No. 10-72655

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 4, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS UNION

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement of its Order issued against United Food and Commercial Workers Union, Local 4, affiliated with United Food and Commercial Workers Union ("the Union"). The Board's Decision and Order

issued on August 26, 2010, and is reported at 355 NLRB No. 133, and the Board's denial of the Union's motion for reconsideration issued on October 25, 2010.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) ("the Act" or "the NLRA")), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case under the same section of the Act, because the unfair labor practice occurred in Montana.

The Board filed its application for enforcement on August 30, 2010. The application is timely; the Act places no limit on the time for filing actions to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Union unlawfully failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information to support the calculation of its agency fee.

RELEVANT STATUTES

Relevant statutory provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on charges filed by Pamela Barrett—a unit employee who objected to paying dues for nonrepresentational activities and therefore became a nonmember agency fee payer—the Board's General Counsel issued an unfair labor practice complaint against the Union, alleging that the Union violated its duty of fair representation and therefore Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)). The complaint alleged that the Union, in calculating Barrett's agency fee, unlawfully failed to provide her with an adequate explanation for the discrepancy between the Union's total amount for chargeable expenses (95 percent) and the International Union's total amount for chargeable expenses (85 percent). (ER 5g.) [1]

However, the subject of both the hearing before the administrative law judge and the rulings in this case was whether the expenditure information that *the Union* did provide to Barrett on May 11, 2007—categorizing *its* expenses and forming the

[1] "ER" refers to the excerpts of record filed by the Union. "SER" refers to the supplemental excerpts of record filed by the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

basis for the 95 percent chargeable expense rate comprising the agency fee—was sufficiently verified pursuant to settled Board law.[2] (ER 5g-h.) Following the hearing, the judge issued a recommended bench decision, in which he found that the Union had provided Barrett with sufficiently verified expenditure information and therefore had not violated the Act. (ER 5i-k.)

The General Counsel filed exceptions to the judge's decision and the Union filed cross-exceptions. (ER 5f.) On review, a two-member Board, in a decision and order issued on October 31, 2008, and reported at 353 NLRB 469, reversed the judge's finding that the Union had not violated the Act. Contrary to the judge, the Board found that the expenditure information provided to Barrett was insufficient, because it did not meet the independent-verification requirements described in settled Board law. As the Board explained, the information was not properly verified, because it was not audited by an auditor who independently verified that the expenditures were actually made. (ER 5f-h.) Accordingly, the Board found that, by failing to provide Barrett with sufficiently verified expenditure information, the Union breached its duty of fair representation and therefore violated the Act. The Board entered an order remedying the Union's unlawful conduct. (ER 5h.)

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[2] The Board, applying settled law relating to the litigation of issues closely connected to the subject matter of a complaint allegation, found—without any dispute from the parties—that the judge's decision to exclusively address this particular issue was proper. (ER 5g-h.)

Subsequently, the Union filed a motion for reconsideration of the Board's Decision and Order, and the General Counsel filed a motion to modify certain remedial aspects of the Board's Decision and Order. On January 21, 2009, a two-member Board issued an unpublished order denying the Union's motion and granting the General Counsel's motion in part. (ER 5a-d.) As a result, the Board issued an amended order affirming its previous Order as modified in certain respects, and issuing a modified notice. (ER 5d; *see also* ER 5.).

In Ninth Circuit Case No. 09-70922, the Board applied for enforcement of its Order On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) ("*New Process*"), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. The Union then filed a motion to dismiss the case, in light of *New Process*. On June 25, 2010, the Board filed a response opposing the Union's motion, and moved to remand the case in light of *New Process*. This Court granted the Board's motion, denied all other pending motions as moot, and remanded the case to the Board on June 30, 2010.

On August 26, 2010, a three-member panel of the Board issued the Decision and Order that is now before the Court. (ER 5.) In its August 26, 2010 Decision and Order, the Board "affirm[ed] the judge's rulings, findings, and conclusions and . . . adopt[ed] the recommended Order to the extent and for the reasons stated in the

decision reported at 353 NLRB 469, as modified by the January 21, 2009 unpublished Order, which is incorporated by reference."[3] (ER 5.) On September 9, 2010, the Union filed a motion for reconsideration. (ER 2, SER 1-3.) On October 25, 2010, the Board issued an order denying the motion. (ER 1-4.)

The facts supporting the Board's Order are summarized below; the Board's conclusions and order are described thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union's Collective-Bargaining Agreement with Safeway Contains a Union-Security Clause Requiring Unit Employees To Become "Members" of the Union

The Union is the collective-bargaining representative of a unit of retail employees at a Safeway grocery store in Whitefish, Montana. (ER 5f, 5i; ER 64, 174, 178.) The unit employees are covered by a collective-bargaining agreement between Safeway and the Union. (ER 5i; 178.)

