

**Nos. 07-1025, 07-1082, & 07-1207**

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

**SHERRY PIRLOTT & DAVID PIRLOTT**  
Petitioners

v.

**NATIONAL LABOR RELATIONS BOARD**  
Respondent

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**TEAMSTERS LOCAL 75**  
Petitioner/Cross-Respondent

v.

**NATIONAL LABOR RELATIONS BOARD**  
Respondent/Cross-Petitioner

and

**SHERRY PIRLOTT & DAVID PIRLOTT**  
Intervenors

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	2
Statement of the issue presented .....	3
Relevant statutory and regulatory provisions .....	3
Statement of the case.....	3
Statement of facts.....	5
I. The Board’s findings of fact .....	5
A. The Union’s membership and operations; the collective-bargaining agreement with Schreiber Foods.....	5
B. Two Schreiber Foods’ employees resign their memberships in the Union; the Union provides objectors with a fee calculation and list of expenses; objectors demand funds be placed in escrow; the Union collects the agency fee and places the funds in escrow .....	7
II. The Board’s conclusions and order .....	8
Summary of argument.....	11
I. The Board is entitled to summary enforcement of its uncontested finding that the Union violated Section 8(b)(1)(A) of the Act by failing to provide newly hired unit employees with notice of their <i>Beck</i> Rights.....	13
II. The Board reasonably found that the Union failed to demonstrate that its organizing expenses were germane to collective bargaining and therefore violated its statutory duty of fair representation by charging objectors for expenses incurred in organizing employees of other employers within Schreiber Foods’ competitive market.....	14

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. Applicable principles and the standard of review .....	14
1. Chargeability of expenses to objecting nonmembers.....	14
2. The duty of fair representation and the standard of review .....	17
B. The Board reasonably found that the Union failed to meet its burden of proving that its expenses incurred in organizing employees of other employers within Schreiber Foods’ competitive market are germane to its representational activities and may inure to the benefit of the unit employees.....	19
1. The Board’s decision in <i>Meijer</i> does not resolve the issue in this case and the Union failed to meet its burden of proof under <i>Meijer</i> and <i>California Saw</i> .....	22
2. The Union’s claim that it did not know that it had to defend the chargeability of nonunit organizing expenses is directly contravened by the two Board orders in this case refining the issue and setting forth the Union’s burden of proof .....	26
C. The Board acted within its discretion by giving the charging parties the specific relief they sought regarding the chargeability of organizing expenses .....	32
III. The Board does not oppose a remand for the limited purpose of granting the charging parties’ petition for review regarding the sufficiency of the Union’s financial disclosure statement and specifically regarding the per capita tax .....	35
Conclusion .....	38

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>American Trucking Ass'ns, Inc. v. ICC</i> , 747 F.2d 787, 790 (D.C. Cir. 1984)).....	35
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978).....	24
<i>Breining v. Sheet Metal Workers</i> , 493 U.S. 67 (1989).....	19
<i>CPS Chemical Co.</i> , 324 NLRB 1018 (1997), <i>enforced</i> , 160 F.3d 150 (3d Cir. 1998) .....	34
* <i>California Saw &amp; Knife Works</i> , 320 NLRB 224 (1995), <i>enforced sub. nom</i> .....	17,19,20,22,23,27,28,31
<i>Carpenters &amp; Millwrights, Local Union 2471 v. NLRB</i> , 481 F.3d 804 (D.C. Cir. 2007).....	13
<i>Chevron U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	18
<i>Community Hospital of Central California v. NLRB</i> , 335 F.3d 1079 (D.C. Cir. 2003).....	18
* <i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988).....	3,4,6,8,10,15,16,17,18,31
* <i>Connecticut Limousine Services</i> , 324 NLRB 633 (1997) .....	17,28,29

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>Ferriso v. NLRB</i> , 125 F.3d 865 (D.C. Cir. 1997) .....	32
<i>Finerty v. NLRB</i> , 113 F.3d 1288 (D.C. Cir. 1997) .....	18
<i>Flying Food Group, Inc. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006) .....	13
<i>International Alliance of Theatrical &amp; Stage Employees, Local 39 v. NLRB</i> , 334 F.3d 27 (D.C. Cir. 2003) .....	30
* <i>International Association of Machinists &amp; Aerospace Workers v. NLRB</i> , 133 F.3d 1012 (7th Cir. 1998) .....	16,17,19
<i>Lehnert v. Ferris Faculty Ass'n</i> , 500 U.S. 507 (1991) .....	17
<i>Local Union No. 749, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers &amp; Helpers, AFL-CIO v. NLRB</i> , 466 F.2d 343 (D.C. Cir. 1972) .....	15
<i>Louisiana Environmental Action Network v. Bronner</i> , 87 F.3d 1379 (D.C. Cir. 1996) .....	35
* <i>Meijer, Inc.</i> , 329 NLRB 730 (1999) .....	passim
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990) .....	24

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\* Authorities upon which we chiefly rely are marked with asterisks.

**TABLE OF AUTHORITIES**

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....	24
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963).....	15
<i>NLRB v. United Food &amp; Commercial Workers Union</i> , 484 U.S. 112 (1997).....	18
<i>Penrod v. NLRB</i> , 203 F.3d 41 (D.C. Cir. 2000).....	32,36,38
<i>Production Workers Union of Chicago &amp; Vicinity, Local 707 v. NLRB</i> , 161 F.3d 1047 (7th Cir. 1998) .....	15
<i>Radio Officers' Union v. NLRB</i> , 347 U.S. 17 (1954).....	14,15
<i>Show Industries</i> , 326 NLRB 910 (1998) .....	34
<i>Teamsters Local 166 (Dyncorp Support Services)</i> , 327 NLRB 950 (1999) .....	36,37
<i>Teamsters Local 166 (Dyncorp Support Services)</i> , 333 NLRB 1145 (2001) .....	36
<i>Teamsters Local Union No. 579 (Chambers &amp; Owen, Inc.)</i> , 350 NLRB No. 87 (September 7, 2007) .....	37,38

---

\* Authorities upon which we chiefly rely are marked with asterisks.

