

No. 11-2262

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GEORGE H. GALLY and SOLO J. DOWUONA-HAMMOND

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of George H. Gally (“Gally”) and Solo J. Dowuona-Hammond (“Dowuona-Hammond”) (collectively

“Petitioners”) to review the Board’s Decision and Order, which issued on May 27, 2011, and is reported at 356 NLRB No. 164. (S.A. 1-12.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act” or “NLRA”). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160 (f)) because Gally’s and Dowuona-Hammond’s respective employers, Colt’s Manufacturing, Co., Inc. (“Colt”) and New York University (“NYU”), conduct business within this judicial circuit and because the alleged unfair labor practices occurred within this Court’s jurisdiction. (S.A. 6.)

Petitioners timely filed their petition for review on June 3, 2011. The Act contains no limitation on the time to petition for review of Board orders. The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO (“UAW”), a Respondent before the Board, has intervened in support of the Board.² The Board’s Order is final with respect to all parties under Section 10(f).

¹ “S.A.” and “A.” refer to the special appendix and appendix, respectively, filed with the Petitioners’ brief. “Supp. A.” refers to the supplemental appendix that the Board is filing with its brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Petitioners’ brief.

² UAW’s affiliate, Local 376, was also a respondent before the Board but is not a party to this appeal.

STATEMENT OF THE ISSUE PRESENTED

The Act expressly allows collective-bargaining agreements to contain union-security clauses, which require employees to become union members as a condition of employment. An employee can satisfy the membership condition by paying an amount equal to the union's initiation fees and dues. These employees can object to paying dues for union activities not directly related to the union's duties as the employees' collective-bargaining agent and obtain reduced fees, consistent with *Communication Workers v. Beck*, 487 U.S. 735, 745 (1988). Such employees are called *Beck* objectors.

Here, because there is a valid union-security clause in place, the UAW maintains a procedure for employees to claim *Beck* objector status. One aspect of the UAW's system requires *Beck* objectors to annually renew their objection. Petitioners are two *Beck* objectors who are challenging the UAW's annual renewal requirement. The Board rejected their challenge, finding that the requirement fell within the wide range of reasonableness afforded to the UAW in exercising its duty of fair representation. Accordingly, the Board dismissed the complaint.

The issue before the Court is whether the Board reasonably found that the UAW did not violate its duty of fair representation under Section 8(b)(1)(A) of the Act by requiring *Beck* objectors to renew their objections annually.

STATEMENT OF THE CASE

Acting on unfair labor practice charges that Gally filed against the UAW and its local union affiliate, Local 376, the General Counsel issued a complaint alleging that both the UAW and Local 376 (“the Unions”) violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)), by maintaining a procedure for the exercise of *Beck* rights that required Gally to renew his objection annually. (A. 17, 19-21, 25-29.)

Gally’s case initially came to the Board on cross-motions for summary judgment, which the Board denied. (S.A. 1 n.3, 7.) The Board, finding that material facts were in dispute, remanded the case for a hearing before an administrative law judge. (*Id.*) The Board explained that disputed facts existed regarding “the extent of the burden on objectors and the legitimacy of the [Unions’] asserted business justification” for its annual renewal policy. (S.A. 7.)

Soon after the Board remanded Gally’s case for a hearing, Dowuona-Hammond filed a similar charge against the UAW alleging that it violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)), by maintaining an agency fee objection procedure that required nonmembers to renew their objections annually. Because both Gally and Dowuona-Hammond were challenging identical *Beck* procedures and to avoid any further delay, the General Counsel consolidated the cases. (A. 62.)

Following a hearing, the judge found that although the Unions' procedure placed only an "insignificant" burden on objectors, the Unions failed to establish a valid justification for that burden. (S.A. 2, 11.) Accordingly, the judge found that the Unions violated the Act by requiring Gally and Dowuona-Hammond to renew their objection yearly. (*Id.*) Both the Unions and the Petitioners filed exceptions to the judge's decision.

While this case was pending before the Board, the Board issued a decision in *Machinists Local Lodge 2777* (hereinafter "*L-3 Communications*"), 355 NLRB No. 174, 2010 WL 3446130 (Aug. 10, 2010), which addressed, for the first time, the legality of a union's annual renewal requirement of *Beck* objections and set forth the framework for evaluating it. *Id.* at *2. Because *L-3 Communications* issued after the judge's recommended order in this case, the Board asked the parties to file supplemental briefs addressing the effect of that decision. (S.A. 1 n.3.) After considering the supplemental briefs as well as the parties' other briefs and exceptions, the Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) rejected the judge's findings and recommended order, finding instead that the Unions' annual renewal requirement did not violate the duty of fair representation. (S.A. 1.)

THE BOARD'S FINDINGS OF FACT

A. Overview; the UAW's *Beck* Procedure

The UAW represents about 650,000 employees, and has a bargaining relationship with about 1,000 employers, including Petitioners' employers, Colt and NYU. (A. 307, 313.) Both employers have collective-bargaining agreements with the UAW that contain union-security clauses requiring union membership as a condition of employment. Consistent with *Beck*, an employee may satisfy membership by paying an amount equal to the union's initiation fees and dues. Further, employees who object to supporting activities not germane to collective bargaining (such as political and other non-representational expenses) are considered "*Beck* objectors." The UAW has adopted an objection procedure that requires a *Beck* objector to renew his objection annually. (S.A. 6; A. 47.) The UAW's procedure also provides the *Beck* objector with information detailing the percentage by which his dues and fees will be reduced, the basis for the calculation of the reduction (including the major categories of expenditures), and notice of the objector's right to challenge the UAW's determination of representational expenses.

- 1. The UAW's *Beck* procedure allows employees to present their objection in any form and to object at any time during the year**

The UAW's *Beck* objection process begins when an employee notifies the UAW that he wishes to become a *Beck* objector. (S.A. 9.) An objecting employee can mail the objection via regular mail or hand-deliver it to the UAW's office.

(S.A. 9.) There is no window period for filing a *Beck* objection, and employees can file objections any day of the year. (S.A. 3; A. 49.)

- 2. Upon receiving a *Beck* objection, the UAW sends the objector employee a "new objector letter" and then sends a letter of instruction to the employer, with a copy to the employee**

Upon receipt of an employee's *Beck* objection, the UAW sends a "new objector letter" to the employee. (S.A. 1; A. 49.) The letter states the reduced percentage of dues the objector must pay for the year, encloses the most recent annual financial report showing how the reduction for the current year was calculated, and confirms that the objector's dues will be reduced by the appropriate amount. (S.A. 1.)

The letter also notifies the employee of the date of expiration of his objection, which is one year after the objection's receipt. The expiration date is displayed prominently in bold type at the head of the letter. (S.A. 1; A. 49-50, 69-70.) The letter's last paragraph refers the objector to the expiration date and its location in the letter, provides all the information necessary for renewing the

objection, and explains the annual renewal process. (S.A. 9; A. 70.) Under that process, the objector must renew his objection during the 30-day period before the objection's expiration date. (S.A. 1, 9; A. 49.)