The collective-bargaining agreement contains a union-security clause. (ER 5f, 5i; ER 174, 178.) The union-security clause requires that within 30 days of employment, "employees must be or become members of the Union" as a

[3] The full text of the Board's Order, which it incorporated by reference in its August 26, 2010 Decision and Order, is located at pages 5h and 5d of the excerpts of records.

condition of employment.[4] (ER 5i; ER 178.) The Union spends money collected pursuant to the union-security clause on activities germane to its role as collective-bargaining representative (representational activities), as well as activities that are not germane to its role as collective-bargaining representative (nonrepresentational activities). (ER 5i; 178-79.)

B. Unit Employee Pamela Barrett Becomes a Nonmember *Beck* Objector; She Asks the Union for Verified Financial Information Supporting the Union's Calculation of Her Agency Fee, but the Union Fails To Provide Her with It

Pamela Barrett began working as a general clerk at the Safeway store in April 2007. (ER 5f; ER 64, 113, 116.) General clerks are included in the bargaining unit. (ER 178.)

In early May, the Union sent a "welcome aboard" letter to Barrett, notifying her that she was "required as a condition of employment to pay dues or fees to the

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[4] In practice, and in accord with Supreme Court decisions and Board law, actual "membership" in a union has been "whittled down to its financial core," and requires only the payment of uniformly required union dues and initiation fees. *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). Further, as discussed in detail below, while employees subject to a union-security clause may decide not to join the union, the union can require them to pay an agency fee. *Id.* at 742. These nonmembers may also become objectors under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988) ("*Beck*"). Nonmembers who are also "*Beck* objectors[,]" such as Barrett, are entitled to demand that the union charge them agency fees only for activities "germane to collective bargaining, contract administration, and grievance adjustment." Such activities are referred to as representational activities and they are chargeable. Thus, a *Beck* objector is entitled to have his or her agency fee reduced by an amount reflecting the percentage of union expenses that were nonrepresentational and thus nonchargeable. *Beck*, 487 U.S. at 752-54.

Union." (ER 5f, 5i; ER 119-20, 224-26.) The letter also notified Barrett of her right to join or be a financial core member of the Union and, in the latter case, to object under *Beck* to paying union dues for nonrepresentational purposes. (ER 9-12; ER 119-20, 224-26.) The letter stated that Barrett's monthly membership dues would be $33.00. (ER 226.)

Barrett, who had concerns about the membership dues she would have to pay, sent a letter to the Union on May 9 asserting her rights as a *Beck* objector. (ER 5f; ER 65-66, 182.) In her letter, she stated she did not want to be a member of the Union and was resigning from union membership. She further stated that she wanted to pay only the "agency" fee. To that end, she requested that the Union provide her with a "full" and "verified financial disclosure of union expenditures." (ER 5f; ER 182.)

The Union responded to Barrett in a letter dated May 11. (ER 5f, 5i; ER 183-84.) In its letter, the Union acknowledged Barrett's request for nonmember status. (ER 5f; ER 69, 183-84.) The Union informed Barrett that, as an agency fee payer, her dues would be $31.50 per month. According to the Union, that amount represented 95 percent of the Union's current member dues rate of $33.00. (ER 5f; ER 69, 184.)

The Union enclosed two attachments with this letter. (ER 5f; 69, 185-95.) As support for its $31.50 agency fee calculation, the Union enclosed a one-page

financial statement entitled "United Food Commercial Workers Union Local #4 Statement of Expenses and Allocation of Expenses Between Chargeable and Non-Chargeable Expenses." (ER 5f; ER 69, 185.) The statement listed the Union's "[c]hargeable and [n]on-chargeable expenses" for the year ending December 31, 2006. It also stated that the Union's chargeable expense rate for representational activities was 95 percent of the Union's total expenses, and that the Union's nonchargeable expense rate for nonrepresentational activities was 5 percent.[5] (ER 5(f); ER 185.) Neither this statement nor the letter mentioned above contained any indication that the expenditure amounts listed had been independently verified.[6] (ER 5f-h; ER 183-85.)

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[5] The statement listed the Union's total expenses as $525,428; chargeable expenses as $497,687 (which it calculated as 95 percent of the total expenses); and nonchargeable expenses as $27,741 (which it calculated as 5 percent of the total expenses). (ER 185.)