**TABLE OF AUTHORITIES**

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>Thomas v. NLRB</i> , 213 F.3d 651 (D.C. Cir. 2000) .....	16,18
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	18

<b>Statutes</b>	<b>Page(s)</b>
* National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157) .....	10,14
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) .....	3,5,8,9,13,17
Section 8(b)(2) (29 U.S.C. § 158(b)(2)) .....	3
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	14,16
Section 9(a) (29 U.S.C. § 169(a)) .....	14
Section 10(a)(29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2
Section 10(f) (29 U.S.C. § 160(f)) .....	2,32

<b>Regulations</b>	<b>Page(s)</b>
29 C.F.R. §102.48(d)(1).....	30

<b>Miscellaneous</b>	
S. Rep. No. 105, 80th Cong., 1st Sess. (1947).....	15

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petitions of Sherry Pirlott and David Pirlott (“the Charging Parties”) and Teamsters Local 75 (“the Union”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, Board Orders issued against the Union. The initial Decision and Order issued on September 1, 1999, and is reported at 329 NLRB 28. (A 275-96.)<sup>1</sup> A Supplemental Decision and Order issued on January 26, 2007, and is reported at 349 NLRB No. 14. (A 297-324.) The Charging Parties filed their petition for review of the Board’s Orders on January 31, 2007. The Union filed its petition for review on March 30, 2007, and the Board filed its cross-application for enforcement on June 15, 2007. All filings were timely; the Act imposes no time limit on such filings.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

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<sup>1</sup> “A” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Union failed to demonstrate that its organizing expenses were germane to collective bargaining and inured to the benefit of the unit, and therefore violated its duty of fair representation by charging objectors for expenses incurred in organizing employees of other employers within Schreiber Foods' competitive market.

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

This case first arose in the early 1990s and has been the subject of a remand, a special appeal, and two hearings. Acting on charges filed by the Charging Parties, the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by failing to provide objectors<sup>2</sup> with sufficient information regarding the Union's expenditures, including expenditures by its affiliates. (A 291; A 18-19.) The complaint further alleged that the Union violated Section 8(b)(1)(A) of the Act (29

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<sup>2</sup> "Objectors" are employees covered by a union-security clause who reject membership in the union and object to payment of fees to the union for expenses other than those germane to collective bargaining. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988).

U.S.C. § 158(b)(1)(A)) by charging objectors for expenses incurred outside their bargaining unit of production and maintenance employees at Schreiber Foods and by failing to give new employees notice of their rights under *Communications Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (“*Beck*”), to object to union membership and payment of full dues.<sup>3</sup> (A 277, 291; A 18.)

Following a hearing, an administrative law judge found that the Union’s financial disclosure statement provided insufficient information to the Charging Party objectors concerning the Union’s expenses and therefore violated the Union’s duty of fair representation under the Act. (A 293-94.) The judge dismissed the allegations relating to the chargeability of organizing expenses incurred in the private sector outside the bargaining unit and the failure to provide notice of *Beck* rights to newly hired employees. (A 290, 294-95.) Upon review of exceptions to the judge’s decision, the Board reversed on all counts.

The Board found that the initial financial disclosure statement given to the Charging Parties was sufficient at this point in the objection process and dismissed that allegation. (A 277-78.) The Board found that the Union had unlawfully failed to provide newly hired employees with notice of their *Beck* rights. (A 277.) With

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<sup>3</sup> Additional allegations in the complaint are not at issue in this case.

respect to expenses incurred in organizing employees of other employers, the Board remanded that portion of the case for further proceedings.<sup>4</sup> (A 278-79.)

Following the remand, the General Counsel filed a motion to close the record and dismiss the complaint. Both the judge and the Board, after a special appeal, denied the motion. (Order of February 5, 2001.)<sup>5</sup> Subsequently, following a hearing, the judge found that the Union had lawfully charged objectors for organizing expenses incurred outside the bargaining unit in the private sector. (A 323.) The Charging Parties filed exceptions to the judge's decision. Upon review of those exceptions, the Board reversed, finding that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) and its duty of fair representation by charging objectors for organizing expenses incurred in organizing employees of other employers in Schreiber Foods' competitive market. (A 297, 303.)

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. The Union's Membership and Operations; the Collective-Bargaining Agreement with Schreiber Foods

The Union represents approximately 4000 employees in 143 bargaining

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<sup>4</sup> The Board also remanded the question of the chargeability of representational and organizing expenses incurred in representing public sector employees, which is not at issue here.

<sup>5</sup> The Board's February 5, 2001 Order is included as an addendum to this brief.

units in Wisconsin. (A 292; A 34, 69.) The Union has roughly 1600 members working in the dairy industry and 600 in the food processing industry. (A 292; A 69.) The Union employs six business agents, two of whom are assigned to the dairy industry and all of whom engage in some organizing activities as part of their positions. (A 292; A 47, 96.) In the 3 years prior to 1992, the Union sought to organize additional employees at six cheese companies and at least one food processing company. (A 292; A 71.)

Schreiber Foods processes cheese and other dairy products in Green Bay, Wisconsin. (A 289.) Since 1951, the Union has been the exclusive representative of production and maintenance employees at Schreiber Foods. (A 289; A 66.) At all relevant times, the Union and Schreiber Foods have been parties to a collective-bargaining agreement that contains a union-security clause requiring an employee to maintain union membership in good standing as a condition of employment after the first 31 days of employment. (A 289; A 67, 203.)

All new employees hired by Schreiber Foods between May 1989 and October 1991 became members of the Union sometime after 31 days of employment and had their dues checked off and remitted to the Union. (A 289; A 43.) The Union did not inform any of the newly hired employees of their *Beck* rights prior to the time they joined the Union. (A 289; A 43-45.)

- B. Two Schreiber Foods' Employees Resign Their Memberships in the Union; The Union Provides Objectors with a Fee Calculation and List of Expenses; Objectors Demand Funds be Placed in Escrow; the Union Collects the Agency Fee and Places the Funds in Escrow

Sherry Pirlott began working at Schreiber Foods and joined the Union in 1963; her husband David Pirlott was hired at Schreiber Foods and joined the Union in 1973. (A 291; A 53.) In a joint letter dated September 20, 1989, they resigned their membership in the Union and objected to the use of their fees for "any non collective bargaining activity." (A 291; A 54, 224.) At that time, the Pirlotts became the only objectors in the bargaining unit. (A 291; A 43.)