When the UAW sends this acknowledgement letter to the employee, the UAW also sends a letter of instruction to the objector's employer, authorizing the dues reduction and noting that the employee's objector status will continue for 12 months. (S.A. 1, 2; A. 50.) The UAW sends a copy of this letter to the objector and to the local union. (S.A. 2, 9; A. 51.)

3. Every year, the UAW sends objectors the yearly recalculation of their *Beck* dues reduction and also publishes the objection procedure in its magazine

Each May or June, the UAW completes its annual financial report to objectors, recalculating the *Beck* dues reduction on the basis of the UAW's expenditures over the previous year. (S.A. 2; A. 51.) In June or July, the UAW mails this report to all current objectors. (*Id.*) The reduced amount is effective for the next 12-month August-July period. (S.A. 2; A. 51.) The last paragraph of this letter reminds the individual objector of his objection's expiration date and explains that the date may be extended by writing a letter within 30 days of the expiration date to the address provided. (*Id.*)

Every year the UAW notifies all represented employees about its objection procedure by publishing that procedure in the July/August issue of the UAW's

bimonthly magazine, *Solidarity*. (S.A. 1; A. 48.) This magazine notice specifies the percentage of dues reduction to which objectors will be entitled for the 12-month period from August through July. (A. 48, 221-24.) The notice also explains that a nonmember can file a *Beck* objection in writing at any time, by regular mail or hand delivery, but that an objection must be renewed after one year to maintain objector status without interruption. (*Id.*)

4. An employee who fails to renew an objection does not need to wait for a specified period of time to renew the objection

If an objector timely renews his *Beck* objection, the UAW sends him an acknowledgement letter setting forth the new expiration date. (S.A. 2; A. 51.) If the objector fails to renew by the end of the objection year, the UAW sends a notice letter to the employer indicating that the employee's dues withholding should be increased to the full amount. (A. 51.) The UAW sends a copy of the letter to the employee, so that the nonmember is reminded of the objection's expiration. (*Id.*) The UAW does not send this letter immediately after the expiration of the objection period. Rather, the UAW typically waits a few weeks because "letters cross in the mail." (A. 295.) If the objection is received within a reasonable period of time, the UAW typically processes the objection without a break in continuity. (*Id.*)

B. Gally's *Beck* Objection

Gally was employed by Colt, a company that manufactures, sells, and distributes firearms. Colt's production and maintenance employees have long been represented by the UAW and its affiliate Local 376. Colt has a collective-bargaining agreement with Local 376 that contains a union-security provision requiring all unit employees to become and remain members of Local 376 in good standing. (S.A. 6.)

1. Gally informs the UAW of his *Beck* objection, and the UAW sends Colt an acknowledgement letter

On February 19, 2002, Gally sent the UAW a letter informing it of his *Beck* objection. (S.A. 8; A. 211, 269.) On February 25, the UAW sent Gally a letter acknowledging his *Beck* objection, informing him that his objection's expiration date was March 1, 2003 and explaining the annual renewal process. (A. 212.) On August 22, 2002, Gally sent the UAW another letter alerting it to his objector status. (S.A. 8; A. 214.) The UAW responded on August 26, reminding Gally that he was currently a *Beck* objector, that his objection would not expire until March 1, 2003, and that he needed to mail his renewal letter within the 30 days before March 1. (S.A. 8; A. 215.)

2. Gally fails to file his renewal timely and tells the UAW he wants to renew his objection for the next three years

March 1, 2003, came and went without Gally sending in his renewal letter. Therefore, on March 10, 2003, the UAW sent Colt a letter, with a copy to Gally, stating that Gally had not renewed his *Beck* objection and requesting that Gally's dues withholding be increased accordingly. (S.A. 8; A. 216.)

On March 17, 2003, Gally sent the UAW a letter stating that he wanted to renew his objection "for the next three years." (S.A. 2, 8; A. 218.) On March 27, the UAW sent Gally two letters: One acknowledged receipt of his March 17 letter and explained that "[a]nnual renewal of your *Beck* objection is still required." (A. 220.) The other letter stated that the new expiration date for his objection would be April 1, 2004. (S.A. 2, 8.)

Gally has not communicated with the UAW since his March 17 letter. (S.A. 8.) The UAW continued to treat Gally as a *Beck* objector and did not demand that Gally pay full union dues. (S.A. 8; A. 260.)

C. Dowuona-Hammond's *Beck* Objection

Dowuona-Hammond, who did not testify at the unfair labor practice hearing, was an adjunct professor at New York University ("NYU"). (S.A. 2, 8.) NYU has a collective bargaining agreement with the Union's local affiliate, Local 7902. (A. 165-203.) This agreement has a union-security clause requiring all adjunct or part-

time faculty to “acquire and maintain membership in the Union . . . as a condition of employment.” (A. 166.)

1. Dowuona-Hammond tells the UAW that he wants to invoke his *Beck* rights

On May 27, 2004, Dowuona-Hammond resigned from the UAW and from Local 7902. (S.A. 2; A. 240-41.) His resignation letter stated that he “wish[ed] to invoke [his] *Beck* right[s].” (A. 240.) On November 1, when NYU and the UAW reached an agreement that included the union-security clause, the UAW sent Dowuona-Hammond a letter acknowledging receipt of his objection, informing him of the annual renewal requirement and his November 1, 2005 expiration date. (S.A. 2; A. 242-43.) The letter also explained that Dowuona-Hammond could renew his objection by mailing a letter to the provided address within the 30 days immediately prior to his expiration date. (A. 243.) The UAW also sent a letter to NYU, with a copy to Dowuona-Hammond, notifying it of his objection and the reduction in fees. (A. 244.)

2. Dowuona-Hammond fails to timely renew his objection and asks the UAW to continue his objector status; the UAW renews his objection for one year, and Dowuona-Hammond again fails to timely renew his objection

On November 16, 2005, the UAW wrote to NYU, informing it that Dowuona-Hammond had not timely renewed his objection and that his dues should be increased accordingly. (S.A. 2; A. 247.) Dowuona-Hammond received a copy

of this letter. On December 2, 2005, Dowuona-Hammond submitted an objection, this time stating that he wished to continue his *Beck* objector status “until the [UAW] is decertified” (S.A. 2; A. 248.) On January 24, 2006, the UAW acknowledged the objection, reminded Dowuona-Hammond of the annual renewal requirement, set the objection’s expiration date (January 1, 2007), and again treated him as an objector. (S.A. 2.)