[6] In the other attachment to the letter, the Union provided Barrett with the *International Union's* audited financial statement from 2005, entitled "United Food and Commercial Workers International Union Statement of Expenses Between Chargeable Expenses and Non-Chargeable Expenses And Report of Independent Auditors." (ER 186-95.) That document stated that the chargeable expense rate for the International Union was 85 percent.

Under Board law, a local union—as an alternative to determining its agency fee by conducting an audit of its own chargeable and nonchargeable expenditures—may use what is called the "local presumption" to calculate its agency fee. The "local presumption" allows a local union to use the same allocation of chargeable and nonchargeable expenses as that of its parent affiliate. The Board permits this alternative because the Board has found that parent organizations almost always have more nonchargeable expenses than their locals, which means the *Beck*

The Union instructed Barrett to contact it by May 21 if she wished to remain a nonmember agency fee payer. (ER 184.) Barrett so notified the Union, and on May 16, the Union sent a letter to Barrett reacknowledging her status as a nonmember/agency-fee objector. (ER 5j; ER 196.) The Union's letter to Barrett reiterated that, as a nonmember/agency-fee objector, her agency fee was $31.50 per month. (ER 196.)

As stated above, Barrett had previously requested the Union to provide her with verified financial information relating to the calculation of the agency fee amount. (ER 5j; ER 182.) She had not received any verified information, however, and continued to have concerns about the matter. (ER 197.) On May 29, she sent the Union a letter in which she reiterated that she was a *Beck* objector. (ER 5j; ER 70, 197.) She further stated that, although the Union had acknowledged that she was an agency fee payer, she had not been "provided with any information that explains or justifies the calculation of this high agency fee."

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objector will actually pay a smaller agency fee when the "local presumption" is used. *See Thomas v. NLRB*, 213 F.3d 651, 661 (D.C. Cir. 2000). When a local union uses the local presumption, it will get less dues' money from those paying the agency fee, but it will also be able to avoid the Board's requirement of a local audit. *Auto Workers Local 95 (Various Employers)*, 328 NLRB 1215, 1217 (1999), *petition for review denied in relevant part, Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000). The parent organization, however, still has to provide "verified supporting expenditure information" justifying its chargeable and nonchargeable expenses. *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 n.15 (1999). In this case, there is no dispute that the Union chose not to use the "local presumption" and, instead, required *Beck* objectors to pay the higher agency fee based on its actual local expenditures.

(ER 5f, 5j; ER 70, 197.) She again asked the Union to provide her with a verified financial disclosure explaining the basis for its calculation of the agency fee. (ER 5f, 5j; ER 197.) She noted that, even though the Union had not provided her with an "adequate financial disclosure" supporting the agency fee, she would nonetheless tender her agency fee each month under protest in order to protect her livelihood. (ER 197.)

The Union responded to Barrett in a letter dated June 15. (ER 5f; ER 199.) With respect to Barrett's statement that the Union had not provided her with a verified financial explanation of the agency fee, the Union stated that it was a "small" local, and that it did not have "a lot" of nonchargeable expenses. (ER 5j; ER 199.) The Union also referred Barrett to the expenditure information that it had enclosed in its May 11 letter. (ER 5j; 199.) That information, as described above, consisted of the Union's nonverified one-page financial statement (as well as the International Union's audited financial statement). (ER 5j; ER 199.) The Union reasserted that Barrett's agency fee would be $31.50 per month. (ER 199.)

C. The Union Belatedly Provides Barrett with an Accountant's Report Regarding the Union's 2006 Expenditure Statement; the Report, which Was Not an Audit, Was Based Solely on the Union's Representations, and Did Not Verify that the Expenses Had Actually Been Made

On December 14, the Union—in an apparent attempt to settle this case—offered Barrett a reimbursement check for the difference between the agency fee

she had paid from May to December based on the Union's 95-percent chargeable expense rate ($31.50, according to the Union), and the amount she would have paid during that period if her dues had been calculated using the International Union's 85-percent chargeable expense rate (under $28.00). (ER 5f, 5j; ER 212-13.) Barrett declined the offer. (ER 5j.)

In a letter accompanying the proffered reimbursement check, the Union acknowledged that when it provided its expenditure statement to Barrett on May 11, it did not include a "2006 financial report" showing that the figures in the statement were reviewed by an accountant. (ER 5f-g; ER 212). The Union thus provided Barrett—for the first time—with this document, which was entitled "Independent Accountant's Report" and was dated February 19, 2007. (ER 5g; ER 212, 202-11.) The "Independent Accountant's Report" stated that an accountant had reviewed the Union's statement of support, expenses, and changes in net assets, but that all information included in the financial statement was based solely on the representations of the Union's management. (ER 5g-h; ER 204.)
The report emphasized that it was "substantially less in scope than an audit in accordance with generally accepted auditing standards[,]" and that the accountant expressed no opinion regarding the financial statements as a whole. (ER 5g-h; ER 204.)

