

**United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Trimas Corporation d/b/a Cequent Towing Products) and Douglas Richards**

**United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Chemtura Corporation) and Ronald R. Eche garay**

**United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Chemtura Corporation) and David M. Yost.** Cases 25-CB-8891, 25-CB-9253 (Formerly 6-CB-11544), and 25-CB-9254 (Formerly 06-CB-0p11545)

August 16, 2011

#### DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,  
PEARCE, AND HAYES

The issue presented is whether the Respondent Union (hereafter Respondent) violated its duty of fair representation by requiring employees it represents who are not union members and who seek objector status under *Communications Workers of America v. Beck*<sup>1</sup> to assert their objection on an annual basis. In *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB 1062 (2010),<sup>2</sup> the Board announced the standard by which it will evaluate the propriety of a union's annual *Beck* renewal requirement. Applying that standard here, we find that the Respondent has failed to present a legitimate justification for its annual renewal requirement sufficient to justify the burden the requirement imposes on an individual seeking to extend an objection. We accordingly find, contrary to the judge, that the annual renewal requirement here is arbitrary under the duty of fair representation, and that in imposing it on the Charging Parties—and refusing to honor their specific request that their *Beck* objections be permanent and continuing in nature—the Respondent has violated Section 8(b)(1)(A) of the Act.<sup>3</sup>

<sup>1</sup> 487 U.S. 735 (1988).

<sup>2</sup> Petition for review dismissed 2010 WL 4340436 (D.C. Cir. 2010).

<sup>3</sup> On August 6, 2009, Administrative Law Judge John H. West issued the attached decision. The Charging Parties filed exceptions and a supporting brief. The General Counsel and the Respondent Union filed an answering brief, and the Charging Parties filed a reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to af-

#### I. FACTUAL BACKGROUND

The three Charging Parties in this case—Douglas Richards, Ronald R. Eche garay, and David M. Yost—are members of a bargaining unit represented by the Respondent. The Respondent and the Charging Parties' employer have entered into collective-bargaining agreements that have included a union-security clause.<sup>4</sup>

The Respondent maintains a procedure for processing objections (under *Beck*) to supporting the Respondent's activities unrelated to collective bargaining, contract administration, and grievance adjustment.<sup>5</sup> The Respondent's *Beck* policy requires that *Beck* objectors renew their objections annually, within 30 days of the anniversary of their hire date. Failure to do so results in the employee not being classified as an objector for the next year and being charged full dues for that year.

Upon receiving an objection, the Respondent sends an acknowledgement letter, which also states that the objection will expire 1 year hence on the anniversary of the employee's hire date, absent renewal by the objector within the subsequent 30-day window period. The Respondent thereafter annually sends each objector a copy of the Respondent's *Beck* procedure, which again sets forth the annual renewal requirement, along with other *Beck*-related financial information, including the amount to be charged objectors in the upcoming year and the basis for that calculation.

In 2008, each of the three Charging Parties separately notified the Respondent in writing, within the specified window period, that he sought *Beck* objector status, and each specifically requested that his objection be considered "permanent and continuing in nature." The Respondent in reply notified each of them of its annual renewal requirement for *Beck* objections, and that their objections would expire in 1 year. The Respondent did not recognize the objections as continuing.

#### II. THE JUDGE'S DECISION

The judge found that the Respondent did not breach its duty of fair representation by maintaining its annual renewal requirement and applying it to the Charging Parties by refusing to honor their request for a continuing *Beck* objection. A union breaches its duty of fair repre-

firm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

<sup>4</sup> Richards is employed by Cequent Towing Products. Eche garay and Yost are employed by Chemtura Corporation. None of them is a member.

<sup>5</sup> Under *Beck*, a union may not, over the objection of nonmember employees it represents, expend funds collected from such objectors under a union-security agreement on activities unrelated to collective bargaining, contract administration, and grievance adjustment. 487 U.S. at 752-754.

sentation if its actions affecting employees whom it represents are arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The judge first found that the Respondent’s annual renewal requirement was not arbitrary because the Union demonstrated legitimate justifications for the requirement. The judge further found that the requirement was not discriminatory vis-a-vis the Respondent’s treatment of union members—whom it does not require to annually renew membership—because the differing treatment was based on differences in governing law rather than animus. Finally, the judge found that the annual renewal requirement was not undertaken in bad faith, absent evidence showing dishonest action by the Respondent.

The Charging Parties have excepted to each of these findings. For the reasons set forth below, we find that the Respondent’s annual renewal requirement is arbitrary under the duty of fair representation, and thus unlawful.<sup>6</sup>

### III. DISCUSSION

#### A. Arbitrary Conduct Under the Duty of Fair Representation

The legality of union procedures designed to implement *Beck* is measured using the duty-of-fair-representation standard. See *California Saw & Knife Works*, 320 NLRB 224, 230 (1995), *enfd. sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998); *Machinists Local Lodge 2777 (L-3 Communications)*, *supra*, 355 NLRB 1062, 1063–1064. A union’s actions are considered arbitrary under the duty of fair representation “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.” *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). The wide range of reasonableness affords a union discretion to account for conflicting interests of the employees it represents. See *Humphrey v. Moore*, 375 U.S. 335, 349–350 (1964).

In *Machinists Local Lodge 2777 (L-3 Communications)*, *supra*, the Board addressed whether a union’s annual renewal requirement constitutes arbitrary conduct

violative of the duty of fair representation. The Board held that in applying the arbitrary standard in this context, it “consider[s] the balance between the competing interests: the legitimacy of the union’s asserted justifications for its procedures and the extent to which they burden employees’ assertion of a *Beck* objection.” 355 NLRB at 1063. The Board explained that in analyzing the union’s proffered rationales for the annual renewal requirement:

we consider the fact that the annual renewal requirement poses some burden, albeit a modest one, on potential objectors. Those individuals must send a statement of their objection to the Unions each year during the 1-month period specified in the Unions’ procedure. While the simple mailing of an objection poses a minimal burden, remembering to do so is also a burden and, further, the failure to remember engenders a burden of more import . . . loss of the opportunity to object for 11 months (until the renewal period recurs). While the requirement does not pose a significant burden, equivalent, for example, to job loss, and has been viewed as *de minimis* by some courts,<sup>[7]</sup> we must ask whether the Unions have articulated a legitimate justification for the imposition of the burden, considering the wide range of reasonableness accorded them under the duty of fair representation. [355 NLRB at 1064–1065.]