On January 17, 2007, the UAW informed NYU, with a copy to Dowuona-Hammond, that he had not renewed his objection and that his dues should be increased accordingly. (S.A. 2; A. 251.) There is no evidence of any additional communications between the UAW and Dowuona-Hammond since the January 17 letter. (A. 332.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) disagreeing with the judge, found that the Unions had not violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by requiring objecting nonmembers to annually renew their objections. (S.A. 1-3.) In doing so, the Board majority relied on its recent decision in *L-3 Communications*, 355 NLRB No. 174, 2010 WL 3446130, (Aug. 10, 2010), the lead case examining the annual renewal requirement for *Beck* objectors. (S.A. 1-3.) The Board stated there that it would apply the duty of fair representation in examining the issue and would

“evaluate such [annual renewal] requirements on a case-by-case basis to determine ‘whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.’” (S.A. 1, quoting *Id.* at *1.)

In examining the Unions’ annual renewal requirement here, the Board noted that it had several protections to ensure that the requirement imposed only a “de minimis” burden on objector employees. (S.A. 3.) These safeguards included supplying an objector with four reminders of the annual renewal requirement over the course of one year, reminding the objector who fails to renew of the need to act to regain objector status, and allowing nonmembers to file objections at any time. (S.A. 3.) After examining the extensive notice given to objectors, the Board found that “the burden imposed on potential objectors under the Unions’ *Beck* procedures is so minimal that the annual renewal here cannot be held to violate the duty of fair representation.” (S.A. 1.) Because the Board found the burden to be “de minimis,” it found it unnecessary to determine the weight to be given to the Unions’ proffered justifications for the requirement. (S.A. 3.) Finding no violation of the Act, the Board dismissed the complaint. (S.A. 4.)

ARGUMENT SUMMARY

This case presents the issue of whether the UAW, acting pursuant to a lawful security clause, violated its duty of fair representation by requiring *Beck* objectors to renew their objections annually. When the UAW created its *Beck* objection procedure, it had to comply with its statutory obligations under the duty of fair representation. This duty applies to *all* union activity, and a union breaches that duty, and violates the Act, when its actions affecting the employees whom it represents are arbitrary, discriminatory, or in bad faith. A union's conduct is arbitrary, and therefore unlawful, if it falls so far outside a wide range of reasonableness that it is wholly irrational.

Here, the Board reasonably found that the UAW's annual renewal requirement imposed such a minimal burden that it could not be deemed arbitrary or outside the bounds of reasonableness. This decision is consistent with the Board's recent refusal to establish a *per se* rule prohibiting annual *Beck* objection requirements in favor of proceeding on a case-by-case basis to examine the content specific requirements of particular procedures. Here, the Board first considered the burden that the UAW's procedures imposed on *Beck* objectors. Noting that the annual renewal provision has no restrictive window and permits employees to file an objection at any time, as well as the UAW's frequent reminders and instructions to employees regarding the procedure, the Board reasonably concluded that the

annual renewal requirement imposed only a “de minimis” burden on employees. Because the aggregate burden was so minimal, the Board did not reach the UAW’s justifications for the requirement. The Board concluded that the UAW’s renewal procedure - requiring an employee to write a simple note and either mail or hand deliver it at any time - was not arbitrary but fell within the “wide range of reasonableness” required by the duty of fair representation.

While Petitioners assert a variety of arguments against the annual renewal requirement, they never challenge the Board’s finding that the requirement imposes only a “de minimis” burden. Rather, the Petitioners dispute well-accepted principles, pursue theories that either the General Counsel did not allege or that are unsupported, and rely on inapposite precedent. Petitioners first urge the court to reject the duty of fair representation standard. This argument ignores established precedent finding the standard well-suited to determining the propriety of a union’s *Beck* procedures. Petitioners next claim that the UAW acted in bad faith by requiring annual renewal, and that the procedure is discriminatory. However, the General Counsel never asserted a bad faith claim, and the Petitioners present no evidence showing the UAW’s renewal requirement was motivated by animus or any other unlawful purpose. Finally, Petitioners rely on precedent that has found other unions’ annual renewal procedures unlawful, but these cases arose in a different statutory context and applied a constitutional standard that this Court and

the Board have already rejected as inapplicable to cases arising under the Act. Thus, the Petitioners cannot show that UAW acted irrationally when it established an annual renewal procedure that provides employees with frequent reminders of their renewal date as well as the ability to object any day of the year.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE UAW DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION BY REQUIRING *BECK* OBJECTORS TO RENEW THEIR OBJECTION ANNUALLY

A. Applicable Principles and Standard of Review

1. Union-Security Agreements

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)” 29 U.S.C. § 157. 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 become members of the union as a condition of employment.

The form of union security permitted under the Act reflects a compromise. Congress sought to accommodate the desire to “insulate employees’ jobs from their organizational rights,” with the 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 v. NLRB*, 347 U.S. 17, 40-41 (1941). *See also* S. Rep. No. 105, 80th Cong., 1st Sess. at 6 (1947).

The Supreme Court has interpreted the membership requirement as obligating employees only to pay union fees and dues. Thus, despite the broad meaning that might be implied by the term “membership” in the first proviso of Section 8(a)(3), “[m]embership’ as a condition of employment is whittled down to its financial core.” *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). *Accord Comm’n Workers v. Beck*, 487 U.S. 735, 745 (1988). In short, so long as the employee pays the dues and fees that lawfully may be required, he is “protected from discharge” even if he refuses to join the union. *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). An employee who opts to reject membership but pays the full union initiation fee and dues is called an “agency fee payer” or a “financial core member.” *Gen. Motors*, 373 U.S. at 742-43 (1963).

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 (29 U.S.C. § 158(a)(3)) 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.

Those employees who oppose supporting activities not germane to collective bargaining (“*Beck* objectors”) are entitled to have their dues and fees reduced by the percentage of the union’s total expenditures spent on nonrepresentational activities and are required to pay “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). However, *Beck* left the exact parameters of a union’s responsibilities to the Board’s discretion. *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000).

2. 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].” The Board, with court approval, has found that section imposes a duty of fair representation on a union in its role as the exclusive representative of employees for collective-bargaining purposes. *See*

Miranda Fuel Co., Inc., 140 NLRB 181, 185-86 (1962); *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. NLRB*, 368 F.2d 12, 17 (5th Cir. 1966). 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, as the Supreme Court has held, 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, Inc.*, 525 U.S. 33, 44 (1998).

As relevant here, the duty of fair representation requires that the union "avoid arbitrary conduct." *Marquez*, 525 U.S. at 44. A union's actions are arbitrary and breach its duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) (quoting *Ford Motor Co. v. Huffmann*, 345 U.S. 330, 338 (1953)). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964) (a union's conduct can be classified as arbitrary "only when it is irrational, when it is without a rational basis or explanation"). This "'wide range of reasonableness' gives the

union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.” *Marquez*, 525 U.S. at 45 (quoting *Air Line Pilots*, 499 U.S. at 78).