The report contained no verification that the expenditures on the Union's expenditure statement had actually been made. (ER 5g-h; ER 204.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Becker), reversing the administrative law judge, found that the Union unlawfully failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information, consistent with its obligations under settled Board law.

Board law requires that expenditure information given to a *Beck* objector by a union must be audited by an auditor who independently verifies that the expenditures claimed were actually made, and who does not merely accept the representations of the union. (ER 5g-h.) The Board found that the Union failed to fulfill these requirements, because the Union's accountant only reviewed the one-page expenditure statement given to Barrett on May 11. The Board found that there was no evidence that the accountant did more than rely on the Union's representations in preparing the report. The Board also found no evidence that the accountant independently verified that the expenses claimed were actually made. (ER 5c n.4, 5f-h.) Having found that the Union failed to provide Barrett with sufficiently verified expenditure information, the Board accordingly found that the

Union breached its duty of fair representation and therefore violated the Act. (ER 5h.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the Order requires the Union to, for all accounting periods covered by the complaint, provide Barrett with information concerning expenditures by the Union (or in the event the Union relies on a local presumption, expenditures by its parent union) that has been verified by an independent auditor. The Order further states that, if Barrett, with reasonable promptness after receiving this information, challenges the dues-reduction calculations for any accounting period, the Union must process such challenge as it would otherwise have done, in accordance with the principles of *California Saw & Knife*, 320 NLRB 224 (1995), *enforced sub. nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). The Order also directs the Union to post a remedial notice, and provides the Safeway store with the option of posting the remedial notice at its workplace in Whitefish, Montana. (ER 5d, 5h.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Union failed to provide Pamela Barrett, a *Beck* objector, with sufficiently verified expenditure information supporting its

calculation of her agency fee. Board law is clear that a union that does not calculate its agency fee by using the so-called "local presumption" (*see* note 6, above) must provide a *Beck* objector with audited expenditures, within the generally accepted meaning of the term audit, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepting the representations of the Union. The Board reasonably found that the "review" that the Union provided to Barrett fell short of this mark, because it contained no independent verification that the expenses claimed were actually made.

On review, the Union has provided no basis for unsettling the Board's finding that it violated the Act. To begin, the Union is simply wrong in claiming that the Board did not find that the Union violated the Act. The Board's August 26, 2010 Decision and Order, which also incorporates the Board's first denial of reconsideration, clearly states that the Union violated the Act. The Union knew this, prompting it to file a second motion for reconsideration after the Board issued its August 26, 2010 Decision and Order. And the Board's denial of the second motion for reconsideration reaffirms the finding of the Union's violation.

The Union's challenges to the merits of the Board's unfair labor practice finding are also unpersuasive. Notably, the Union does not dispute that its "review" of the expenditure information was not as complete as an audit. Instead, it argues that its "review" should have been enough. The Union, however, fails to

recognize that the Board has made clear that what is required is an audit, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepting the representations of the Union. Further, the Union's discussion of accounting terminology cannot obscure the fact that—whatever it wants to call its accountant's report—it failed to meet the Board's independent-verification requirements.

The remainder of the Union's challenges to the Board's findings are equally unpersuasive. Although the Union claims that, by May 29, Barrett had moved past the objector stage and had decided to pursue a "challenge," wherein she would challenge the Union's *allocation* of its chargeable and nonchargeable expenses, this argument is first wrong as a factual matter. Barrett was clearly seeking the verified expenditure information to which she was entitled. And, in any event, even if she had decided to pursue a challenge, it makes no difference because the Union must still provide the *Beck* objector with verified expenditure information that can be used in the challenge and that can allow the objector to make an informed judgment about the likelihood of success of any such challenge. Finally, there is no merit to the Union's argument that the Board should accept a document utilized by the Department of Labor, called the "LM-2," for the requirement that an audit be performed. It does not appear, and the Union does not represent, that the

LM-2 form contains independent verification that the claimed local expenditures were ever made.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE UNION UNLAWFULLY FAILED TO PROVIDE PAMELA BARRETT, A *BECK* OBJECTOR, WITH SUFFICIENTLY VERIFIED EXPENDITURE INFORMATION TO SUPPORT THE CALCULATION OF ITS AGENCY FEE

A. Union-Security Agreements under the Act

Section 7 of the Act (29 U.S.C. § 157) affords employees the right to engage in a broad range of concerted activities, including joining labor organizations, for the purpose of collective bargaining or other mutual aid or protection. That section also grants employees "the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 8(a)(3) . . . ." In turn, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) specifies that collective-bargaining agreements may contain union-security provisions requiring employees to become members of the union as a condition of employment.