In *Auto Workers Local 376 (Colt’s Mfg. Co.)*, 356 NLRB 1320 (2011), the Board applied the standard announced in *L-3 Communications*, but found that the unions’ annual *Beck* renewal requirement was lawful because the unions there had taken steps to significantly minimize the burden the requirement imposed on objectors. The Board, citing the multiple notice and reminders given to objectors of the annual renewal requirement, and that the annual renewal may be filed at any time, held that “the burden imposed on potential objectors under the Unions’ *Beck* procedures is so minimal that the annual renewal rule here cannot be held to violate the duty of fair representation.” 356 NLRB 1320, 1320. In light of the Board’s finding that the burden imposed by the requirement was *de minimis*, the Board found it unnecessary to reach the weight given to the union’s proffered justifications for the requirement. *Id.* slip op. at 3.

The Union’s *Beck* procedure in the instant case, in contrast, does not furnish objectors with multiple notices and reminders, and does not permit the annual renewal to be filed at any time. Thus, the burden imposed here on

<sup>6</sup> We agree with the judge, for the reasons set forth by him and in our prior decision in *Machinists Local Lodge 2777 (L-3 Communications)*, *supra* at 1064, that the requirement was not imposed in bad faith. See *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994) (bad-faith prong of duty of fair representation requires proof of fraud, or deceitful or dishonest action). Bad faith is negated here by the Respondent’s clear notice to *Beck* objectors of the annual renewal requirement. We further find, as discussed *infra*, that the requirement is not discriminatory under the duty of fair representation as construed in *Machinists Local Lodge 2777 (L-3 Communications)*.

<sup>7</sup> *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116–1117 (7th Cir. 1996). See *Abrams v. Communications Workers*, 59 F.3d 1373, 1381 (D.C. Cir. 1995).

objectors who fail to renew within the window period is the loss of objector status for the entire next year. That burden may not be characterized as de minimis, as in *Colt's Mfg. Co.*, but is analogous to the burden imposed on objectors in *L-3 Communications*. Accordingly, we turn to an evaluation of the Union's proffered justifications for its annual renewal requirement.

*B. The Respondent's Justifications for its Annual Renewal Requirement*

The Respondent advances several justifications for the requirement at issue here. The Respondent asserts that the annual renewal requirement is justified because it provides objectors annually with revised *Beck* information, including changes in the amount charged to objectors. The Respondent asserts that it is thus reasonable to ask objectors to inform the Respondent annually whether they wish to continue objecting in light of the revised *Beck* data.

The Board in *Machinists Local Lodge 2777 (L-3 Communications)* considered this same justification and found it wanting. The Board observed that *Beck* objectors may indeed change their mind, in light of changes in the amount objectors are charged or in the purposes of the underlying union expenditures. 355 NLRB 1062, 1065–1066. The Board explained, however, that:

[t]he ability of objectors to change their position is not meaningfully advanced by an annual renewal requirement. . . . They are free to do so with or without the requirement. . . . Affording employees the opportunity to change their mind is thus as easily accomplished under a system which honors a continuing objection of the type [sought here] as under the Unions' current system . . . . The Unions retain, under either approach, the ability to attempt to persuade employees, through noncoercive means, to become full members of the union. *California Saw*, 320 NLRB at 233 fn. 51. We find no rational relationship between the legitimate interest in permitting employees to change their minds and requiring annual renewal of expressly continuing objections. [Id. at 5.] [Footnote and citation omitted.]

Likewise unpersuasive is the Respondent's related contention that the requirement serves as a reminder of the union membership rights that nonmember *Beck* objectors forego. The Respondent's ability to remind objectors of those rights remains unfettered and in no way hinges on an annual renewal requirement.

The Respondent further asserts that the annual renewal requirement gives it "reasonable assurance that only employees who are moved (and continue to be moved) by an objection to providing financial support to activities

not germane to collective bargaining will be entitled to pay a reduced fee." Conserving union funds is undoubtedly a legitimate objective.<sup>8</sup> But the Respondent has failed to establish any correlation between the requirement and any potential savings. The Respondent has presented no empirical evidence indicating how many objectors change their minds over time, how many communicate as much to the Unions, or how many would confirm a change of mind by not renewing their objections. Further, to the extent the Respondent's argument relates to testing the motive or good faith of the original objection, we rejected procedural requirements imposed for that reason in *California Saw & Knife Works*, supra, 320 NLRB at 237.

The Respondent additionally asserts it was justified in maintaining the requirement because it relied on court cases upholding similar annual renewal requirements,<sup>9</sup> and because the requirement was consistent with the *Beck* guidelines issued by the NLRB General Counsel prior to his issuance of the complaint in this case.<sup>10</sup> The Board considered and rejected this same justification in *Machinists Local Lodge 2777 (L-3 Communications)*, explaining that the General Counsel's earlier exercise of prosecutorial discretion in declining to issue complaint does not insulate the requirement from subsequent Board scrutiny upon issuance of complaint. Id. at 1066. The Board further explained that the court cases relied on by the Respondent—to which the Board was not a party—do not preclude our independent assessment of the issue, because it is the Board that is vested with the primary responsibility to establish national labor policy. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). "While we evaluate the Unions' conduct 'in light of the factual and legal landscape at the time of the union's actions,' prior nonbinding precedent is not a substitute for a valid union rationale for the annual renewal requirement." *Machinists Local Lodge 2777 (L-3 Com-*

<sup>8</sup> See *California Saw*, 320 NLRB at 243 (protecting individual *Beck* rights "without compromising the collective interests of union members in protecting limited funds").

<sup>9</sup> Several courts have upheld the requirement in a variety of contexts. See *Gorham v. Machinists*, 733 F.Supp.2d 628 (D.Md. 2010) (NLRA); *Abrams v. Communications Workers*, 59 F.3d 1373, 1381–1382 (D.C. Cir. 1995) (NLRA); *Kidwell v. Transportation Communications Union*, 731 F.Supp. 192, 205 (D. Md. 1990), aff'd. in part and rev'd. on other grounds 946 F.2d 283 (4th Cir. 1991), cert. denied 503 U.S. 1005 (1992) (Railway Labor Act); *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) (public sector). Several other courts have found the requirement to be unlawful. See *Seidemann v. Bowen*, 499 F.3d 119, 125 (2d Cir. 2007) (public sector); *Lutz v. IAM*, 121 F.Supp.2d 498, 506–507 (E. D. Va. 2000) (Railway Labor Act); *Shea v. Machinists*, 154 F.3d 508, 517 (5th Cir. 1998) (same).