In response, the Union sent a letter dated October 19, 1989 indicating that the objectors' dues would each be reduced from \$21 per paycheck to \$20.77. (A 291; A 37, 54, 225-27.) This reduction was based on a calculation that 1.1 percent of the Union's expenditures in the previous year were used for activities unrelated to collective bargaining. (A 291; A 228.) The letter included a breakdown of the Union's expenses for the previous year, which was prepared by an accountant. (A 291-92; A 50, 226, 228.) The first entry on the financial statement was for "per capita tax" paid to affiliates, including the Wisconsin Joint Council 39, the Central Conference of Teamsters, and the International Brotherhood of Teamsters. (A 292; A 37-38, 228.) The letter further explained the internal union procedure for challenging the calculation. (A 295; A 226-27.)

The objectors responded with a letter on November 1 stating that the financial disclosure sent to them was inadequate, rejecting use of the Union's challenge procedure, and demanding that their dues be placed in escrow. (A 292; A 55, 229.) On November 8, the Union informed the objectors via letter that their payments, deducted only for the "percent of your dues spent on lawful, chargeable activities," would be placed in escrow. (A 292; A 230.) All dues paid by the objectors since 1989 have been placed in escrow. (A 292, A 83-84.)

## II. THE BOARD'S CONCLUSIONS AND ORDERS

On September 1, 1999, the Board (Chairman Truesdale and Members Fox, Liebman, and Hurtgen, Member Brame concurring in part and dissenting in part), reversing the judge, dismissed the allegation that the Union violated its duty of fair representation under Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by failing to provide sufficient information about its expenditures or those of its affiliates. The Board found that the Union violated Section 8(b)(1)(A) by failing to provide newly hired unit employees with notice of their *Beck* rights. (A 277.) The Board severed and remanded to the judge the issue of the chargeability of organizing expenses incurred outside the bargaining unit. (A 278-79.) The judge had found those expenses to be lawfully charged. (A 294-95.)

Following the remand, and prior to the hearing being reopened, the General Counsel filed a motion to close the record and dismiss the complaint on the basis

that the Board rejected the sole theory alleged, which was that *no* nonunit expenses were chargeable to the objectors. The judge denied the motion, finding the chargeability of organizing expenses constituted a lesser included theory of the violation. The General Counsel took a special appeal to the Board. The Board (Chairman Truesdale and Members Liebman, Hurtgen, and Walsh) issued an Order on February 5, 2001 denying the General Counsel's appeal on two grounds: the motion was untimely, and viable issues remained in the case with respect to the chargeability of nonunit expenses. Specifically, the Board stated that both the judge and the Board had explicitly considered a lesser theory of the violation alleged, which was that some nonunit expenses may be chargeable and others not. (Order of February 5, 2001.)

After the hearing on remand, the Board (Chairman Battista and Member Schaumber dissenting in part, Member Liebman dissenting) issued a Supplemental Decision and Order on January 26, 2007. (A 297-324.) The Board found, reversing the judge, that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) and its duty of fair representation by charging the Charging Parties for expenses incurred in organizing employees of other employers in the dairy and food processing industries. (A 297, 303.) The Board found that the Union failed to meet its burden of proving that its organizing expenses within

Schreiber Foods' competitive market were germane to its representational activities. (A 302.)

The Board's Order requires the Union to cease and desist from charging and collecting from objecting nonmembers dues and fees attributable to nonchargeable organizing expenditures and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 304.) Affirmatively, the Board's Order requires the Union to refund with interest to the objecting nonmembers, the amount of their dues and fees that were spent on nonchargeable organizing activities. (A 304.) The Union is also required to notify in writing those employees obligated to pay dues and fees under the union-security clause after May 8, 1989, of their right to elect nonmember status and to make *Beck* objections. (A 280.) For any employee who, with reasonable promptness after receiving his or her notice, elects nonmember status and files *Beck* objections for any accounting period covered by the complaint, the Union must process the objections. (A 280.) The Union must also post a remedial notice. (A 304.)

## SUMMARY OF ARGUMENT

The Union and Schreiber Foods have a longstanding collective-bargaining history and their collective-bargaining agreements have consistently included a union-security provision. When the Charging Parties resigned their union memberships and objected to paying full dues, it was incumbent upon the Union to calculate their required fees so that the Charging Parties, as objecting nonmembers, would be paying only their fair share of the Union's lawful representational expenses. The Union undisputedly charged the Charging Parties for organizing expenses incurred in its efforts to organize employees of other employers in the dairy and food processing industries.

Contrary to the Union's assertion, the Board's decision in *Meijer, Inc.*, 329 NLRB 730 (1999), did not privilege it to charge the objectors for organizing expenses incurred within Schreiber Foods' competitive market in the absence of evidence demonstrating that those expenses were germane to representational activities and inured to the benefit of unit members. The Union's argument wholly ignores the Board's interpretation its own case law. As the Board clearly indicated in two separate orders, the Union had the burden of proving that the organizing expenses were germane to its role as collective-bargaining representative and may ultimately inure to the benefit of the unit employees. The Union failed to meet that burden, presenting evidence only about the effects of organizing generally. Thus,

the Union violated its duty of fair representation by charging objectors for these organizing expenses.

The Charging Parties are not “aggrieved” under the Act. The Board ordered the Union to stop charging for organizing expenses and refund with interest to the Charging Parties the amount of their fees that were spent on organizing. Despite being granted the relief they sought and to which they were entitled, the Charging Parties are before this Court expressing dissatisfaction that the Board did not overrule the decision it issued 8 years ago in *Meijer*—a case that did not involve them. The Charging Parties are simply not entitled to a decision of this Court passing on a matter that is not before it.

The Board does not oppose the Court’s granting the Charging Parties’ petition for review with respect to the adequacy of the general financial disclosure notice provided to the objectors, and the sufficiency of the Union’s per capita fees disclosure, and remanding the case to the Board for entry of an appropriate remedy.

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY FAILING TO PROVIDE NEWLY HIRED UNIT EMPLOYEES WITH NOTICE OF THEIR *BECK* RIGHTS

Before this Court, the Union does not contest the Board's finding that it violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by "failing to provide newly hired unit employees . . . notice of their rights under *Beck* . . . prior to obligating them to pay dues under the union-security clause." (A 277.) Under well-settled law, the Union's failure to contest this finding constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to this violation. *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) ("[i]t is this Court's 'longstanding rule that '[t]he Board is entitled to summary enforcement of the uncontested portions of its order[s]'" (quoting *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006)).