Thus, an employee may be discharged for failing to satisfy union-membership requirements. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1941). The form of union security permitted under the Act reflects a compromise

between the desire to "insulate employees' jobs from their organizational rights," and Congressional recognition that, absent any union-security agreements, "many" employees would receive the benefits of union representation but refuse to contribute financial support to the union through payment of dues. *Radio Officers' Union*, 347 U.S at 40-41. *See also* S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

Union-security provisions are not without limitation, however. Although the Act specifies that a union-security provision may require union membership, the Supreme Court has long interpreted the *actual* membership requirement as obligating employees only to pay union fees and dues. Thus, membership, as a condition of employment, "is whittled down to its financial core." *NLRB v. Gen. Motors Corp*., 373 U.S. 734, 742 (1963). *Accord Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988) ("*Beck*"); *NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898, 902 (9th Cir. 2008). Simply put, so long as employees pay the dues and fees that lawfully may be required, they are "protected from discharge" even if they refuse to join the union. *NLRB v. Hershey Foods Corp*., 513 F.2d 1083, 1084, 1086-87 (9th Cir. 1975). *Accord Local Union No. 749, Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. NLRB*, 466 F.2d 343, 344 n. 1 (D.C. Cir. 1972).

In *Beck*, the Supreme Court refined the "financial core" obligations of employees working under union-security agreements. The Court held that the

financial core membership that may be required under Section 8(a)(3) of the Act does not include "the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Beck*, 487 U.S. at 745. Thus, all that objecting nonmember employees (who are typically referred to as "*Beck* objectors") covered by a union-security clause may be required to pay "is an 'agency fee' representing the portion of the dues that the union expends in its collective bargaining activities." *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). *Accord Studio Transp. Drivers Local 399*, 525 F.3d at 902.

B. The Duty of Fair Representation

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in [Section 7 of the Act]." That section imposes a duty of fair representation on a union in its role as the exclusive representative of employees for collective-bargaining purposes. The judicially created duty of fair representation reflects the principle that a union's status as the exclusive 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 (1967). Thus, a union breaches the duty of fair representation

when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. *Accord International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994).

A union's *Beck* obligations arise pursuant to its duty of fair representation. *See Beck*, 487 U.S. at 745; *see also California Saw & Knife Works*, 320 NLRB 224, 228-30 (discussing the duty of fair representation in the *Beck* context), *enforced sub. nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (the union is "required to represent all the members of the unit equally, whether or not they are union members"). Thus, when a union fails to implement its *Beck* obligations, it breaches its duty of fair representation and violates Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)).

C. The Union Breaches Its Duty of Fair Representation and Therefore Violates the Act when It Fails to Provide a *Beck* Objector with Sufficiently Verified Expenditure Information

The exact parameters of a union's obligations under *Beck* were left to the Board's discretion. *See United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 (9th Cir. 2002)("*UFCW*")(en banc); *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000). In *California Saw & Knife Works*, 320 NLRB at 233, 239, the Board's first comprehensive decision addressing *Beck*, the Board

established a two-step process available to the employee who objects to paying dues for nonrepresentational purposes. In the first step, the union must apprise the objector of the percentage that their dues will be reduced because they pay only their portion of the union's chargeable, representational-related expenditures. The union also must demonstrate how it made that calculation. In the second step, an objector can file a challenge, where a determination is made whether the union properly allocated its expenditures between chargeable expenses and nonchargeable expenses. *Television Artists AFTRA (KGW Radio*), 327 NLRB 474, 477 (1999). In a challenge procedure, the union bears the burden of proving that the expenditures are chargeable to the degree asserted. *Id.* at 478.

The financial information that the objector has been supplied in the first step enables the objector to determine whether to challenge the dues-reduction calculations, and to determine the likelihood of success of such a challenge. Without knowing what expenditures were actually made, an objector would have only incomplete information on which to base the decision whether to proceed to a challenge. *See Ferriso v. NLRB*, 125 F.3d 865, 869-70 (D.C. Cir. 1997).

In *Television Artists AFTRA (KGW Radio*), 327 NLRB 474 (1999), the Board held, with respect to the first step, that, in order to provide *Beck* objectors with a reliable basis for calculating the fees they must pay, the union's local expenditures must be audited. The audit must "*independently verif*[*y*] that the

expenditures claimed *were actually made*;" the audit cannot be based on representations made by the union. *Id.* at 477 (emphasis added). *Accord Ferriso*, 125 F.3d at 868-70. The auditor does not necessarily review the correctness of the *allocation* of the expenditures into chargeable or nonchargeable categories; that is left for the second-step, challenge stage. *Television Artists AFTRA (KGW Radio*), 327 NLRB at 477.