<sup>10</sup> See GC Memorandum 88–14 at 3 (Nov. 15, 1988) ("a union can require nonmembers to file new objection . . . each year"); GC Memorandum 01–04 (April 6, 2001) (same).

munications), supra at 1066, quoting *Airline Pilots Assn. v. O'Neill*, supra, 499 U.S. at 67.<sup>11</sup>

Finally, the Respondent asserts that the requirement provides some assurance that it is not making advance rebates under its *Beck* rebate-payment system to individuals who are no longer employed in a bargaining unit represented by the Respondent.<sup>12</sup> As stated, conserving union funds is a legitimate objective. The Respondent, however, adduced no evidence as to the frequency with which it might make such mistaken rebates to former employees but for the annual renewal requirement, and we are thus hesitant to assign any weight to this justification. Nor has the Respondent explained why it cannot rely on information concerning separation from employment it is entitled periodically to receive from employers that are parties to the agreements pursuant to which dues and fees are deducted. The Respondent certainly has not advanced any argument that this alternative, or other available means for achieving its goal—such as verifying employment with objectors themselves, are less efficacious, more costly, or more administratively burdensome than the annual renewal requirement. We are thus unpersuaded on the record before us that the Respondent's legitimate desire to avoid unwarranted rebate payments provides a rational explanation for its annual renewal requirement. See *Machinists Local Lodge 2777 (L-3 Communications)*, supra at 1065 (union failed to provide a rational explanation for choosing among admittedly available alternatives).

As we explained above, the annual renewal requirement here imposes some burden, albeit a modest one, on potential objectors. See *Machinists Local Lodge 2777 (L-3 Communications)*. We find that the Respondent has failed to articulate a legitimate justification for the imposition of that burden here.<sup>13</sup>

<sup>11</sup> The Respondent's additional assertion, that its choice of annual renewal date—the anniversary of the employee's date of hire—is reasonable, likewise cannot serve as a justification for the annual renewal requirement itself.

<sup>12</sup> The Respondent sends objectors an advanced dues reduction check on a quarterly basis, effectively reducing their total payments by the appropriate amount, then charges objectors full monthly dues.

<sup>13</sup> We find, however, that the annual renewal requirement does not discriminate between union members and nonmember objectors under the duty of fair representation, as we held in *Machinists Local Lodge 2777 (L-3 Communications)*. Union members and nonmembers are not similarly situated with respect to the Respondent's administration of its contractual union-security provisions under *Beck*. For example, members have no right to object—only nonmembers do—and even nonmembers must affirmatively object. Thus, membership is a relevant consideration in this context, and the Respondent was accordingly free to design, and in fact could not avoid designing, different procedures applicable to each category of employee. *Id.* at 1068. Absent any evidence before us of animus by the Respondent toward nonmembers or

## ORDER

The National Labor Relations Board orders that the Respondent, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL–CIO, CLC, Pittsburgh, Pennsylvania, its officers, agents and, representatives, shall

1. Cease and desist from

(a) Requiring nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under the Union's existing annual renewal procedure.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

(b) Notify nonmember employees who are subject to a union-security clause that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the Respondent's magazine.

(c) Recognize Ronald R. Echegaray as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

(d) Recognize David M. Yost as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

(e) Recognize Douglas Richards as a continuing objector and continue to recognize his objector status until he revokes his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

(f) Within 14 days after service by the Region, post at its union office in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the

objectors, there is no basis for finding discrimination here under the duty of fair representation. *Id.*

<sup>14</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means.<sup>15</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Sign and return to the Regional Director sufficient copies of the notice for posting by Cequent Towing Products and Chemtura Corporation, if willing, at all places where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues that the Respondents' rule requiring *Beck* objectors to renew their objections annually was arbitrary and thus breached their duty of fair representation in violation of Section 8(b)(1)(A). I would further find, for the reasons fully set out in my dissent in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB 1320, 1323–1325 (2011), that the annual renewal requirement infringes on employees' fundamental Section 7 right to refrain from assisting a union and must therefore be analyzed under Section 8(a)(3) and 8(b)(1)(A) rather than under the more deferential duty-of-fair-representation standard applied here by the majority. Finally, for the reasons set out in the dissenting opinions in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB 1062, 1073–1075 (2010), and in *Colt's Mfg.*, slip op. at 6, I dissent from my colleagues' finding that the Respondent's annual renewal requirement for *Beck* objectors was not discriminatory.

MEMBER PEARCE, dissenting in part.

Although I agree with the majority that the appropriate legal framework for analyzing this case is the duty of fair representation under Section 8(b)(1)(A), for the reasons set forth in my dissenting opinion in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB 1076,

<sup>15</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

1089–1091 (2010), I would dismiss the 8(b)(1)(A) allegation that the Union breached its duty of fair representation by requiring the Charging Parties to renew their *Beck*<sup>1</sup> objections annually.

Because the General Counsel bears the burden of proving that the Union's action was arbitrary, discriminatory, or in bad faith, and as the Union's annual-renewal requirement rationally serves its legitimate interests and was well supported by legal precedent at the time of its actions, I find that this burden has not been met. Indeed, as in *L-3 Communications*, I find that it is manifestly unjust to find a violation here.

Accordingly, I respectfully dissent.

#### APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT require nonmember employees, who are covered by a collective-bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under our existing annual renewal procedure.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.

WE WILL notify nonmember employees who are subject to a union-security clause that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in our magazine.

<sup>1</sup> *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

WE WILL recognize Ronald R. Echegaray as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

WE WILL recognize David M. Yost as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

WE WILL recognize Douglas Richards as a continuing objector and continue to recognize his objector status until he revokes his objection or we implement a lawful annual renewal requirement, whichever occurs earlier.

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, AFL-CIO, CLC

*Patricia H. McGruder, Esq.*, for the General Counsel.

*John G. Adam, Esq. (Martens, Ice, Klass, Legghio & Israel, P.C.)*, of Royal Oak, Michigan, for the Respondent.

*William L. Messenger, Esq. (National Right to Work Legal Defense Foundation)*, of Springfield, Virginia, for Charging Party Douglas Richards.

*Glenn M. Taubman, Esq. (National Right to Work Legal Defense Foundation)*, of Springfield, Virginia, for Charging Parties Ronald Echegaray and David Yost.