The Board has applied the duty of fair representation standard when evaluating union’s procedures designed to implement Beck. *California Saw & Knife Works*, 320 NLRB 224, 230 (1995), enforced sub. nom. *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (“*California Saw*”). In designing Beck procedures, a union must “balance the interests of potential objectors in easily registering their objection with the interests of the collective-bargaining unit as a whole in having the union secure the resources necessary to vigorously perform its statutory duties without unreasonable administrative burden or costs.” *L-3 Commc’n*, 355 NLRB No. 174, 2010 WL 3446130, at *2 (Aug. 10, 2010) (citing *California Saw*, 320 NLRB at 230). The duty of fair representation, with its emphasis on the balancing of “tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals,” is the appropriate standard to use when examining a union’s Beck procedures. *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989). Applying that standard here, the Board found that the UAW’s requirement that potential objectors annually renew their objections was not arbitrary and instead fell within

the “wide range of reasonableness” required by the UAW’s duty of fair representation.

3. This Court gives considerable deference to the Board’s interpretation of the Act

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the General Counsel bears the burden of establishing an unfair labor practice by a preponderance of the evidence. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983). Where, as here, the Board decides that the General Counsel has failed to establish a violation of the Act, that determination ““must be upheld unless it has no rational basis.”” *Williams v. NLRB*, 105 F.3d 787, 790 (2d Cir. 1996) (quoting *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)).

The underlying substantive question here – whether the UAW’s annual renewal requirement for *Beck* objectors violated the Act – warrants a highly deferential standard of review because the exact parameters of a union’s obligations under *Beck* were left to the Board’s discretion. *See United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 (9th Cir. 2002) (en banc). Under the doctrine of *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), the Board has “broad latitude in interpreting nondirective statutory language.” *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). To uphold the Board’s determination, a reviewing court “need not conclude that the [Board’s]

construction was the only one it permissibly could have adopted” or “even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11. Rather, this Court reviews the Board’s legal conclusions only to ensure that they have a reasonable basis in law. *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001). In so doing, this Court affords the Board “a degree of legal leeway.” *Id.* (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995)).

These review principles apply with particular force when the Board determines the legality of a union’s *Beck* procedures. Petitioners claim (Br. 15) that this Court owes the Board “no special deference” in this matter. This assertion, however, ignores the well-established deference afforded to the Board under *Chevron*. As the Seventh Circuit explained:

All the details necessary to make the rule of *Beck* operational were left to the Board, subject to the very light review authorized by *Chevron*. It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees.

Int’l Ass’n of Machinists, 133 F.3d at 1015.

Finally, this Court has stated that its review of allegations that a union has breached its duty of fair representation is “highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining

responsibilities.’’ *Vaughn v. Air Line Pilots Ass’n, Int’l*, 604 F.3d 703, 709 (2d Cir. 2010) (quoting *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 78 (1991)).

B. The Board Appropriately Determined that the UAW’s Procedure Minimized any Burden that the Annual Renewal Requirement Imposed on *Beck* Objectors and, Therefore, Properly Found that the UAW Did Not Breach its Duty of Fair Representation

In determining that the UAW’s *Beck* procedure complied with the duty of fair representation, the Board relied on the analysis it established in *L-3 Communications*, 355 NLRB No. 174, 2010 WL 3446130, (Aug. 10, 2010), the first case to address the legality of an annual renewal procedure for *Beck* objectors. In *L-3 Communications*, the Board applied the duty of fair representation standard, explaining that the union’s decision to require annual renewal “inevitably involv[ed] a balancing of the interests of different employees in the bargaining unit and a union’s answers to those questions are . . . appropriately reviewed” under that standard. *Id.* at *2 n.10. The Board then held that it would evaluate a union’s annual renewal requirement on a “case-by-case basis to determine ‘whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.’” *Id.* at *1.

The union’s annual renewal requirement in *L-3 Communications* required *Beck* objectors, after receiving one yearly reminder, to renew their objections annually by writing within a 30-day window period or risk having to pay full dues

and fees for the remaining 11 months. *Id.* at *4. Although the Board found that the annual renewal requirement violated the Act because the union’s rationale for the requirement did not justify the burden – and the financial consequences – imposed on objectors, the Board “emphasize[d] that [it was] not announcing a per se rule finding an annual renewal requirement to be unlawful.” *Id.* at *1. The Board took pains to highlight that its holding was limited to “the record in [that] case” and that the “[u]nions acted arbitrarily . . . under the facts of [that] case” only. *Id.* at *7 & n.29. Instead of an absolute prohibition on annual renewal requirements, the Board stressed that an annual renewal requirement “may be permissible if properly justified or if the burden imposed on potential objectors is further minimized by other features of the union’s *Beck* procedures.” *Id.* at *10.

Since *L-3 Communications*, the Board has consistently adhered both to this analysis and to its promise to determine on a case-by-case basis the lawfulness of a union’s annual renewal requirement. *See Trimas Towing Corp.*, 357 NLRB No. 48, 2011 WL 3841700 at * 1 (Aug. 16, 2011) (applying *L-3 Communications* analysis to union’s annual renewal requirement); *Int’l Bhd. of Elec. Workers, Local Union No. 34*, 357 NLRB No. 45, 2011 WL 3735520 at *1 (Aug. 10, 2011) (same).

1. The UAW's annual renewal requirement imposes only a de minimis burden

The Board found that the “burden imposed on potential objectors under the Unions’ *Beck* procedures is so minimal that the annual renewal rule . . . cannot be held to violate the duty of fair representation.” (S.A. 1.) The Board rested its finding on procedures in place that minimized any potential burden on an objecting employee and imposed, at most, a de minimis burden on the objecting employee. (S.A. 3.) These procedures include providing extensive notice of the renewal requirement and allowing an employee to file a *Beck* objection at any time rather than during a specified window of time. (*Id.*) Having found that the annual renewal requirement imposes only a “de minimis” burden on the nonmembers, the Board did not consider the UAW’s proffered justifications for the requirement. (*Id.*) The Court should affirm the Board’s reasonable determination.

a. Extensive notice reduces employees’ burden of remembering to mail their *Beck* objection

The UAW’s procedure does not place the burden of remembering to annually renew their objection on the *Beck* objectors. Rather, the UAW sends four separate notices to *Beck* objectors at various times throughout the year. The first notice is an ad published in the UAW’s *Solidarity* magazine, which the UAW mails every August to each employee of every employer with a union contract. (S.A. 1.) This notice explains the *Beck* objection process, including how an

employee may file a *Beck* objection, and states that the objection is valid for one year. (A. 47-49.)