The Board's requirement in *Television Artists AFTRA (KGW Radio*), 327 NLRB at 477, that an objector be provided an audit of the local union's expenditures to ensure that the expenditures were actually made, is an example of where the Board has "craft[ed] the rules for translating the generalities of . . . the statute as authoritatively construed in *Beck* . . . into a workable system for determining and collecting agency fees." *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 (9th Cir. 2002)("*UFCW*") (*en banc*) (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)). As this *en banc* Court in *UFCW* emphasized, "[i]t 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 the crafting of such rules. *Id*. (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)). Accordingly, the Board's audit requirement is entitled to the highest degree of judicial deference. The Union's

brief nowhere mentions this Court's decision in *UFCW*, nor does it acknowledge this deferential standard of review.

D. The Board Reasonably Found that the Union Failed to Provide Barrett with Sufficiently Verified Expenditure Information

In this case, the Union did not provide Barrett with an audit of its expenditures. (ER 5g-h.) Instead, as the Board explained (ER 5h, 5c), the Union's accountant merely reviewed the one-page expenditure statement given to Barrett on May 11, and his report specifically emphasized that all the information was based on the representations of the Union's management. (ER 5h, 5c.) There was "no evidence" of any independent verification that the expenses claimed were in fact made. (ER 5h.) The Union does not dispute these findings. Accordingly, the Union does not dispute the Board's finding (ER 5f, 5h) that it did not perform the kind of audit that the Board required in *Television Artists AFTRA (KGW Radio*), 327 NLRB at 477. Thus, the Board reasonably found that the Union violated the Act.

E. The Union's Contentions Are Without Merit

1. The Union's claim that the Board inadvertently "expressly" adopted the decision of the administrative law judge dismissing the complaint is wrong

The Union claims, as a threshold matter, that there is not actually an order for the Court to enforce in the instant case. In this regard, the Union seems to

argue that the Board, in its August 26, 2010 Decision and Order, inadvertently created a topsy-turvy result by adopting the administrative law judge's decision and order dismissing the complaint, instead of its own Order remedying the Union's unlawful conduct. (Br 11, 12-14.) As we show below, the Union is just wrong about this. The Board did no such thing. The plain text of the Board's August 26, 2010 Decision and Order firmly establishes that the Board adopted, by reference, its prior decision *reversing* the judge and its prior Order *remedying* the Union's unlawful conduct. In short, the Board's prior Order is part of the August 26, 2010 Decision and Order, and is properly before the Court.

In order to place the Union's meritless claim in context, we will briefly summarize the relevant procedural history of the instant case. In a Decision and Order of October 31, 2008, the two-member Board reversed the administrative law judge's finding that the Union had not violated Section 8(b)(1)(A) of the Act, and, accordingly, entered an order remedying the Union's unlawful conduct. Then, in an unpublished Order of January 21, 2009, the two-member Board modified certain aspects of its October 31, 2008 Order, and reaffirmed its October 31, 2008 Order as modified. In its August 26, 2010 Decision and Order, the three member panel of the Board stated that it was affirming the judge's rulings, findings, conclusions, and adopting the recommended order to a limited degree, that is, "to the extent and for the reasons stated in" the Decision and Order of October 31,

2008, as modified by the January 21, 2009 Order, which it "incorporated by reference." (ER 5.)

The Union asserts—without offering any analysis at all—that, in its August 26, 2010 Decision and Order, the Board inadvertently "expressly" adopted the "wrong" (Br 12, 14) decision and order. The relevant sentence, which the Union quotes in its brief (Br 13), states as follows:

> The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NRLB 469, as modified by the January 21, 2009 unpublished Order, which is incorporated by reference. (ER 5.)

The Union has grossly misinterpreted this sentence. Contrary to the Union's contention, the plain text of the above-quoted sentence easily establishes that the Board adopted its prior decision and remedial order, not the judge's finding that the Union did not violate the Act and his recommended order dismissing the complaint. The dispositive fact of the matter is that the above-quoted sentence does not end after the words "recommended Order," as the Union's interpretation would seem to have it.