#### DECISION

##### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Morgantown, West Virginia, on May 19, 2009. Charges<sup>1</sup> were filed and, as here pertinent, an amended consolidated complaint (the complaint) was issued on May 8, 2009, alleging that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Respondent or the Union) has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (the Act), in violation of Section 8(b)(1)(A) of the Act in that (1) at all material times Respondent has maintained a procedure governing the reduction in dues and fees for nonmember employees covered by the Union Security Provisions who object to the payment of dues and fees for nonrepresentational activities, (2) the Procedure requires that objecting nonmember employees renew their objector status on an annual basis, and (3)

<sup>1</sup> On June 10, 2005, the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party Douglas Richards in Case 25-CB-8891. On November 17, 2008, the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party Ronald R. Echegaray in Case 6-CB-11544, which on February 2, 2009, was renumbered Case 25-CB-9253. And on November 17, 2008, the National Right to Work Legal Defense Foundation filed a charge on behalf of Charging Party David M. Yost in Case 6-CB-11545, which on February 2, 2009, was renumbered Case 25-CB-9254.

collectively, on specified dates Respondent applied the Procedure to Charging Parties Richards, Echegaray, and Yost, notifying each of them that they must renew their objector status on an annual basis. As set forth in the complaint General Counsel seeks an Order requiring Respondent to take the following action with respect to all bargaining units represented by Respondent in which there is a union-security clause:

- (1) rescind and cease giving effect to any rule that requires objecting nonmember employees to renew their objector status on an annual basis; and (2) provide written notification to all bargaining unit employees in those bargaining units that Respondent has rescinded and cease giving effect to such rule.

Respondent denies that it has violated the Act in any way and Respondent objects to the remedy sought by the General Counsel since it seeks relief as to “all bargaining units represented by Respondent” not just the two units at issue in this case.<sup>2</sup>

In her opening at the trial herein, counsel for General Counsel indicated as follows:

These cases raise the sole question of whether Respondent’s requirement that employees annually renew objections to payment of full union dues pursuant to *Beck* [*Communication Workers of America v. Beck*, 487 U.S. 735 (1988)], notwithstanding their continuing objection, violates the duty of fair representation . . . because it [(a)] places an unreasonable burden on objecting nonmembers without serving any legitimate interest and [is] thus arbitrary . . . [, (b)] unnecessarily and arbitrarily infringes on the right of an employee to become and remain a *Beck* objector . . . [, and (c)] permits [R]espondent to presume that employees will make a different value judgment than the prior year regarding their [continuing] objection. [Tr. pp. 7, 8, and 9.]

Counsel for General Counsel also indicated in her opening that the Board has not yet ruled on the legality of an annual objection requirement; that the legal issue presented is novel; that based upon factual considerations these cases may be dismissed; that the primary argument against the finding of a violation is that an annual objection requirement satisfies the union’s obligation under the duty of fair representation because it serves a legitimate purpose and cannot be said to be arbitrary, discriminatory or in bad faith; that several courts have upheld annual objection requirements on the premise that the status is not presumed and the burden of objecting lies with the employee; that this gives nonmembers the opportunity to make a conscious decision on an annual basis about whether to object; that

<sup>2</sup> The response is dated May 18, 2009. By letter dated March 18, 2009, Respondent’s attorney advised the Regional Director for Region 25 of the National Labor Relations Board (the Board) in part as follows:

In response to Mr. Taubman’s March 17 [2009] letter to you and Chief Judge Giannasi and to expedite the matter and avoid a ‘traveling’ hearing, USW has no objection if the CGC [Counsel for General Counsel] and/or charging party want to offer just one or two of the charging parties to present representative testimony. We are willing to discuss holding the hearing at one location, if feasible. [GC Exh. 1(p).]

an annual requirement may allow a union to maintain a workable system for keeping track of its obligations to objectors; and that “no violation may be established, if Respondent articulates a reasonable basis for [an] annual renewal requirement that outweighs the burden placed on the charging parties to annually renew objections.” [Tr. p. 10.]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Parties, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent admits that Trimas Corporation d/b/a Cequent Towing Products (Cequent), a corporation, is engaged in the manufacture of towing products at its facility in Goshen, Indiana, where during the 12 months before the complaint issued it purchased and received goods valued in excess of \$50,000 directly from points outside the State of Indiana. Respondent admits and I find that Cequent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits that Chemtura Corporation (Chemtura), a corporation, is engaged in the manufacture of specialty liquid, solid, and flaked chemicals at its facility in Morgantown where during the 12 months before the complaint issued it purchased and received goods valued in excess of \$50,000 directly from points outside the State of West Virginia. Respondent admits and I find that Chemtura is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

All of the parties, including the General Counsel—who indicates that the relevant facts are not in dispute, signed and entered into a stipulation regarding the majority of the background information, General Counsel’s Exhibit 2. As here pertinent, it reads as follows:

....

4. At all material times since about March 22, 2004, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of the following employees of Cequent . . . as set forth in Article 1 of the most recent collective bargaining agreement between Respondent and Cequent . . .

5. At all material times since about May 16, 2006, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of certain employees of Chemtura . . . as set forth in Article 1 of the most recent collective bargaining agreement between Respondent and Chemtura . . .

6. At all material times, by virtue of Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of employees of various Employers throughout the United States, herein called the Bargaining Units.

7. At all material times since about March 12, 2008, Respondent and Cequent have maintained and enforced a collective-bargaining agreement . . . covering the Cequent Unit and

containing the following conditions of employment, herein called the Cequent Union Security Provision as set forth in Article 3 of the collective bargaining agreement between Respondent and Cequent.

8. At all material times since about October 2, 2007, Respondent and Chemtura have maintained and enforced a collective-bargaining agreement . . . covering the Chemtura Unit and containing the following conditions of employment, herein called the Cequent Union Security Provision as set forth in Article 2 of the collective bargaining agreement between Respondent and Chemtura.

9. At all material times, Respondent and various Employers throughout the United States have maintained and enforced a collective-bargaining agreements covering Bargaining Units and containing as a condition of employment union security provisions that obligate bargaining unit employees to maintain membership in the Union as in the Chemtura Union Security Provision and the Cequent Union Security Provision (hereinafter referred to as the Union Security Provisions).

10. On or about August 26, 2008, Ronald R. Echegaray notified Respondent [by letter<sup>3</sup>] that he objected to the payment of dues and fees for nonrepresentational activities. . . .

11. On or about June 11, 2008, David M. Yost notified Respondent [by letter<sup>4</sup>] that he objected to the payment of dues and fees for nonrepresentational activities. . . .

12. On or about November 7, 2008, Douglas Richards notified Respondent [by letter<sup>5</sup>] that he objected to the payment of dues and fees for nonrepresentational activities. . . .

13. Respondent admits receipt of said notifications by Echegaray, Yost, and Richards as set forth in clauses 10–12 of this Stipulation.