The second and third notices occur after the UAW receives a *Beck* objection from an employee. At that point, the UAW sends two letters – an acknowledgement letter to the objecting employee and a letter to the relevant employer. (A. 49-50.) At the top of the acknowledgment letter, prominently displayed and in bold print, is the date that the employee’s objection expires. (A. 49-50, 70.) The letter explains that the employee “may renew [the] objection in writing for another year within the 30 days immediately prior to [the date of expiration],” and provides the address for submitting the objection. (A. 70.) The objecting employee also receives a copy of the letter that the UAW sends to the employer notifying the employer of the objection and the reduced union security obligation. (A. 71.) The letter to the employer also explains that the *Beck* objection is effective for “a 12-month period.” (*Id.*)

Finally, every May or June, the UAW sends each *Beck* objector an annual financial report that establishes the future yearly reduced fee based on the UAW’s expenditures over the previous year. (S.A. 2; A. 51, 72-88.) The UAW attaches a personalized letter to the report that prominently displays the objection’s date of expiration at the top of the letter across from the employee’s name and address.

(A. 51, 90.) The letter's last paragraph again explains the process for annual renewal of an objection. (A. 51, 91.)

In short, the UAW's four notices keep the objector informed about the simple annual objection requirements and the individual objection renewal deadline, thus easing the burden of remembering when to renew. The UAW's reminders do not hide the employee's *Beck* rights; rather, the frequent reminders prompt employees to exercise those rights. Thus, an objecting employee's burden in maintaining his objector status is slight and requires essentially the cost of mailing a letter or postcard every year and remembering (after receiving four different reminders) to do so.

b. The UAW's *Beck* procedure allows employees to file objections at any time, thereby reducing the financial consequences of failing to renew objections

The UAW's yearly renewal requirement also does not burden employees with the task of remembering to renew, or file, objections within only a specified period of time, but instead allows an employee to file an objection at any time throughout the year. Thus, even if a *Beck* objector, despite receiving four reminders of his renewal date, fails to renew his objection, that employee can easily renew the objection after the expiration date, and the UAW will honor that objection for the next 12 months. Moreover, if an objector renews shortly after his expiration date passes, the UAW continues the objection without a break because

“it is not worth [the UAW’s] while to go back and collect . . . from a fellow for one month just because he was a little late.” (A. 295.)

As the Board explained, “[t]he absence of a fixed window period for objections greatly reduces the consequences of failing to renew: an employee in that situation can regain objector status - and resume paying reduced dues - by filing a new objection immediately upon being made aware of the omission.” (S.A. 3.) Thus, the financial cost to an objecting employee for failing to renew the objection is “very small” - an objector who acts promptly to renew his objection after missing the deadline may be required to pay full dues for only a brief period of time, if at all. (S.A. 3.) The lack of a specified period of time to object also aids new objectors as they can file an objection at any time instead of waiting for a specific month, and the UAW will honor that objection for the next 12 months.

Thus, the UAW’s procedure is not a trap for the unwary, with the UAW capitalizing on an employee’s overlooking their renewal date. Rather, by allowing for objections at any time, the UAW has shown that it is not interested in collecting full dues from nonmembers who do not want to pay more than the portion germane to collective-bargaining related activities.

Overall, the frequent and repeated reminders to renew the objection, coupled with the opportunity to object at any time, supports the Board’s finding (S.A. 3) that the UAW’s annual renewal requirement imposes only a “de minimis” burden

on employees, thereby placing the requirement within the “wide range of reasonableness” afforded the UAW under its duty of fair representation.

2. Petitioners do not challenge the Board’s conclusion that the annual renewal requirement imposes a “de minimis” burden but instead raise arguments the Board expressly did not reach

Significantly, Petitioners’ do not dispute the Board’s finding regarding the annual renewal requirements imposed only a “de minimis” burden. Rather, the Petitioners challenge the UAW’s justifications for its procedure, claiming (Br. 28) that the UAW’s annual objection procedure is arbitrary because it “serves no legitimate purpose.” Petitioners further criticize (Br. 28) the UAW’s reasons for the requirement as being the “same justifications” that the Board rejected in *L-3 Communications*. However, these arguments are not before the Court because the Board explicitly stated (S.A. 3) that having found the annual renewal requirement imposed only a de minimis burden, it did not “need [to] reach the weight to be given to the [UAW’s] proffered justifications for the requirement.” (S.A. 3.) *See also Int’l Bhd. of Elec. Workers, Local Union No. 34, 357 NLRB No. 45, 2011 WL 3735520 at *3 (Aug. 10, 2011)* (“If the burden imposed on employees by an annual renewal requirement is more than de minimis, the Board evaluates a union’s

proffered justifications for the requirement, considered in the context of the particular *Beck* procedures involved.”).³

Petitioners fault the UAW’s procedure for the expense incurred in sending out all the reminders, and claim (Br. 26 n.3) that the UAW should choose the allegedly less expensive route of allowing continuing objections. However, “[t]he Board does not require that a union prove ‘that the choices it makes are better or more logical than other possibilities,’ but, instead that the union ‘act[s] on the basis of relevant considerations,’ not arbitrary ones.” *Thomas v. NLRB*, 213 F.3d 651, 656-57 (D.C. Cir. 2000) (quoting *Reading Anthracite Co.*, 326 NLRB 1370, 1370 (1998)). Therefore, while Petitioners may argue that there are better approaches the UAW could take, such an argument attempts to substitute Petitioners’ judgment for that of the UAW and does not demonstrate that the UAW actions fall outside the “generous range of reasonableness” required under the duty of fair

³ In any event, while declining to pass on the justifications’ weight, the Board (S.A. 3 n.9), in responding to the dissent, disagreed that the UAW’s justifications here were “identical” to those offered by the union in *L-3 Communications*. There, while the union defended its annual renewal requirement by claiming that it gave objectors the opportunity to change their mind, it “presented little evidence with respect to objectors changing their minds.” (S.A. 3 n.9.) Here, however, the Board noted that the UAW presented empirical evidence showing that “a significant number of objectors” (about 40%) do not renew their objection each year, thereby demonstrating a reasonable need for an annual renewal requirement to make the UAW certain that it was reducing fees “only for those employees who actually wish to continue their *Beck* objections.” (S.A. 3 n.9; A. 340.)

representation. *Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 2569*, 94 F.3d 1107, 1116-17 (7th Cir. 1996).

C. Petitioners Have Failed To Show that the Board's Finding Was Unreasonable

This case involves the basic question of whether the UAW acted arbitrarily in requiring annual renewal of *Beck* objections. However, the Petitioners attempt to complicate the issue by contesting the well-settled standard for analyzing *Beck* procedures, arguing theories that the General Counsel did not pursue or that are wholly unsupported, and relying on inapposite precedent in an unpersuasive effort to convince this Court to require that the Board use a constitutional standard to evaluate the legality of a union's *Beck* procedure. While the Petitioners' arguments succeed at expressing their severe displeasure with the UAW's requirement - and to some extent with lawful union-security agreements in general - they fail to show that the Board acted unreasonably in upholding the UAW's annual renewal requirement as consistent with its duty of fair representation.