Instead, the sentence continues on from that point, and, in doing so, provides key language *qualifying and explaining* the limited scope and content of the Board's agreement with the judge's rulings, findings, conclusions, and

recommended order. This qualifying language is found in the phrase "*to the extent and for the reasons* stated in the [October 31, 2008] decision reported at 353 NLRB 369, as modified by the January 21, 2009 unpublished Order, which is incorporated by reference." (ER 5) (emphasis supplied).) The meaning of these words is clear. The Board, in its August 26, 2010 Decision and Order, was only affirming the judge's rulings, finding, conclusions, and recommended order up to a point—it was agreeing with these items only to "the extent" and "for the reasons stated" in the Board's decision and order of October 31, 2008, as modified by its unpublished Order of January 21, 2009, which it incorporated by reference.[7] (ER 5; *see also* ER 1.) By explicitly incorporating these documents into its August 26, 2010 Decision and Order (ER 5), the Board made them part of the August 26, 2010 Decision and Order; as such, they contain the articulated basis for the Board's decision to reverse the judge and the text of the Order remedying the unfair labor practice.[8] At bottom, the Union, in arguing otherwise, is effectively reading the

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[7] Incorporation by reference is "[a] method of making a secondary document part of the primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." Black's Law Dictionary (9th ed. 2009).

[8] In the Board's unpublished Order of January 21, 2009, which modified its October 31, 2008 Order in certain respects, the Board states, among other things, that the it "affirms its previous Order as modified . . . and orders that the [Union] shall take the action set forth in the Order as modified." (ER 5d.) The January 21, 2009 Order also includes an amended notice. (ER 5e.)

above-quoted sentence as if a core component of it—the portion qualifiying the degree to which the Board agreed with the judge—vanished from the page.

As a final matter, it is worth noting that even up to the time that the Union filed its most recent, September 9, 2010, motion for reconsideration with the Board, it construed the Board's decision as having adopted the earlier order against the Union. The Union's motion specifically argued that "the Board's Decision and Order should be rescinded." (SER 1.) This is certainly not in keeping with the Union's current assertion that no order had been entered against it. In turn, the Board's October 25, 2010 Order denying the Union's motion for reconsideration yet again restates the fact that the Board's Order has "found that the [Union] violated its duty of fair representation and thus Section 8(b)(1)(A)." (ER 2.) The Board's Order remedying the Union's unfair labor practice is in place and properly before the Court.[9]

2. The Union's challenges to the merits of the Board's unfair labor practice finding are without merit

The Union acknowledges (Br 18) that, although its review of its expenditure information was "less thorough than an audit" and "not as complete as an audit," it was something "more complete than a mere compilation[,]" and

[9] The Union's discussion of the Board's "jurisdiction . . . to change its Order" and matters relating to the "certified list of the record" is irrelevant. (Br 13-14.) There is nothing for the Board to "correct." As shown above, the Board adopted its prior Order against the Union. It did not adopt the judge's recommended order dismissing the complaint.

therefore should have been enough. The Union's argument, however, fails to recognize that, in *Television Artists AFTRA (KGW Radio*), 327 NLRB at 477, the Board made clear that a union's supplying something more than a compilation was not, in fact, enough. The union was required to perform an audit "within the generally accepted meaning of the term, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepts the representations of the Union." *Id*.

The Union's effort (Br 17-21, 26-29) to conflate an audit with a "review," of the sort it provided in the present case, overlooks the fact that its "review" contained no *independent verification* that the expenses it claimed were actually made. (ER 5h, 5c.) And the Union's discussion of accounting terminology cannot obscure the fact that—whatever it wants to call its accountant's report—it failed to meet the independent-verification requirements of *Television Artists AFTRA (KGW Radio)*. (ER 5h, 5c.) The Union has pointed to no "evidence that the accountant did anything more than rely on the [Union's] representations in preparing the report, such as independently verifying that the expenses claimed were in fact made." (ER 5h, 5c.)

The Union also argues, at great length (Br 21-24), that the Board should accept a document utilized by the Department of Labor, called the "LM-2," in fulfillment of the requirement that an audit be performed. The Board reasonably

rejected that argument. (ER 5 n.4, ER 5h n.8, ER 2.) Indeed, it does not appear, and the Union does not represent, that the LM-2 form (which it never even sent Barrett (ER 113)) contains independent verification that the claimed local expenditures were actually made.[10] In a related vein, the Union's argument that "the LM-2 form combined with other information provided to [Barrett] was sufficient to satisfy the union's duty of fair representation" (Br 23; *see also* Br 30, 33-34, 40) is without merit. As stated above, none of the information provided Barrett met the independent verification requirements of *Television Artists AFTRA (KGW Radio)*.