14. At all material times, Respondent has maintained a procedure governing the reduction in dues and fees for nonmember employees who object to the payment of dues and fees for nonrepresentational activities, herein called the Procedure. The Procedure, which speaks for itself, requires that objecting

<sup>3</sup> The letter contains the following:

Finally, please consider this objection to be permanent and continuing in nature. I stated this is my original objection letter but you still notified me that I had to file an annual objection. The annual objection requirement places an unnecessary burden upon me and is unlawful. Please notify me immediately whether you accept my objection as a permanent and continuing objection or whether you will require me to file an annual objection letter. [Attachment C to GC Exh. 2.]

<sup>4</sup> The letter reads in part as follows:

Originally, I told you to consider this objection to be permanent and continuing in nature. . . . If I am required to notify the Union annually, please state so specifically as I intend to file an unfair labor practice to address this issue if necessary. This issue has been resolved in Florida and I have been offered assistance by National Right to Work Committee to fight this for the West Virginia workers that are being held hostage to this unfair practice. I did not need or want to be a part of your Union - but you won that fight - for now. We will see if we will remain union on the third anniversary of the contract. [Attachment D to GC Exh. 2.]

<sup>5</sup> The letter reads in part as follows: “Finally, please consider this objection to be permanent and continuing in nature.” [Attachment E to GC Exh. 2.]

nonmember employees renew their objector status on an annual basis. The Procedure is applied to nonmember employees covered by the Union Security Provisions in the Bargaining Units. . . .

15. On or about June 26, 2008, Respondent [by letter] applied the Procedure to Yost and notified him that he must renew his objector status on an annual basis. . . . Yost admits receipt of the letter along with the Procedure. . . .

16. On or about September 9, 2008, Respondent [by letter] applied the Procedure to Echegaray and notified him that he must renew his objector status on an annual basis. . . . Echegaray admits receipt of the letter along with the Procedure. . . .

17. On or about January 26, 2009, Respondent [by letter] applied the Procedure to Richards and notified him that he must renew his objector status on an annual basis. . . . Richards admits receipt of the letter along with the Procedure . . . , the Twenty-Fifth Report of the International Secretary-Treasurer . . . , the 2006 Independent Auditors' Report . . . , [the] Twenty-Sixth Report of the International Secretary-Treasurer . . . , the 2007 Independent Auditors' Report . . . , and the Notice to All Employees Covered by a Union Security Clause. . . .

18. On or about August 27, 2008 and November 24, 2008, Respondent sent letters along with checks to Yost. . . . These checks were issued pursuant to Respondent's administration of the Procedure. Yost admits receipt of these letters and checks.

19. On or about February 23, 2009 and April 28, 2009, Respondent sent letters along with checks to Richards. . . . These checks were issued pursuant to Respondent's administration of the Procedure. Richards admits receipt of these letters and checks.

20. On or about September 15, 2008 and November 24, 2008, Respondent sent letters along with checks to Echegaray . . . . These checks were issued pursuant to Respondent's administration of the Procedure. Echegaray admits receipt of these letters and checks.

21. In late February 2009, Respondent sent Yost a letter dated February 20, 2009, related to the Procedure. . . . Attached to the letter was Respondent's Nonmember Objection Procedure, . . . the Twenty-Sixth Report of the International Secretary-Treasurer . . . , the 2007 Independent Auditors' Report . . . , and the Notice to All Employees Covered by a Union Security Clause. . . .

22. In late February 2009, Respondent sent Echegaray a letter dated February 20, 2009, related to the Procedure. . . . Attached to the letter was Respondent's Nonmember Objection Procedure, . . . the Twenty-Sixth Report of the International Secretary-Treasurer . . . , the 2007 Independent Auditors' Report . . . , and the Notice to All Employees Covered by a Union Security Clause. . . .

The Charging Parties and the Respondent entered into a stipulation regarding the testimony of Richards. Counsel for the General Counsel indicated that she did not object. As here pertinent, the stipulation, Charging Parties' Exhibit 1, reads as follows:

[P]arties hereby stipulate that if called to testify at trial, Douglas Richards would testify that:

1) I am an employee of Trimas Corp. d/b/a Cequent Towing Products. I am the Charging Party in NLRB Case No. 25-CB-8891.

2) I am employed within a bargaining unit represented by . . . [Respondent] (hereinafter "USW").

3) I am not a member of the USW.

4) On or around November 7, 2008, I sent a letter to the USW stating my objections to paying dues and fees for non-representational purposes. The letter states that my objection is permanent and continuing in nature. A true and correct copy of the letter I sent is attached to the General Counsel's Stipulation as Attachment E.

5) In a letter dated January 26, 2009, the USW notified me that, pursuant to its Agency Fee Objection Procedure, I must renew my objector status on an annual basis during a specified thirty-day window period. It is my understanding that, if I do not renew my objection, the USW will revoke my objector status and I will have to pay full union dues for at least one year until the next window period. A true and correct copy of the letter I received from the USW is attached to the General Counsel's Stipulation as Attachment I. I received a copy of the USW's Agency Fee Objection Procedure along with the USW letter dated January 26, 2009. A true and correct copy of the Agency Fee Objection Procedure is attached to the General Counsel's Stipulation as Attachment F.

6) I have never signed any document or waiver that provides that USW with authority to control if, when, or for how long I shall object to paying dues and fees for nonrepresentational purposes.

7) I believe that it is burdensome for me to have to annually renew my objection, to keep track of the renewal dates,<sup>6</sup> and thereafter mail an annual renewal of my objection. I believe that it is unfair that I and others have to pay full union dues for one year if the renewal period is missed. I believe that the USW's annual objection policy lacks a legitimate justification.

Conclusion: All parties stipulate that, if called to testify at trial, Douglas Richards would testify to these facts and opinions. All parties expressly waive all further ability to examine or cross-examine Douglas Richards, and all parties ask that the Administrative Law Judge accept this stipulation in lieu of Douglas Richards' live testimony.

The Richards stipulation is signed by the attorneys for the Charging Parties and the Respondent.

Echegaray testified that he has worked for Chemtura in Morgantown for 15 years; that Respondent has had a collective-bargaining agreement to represent the bargaining unit employees for about 1-1/2 years; that he did not become a member of the Union; that he does not agree with the Respondent's support of Barak Obama and the Employee Free Choice Act; that he used to receive the Respondent's magazine; that in his original objection letter to the Union he indicated that his objection should be considered permanent and continuing in nature because he did not believe that his opinion is ever going to change but if it did, he was sure that the Union would be happy to ac-

<sup>6</sup> The 30-day renewal period is linked to just one date, namely the employee's hire date.

cept his phone call at any time; and that he considers it a burden to annually renew his objection because

It is in such that I have three daughters, a wife. My daughter is involved in several things. I am involved in several things.

