, 320 NLRB 224 (1995) struck down a window period that limited employees' objections to a single calendar month, regardless of when they resigned; and that the same rationale applies here. (ALJD at 27).

Judge West correctly rejected these arguments. Judge West found the 30-day window period did not impose an unreasonable burden upon the objectors, as shown by the testimony of the Charging Parties. Indeed, despite the protestations of the Charging Parties, the burden of sending one letter annually, at a date that has been clearly identified, is "minimal," if not inconsequential. (ALJD at 27-8). "All things considered, it is no real burden to remember one's hire date and a 30-day period linked to that hire date." (ALJD at 29). The renewal date is also reasonable in that it is linked to the employee's hiring anniversary date. Objectors are given the date when they first object and later receive quarterly letters from the USW, which serve as reminders of their objector status. While Charging Parties suggested they were too busy, the sending of a single letter, by any reasonable measure, cannot be considered so burdensome as to the requirement arbitrary under a DFR analysis. Judge West agreed, finding the "burden" to be "minimal." (ALJD at 27).

*California Saw* supports Judge West's finding. That case sanctions a unions' 30-day window period for the filing of employee *Beck* objections. Window periods are in fact common in other areas, such as dues checkoff revocation and contract reopeners. Objectors are advised of

the date for renewing an objection and are given ample time to renew their objections. An objector who wishes to take note of the date for renewal may easily do so, just as he or she may choose to note other important dates or appointments. Here, the USW plainly advises each objector in writing of his or her renewal date, and none of the Charging Parties can reasonably contend that he has not been informed of the relevant date for renewal. And USW witness Jury testified that “in practice, when an employee belatedly renews his or her objection, in practice, [the USW has] tended to renew that objection status prospectively from the renewal.” (Jury 71).

Likewise, USW’s reliance on federal cases in maintaining its rules is not just “legal because it is legal” as claimed by Charging Parties, but rather shows the USW Procedure cannot be arbitrary. Judge West agreed with the claim of the USW that its “reliance upon existing authority; that while General Counsel no longer adheres to its original and longstanding position approving a procedure requiring nonmembers to file new objections each year, Respondent’s reliance on prior decisions and other precedent **cannot be viewed as arbitrary conduct**, at least not until the Board - as opposed to the General Counsel - has ruled on this issue.” (ALJD at 28; bold added).

As noted, the one-year requirement has been upheld by several federal courts; this alone precludes any finding of arbitrariness. See, e.g., *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) and *Abrams v. CWA*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995). As USW witness Jury testified, federal “courts in construing the National Labor Relations Act have concluded that annual renewal requirements are lawful, because as we understand the reasoning of those courts]” continuing dissent is not to be presumed. Thus, USW acted in reliance upon “existing authority.” (Jury Tr. 58). Consequently, Charging Parties’ claim fails.

In addition to federal court precedent, USW's Procedure cannot be found to be arbitrary when it followed the guidelines established in GC Memorandum 88-14, at least not until the Board has ruled on this issue. GC Memorandum 88-14 prescribed an annual objection procedure—a procedure whereby the union annually recalculates the amount charged to objectors, annually provides objectors with notice of the objection right, and, as an integral component of this annual objection procedure, "require[s] nonmembers to file new objections...each year." GC Memorandum 88-14, p.3.

Judge West also found that the USW had legitimate reasons for its Procedure because a nonmember objector is presented with new financial data every year and will "forgo important rights" if it remains an objector, the USW policy is designed to "have them renew annually to make certain that it continues to be their contentions." (Jury Tr. 65: ALJD at 28). The GC's opening statement at the hearing and in its post-hearing brief acknowledged this is a legitimate factor, recognizing an annual renewal "gives nonmembers opportunity to make a conscious decision on an annual basis about whether to object." (Tr. 10). Requiring a nonmember objector to renew his objection is legitimate when balanced with the rights he gives up by remaining a nonmember objector. While Charging Parties suggest that a member gives up the "right" not to pay full dues, such a "right" does not outbalance the positive right to vote on CBAs and union officers that are waived by a nonmember objector. At the least, the USW is entitled to adopt such a Procedure without being found to be arbitrary.

In addition, because USW gives annual *Beck* notices to existing objectors, along with information such as audits and reports (ALJD at 28; Exs. N-P; Stip. ¶¶21-22), it is not arbitrary to require the objector to mail in a letter once a year. By providing annual notice to employees of the USW's Procedure, the Procedure maximizes the likelihood that employees who do have

an objection to providing financial support to the union's non-collective bargaining activities will register that objection. (ALJD at 28).<sup>9</sup>

Moreover, by providing for an annual objection, the Procedure gives the USW reasonable assurance that only employees who are moved (and continue to be moved) by an objection to providing financial support to activities not germane to collective bargaining will be entitled to pay a reduced agency fee. And, an annual objection procedure furthers these important interests at the minimal cost of requiring those employees who do wish to maintain an objection to periodically submit a short statement to that effect. As witness Jury explained: USW “provide[s] objectors annually with revised data, revised calculation as to the union's chargeable and nonchargeable expenditures, we believe that it is reasonable to ask the objector to advise whether or not he or she wishes to continue objecting for the following year. Because the data changes each year, the union's expenditures change. And we believe it is appropriate to ask an objector to bear that in mind.” (Jury Tr. 57-58). While the Charging Parties claim that their own objection is permanent and that their opinions are immutable, it is not arbitrary for the USW to maintain a procedure that is premised on the basis that the continuing objection of all covered employees is not to be presumed and that whether or not an employee wishes to remain an objector may be influenced by his or her review of new data and new facts.