II. THE BOARD REASONABLY FOUND THAT THE UNION FAILED TO DEMONSTRATE THAT ITS ORGANIZING EXPENSES WERE GERMANE TO COLLECTIVE BARGAINING AND THEREFORE VIOLATED ITS DUTY OF FAIR REPRESENTATION BY CHARGING OBJECTORS FOR EXPENSES INCURRED IN ORGANIZING EMPLOYEES OF OTHER EMPLOYERS WITHIN SCHREIBER FOODS' COMPETITIVE MARKET

A. Applicable Principles and Standard of Review

1. Chargeability of Expenses to Objecting Nonmembers

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 as well as “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. Congress, in enacting the union-security proviso to Section 8(a)(3), intended to eliminate “‘free riders,’ i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support” to the union. *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 41 (1954).

The possibility of such “free riders” absent a union-security clause arises as a result of Section 9(a) of the Act (29 U.S.C. § 159(a)). That section provides that

representatives “designated or selected for the purposes of collective bargaining by the majority of employees in [an appropriate unit,] shall be the exclusive representative of all the employees in the unit for purposes of collective bargaining . . . .” The practical result is that all employees in a unit, not just those employees who are union members, receive the benefits of any agreement the union successfully reaches with their employer. *See Production Workers Union of Chicago & Vicinity, Local 707 v. NLRB*, 161 F.3d 1047, 1052 (7th Cir. 1998). Thus, 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).

Although the Act specifies that a union-security provision may require union membership, the Supreme Court has interpreted the membership requirement as obligating employees only to pay union fees and dues. “‘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 Beck*, 487 U.S. at 745. 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).

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. Thus, all that objecting nonmember employees 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). As this Court recognized, *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) (citing *Int'l Ass'n of Machinists*, 133 F.2d at 1016).

In its seminal decision setting out a union’s *Beck* obligations, the Board concluded that an expenditure incurred by a union outside of an objector’s bargaining unit is chargeable to the objector if the expenditure (1) is germane to the union’s role in collective bargaining, contract administration, or grievance adjustment, and (2) is incurred for “services that may ultimately inure to the

benefit of members of the local union.” *California Saw & Knife Works*, 320 NLRB 224, 239 (1995) (“*California Saw*”) (quoting *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991)), *enforced sub. nom. Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Additionally, in *Connecticut Limousine Servs.*, 324 NLRB 633 (1997), the Board identified several questions relevant specifically to the determination of the chargeability of organizing expenses to objectors. The questions include, for example, whether the expenditures for organizing are necessary to “preserve uniformity of labor standards in the organized workforce” and “what kinds of employers, either in the employer’s specific industry or in competing industries, the Union might attempt to organize in order to preserve uniform labor standards.” *Id.* at 637.

## 2. The duty of fair representation and the standard of review

A union that does not properly execute its *Beck* obligations violates Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) and its concomitant duty of fair representation. *See Beck*, 487 U.S. at 745; *see also California Saw*, 320 NLRB at 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 at 1015 (the union is “required to represent all the members of the unit equally, whether or not they are union members”). 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).

This Court “review[s] with deference” Board decisions that implicate its expertise in labor relations. *Cnty. Hosp. of Central California v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003). *Accord Thomas v. NLRB*, 213 F.3d at 657 (deferring to Board’s expertise in labor relations to define a union’s *Beck* obligations).

Where, as here, the Act is “silent or ambiguous” with respect to the rule the Board has adopted, the question on review is whether the rule “is based on a permissible construction of the [Act].” *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). To uphold the Board’s rule, 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.” *Id.* at 843 n.11. Rather, this Court will accept the Board’s interpretation of the Act if it is “rational and consistent with the statute.” *Finerty v. NLRB*, 113 F.3d 1288, 1291 (D.C. Cir. 1997) (quoting *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1997)). These principles apply with particular force here.

As the Seventh Circuit stated in enforcing *California Saw*:

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.

As the Board has explained, it is “mindful of the tension between individual, collective, and public policy interests that lies at the core of the duty of fair representation,” and has sought to strike “a careful balance” between the interests of employees and the other “competing interests” implicated in the duty.

*California Saw*, 320 NLRB at 230. *See also Breininger v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989) (“Most fair representation cases require great sensitivity to the tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals.”). This Court should defer to that balance.

B. The Board Reasonably Found that the Union Failed to Meet Its Burden of Proving that Its Expenses Incurred in Organizing Employees of Other Employers Within Schreiber Foods’ Competitive Market Are Germane to Its Representational Activities and May Inure to the Benefit of the Unit Employees

The Union “failed to carry its burden . . . of demonstrating that its organizing expenses were germane to its role as collective-bargaining representative and inured to the benefit of employees in the Charging Parties’

unit.” (A 300.) As the Board found, “no evidence was presented at the hearing on remand in this case similar to the focused and specific analysis of [the employer’s competitive market] in the relevant [geographical] areas at issue [as] in *Meijer*.” (A 302.) *See Meijer, Inc.*, 329 NLRB 730 (1999), *enforced*, 307 F.3d 760 (9th Cir. 2002). Accordingly, applying the case-by-case approach of *California Saw*, the Board reasonably found that the Union violated its duty of fair representation. (A 300.)

There is no dispute that the Union charged the objectors for organizing expenses incurred outside the bargaining unit, within the Schreiber Foods’ competitive market. (A 46, 70-71.) As the Board found, the Union failed to produce evidence showing a correlation between “the actual organizing activities” that it undertook and any benefit to the Charging Parties’ unit. (A 303.) The Union did not present evidence on remand with respect to the relationship between its organizing efforts and bargaining in the Charging Parties’ unit. In the earlier hearing, Union President Fred Gegare testified that, in the 3 years prior to the commencement of this case, the Union sought to organize six cheese companies and at least one food processing company. (A 302; A 71.) The outcome of that organizing and its relation to the Schreiber Foods’ bargaining unit is unknown.<sup>6</sup>

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<sup>6</sup> The Board recognized that Gegare was unable to develop his testimony about organizing at the initial hearing and it was “[f]or this reason, among others, the

No evidence was presented, by testimony of a union representative or in any other form, indicating that the Union had been able to negotiate improved wages or working conditions for unit employees when or if Schreiber's competitors were successfully organized.

At the remand hearing, the only evidence presented by the Union consisted of the testimony of the Union's sole witness, labor economist Dale Belman, who testified only about the effects of organizing generally. (A 302; A 125-40, 151.) He provided general testimony about statistical studies of the effects of organizing and collective bargaining, but referenced no industry-specific information and made no industry-specific statements about the benefits of organizing. (A 302; A 125-40, 151.) As the Board noted, "Professor Belman stated, and the [Union] counsel conceded, that Professor Belman was not acquainted with the markets or industries relevant to the objectors' unit; nor did he have any knowledge of or acquaintance with the [Union's] organizing efforts." (A 302.) As such, it is clear that Professor Belman did not present information specific to Schreiber Foods' competitive market. (A 302; A 175-76.)