My anniversary date, I must admit, I think of it on my fifth year anniversary, on my 10th year I thought of it, on my 15th year anniversary I thought of it, because we are allowed to choose a trinket out of a magazine celebrating our milestone anniversary.

It is an arbitrary date to me.

In everyone's busy lives, it is one more thing that I have to—it puts a burden on me. [Tr. pp. 25 and 26.]

Echegaray further testified that he has never signed any documents waiving or changing his permanent objection.

On cross-examination, Echegaray testified that he openly opposed the Respondent's union organizing drive from the beginning; that he served as the Employer's observer at the Board election; that he has never participated in any union matter even prior to the Respondent's organizing drive; that since he filed his objection letter he has received advanced reduction of dues payments every 3 months from the Respondent; that after he became an objector, he received a letter from the Respondent advising him that he had to renew his objection annually; that he is aware that under the collective bargaining agreement seniority governs for layoffs, recall, vacation, filling vacancies, forced overtime, and temporary shifts; that he knows what his date of hire is; that he understands that the annual objection letter simply has to state "I want to continue to object"; that while he does not believe that he is required to send the objection letter certified, he takes this approach to insure that the letter is received; that he sent his initial objection letter to the wrong location but eventually it was tracked down and his objector status was recognized; that he uses the mail to send personal letters, the payment of bills, and Christmas cards; that since he became a nonmember objector he was laid off for three and one half months and he continued to receive the advance reduction check from Respondent; that he assumed that the Union did not know that he was laid off; that he did not advise the Union that he was out for 3-1/2 months; and that this was taken into account in future reductions.

On redirect Echegaray testified that he has never received notice from the Respondent right before his renewal period reminding him that it was time to object; and that the notice comes with the packet the Respondent sends after he objects.

Yost testified that he has worked for Chemtura for 19 years in Morgantown; and that he does not support the Respondent because

[t]he union's political activities are in conflict with—they support and their web site shows that they are very—they support liberal, far left agenda, very pro labor, which also happens to be antigun.

I am very pro NRA.

To me, it is a very clear conflict of interest with what the union stands for with my own views. [Tr. p. 38.]

Yost further testified that the only mailings he gets from the Union are the annual dues calculation notice and rebate checks; that he has never received a notice from the Union reminding him that the time to object is approaching; that in his original objection letter he indicated that his objection should be considered to be permanent and continuing because he does not believe that his political views are going to change; and that he considers it to be a burden to annually renew his objection every year in that

I am the father of seven children.

I currently carry a full-time college load.

Raising kids like that and providing foster care, which is an increased burden over raising natural born children, given the extra emotional burdens that these children carry, my anniversary date is an arbitrary date.

It means nothing.

I mean, I currently have nine other anniversaries and birthdays and things like that to remember, that are important. [Tr. p. 40.]

And Yost further testified that he has never signed any document or waiver that provides the Union with authority to control, if, when or for how long he can object to paying dues and fees for nonrepresentational purposes; that he has never signed any documents waiving or changing his continuing and permanent objection; and that he has never given the Union permission to change his status.

On cross-examination, Yost testified that he was hired on June 25, 1989; that he understands that under the collective-bargaining agreement seniority plays an important role; that he did not participate in Respondent's organizing drive and he was against unionization from the beginning; that he never became a member of the Union and since the Union was certified by the Board he has not participated in any union activity; that he receives advance reduction money from the Union and has no complaint about that; that he does have a complaint about renewing his objection within 30 days of his date of hire, his anniversary date; that he does not use the mail at all to pay bills since he pays electronically by computer; that he has renewed his objection and he received a letter from the Union indicating "We have acknowledged your perfection of the objection" (Tr. p. 47); that he has received several letters from the Union related to the procedure, namely (1) a notice of the new chargeable versus nonchargeable expenditures at the end of January, (2) another copy of the notice of procedure of how to object, and (3) an audited report showing how much more or less is being spent on political activity; that he reviewed the audited report thoroughly, he decided he wanted to maintain his objection, and he sent his letter to the Union; that he does not want to send a letter in to maintain his objection status, "[i]t is very burdensome" (Tr. p. 48), it is too expensive, and it requires a trip to the post office; and that he makes \$29.12 an hour and sometimes works overtime.

On redirect Yost testified that he renewed his objection because the Union holds no credibility with him; that he felt that it is an absolute necessity to send the renewal objection letter

by certified mail, return receipt requested to have absolute proof that they received that letter; and that he does not want to have a continuing relationship with the Union in any form.

David Jury, who is an associate general counsel in Respondent's legal department, testified that as part of his job duties he has had the responsibility for administering the nonmember objection procedure; that attachments to the above-described stipulation are letters from him to the different Charging Parties; that Respondent's international constitution provides that the International secretary treasurer is to establish a nonmember objection procedure, which was done years ago, and the International secretary treasurer has delegated the work related to the nonmember objection procedure to the legal department because of the legal issues involved; that he responds to letters from employees relating to perfecting objections, renewing objections, and simply making inquiries relative to the nonmember objection procedure; that he responded to the Charging Parties' objections, and he sent them letters about advance reductions; that the Union's nonmember objection procedure has an element of advanced reductions since most employers continue to withhold from nonmember objectors the full union security amount per the checkoff authorization that the objectors sign, and in order to accommodate that, the Union provides advanced reduction payments on a quarterly basis to each of the objectors who are having the full amount withheld from their dues; that the Union makes estimates about what the objector may pay in the upcoming quarter and sends the objector a letter explaining the basis of the Union's calculation and encloses a check as an advanced reduction; that the Union subsequently determines whether its estimates of the dues withheld were correct and, if necessary, adjusts accordingly quarter by quarter, generally; that annually the International Union prepares a new report of its chargeable and nonchargeable expenditures based upon its actual expenditures in a prior year; that he works with Respondent's auditing and finance department, and with Respondent's outside auditors who review Respondent's calculations and produce a certified report; that someone who is already an objector receives an annual notice in the form of (a) the report of the International secretary treasurer, (b) excerpts from the Union's financial audit, (c) a copy of the outside auditor's report affirming the Union's calculation of chargeable and nonchargeable expenditures, (d) a one-page notice that would be published in the upcoming edition of the Union's newspaper or magazine (i.e., CP Exh. 2), and (e) a copy of the Union's nonmember objection procedure; that this is generally done in the beginning of each year; that the Union typically completes its calculation of chargeable and nonchargeable expenditures in December and it sends this data, along with the other information he described above, to the nonmember objectors in the first quarter of the following year; and that the Union requires annual renewal for the following reasons:

The steelworkers union has had an annual renewal requirement in its nonmember objection procedure for a number of years.