Finally, Judge West noted that USW provides advanced reduction payments on a quarterly basis to those objectors whose employers withhold the union security fee at the full amount of regular dues. (ALJD at 28). The renewal requirement provides some assurance to the

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<sup>9</sup>Member Cohen stated "repeat[ing] [the objection] notice each year" is a "corresponding" practice to providing that objections are effective for one year. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 n. 7 (1995) (Member Cohen, concurring). See also *United Steelworkers (George E. Failing Co.)*, 329 NLRB 145, 146 n.5 (1999) (Member Hurtgen, concurring).

USW to be certain it is not paying amounts to persons who are no longer employed within covered bargaining units, whether such persons leave employment due to a plant closure, layoff, retirement, or resignation. (ALJD at 28). As Jury testified, the annual renewal requirement is of “some assistance to the union in administering our program to make certain that when we send advance reduction payments to objectors, that they are still actually in the work force and have not either retired, resigned, been laid off or out of work on some long term basis, thus no longer have union security fees withheld from them.” (Jury Tr. 59, 74). Surely it is not arbitrary for the USW to seek to avoid making advanced reduction payments to persons who no longer are subject to union security fee withholding and who thus no longer have a right to continue receiving advanced reduction payments from the union. (ALJD at 28).

**B. Judge West Correctly Ruled that the Renewal Policy is Not Discriminatory.**

“With respect to whether the annual renewal requirement for objectors is discriminatory, the Charging Parties argue that this is the situation in that members do not have to annually renew their membership or dues checkoff authorizations.” (ALJD at 26). Charging Parties argue in its exception that the policy is discriminatory because it applies to “only nonmember *Beck* objectors” and USW does not make union members annually renew their membership or flip them into nonmembers.” (Brief at 21-22).

This exception is without merit. USW is not treating Charging Parties differently because they are objectors. Union membership/checkoff is not similarly situated to *Beck* objections when viewed "in light of the factual and legal landscape." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991). Union membership is regulated by the Labor Management Reporting and Disclosure Act, which specifically forbids a union to summarily terminate an employee's membership for any reason other than nonpayment of dues. 29 U.S.C. § 411(a)(5). Checkoff

authorization cards are expressly regulated by Section 302(c)(5) of the Labor Management Relations Act, which specifically states the period for which a dues authorization may be treated as irrevocable. 29 U.S.C. § 186(c)(5). Charging Parties are comparing apples to oranges and this cannot make out a claim of discrimination. *Raleys*, 348 NLRB 382, 519 (2006) (“apples must be compared to apples, not to oranges, much less to kumquats”). Or as Jury explained: “The union chooses to do exactly what Congress permits in Section 302(c)(4).” (Jury Tr. 63).

In addition, as noted, *Beck* objections are regulated by the duty of fair representation, which has, so far, been interpreted to allow unions to handle objections on an annual basis. In each regard, USW’s conduct has been fully consistent with the governing law as articulated by the authorities responsible for enforcing it. Any “inconsistency” must, therefore, be attributed to the authoritative articulations of the law, not to the USW. Therefore, the claim of discrimination or of applying a “double standard” lacks merit.

**C. Judge West Correctly Found “No Merit” to Charging Parties’ claim of Bad Faith.**

Charging Parties also argue that “bad faith” is shown because USW put its “self interest” before those of the bargaining unit. (Brief at 22-3). Charging Parties misstate the legal standard. Judge West summarized the proof needed to show bad faith:

A bad-faith violation of the duty of fair representation "requires a showing of fraud, or deceitful or dishonest action." *Mock v. T.G. & Y. Stores Co.* 971 F.2d 522, 531 (10th Cir.1992). Courts have applied a "demanding standard" for finding bad faith under the duty of fair representation, *Swatts v. United Steelworkers*, 808 F.2d 1221, 1225 (7th Cir.1986), requiring a union's actions toward unit employees to be "sufficiently egregious or so intentionally misleading [as] to be invidious," *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1203 (5th Cir. 1991) (internal quotation omitted); see also *Alicea v. SuffieldPoultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990) (requiring for bad-faith violation of duty of fair representation "serious misrepresentations that lack rational justification or are improperly motivated"). (ALJD at 26).