In short, the Union "fail[ed] to connect its organizing efforts with benefits to the objectors' unit." (A 303.) On this record, the Board simply would be

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Board remanded the issue to elicit further evidence on the scope and effect of the [Union's] organizing efforts." (A 302.)

speculating were it to conclude that any organizing expenses incurred by the Union for the purpose of targeting employers in the same competitive market as the Charging Parties' bargaining unit were germane to the Union's duties as a bargaining representative and may ultimately inure to the benefit of the unit employees. *See California Saw*, 320 NLRB at 239. Thus, the Union violated its duty of fair representation by charging the objectors for nonunit organizing expenditures.

1. The Board's Decision in *Meijer* does not resolve the issue in this case and the Union failed to meet its burden of proof under *Meijer* and *California Saw*

Both the Union and the Charging Parties claim that the Board's decision in *Meijer* should be, in one way or another, dispositive of the issue here. Both assertions are premised on the notion that the Board should take a *per se* approach to the chargeability of nonunit organizing expenses within the employer's competitive market. The Union claims that *Meijer* established that nonunit organizing expenses within the same competitive market are *always* chargeable to the objector. The Charging Parties claim that these same organizing expenses can *never* be chargeable to the objector, and that *Meijer*, which allowed such expenses to be charged to objectors under the facts presented in that case, should be overturned.

Here, the Board expressly rejected any view that *Meijer* established, as a matter of Board law, that organizing within an employer's competitive market is necessarily germane to a union's role as bargaining representative and inures to the benefit of an objector's unit. (A 301.) Instead, the Board consistently followed the approach that it established in *California Saw*. That is, the Board "adopted a case-by-case approach to determining whether extra-unit expenditures are germane to collective bargaining and inure to the benefit of the objector's unit." (A 297, citing *California Saw*, 320 NLRB at 239.) Thus, if a union demonstrates that these expenditures are both germane to representational activities and inure to the benefit of the objector's unit, they are chargeable to the objector. In the absence of such proof, such nonunit charges to an objector are unlawful.

Thus, notwithstanding the Union's protestations to the contrary (Br 22-25), the Board's decision in *Meijer* did not resolve the fact-specific issue presented in *this* case with respect to the Union's organizing activities outside the bargaining unit. Rather, as the Board stated here, "In *Meijer*, the Board found that the evidence presented by the unions established that the expenses they incurred in organizing employees employed in the retail grocery business in the same metropolitan area ('the same competitive market') as the bargaining unit employees were lawfully charged to objectors." (A 301.) The Board reached this conclusion based on a "specific proposition" supported by the evidence presented

to it in that case—that the level of organization among employers in the “same competitive market” (the retail grocery industries in Michigan and Colorado) had a direct positive relationship with the wages of union-represented employees. *Id.* at 738.

Furthermore, as the court enforcing *Meijer* stated, it is for the Board to determine “whether or not challenged organizing expenses indeed relate to ‘organizing within the same competitive market.’” 307 F.3d at 769 n.13. Nevertheless, the Union attempts (Br 21, 23, 25) to assert that its interpretation of *Meijer* is a more correct reading than the Board’s. It is the Board’s province and role to interpret and apply its own case law. It is the Board that “has the primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The evidence in *Meijer*, as the Board here recognized (A 301), was twofold: expert testimony based on academic research and empirical data regarding the effects of organizing specifically in the retail grocery industry; and testimony by union representatives detailing a positive relationship between the percentage of the retail grocery work force represented by unions and success in negotiating higher wage rates for union-represented employees. In *Meijer*, the Board relied on

“persuasive” record evidence demonstrating that “the positive relationship between the extent of unionization of employees and negotiated wage rates exists specifically in the retail food industry.” *Id.* at 734. For example, the Board found, based on record evidence, that in the Denver, Colorado, supermarket industry, the local union was forced to accept wage reductions in negotiations with organized employers after a nonunion grocery store chain with significantly lower labor costs began operations in that market. After successfully organizing the employees of the nonunion competitor, the local union was able to negotiate wage increases for the union-represented grocery store employees. *Id.*

The Union’s reliance (Br 24) on economic studies in the *Meijer* record as evidence that the Board’s holding in that case is applicable equally to the Wisconsin dairy and food processing industries and the Michigan and Colorado retail grocery industries in *Meijer*, utterly ignores the firsthand testimonial evidence presented in *Meijer*. The Union sought to duplicate, in certain respects, the empirical evidence regarding the effects of organizing generally. While some of that empirical data was similar to that presented in *Meijer*, it was unaccompanied by information about Schreiber Foods’ competitors. There is no support in the record for the notion that the Schreiber Foods’ bargaining unit operates in an industry akin to the retail grocery industries in *Meijer*. The Union put on no evidence regarding the dairy and food processing industries in Schreiber

Foods' geographic location, nor did the Union indicate how production and maintenance workers in a cheese plant are impacted by the same industry-wide competitive factors as employees in retail grocery stores. The Board has clearly stated the requirements of lawfully charging objectors for expenses incurred in organizing employees within the employer's competitive market—"the union must produce specific evidence showing a positive correlation between wages and union density in the relevant market at issue." (A 302 n.18.) The Union failed to meet its burden.

2. The Union's claim that it did not know that it had to defend the chargeability of nonunit organizing expenses is directly contravened by the two Board orders in this case refining the issue and setting forth the Union's burden of proof

This case began with the General Counsel broadly alleging that all nonunit expenditures were not chargeable to the objectors. It was subsequently refined, first in a decision by the judge and then in two orders of the Board, to the lesser included theory that expenses to organize employees of other employers within Schreiber Foods' competitive market were not chargeable to objectors. In its orders, the Board provided specific guidance as to the questions to be addressed in resolving the lesser included charge and clearly delineated the Union's burden of proof.