Next, the Union claims that Barrett's May 29 letter to the Union demonstrated that she had "come to the conclusion that [the Union's] chargeable

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[10] The Union's discussion (Br 23) of Member Becker's personal footnote in the Board's August 26, 2010 Decision and Order (ER 5 n.3) does nothing to advance its cause. The three-member panel of the Board, including Member Becker, unanimously agreed that the Union violated the Act by failing to provide Barrett with sufficiently verified expenditure information. (ER 5.) Member Becker, writing separately, was stating his view "that the Board should consider, in an appropriate case, modifying its expenditure reporting requirement." (ER 2.) Clearly, the Board did not do that in the instant case. As the three-member panel unanimously stated in its order denying the Union's motion for reconsideration of the August 26, 2010 Decision and Order, it "considered and declined the [Union's] request that the Board modify its expenditure reporting requirements for unions in this case." (ER 3 n.4.)

Further, the Company's discussion (Br 37) of *Harik v. California Teachers Association*, 326 F.3d 1042 (9th Cir. 2003), is irrelevant to the present case. The issue in the present case is the Union's failure to follow Board law by not providing Barrett with independent verification that the expenditures were actually made.

expenditures" were "too high." (Br 41.) The Union argues that this means that Barrett had moved past being a *Beck* objector and had decided to pursue a challenge. Under these circumstances, the Union argues, it should be relieved of its first-step obligation to provide Barrett with the results of an audit. (Br 41.)

As a factual matter, Barrett's May 29 letter to the Union never said the agency fee was "too" high, and she never referred to a "challenge" or "allocation" of chargeable expenses, the kind of dispute that is resolved in the challenge procedure. Instead, and as shown above, Barrett's May 29 letter reaffirmed that she was a *Beck* objector. She also reiterated that she had not been "provided with any information that explains or justifies the calculation of this high agency fee." (ER 5f; ER 197.) Given that she had not received this information, she requested that the Union provide her with a verified financial disclosure explaining the basis for the calculation of the "agency fee." (ER 5f; ER 197.) The Union never provided her with such information. (ER 5f-h.)

In any event, as a legal matter, it is of no moment whether a *Beck* objector announces, at the time of her objection, an intention to file a challenge to the allocation of expenditures. The Union must still provide the objector with verified expenditure information in order to supply her with the verified information that will be used in the challenge and to allow her to make an informed judgment about the likelihood of success of any such challenge. As the Board stated (ER 5c n.4),

because the Union had not provided Barrett with sufficiently verified information on May 29, "her recourse was to have the [Union] provide her such verified information, and not, as the [Union] asserts . . . to proceed to internal union procedures . . . ."

The Union's discussion of the May 4 "welcome letter" (or "initial" letter, as the Union refers to it) sent to new unit employees does not help its cause. According to the Union, the "initial" letter provided "the specific basis upon which the [Union] calculated its chargeable and non-chargeable expenses." (Br 42). The "initial" letter did nothing of the sort (ER 224-26.). The Union's argument is misplaced. The instant case does not involve the legal adequacy of the initial notice, wherein the Union was required to notify new unit employees of their *Beck* rights. The Union miscomprehends the timeline of events and the obligations it owes at the *objection* stage. In any event, the initial notice provided no expenditure information whatsoever.[11]

[11] The Union goes too far in contending that Barrett "false[ly]" (Br 16, 43) claimed she never received the initial letter. The judge did not say anything of the sort. He simply inferred that, because a union witness testified that she routinely sent out hundreds of such letters to groups of new unit employees (ER 5j; 125), Barrett must have received one too. In any event, this makes no difference. The Union's initial letter contained no verified expenditure information—or any expenditure information at all, for that matter. What matters is what the Union failed to provide Barrett with after she informed it of her *Beck* objector status.

When Barrett notified the Union of her objection on May 9, the Union had a simple task: provide her with sufficiently verified expenditure information of the local's expenditures or invoke its right to use the "local presumption." *See* note 6, above; *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 n.15 (1999). It did neither. At bottom, the Union's contentions about what it thinks *ought to* constitute compliance with the duty of fair representation cannot mask the basic fact that it breached that duty and therefore violated the Act in this case.[12]

[12] The Union's discussion (Br 5-6, 42-43) of its internal procedure for challenging the allocation of chargeable and nonchargeable expenses is all well and good, but this has no relevance to the present case.

Further, there is no merit to the Union's novel claim (Br 44) that Barrett's reference to a "certified public accountant" in her May 29 letter meant that the Union could "rightfully" ignore her request for verified information. A certified public accountant may, obviously, serve as an auditor.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's order in full.

STATEMENT OF RELATED CASES

Board counsel are unaware of any related cases pending in this Circuit.

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March 2011

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ADDENDUM

STATUTORY ADDENDUM

Section 7 of the Act, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A):

It shall be an unfair labor practice for a labor organization or its agents—

(1)to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]

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

It shall be an unfair labor practice for an employer—

(3) 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[.]