We believe there are a number of reasons that support the continuation of an annual renewal requirement.

First, because we provide objectors annually with revised data, revised calculation as to the Union's chargeable and nonchargeable expenditures, we believe that it is reasonable to ask the objector to advise whether or not he or she wishes to continue objecting for the following year.

Because the data changes each year. The union's expenditures change.

And we believe it is appropriate to ask an objector to bear that in mind.

Second, we maintain it, because we believe it is lawful.

We believe that several federal district courts in construing the National Labor Relations Act have concluded that annual renewal requirements are lawful, because as we understand the reasoning of those courts, including the D.C. circuit in *Abrams v. Communication Workers* continuing to . . . [dissent (See Tr. p. 67, L. 14)] is not to be presumed.

So we operate with our understanding of those cases as well as our understanding of the position of the NLRB General Counsel circa 1988, MGC memorandum 8814, which suggested an annual renewal requirement is lawful.

We have acted in reliance upon that memo, as well as existing authority.

Further, we believe that an annual renewal requirement is appropriate in light of the rights that a nonmember objector gives up.

A nonmember objector is by definition someone who is not a member of the union.

And a member—a person who is not a member of the union, and we have informed objectors [of] this in their letters, when they perfect [their objector status].

A person who is not a member of the union has no right to attend local union meetings, to vote on collective bargaining agreements, when new collective bargaining agreements are presented for ratification.

A nonmember has no right to vote in local union or international union elections. And indeed, a nonmember has no right to run for union office or to seek to be a [union] delegate. . . .

We think these are significant rights that a nonmember knowingly gives up.

And we believe that in light of those rights and in light of changes that could occur in the work place, that it is reasonable for us to ask a nonmember to renew.

Finally, we believe that annual renewal requirement is of some assistance to us in our administration of the nonmember objection procedure.

As I testified, the union pays advance quarterly reduction payments to objectors.

And Charging Party Echegaray testified he has been laid off for parts of this year.

Having annual renewal requirements allows the union and some assistance to the union in administering our program to make certain that when we send advance reduction payments to objectors, that they are still actually in

the work force and have not either retired, resigned, been laid off or out of work on some long-term basis, thus no longer have union security fees withheld from them.

So I think for all of these reasons, these are the reasons we continue to maintain our annual renewal obligation. [Tr. pp. 57–60.]

On cross-examination Jury testified that the Union does not make members annually renew their membership since it does not believe that there is an obligation to require them to annually renew; that a member can resign his membership at any time; that the Union does not make employees who sign a dues checkoff card annually renew the dues-checkoff card; that the dues-checkoff card is written so that it automatically and continuously renews every year inasmuch as section 302(c)(4) of Taft Hartley allows for that, the Union's card is consistent with what Congress in the 1940s permitted; that the Union represents approximately 800,000 or 850,000 in the United States, Canada, and the Virgin Islands; that there are presently about a total of 300 nonmember *Beck* objectors; that the timing of the Union's financial package to nonmember objectors is not linked to when any individual was hired or when their renewal date would be; that some employers don't withhold full dues and withhold only the reduced amount; that with employers who withhold only the reduced amount, there is a burden on the Union of policing to make sure that the employers are actually following through on their undertakings and correctly withholding dues at a reduced amount perhaps for one or two persons in a bargaining unit where the rest of the bargaining unit is having dues withheld at the full constitutional amount; that he believed that the United States Supreme Court indicated that dissent is not to be presumed; that notwithstanding what the Charging Parties objections letters state, the Union maintains a policy, beginning with the view that dissent is not to be presumed, which has an annual renewal requirement; that the objection letters of the Charging Parties appear to state their then current views but he had no way of knowing what their views would be in the future; that the annual renewal policy was promulgated in 1979 in response to then recent case authority in the public and then private sector which held that unions should adopt policies to address the interests of nonmember objectors covered by union security clauses; that he did not know what the actual motives were in 1979 when the nonmember objection procedure was first adopted; that technically if an objecting nonmember misses the window period, he remains a nonmember but has to pay full union dues, but as a practical matter when an employee belatedly renews his or her objection the Union has tended to renew that objection status prospectively from the renewal; that a nonmember nonobjector cannot participate in internal union affairs such as voting on the contract or voting in union elections; that one's membership status and one's objection status are two separate obligations but in order to become an objector, one must by definition resign his or her membership or never have become a member in the first place; that it is possible for someone to opt not to be a member but not opt for objector status for reasons known but to them; that to participate in internal union affairs the nonmember objector would have to reconsider and change both his objector and member-

ship status; that with respect to the Union receiving information from employers as to who is actually still employed and not employed in the Union's various bargaining units, the Union represents 8000 or more bargaining units in the United States and Canada and he could not speak to the information that is furnished in all 8000 of those bargaining relationships; and that, with respect to the question of Charging Party Richard's attorney, whether the Union could "just require a nonmember send a letter each year, if they happen to retire or move on or not be employed" (Tr. p. 75) while that is possible, he did not know how persons like Charging Parties would view that as an impediment or burden.

#### Contentions

On brief, counsel for the General Counsel submits that while the Board has not ruled on the legality of an annual objection requirement, Federal courts have considered this issue and have split in their outcome; that the annual objection requirement has been upheld by the D.C. Circuit<sup>7</sup> and the Sixth Circuit<sup>8</sup> United States Courts of Appeals but it was not upheld by the Second Circuit<sup>9</sup> and the Fifth Circuit<sup>10</sup> United States Courts of Appeals; that the Second and Fifth Circuits in finding the annual objection requirement unlawful were constrained to apply the strict principles of the First Amendment to the United States Constitutional rather than the duty of fair representation standard; that although the Fifth Circuit, in the alternative, did apply the duty of fair representation standard, the Fifth Circuit continued to infuse First Amendment principles into its analysis of the Unions' duty of fair representation; that a union's obligations under *Beck* flow from a duty of fair representation, under which unions are allowed a "wide range of reasonableness" in serving the employees they represent;<sup>11</sup> that unions must not act arbitrarily, discriminatorily, or in bad faith toward unit employees<sup>12</sup>; that the issue here is whether Respondent's requirement that *Beck* objectors annually renew their objections is arbitrarily, discriminatorily, or in bad faith; that until 2003 the General Counsel had never taken the position that an annual renewal requirement for nonmember *Beck* objectors violated the Act; that Counsel for General Counsel's primary argument in support of finding a violation is 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; that none of the aforementioned Federal court cases which did not uphold the annual objection requirement arose under the Act;

<sup>7</sup> *Abrams v. Communication Workers*, 59 F.3d 1373, 1381–1382 (D.C. Cir. 1995).