First, the Union was on notice from the time the complaint issued that the General Counsel was alleging a violation of the Act due to the Union's charging

objectors for nonunit expenses. Specifically, the complaint alleged that the Union unlawfully “charges objectors for expenses incurred for activities outside the [Charging Parties’] bargaining unit.” (A 18.) In his decision following the first hearing in this case, the judge explicitly considered a lesser-included theory of violation whereby some nonunit expenses may be chargeable and some nonchargeable. (A 293.) Noting that the “General Counsel alleges that organizing is not chargeable,” the judge subsequently concluded that the Union did not violate the Act by charging the objectors for organizing expenses. (A 293.) Thus, the Union was undoubtedly aware upon issuance of the judge’s decision that organizing expenses were alleged to be nonchargeable to the objectors.

The Union’s arguments ignore the Board’s further refinement of the issue in its initial Decision and Order remanding certain “chargeability issues.” (A 279.) Upon review of exceptions from the judge’s decision, the Board remanded the question of the chargeability of certain expenses outside the bargaining unit in light of its decision in *California Saw*, which issued subsequent to the judge’s initial decision in this case. (A 278.) Specifically, the Board stated that “issues pertaining to the chargeability of union expenses for activities outside the bargaining unit, including organizing expenses . . . shall be severed from the instant proceeding and remanded to the judge.” (A 278.) Contrary to the Union’s statement (Br 15) that the Board’s remand order placed it in the position of having

to defend “each of its hundreds of out of unit expenses,” the remand specified only two categories of expenses that required further inquiry—“organizing expenses and expenses attributable to the representation of public sector employees.” (A 278.) Additionally, in specifying the question on remand, the Board pointed the parties to *Connecticut Limousine Servs.*, 324 NLRB 633 (1997), where, as discussed above at p. 17, the Board had previously identified questions specifically relevant to the chargeability of organizing expenses.

Next, the Union ignores the Board’s subsequent Order on remand, which provided still more guidance to the Union that it had the burden of showing its organizing expenses were chargeable to the objectors. Prior to the hearing on remand, the Board issued an Order denying the General Counsel’s special appeal from denial of his motion to dismiss the complaint. The Order expressly stated that the Union has the burden to show that organizing expenses are chargeable to the objectors—“[t]he [Union] at this point has the burden of going forward to show that these expenditures are properly chargeable under the *California Saw* standard.” (Order of February 5, 2001.) The Board specifically referenced “organizational expenditures” as some of the nonunit expenses involved, and directed the judge to consider the Board’s then-recent decision in *Meijer*. Thus this Order established that the Union had the burden of demonstrating that its organizing expenses were properly chargeable.

The Union's further argument (Br 21) that it understood the scope of the remand as limited only to evidence with respect to organizing expenses *outside* the Schreiber Foods' competitive market is not supported by the Board's orders in this case. The Union's argument is founded on the erroneous premise that *Meijer* settled the question about the chargeability of organizing expenses within the competitive market. As previously discussed, the Union's reading of *Meijer* is at odds with the Board's interpretation of its own precedent. Moreover, as the Board stated, "[n]othing in either the remand decision or the [Board's] February 5, 2001 Order supports the view that the purpose of the remand was to litigate questions pertaining to the chargeability of organizing expenses incurred outside the competitive market, rather than within the competitive market." (A 303.) Furthermore, no Board order had disavowed the Board's reliance (A 279) on *Connecticut Limousine* and its reference to "the employer's specific industry" or "competing industries" as outlining the relevant inquiry on remand. 324 NLRB at 637.

The Union admits (Br 19) that it "did not present available evidence on the chargeability of organizing expenses in Schreiber's industry." The Union claims that because it did not present this evidence, this case was not fully litigated. The Union is mistaking effective litigation with an opportunity to fully litigate, which it had—most patently in the form of a hearing on remand to address the issue of its

organizing expenses. Importantly, upon issuance of the Board's Supplemental Decision and Order, if the Union believed the Board's position had been clarified in a manner that the Union had not understood at the hearing, then it was incumbent upon the Union to file a motion to reopen the record for a further opportunity to present the evidence that it seeks (Br 19-20) to rely on here. No party sought to reopen the record following the Board's Supplemental Decision and Order. 29 CFR § 102.48(d)(1). *See also Int'l Alliance of Theatrical & Stage Employees, Local 39 v. NLRB*, 334 F.3d 27, 37 (D.C. Cir. 2003)(issue arising from Board's decision and not raised in motion for reconsideration may not be raised before the Court).

Overall, the Union's claim that "if [we] knew" (Br 19) what we were supposed to prove, we could have proven it, flies in the face of the Union's admission (Br 15) that the "Board's remand order thus required Local 75 to defend each of its out-of-unit expenses."<sup>7</sup> The Union's decision to stand on the record in another case, *Meijer*, to meet its burden, rather than furnishing its own evidence, was the Union's gamble alone.

The Union devotes (Br 26-31) several pages of its brief to presenting various arguments about the value of organizing. However, this case is not about the value

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<sup>7</sup> As noted previously, the remand order only required the Union to defend its organizing expenses and expenses attributable to its representational activities in the public sector. (A 278.)

of organizing. This case is about who pays for the Union's organizing activity; in particular, whether an objector can be compelled to pay for the Union's nonunit organizing activities. As fully discussed, objectors can only be charged if the activity is germane to collective bargaining and "may ultimately inure to the benefit of" the unit employees. *California Saw*, 350 NLRB at 239.

Finally, the Union's claim (Br 25-26) that it did not violate its duty of fair representation because it did not act in an arbitrary manner is not supported by established Court and Board precedent. In *Beck*, the Supreme Court held that a union violates its duty of fair representation if it charges objectors for activities that are not germane to representational activities. 487 U.S. at 743 ("nonmembers can bring a claim for improperly charged agency fees as a breach of the duty of fair representation, as the claim amounts to one that the union 'failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs'"). In *California Saw*, the Board found "inescapable the conclusion that a union's obligations under *Beck* are to be measured by [the duty of fair representation] standard." 329 NLRB at 230.

Likewise, this Court has consistently found that unions violated their duty of fair representation where, as here, they have run afoul of their *Beck* obligations. *See*

*Penrod v. NLRB*, 203 F.3d 41, 45 (D.C. Cir. 2000); *Ferriso v. NLRB*, 125 F.3d 865, 867 (D.C. Cir. 1997).

C. The Board Acted Within Its Discretion by Giving the Charging Parties the Specific Relief They Sought Regarding the Chargeability of Organizing Expenses

The Charging Parties boldly petition (Br 36) this Court to overrule the Board's decision in *Meijer* and impose upon the Board a *per se* rule that expenses incurred in organizing employees of other employers within the immediate employer's competitive market can never be charged to objectors. However, having received the specific relief they sought, the Charging Parties cannot demand from this Court that the Board be required to reach the result that it did only by means of reasoning favored by the Charging Parties.