Judge West found that the USW Procedure—expressly approved by the General Counsel and the Courts—does not meet the definition of “bad faith.” There is *no* evidence that Charging Parties were misled or lied to about the Procedure, and the Charging Parties do not suggest such. There was no deceit or dishonesty, and the Charging Parties do not suggest such. As a result, there is no basis to find a DFR breach based on “bad faith.”

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In sum, Judge West did not err in finding that the USW did not breach its DFR and the Board should adopt Judge West’s decision and recommended order

### **III. CHARGING PARTIES’ CLAIM THAT THEIR SECTION 7 RIGHTS WERE VIOLATED IS WITHOUT MERIT AND CONTRARY TO BOARD LAW.**

In exception 1, the Charging Parties argue that Judge West failed to address its allegation that the renewal requirement violates Section 7 rights, that is, a statutory standard, independent of the DFR allegation. (Exception at 6). Indeed, the Charging Parties argue that resort to the DFR standard is unnecessary and “inappropriate in this case.” (Exceptions at 16).

As a preliminary matter, the Counsel for the General Counsel did not argue that the annual renewal requirement violated Section 7. The General Counsel in its brief to the Judge argued only the arbitrary prong of the DFR standard.

Under *Beck*, as more generally, "a union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1988); *California Saw & Knife Works*, 320 NLRB at 230 ("[W]e shall apply to cases involving *Beck*-type issues the duty-of-fair-representation standards set forth by the Supreme Court," i.e., "that a union breaches its duty of fair representation if its actions are arbitrary, discriminatory, or in bad faith.").

Judge West correctly held “this case will be decided under the duty of fair representation standard.” (ALJD at 24). Charging Parties attempt to prove a Section 7 violation is contrary to Board precedent and was rejected in *OPEIU Local 29 (Dameron Hosp. Assn.)*, 331 NLRB 48 (2000). Quite tellingly, the Charging Parties rely upon the *dissenting* opinion of Member Brame in *Dameron*, 331 NLRB at 52-71. The majority explained that the DFR standard applied, rejecting the same argument now advanced by the Charging Parties in this case:

Our dissenting colleague disagrees with the Board's application of the duty of fair representation standard in dues objection cases. The Board considered the issues raised by our colleague in deciding *California Saw & Knife Works*, 320 NLRB 224 (1995), where it held that a union's fulfillment of its obligations under *Beck* are subject to the duty of fair representation.... Contrary to our dissenting colleague, the *Beck* decision did not preclude the Board from applying a duty of fair representation analysis. As the Court of Appeals for the Seventh Circuit explained in affirming the Board's decision in *California Saw*, *Beck* implicates the nondirective statutory language of Sec. 8(a)(3), and “the Board has broad latitude in interpreting nondirective statutory language. ... Less directive than section 8(a)(3), so far as agency fees is concerned at any rate, it is scarcely possible to get. ... All the details necessary to make the rule of *Beck* operational were left to the Board ... [of] crafting the rules for translating the generalities of the *Beck* decision ... into a workable system for determining and collecting agency fees.” 133 F.3d at 1015 (citations omitted).  
*OPEIU Local 29 (Dameron Hosp. Assn.)*, 331 NLRB 48, 52 fn. 2 (2000).

Indeed, in the prior annual renewal requirement cases, an ALJ explained why a Section 7 analysis does not apply:

The complaint does not allege that Respondents directly restrained or coerced employees in the exercise of their Section 7 right to become and remain *Beck* objectors. Rather, the complaint alleges only that Respondents breached their duty of fair representation by requiring annual renewal of *Beck* objections. As Respondents point out in their brief, the legal analysis in ascertaining a breach of a duty of fair representation is different from the analysis of a violation of a Section 7 right. The test for the former affords a union a wide range of reasonableness. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 45 (1998); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). By framing the complaint as he does the General Counsel is implicitly conceding the Section 7 right to become and remain a *Beck* objector is qualitatively different from the Section 7 right to resign from membership in a union. The latter is an unfettered right, *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), *Machinist Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB

1330 (1984); the former may be encumbered so long as the encumbrances are not arbitrary or invidious. The Board has not yet differentiated between in this area between the Section 7 right to become and remain a *Beck* objector and notice requirements concerning this right that emanate from the duty of fair representation.

*IBEW Local 34 (John Lugo)*, 2008 WL 5397051; JD-51-08 (December 19, 2008).

Therefore, Charging Parties' attempt to apply a non-DFR standard to the instant case is without merit.

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In sum, the USW Procedure regarding checkoff authorization/membership versus nonmember objections is not inconsistent or discriminatory but based on differences in the law and how these matters are regulated. The charge of "inconsistency" is a red-herring and is not a basis to find a DFR breach.

### CONCLUSION

As a result, USW asks the Board to affirm and adopt Judge West's decision and order dismissing the complaint.

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## **PROOF OF SERVICE**

On October 19, I e-filed the foregoing Respondent USW's Answering Brief to:

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