1. The Board properly determined the validity of the UAW's annual renewal requirement by applying the duty of fair representation

In examining the UAW's annual renewal requirement, the Board relied on its "long-established approach" of analyzing questions regarding a union's obligation under *Beck* by using the duty of fair representation. (S.A. 4 n.13.) From its first decision examining a union's *Beck* obligations, the Board found the

use of that standard “inescapable” given the Supreme Court’s “explicit directive” in *Air Line Pilots Association, International v. O’Neill*, 499 U.S. 65, 67 (1991), that the duty of fair representation “applies to all union activity,” including the negotiation, administration, and enforcement of collective-bargaining agreements. *California Saw*, 320 NLRB 224, 230 (1995). Because “[m]ost fair representation cases require a great sensitivity to the tradeoffs between the interests of the bargaining units as a whole and the rights of individuals,” a union’s duty of fair representation, which involves a balancing of “individual, collective and public policy interests” is the appropriate standard to use when determining the legality of a union’s *Beck* procedure. *Id.* (quoting *Breining v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989)). For example, the union must resolve questions regarding the frequency of notice, the publication of notice, and whether, as here, a continuing objection should be honored. *L-3 Commc’n*, 355 NLRB No. 174, 2010 WL 3446130, at *2 (Aug. 10, 2010). These questions invariably require a balancing of the interests of a bargaining unit as a whole and the rights of individuals, and are “precisely the type of discretionary trade-off subject to the duty of fair representation.” *Id.* at *2 n.10.

The Supreme Court and courts of appeals, including this Court, have embraced the Board’s “well-established approach” of using the duty of fair representation standard when evaluating a union’s administration of its union-

security clause and its compliance with its *Beck* obligations. *See Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 34 (1998) (applying duty of fair representation standard to determine whether union negotiated a lawful union-security clause); *Penrod v. NLRB*, 203 F.3d 41, 54 (D.C. Cir. 2000) (considering “what information a union’s duty of fair representation requires it to give employees about their right[s] under [*Beck*]”); *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015-16 (7th Cir. 1998) (upholding Board’s evaluation of *Beck* procedures “in terms of their conformity to the general norm of reasonableness that is implicit in the concept of ‘fair’ representation”); *Finerty v. NLRB*, 113 F.3d 1288, 1291 (D.C. Cir. 1997) (applying duty of fair representation standard to determine lawfulness of union’s method for calculating reduced agency fee charged to objecting nonmembers); *Price v. Int’l Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88, 92 (2d Cir. 1991) (rejecting use of constitutional standard to evaluate *Beck* procedures and instead finding it “necessary only that the procedures employed not be arbitrary, discriminatory, or implemented in bad faith”).

2. The UAW’s annual renewal requirement was not made in bad faith or for discriminatory reasons

Relying on the duty of fair representation rubric, Petitioners argue (Br. 27) that the UAW’s annual renewal policy is “in bad faith” and “discriminatory.” However, their arguments fall short of proving either claim.

Petitioners first argue (Br. 17, 26) that the UAW's annual renewal procedure constitutes bad faith, claiming (Br. 26) that the UAW's "obvious purpose" behind its annual renewal policy was to make it more difficult for employees to pay their reduced fees and to reap a windfall from objectors' forgetfulness. This argument misses the mark.

First, the Petitioners go outside the bounds of the complaint by arguing that the UAW acted in bad faith by requiring annual renewal of objections. As the Board noted (S.A. 3 n.13), the General Counsel's complaint did not allege bad faith, and as set forth above, pp. 33-34, Section 3(d) prohibits the charging parties from enlarging or changing the General Counsel's complaint or litigation theories. *Penntech Papers, Inc.*, 263 NLRB 264, 265 (1982), *enforced*, 706 F.2d 18 (1st Cir. 1983). Accordingly, Petitioners cannot expand upon the complaint by arguing that the UAW acted in bad faith.

In any event, Petitioners provide no evidence - nor is there any - demonstrating that the UAW acted in bad faith by requiring annual renewal of objections. A bad faith violation of the duty of fair representation requires a showing of fraudulent, deceitful, or dishonest action, "and other intentionally misleading conduct," as well as proof that the union acted with "an improper intent, purpose, or motive." *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010). Petitioners present no evidence showing that the UAW's

enforcement of its annual renewal requirement is so “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). Their argument that the Court should infer bad faith because the annual renewal requirement creates difficulty for the *Beck* objector turns a blind eye towards the myriad steps that the UAW has taken to minimize the burden of objecting – to the point that the objector’s burden is “de minimis.” (S.A. 3.) See *Trimas Corp.*, 357 NLRB No. 48, 2011 WL 3841700, at *6 n.6 (Aug. 16, 2011) (finding that union’s “clear notice” to *Beck* objectors of the annual renewal requirement negates any bad faith determination).

The Petitioners next argue (Br. 17, 28) that the UAW’s annual renewal procedure is discriminatory because it results in disparate treatment of objecting nonmembers because union members do not have to reaffirm their membership annually. The Board (S.A. 3 n.13) properly rejected such a finding. “Mere discrimination between employees by the union cannot be a basis for a claim of unfair representation. Employees are not all similarly situated and a union needs to make many legitimate differentiations to represent them.” *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1238 (8th Cir. 1980). The duty of fair representation prohibits “invidious” discrimination, based on constitutionally protected categories or arising from animus or prejudice. *Jeffreys v. Commc’n Workers of Am., AFL-CIO*, 354 F.3d 270, 276 (4th Cir. 2003). A union’s acts are

discriminatory when “substantial evidence” indicates that it engaged in discrimination that was “intentional, severe, and unrelated to legitimate union objectives.” *Vaughn v. Air Line Pilots Ass’n, Int’l*, 604 F.3d 703, 709 (2d Cir. 2010). The Petitioners have presented no such evidence.

The Board has found discrimination when a union treats members and nonmembers differently in regard to matters where membership is irrelevant. *L-3 Commc’n*, 355 NLRB No. 174, 2010 WL 3446130, at *8 (Aug. 10, 2010). Here, in contrast, with respect to the UAW’s administration of its contractual union-security provisions, “members and nonmembers as well as objectors and nonobjectors are not similarly situated, and the [unions] were thus free to design, indeed, they could not avoid designing, different procedures applicable to each category of employee.” *Id.* at *9. Further, as the Board noted (S.A. 3-4 n.13), the annual renewal requirement’s “de minimis” burden refutes any claim of disparate treatment. Thus, Petitioners’ claim of discrimination is without any basis. *See also Trimas Corp.*, 357 NLRB No. 48, 2011 WL 3841700, at *7 n.13 (Aug. 16, 2011) (finding that union’s annual renewal requirement for *Beck* objectors is not discriminatory because members and nonmembers are not similarly situated).

3. Petitioners’ argument that the duty of fair representation is not the applicable standard lacks merit

Despite the Supreme Court’s “explicit directive” in *Air Line Pilots Association, International v. O’Neill*, 499 U.S. 65, 67 (1991), that the duty of fair

representation applies to all union activity, the Petitioners argue (Br. 23) that the standard is an “unnecessary and inappropriate” legal framework to apply when determining the legality of a union’s *Beck* procedure. However, in challenging the applicability of the duty of fair representation, the Petitioners advance an analytical framework that the General Counsel did not pursue, assert an argument inconsistent with their position before the Board, and rely on inapposite precedent.