The Charging Parties, having been given the specific relief that they sought, are not "aggrieved" within the meaning of the Act. Section 10(f) of the Act (29 U.S.C. 160 (f)) provides that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order . . . ." The Union, as shown above, failed to put on evidence that its within-industry organizing expenses were germane to its representational activities and inured to the benefit of the Charging Parties' bargaining unit. The Board ordered the Union to "cease and desist from charging and collecting from objecting nonmembers" and to "refund with interest" dues and fees attributable to organizing

activities. (A 304.) The Charging Parties are not aggrieved by the Board’s decision here simply because they disagree with the Board’s prior decision in *Meijer*.<sup>8</sup>

If the Board had reached its conclusion here via a different rationale, and found in accord with the Charging Parties’ desires that organizing expenses are never chargeable, they would have been given the same remedy that they have already received.<sup>9</sup> In fact, they point to no other remedy to which they claim to be entitled and it is difficult to fathom what other relief the Board could have crafted. Moreover, the Board granted this relief under a theory of the case that the Charging Parties urged on the Board in their exceptions to the judge’s decision on remand. The Charging Parties specifically argued to the Board that there was no factual basis in the record to allow the Union to charge objectors for organizing expenses based on the limited evidence introduced at the hearing on remand.

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<sup>8</sup> The Charging Parties cannot hide that their displeasure is really with *Meijer*, rather than the remedy in this case, when they repeatedly construct arguments that reference only *Meijer*—“The Board majority in *Meijer* ignored . . .” (Br 39), “the Board majority in *Meijer* and the en banc Ninth Circuit misstated . . .” (Br 42), “both the Board majority in *Meijer* and the en banc Ninth Circuit ignored . . .” (Br 43), “the Board majority’s notion that . . . [citing and paraphrasing *Meijer*] . . . has no basis . . .” (Br 44), “the NLRB majority in *Meijer* refused . . .” (Br 47).

<sup>9</sup> The Charging Parties assert (Br 15, 32) that the Board’s Order leaves open the possibility that they will have to pay for “chargeable” organizing expenditures. This semantic argument misses the point that the Board found that the Union failed to prove that any of its organizing expenses were germane to its representational

The Board's decision not to overrule *Meijer*, a case that is distinguishable on its facts from this case, "is firmly grounded in judicial conservatism." (A 303 n.20.) As the Board noted (A 303 n.20.), a "court will ordinarily not reach out to overrule a precedent where a narrower ruling, consistent with precedent, will suffice." The Charging Parties are not entitled to a decision passing on prior Board precedent simply because it contradicts their desired labor policy where, as here, the Board (A 300-303, 305) has fully decided the issues presented without the need for a broader policy pronouncement. Despite the emphasis placed on his dissent by the Charging Parties (Br 36), Member Schaumber, although advocating a revisiting of *Meijer* by the entire Board, "recognize[d] it as controlling Board law" in agreeing that the Union did not meet its burden under that precedent. (A 305.)

Under well-settled views of judicial economy, the Board's decision to decide this case on its facts, without overreaching, is appropriate. The Board itself noted that "[i]t is axiomatic that where a case is distinguishable, there is no need to overrule it." (A 303 n.21.) *See Show Indus.*, 326 NLRB 910, 913 n.4 (1998) ("given the fact that that case is distinguishable, we would not reach out to overrule it"); *CPS Chemical Co.*, 324 NLRB 1018, 1025 & n.52 (1997) (the Board "need not decide, at this time, whether to overrule those cases" which were

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duties. Accordingly, the Board has found (A 302) that the Union cannot charge the objecting nonmembers for any organizing expenses.

distinguishable), *enforced*, 160 F.3d 150 (3d Cir. 1998). Barring an intervening decision by Congress, the Charging Parties' claim that all organizing expenses should be *per se* nonchargeable as part of the national labor policy under the Act is a decision left to the Board in the first instance, with limited judicial review. *See, e.g., Louisiana Env'tl. Action Network v. Bronner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996) ("Prudence . . . restrains courts from hastily intervening into matters that may best be reviewed at another time or another setting, especially when the uncertain nature of an issue might affect a court's 'ability to decide intelligently.'") (internal citations omitted) (quoting *American Trucking Ass'ns, Inc. v. ICC*, 747 F.2d 787, 790 (D.C. Cir. 1984)). As shown above, the factual record amply distinguishes this case from *Meijer* and there is no basis for the Court to visit the underlying principles of *Meijer*.

**III. THE BOARD DOES NOT OPPOSE A REMAND FOR THE LIMITED PURPOSE OF GRANTING THE CHARGING PARTIES' PETITION FOR REVIEW REGARDING THE SUFFICIENCY OF THE UNION'S FINANCIAL DISCLOSURE STATEMENT AND SPECIFICALLY REGARDING THE PER CAPITA TAX**

The Board does not oppose this Court's granting the Charging Parties' petition for review to the extent it challenges the sufficiency of the Union's general financial disclosure and the included per capita tax disclosure, and remanding the case for the limited purpose of entering an appropriate remedial order. The Board found that the Union's financial disclosure statement to the objectors was sufficient

for the objectors to decide whether to challenge the Union's reduced fee calculation, and that the Union therefore did not violate its duty of fair representation. In finding that the Union's disclosure statement was sufficient to enable objectors to determine whether to mount a challenge to the Union's claim that the expenses were for permissible representational purposes, the Board expressly relied on *Teamsters Local 166 (Dyncorp Support Servs.)*, 327 NLRB 950 (1999) ("*Dyncorp I*").

After the Board issued its 1999 Decision and Order in this case, this Court reversed and remanded *Dyncorp I*. See *Penrod v. NLRB*, 203 F.3d 41 (2000). The Court remanded the issue of the sufficiency of the financial disclosure to the Board for further consideration in light of its opinion. *Penrod*, 203 F.3d at 46. On remand, the Board, accepting the Court's opinion as the law of the case, found the union's general financial disclosure statement insufficient, and ordered the union to provide additional information, including a basis for its calculations. *Teamsters Local 166 (Dyncorp Support Servs.)*, 333 NLRB 1145 (2001) (*Dyncorp II*). The facts in *Dyncorp* and the instant case as they relate to the general disclosure statement are almost identical. Moreover, the Board expressly relied on *Dyncorp I* in finding the Union's statement sufficient. Because the instant case is factually indistinguishable from *Penrod*, which reversed *Dyncorp I*, the Board does not

oppose this Court's granting the Charging Parties' petition for review with respect to the Union's general financial disclosure.