Before the Board, the General Counsel argued that “the annual objection requirement violates the Union’s duty of fair representation because it places an unreasonable burden on objecting nonmembers without serving any legitimate interest and thus is arbitrary.” (Supp. A. 16.) The General Counsel did not pursue the alternative analytical framework that the charging parties now advocate. (Br. 23.) Under Section 3(d) of the Act (29 U.S.C. § 153(d)), the General Counsel has the “final authority” over the “investigation of charges and issuance of complaints [under the Act].” It is settled that pursuant to this section, a charging party cannot enlarge upon or change the General Counsel’s theory. *Williams v. NLRB*, 105 F.3d 787, 791 n.3 (2d Cir. 1996). As this Court has stated, “the General Counsel . . . is dominus litis; the General Counsel has power to decide whether to issue a complaint . . . and to determine what its legal theory should be.” *Local 282, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 339 F.2d 795, 799 (2d Cir. 1964). Because the General Counsel’s authority to frame

the issues before the Board is unreviewable, his decision to refrain from challenging the applicability of the duty of fair representation standard precludes this Court from reaching that issue. *See Williams*, 105 F.3d at 790-91 n.3.

Moreover, the Petitioners' argument against the application of the duty of fair representation analysis contradicts previous positions they have taken in this case. In their supplemental brief to the Board, Petitioners argued that the Board should adhere to a "[f]aithful application" of *L-3 Communications* when deciding this case. (Supp. A. 32.) As discussed above, p. 24, in *L-3 Communications*, the Board applied a duty of fair representation analysis in examining a different annual renewal procedure. *L-3 Commc'n*, 355 NLRB No. 174, 2010 WL 3446130, at *2 (Aug. 10, 2010). In fact, the Board specifically rejected a call to apply the very analysis that the employer advocates here, explaining that such a change "would require dramatic changes in Federal labor law and policy." *Id.* at *3 n.11. In addition to their brief, in their opening statement at the unfair labor practice hearing below, the Petitioners claimed that the evidence would show that the Union's annual renewal policy "violate[d] the duty of fair representation." (Supp. A. 1-2.) Thus, Petitioners previously endorsed the very standard that they now vehemently oppose.

Petitioners contend (Br. 21-22, 29-34) that various courts have found the duty of fair representation standard lacking when reviewing challenges to *Beck*

procedures and have instead applied stricter standards. However, the Petitioners' argument suffers from two significant flaws: It reads *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000) and *Abrams v. Communication Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995) too broadly and ignores the different legal context within which the other cases arose.

First, *Abrams* and *Penrod* both considered the adequacy of the unions' notice to employees regarding their *Beck* rights. In doing so, both courts referenced *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), where the Court, in considering whether the union had provided public sector employees adequate notice of their required union expenses, held that “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.” *Id.* at 306 (emphasis added). As the emphasized language suggests, the Court’s holding in *Hudson* was not rooted solely in First Amendment considerations. In that regard, *Abrams*’s and *Penrod*’s reliance on *Hudson* is not a blanket endorsement of constitutional scrutiny over the rubric of the duty of fair representation standard. Rather, as the *Abrams* court explained, “[a]lthough in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in ‘[b]asic considerations of

fairness” *Abrams*, 59 F.3d at 1379 n.7 (quoting *Hudson*, 475 U.S. at 306).

In the end, although *Abrams* and *Penrod* used the *Hudson* analysis as guidance, both cases ultimately expressly relied on the duty of fair representation standard in determining the legality of the *Beck* objector notices at issue. *See Penrod*, 203 F.3d at 44 (stating that issue for decision was “what information a union’s duty of fair representation requires it to give employees about their rights under [*Beck*]”); *Abrams*, 59 F.3d at 1377 (setting forth the duty of fair representation standard and explaining its applicability to agency fee cases). And, importantly, *Abrams* upheld an annual renewal requirement comparable to the one at issue here. *Abrams*, 59 F.3d at 1382.⁴

Second, Petitioners’ rely (Br. 22, 29-31) primarily on three cases that did not arise under the NLRA and that implicated stricter constitutional standards. *See Seidemann v. Bowden*, 499 F.3d 119, 125 (2d Cir. 2007) (determining that a public union’s annual renewal objection procedure was unlawful because the procedure failed to minimize the risk that the public employees’ First Amendment rights

⁴ Moreover, Petitioners’ treatment of *Abrams* as a whole is inconsistent and misleading. On the one hand, they suggest (Br. 21-22) that *Abrams* disregarded the duty of fair representation in favor of a more strict analysis. However, this contradicts their other assertion (Br. 31) that this Court should ignore *Abrams*’ finding that the union’s annual renewal requirement was lawful because it erroneously relied on a duty of fair representation standard. To be clear, *Abrams* can be accurately summarized as finding that, in the context of the Act, a union’s annual renewal requirement is “not unduly burdensome” and is “permissible.” 59 F.3d at 1381-82.

would be burdened); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 516 (5th Cir. 1998) (finding that the annual renewal requirement that union applied to airline employees subject to the RLA failed to minimize the burden on employees' First Amendment rights); and *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F.Supp. 498, 506 (D.Md. 1998) (same). The different legal landscapes within which these cases arose renders Petitioners' reliance misplaced.

In *Shea*, the court considered the union's procedure of requiring airline employees subject to the Railway Labor Act ("RLA") to object annually during a 30-day window period to opt out of full union membership. The court debated applying the duty of fair representation standard, but ultimately, after recognizing the significant statutory differences between the RLA and the NLRA, applied a constitutional standard. *Id.* at 516. Thus, contrary to Petitioners' claim (Br. 29 n. 5), RLA precedent is not "equally applicable" to actions arising under the Act. *See Comm'n Workers v. Beck*, 487 U.S. 735, 745 (1988) (advising against wholesale application of RLA precedent to cases arising under the Act "[b]ecause the [Act] and the RLA differ in certain crucial respects, [and] decisions construing the latter often provide only the roughest of guidance when interpreting the former"); *Price v. Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 927

F.2d 88, 91-92 (2d Cir. 1991) (cases arising under the Act do not require the heightened constitutional scrutiny found in RLA context); *California Saw*, 320 NLRB 224, 226 (1995) (determining that “RLA precedent premised on constitutional grounds [is] not controlling in the context of the Act”).⁵

Moreover, the concerns that prompted applying a stricter standard, and therefore finding the annual renewal requirement unlawful, in *Seidemann*, *Shea*, and *Lutz* are not present here. Agency shop cases in the public sector, such as *Seidemann*, “raise First Amendment concerns because they force individuals to contribute money as a condition of government employment.” *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 181 (2007). Likewise, as discussed above, union security agreements under the RLA, like those at issue in *Shea* and *Lutz*, also trigger constitutional scrutiny. *See Shea*, 154 F.3d at 516 (finding sufficient state

⁵ Further, *Shea* does not put to rest the issue of whether annual renewal requirements are lawful under the RLA, as other courts have considered the issue and have reached a different conclusion. *See Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) (finding that the union’s annual renewal policy was “not unreasonable”); *Kidwell v. Transp. Comm’n Union*, 731 F.Supp. 192, 205 (D.Md. 1990) (upholding annual renewal requirement because “objections are not to be presumed on an ongoing basis,” and “an employee who previously objected may have a change of heart”), *aff’d in part, rev’d. on other grounds*, 946 F.2d 283 (4th Cir. 1991). While Petitioners fault *Tierney’s* analysis as “ cursory” (Br. 31), being succinct is not synonymous with being incorrect. The court adequately supported its finding that an annual renewal requirement was not “unreasonable” by explaining that the union’s burden to disclose its detailed financial information regarding its categories of expenses necessarily gave rise to the corresponding duty of the nonmember to object. *Tierney*, 824 F.2d at 1506.

action under the RLA to prompt constitutional limitations on union-security clauses); *Lutz*, 121 F. Supp.2d at 505 (same).

This Court has previously rejected an identical request to apply a constitutional standard to union-security agreements under the Act precisely because of these differences. As this Court has explained, a union-security agreement under the Act is “a product of private negotiations and is not attributable to the government,” and therefore does not require constitutional scrutiny or heightened procedural safeguards. *Price v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88, 91-93 (2d Cir. 1991). Thus, this Court has recognized the significance of different legal landscapes and has explicitly rejected applying a constitutional standard to union-security clauses under the NLRA, finding it “necessary only that the procedures employed not be arbitrary, discriminatory, or implemented in bad faith.” *Id.* at 92 (citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

Likewise, while the Board has been mindful of the constitutional standard and has found “much useful guidance” in precedent that applied it, the Board has explicitly stated that it “cannot agree that . . . precedent under public sector law and the RLA grounded in constitutional considerations are binding in the context of [the Act.]” *California Saw*, 320 NLRB at 227. As the Board explained, the “procedures required to protect the constitutional rights of objectors . . . were not

formulated to comport with a union's obligations under *Beck* to represent its employees fairly." *Id.* at 240-41.⁶

In sum, the Board properly applied the duty of fair representation to determine the legality of the UAW's annual renewal requirement. The General Counsel proceeded on that theory, and the Petitioners specifically asked the Board to pursue it. Moreover, the duty of fair representation standard, with its balancing of interests, is well-suited for examining unions' implementation of its obligations under *Beck* and has been accepted by the Board and the courts as the appropriate standard.

4. Requiring annual affirmation of dissent does not force objectors to involuntarily become nonobjectors

Petitioners argue (Br. 19, 25) that the annual renewal procedure, which requires the *Beck* objector to renew his objection once a year, gives the UAW the unlawful authority "to force objecting employees to pay full union dues as a condition of employment" and allows the UAW to transform objectors into

⁶ Finally, Petitioners also cite (Br. 29 n.4) to an administrative law judge decision, not reviewed by the Board, that found an annual renewal requirement unlawful. *See Teamsters Local 952*, No. 21-CB-13609, 2006 WL 1525828 (2006). However, administrative law judge decisions have no precedential value unless affirmed by the Board. *So. Maryland Hosp.*, 288 NLRB 481, 488 n.5 (1988). In any event, while the *Beck* procedure at issue in that case required annual renewal, the union there, unlike the UAW here, had not provided employees with any notice of their *Beck* rights or requirements under the union's *Beck* procedure. *Teamsters Local 952*, 2006 WL 1525828 at *7-8.

nonobjectors. This argument rests on two flawed assumptions. First, it assumes that an employee's decision to become a *Beck* objector absolves any future personal responsibility that an employee has in ensuring that status. Second, the argument relies on the equally false assumption that *Beck* objectors will remain steadfast in their dissent, and that dissent expressed once invalidates any requirement that it need be expressed again.

Petitioners seek to establish an objector status that carries no personal responsibility. However, when, as here, a union has established an orderly procedure for its dues objection program, has timely (and repeatedly) notified the employee of the annual renewal requirement, and has provided accurate instructions regarding how to easily file that renewal, "the employee thereafter bears the responsibility to follow the proper procedure." *California Saw*, 320 NLRB 224, 249 (1995). If an employee chooses not to voice a current objection at any time during the year, then the union, having met its burden of adequate notice, may properly collect full fees from that employee. (S.A. 3.) "Life is full of deadlines." *Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996). A once-a-year deadline preceded by numerous reminders of that deadline is, as the Board found (S.A. 3), only a "de minimis" burden. In the face of these reminders, if an employee does not renew

his status as an objector, it is the employee, and not the UAW, who is choosing to become a nonobjector.

Second, contrary to Petitioners' assertions (Br. 30), dissent expressed once does not invalidate any reasonable requirement that it need be expressed again. As the Supreme Court instructed, "dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 747 (1961). Therefore, "[it] is reasonable, and entirely consistent with human experience, to believe that both nonmembers and unions may alter their positions over time." *Gorham v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 733 F.Supp.2d 628, 634 (D.Md. 2010). Thus, the UAW acted reasonably in developing a procedure grounded in the premise that "objections are not to be presumed on an ongoing basis . . . [and] an employee who previously objected may have a change of heart and choose not to exercise his or her right to object in future years." *Kidwell v. Transp. Comm'n Int'l Union*, 731 F. Supp. 192, 206-07 (D.Md. 1990), *aff'd in relevant part and rev'd in part on other grounds*, 946 F.2d 283 (4th Cir. 1991).

In sum, under the applicable duty of fair representation standard, the UAW does not have to find "the system that imposes the least restriction on *Beck* rights possible." *Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 2569*, 94 F.3d 1107, 1117 (7th Cir. 1996). Such "exacting scrutiny is inconsistent"

with the duty of fair representation. *Id.* Rather, the proper query is whether the UAW acted reasonably in balancing competing interests, and the Board, after examining the numerous reminders, the lack of a window period, and the corresponding ability to renew an objection at any time, properly determined that the UAW's *Beck* procedure was within the wide range of reasonableness allowed the union in implementing its obligations under *Beck*.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Petitioners' petition for review.

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UNITED STATES COURT OF APPEALS
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GEORGE H. GALLY AND SOLO J. DOWUONA-
HAMMOND *

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v. *

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Respondent * 34-CA-02631

INTERNATIONAL UNION, UNITED AUTOMOBILE, *
AEROSPACE AND AGRICULTURAL IMPLEMENT *
WORKERS OF AMERICA, AFL-CIO *

Intervenor *

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,132 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent.

The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC
this 10th day of January, 2012

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