Furthermore, in *Teamsters Local Union No. 579 (Chambers & Owen, Inc.)*, 350 NLRB No. 87, 2007 WL 2668583 (September 7, 2007), the Board found that a union must provide *Beck* objectors with information about the chargeable expenses of its affiliates at the second stage of the objection procedure so that an objector can decide whether to file a challenge to the union's reduced dues and fees calculation. More importantly, the Board expressly overruled *Dyncorp I* and its 1999 decision in the instant case, which relied on *Dyncorp I*, to the extent they held to the contrary regarding the release of financial information regarding affiliate expenses at this stage of the objection procedure. 350 NLRB No. 87, slip op. at 6, 2007 WL 2668583, \*8. Thus, the Board does not oppose this Court's granting the Charging Parties' petition for review with respect to the Union's failure to provide information about its affiliates' chargeable expenditures in its disclosure of "per capita" expenses.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review in full, denying the Charging Parties' petition in part, specifically remanding the limited issue of the sufficiency of the Union's financial disclosure for an appropriate order consistent with this Court's decision in *Penrod* and the Board's decision in *Chambers & Owens*, and enforcing the Board's Order in all other respects.

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National Labor Relations Board  
October 2007

ADDENDUM

Order of the National Labor Relations Board, February 5, 2001

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD



TEAMSTERS LOCAL 75, affiliated with  
the INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, AFL-CIO  
(SCHREIBER FOODS)

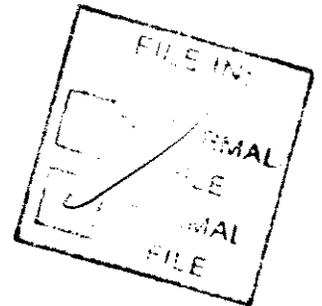
and

Case 30-CB-3077

SHERRY LEE PIRLOTT

and

DAVID E. PIRLOTT



ORDER

The General Counsel's Request for Special Permission to Appeal the Administrative Law Judge's denial of the General Counsel's motion to close the record and dismiss the remaining portions of the complaint is granted. However, after careful consideration of the record and the parties' positions, we deny the General Counsel's appeal.

In its underlying decision in this case, 329 NLRB No. 12 (1999), the Board remanded to the judge for further proceedings the issue whether expenses incurred by the Respondent Union for activities outside the bargaining unit, including organizing expenses and expenses attributable to the representation of public sector employees, are chargeable to dues-paying objectors pursuant to Communications Workers v. Beck, 487 U.S. 735 (1988).

The General Counsel now takes the position that the remanded complaint allegations should be dismissed because the Board rejected the sole theory underlying the complaint, which was that no nonunit expenses were chargeable to Beck objectors. Thus, the General Counsel contends that further proceedings in this case are not warranted because the complaint does not present the issue of whether certain nonunit expenses, are chargeable.

As a threshold matter, we find that the General Counsel's motion to close the record and dismiss the complaint must be denied on the ground that it is untimely. The Board's decision and order issued on September 1, 1999. The General Counsel did not file a timely motion for reconsideration of that decision, but rather waited for more than 6 months after issuance of the Board's decision--well after the remand had been accomplished--before filing its motion to dismiss with the judge. If the General Counsel was of the view that the Board's remand was improper, he should have filed a timely motion for reconsideration pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations. In these circumstances, we conclude that the General Counsel's arguments for dismissal were raised too late.

In any event, assuming that the motion was timely filed, we find that in the present posture of this case, summary dismissal of the complaint is not appropriate. We acknowledge that both the complaint and the record in this case reasonably could be viewed as supporting the General Counsel's argument that his consistent position throughout this litigation has been that the Respondent was not entitled to charge Beck objectors for any expenses incurred on activities outside of the Schreiber bargaining unit. The General Counsel clearly is correct that the Board rejected the General

Counsel's contention that all nonunit expenses are *per se* not chargeable to Beck objectors. Nevertheless, both the judge and the Board explicitly considered a lesser theory of violation, i.e., that some nonunit expenses may be chargeable and some not, and the Board's remand directed the judge to address the chargeability of certain nonunit expenditures under the standard set forth in California Saw & Knife Works, 320 NLRB 224 (1995), enf. sub nom. Machinists v. NLRB, 133 F.3d 1012 (7<sup>th</sup> Cir. 1998), cert. denied sub nom. Strang v. NLRB, 119 S.Ct. 47 (1998). Thus, the Board's decision left open a viable issue in this case as to whether certain nonunit expenses are non-chargeable.

In denying the General Counsel's appeal, we emphasize that our Order is not to be construed as requiring the General Counsel to present any additional evidence, nor does it effectively convert this proceeding into a two-party private litigation. See Sheet Metal Workers Local 28 (American Elgen), 306 NLRB 981, 982 (1992). On the current record, the General Counsel has shown that certain nonunit expenditures are being charged. The Respondent at this point has the burden of going forward to show that these expenditures are properly chargeable under the California Saw standard. The Charging Party and the General Counsel have the right to respond to the Respondent's defense.

The nonunit expenses involved herein involve organizational expenses and other expenses. In regard to the former, the judge should consider the Board's decision in Meijer, Inc., 329 NLRB No. 69 (1999), which issued after the Remand Order in the instant case. In Meijer, the Board held that "at least with respect to organizing within the same competitive market as the bargaining unit employer, organizing

expenses are chargeable to bargaining unit employees" under the California Saw  
standard, Id., slip op. at 4-5.

JOHN C. TRUESDALE,	CHAIRMAN
WILMA B. LIEBMAN,	MEMBER
PETER J. HURTGEN,	MEMBER
DENNIS P. WALSH,	MEMBER

Dated, Washington, D.C., February 5, 2001.

## STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (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 8(a)(3) (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, 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 an action defined in section 8(a) of this Act 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), 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) 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 nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms 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.

Section 8(b)(1)(A) (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: 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(b)(2) (29 U.S.C. § 158(b)(2)):

It shall be an unfair labor practice for a labor organization or its agents—  
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .



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Dated at Washington, DC  
this 24th day of October, 2007



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