<sup>8</sup> *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987). The annual objection requirement was also upheld in *Kidwell v. Transportation Communications International Union*, 731 F.Supp. 192, 205 (D. Md. 1990), *affd.* in part, *revd.* on other grounds 946 F.2d 283 (4th Cir. 1991), *cert. denied* 112 S.Ct. 1760 (1992).

<sup>9</sup> *Seidemann v. Bowen*, 499 F.3d 119 (2d Cir. 2007).

<sup>10</sup> *Shea v. Machinists*, 154 F.3d 508, 515 (5th Cir. 1998). A Virginia Federal District court also ruled against the annual objection requirement in *Lutz v. Machinists*, 121 F.Supp.2d 498, 506–507 (E.D. Va. 2000).

<sup>11</sup> *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

<sup>12</sup> *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967).

that under a duty of fair representation analysis, the annual objection is arbitrary because it places an unreasonable burden on employees who have chosen to object, and it serves no legitimate purpose; that absent a proper and persuasive justification the annual objections requirement is arbitrary; that contrary to those cases which found that the unions involved therein did not provide a sound reason for an annual objection requirement, here Respondent provides several reasons for utilizing the annual renewal requirement; that the courts in *Tierney*, supra, and *Abrams*, supra, relied on the annual reporting obligations imposed on unions to justify an annual renewal requirement; that the Board has stated that unions are not required to provide nonmembers with annual notice of their *Beck* rights;<sup>13</sup> and that

Applying the above considerations to the instant case, no violation should be found, as Respondent has articulated a reasonable basis for its annual renewal requirement, and whatever slight burden [is] suffered by Richards, Echegaray, and Yost in having to annually renew their objection is outweighed by the [Respondent's] justifications. . . . [Counsel for GC Br., p. 21.]

The Charging Parties on brief argue that the Union's annual renewal is unlawful because (a) the Union lacks the substantive authority to transform a *Beck* objector into a non-objector against his will, and (b) it is procedurally arbitrary, discriminatory and in bad faith; that the Union's justifications for its policy are spurious, and the majority of courts and administrative law judges who have considered this issue have struck down annual renewal policies for these reasons<sup>14</sup>; that the Union's annual renewal policy is procedurally arbitrary and constitutes a breach of the duty of fair representation; that a union's conduct is arbitrary if it is so far outside a wide range of reasonableness as to be irrational; that the Union's annual renewal policy is procedurally discriminatory and constitutes a breach of the duty of fair representation; that the Union does not make union members annually renew their membership or their dues deduction authorization; that the Union's annual renewal policy is in bad faith and constitutes a breach of the duty of fair representation; that the Union is burdening the Charging Parties' exercise of their Section 7 rights for the sole purpose of dissuading them from exercising these very rights and options; that the Union's justifications for its annual renewal policy are spurious since (a) the fact that each year the Union sends the objectors information regarding chargeable and nonchargeable expenditures, the objector notification procedure, etc., does not justify requiring that the objector write back to the Union indicating whether he or she renews their objection because the Union's legal obligation to provide annual notices does not

logically justify imposing a burden on employees, (b) the it is lawful because it is lawful justification (1) relies on a minority of court decisions which upheld the annual renewal with little analysis or factual record, and a 20-year old General Counsel Memorandum, GC Memorandum 88-14 which is not Board law or binding on the Board, and (2) must be viewed in light of the fact that there is no Board precedent on which the Union could legitimately rely, and even if there were Board law on the subject, that is not justification in and of itself because the Board is free to overrule its own precedent and reevaluate its decisions as industrial conditions change, (c) with respect to the Union's tracking the employee's status justification, the Union has other ways to find out whether employees have retired, resigned, or been laid off without the objector's annual renewal requirement in that (1) there would be a cessation of dues payments from a nonmember who may no longer be employed in the involved unit, (2) the Union can ask the Employer for the names of the newly retired, resigned, or laid-off nonmembers, and (3) the Union "could simply send a letter to the small number of objectors (estimated to be 300 by the union's witness, Tr. 64) asking them to verify their status as active workers instead of being 'retired, resigned, or laid off,'" (C.P. Br., pp. 23 and 24),<sup>15</sup> and (d) the fact that the Union is not required to but it has chosen to use a needlessly complex quarterly refund procedure does not justify requiring objectors to annually renew their objector status; and that the remedy in these cases must be a nationwide expungement, notification, and a reimbursement for any employee who, within the 10(b) period has had his status flipped from objector to nonobjector as a result of his silence.

The Respondent on brief contends that 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; that "[a] union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation," *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44, 45-46 (1988); that just after the 1988 *Beck* decision was issued, the General Counsel announced its position in November 1988, stating that "a union can require nonmembers to file new objections . . . each year," GC Memorandum 88-14, p. 3 (November 15, 1988); that in *California Saw & Knife Works*, the Board indicated that the "requirement that *Beck* objectors be registered annually is not alleged to be unlawful by the General Counsel, [and] [w]e note that courts have approved the annual objection requirement in the NLRA, RLA, and public sector context";<sup>16</sup> that the legal analysis in ascertaining a duty of fair representation breach is different from an analysis of a violation of a Section 7 right in that the former, as noted above, affords a

<sup>13</sup> *Steelworkers Local 4800 (George E. Failing Co.)*, 329 NLRB 145, 146 (1999); *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995).

<sup>14</sup> The Charging Parties cite *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F.Supp.2d 498 (E.D. Va. 2000); *Seidemann v. Bowen*, 499 F.3d 119 (2d Cir. 2007); *Teamsters Local 952 (Albertsons, Inc.)*, 2006 WL 1525828, Case 21-CB-13609, JD(SF)-30-06 (May 30, 2006); *L-3 Communications Vertex Aerospace*, Case 15-CB-5169, JD(ATL)-02-08 (Jan. 9, 2008); and *Auto Workers Local 376 (Colt's Mfg. Co.)*, Case 34-CB-2631, JD(NY)-06-08 (2008).

<sup>15</sup> This argument appears to mean that Charging Parties' attorneys do not view the physical writing of a letter or the physical filling out of a form by the Charging Parties and mailing it to the Union to be a burden since this is what they are recommending as an alternative. That being the case, apparently the Charging Parties' attorneys are arguing that the burden on the Charging Parties is limited to keeping track of their hire date and a 30-day period which is linked to the hire date anniversary.

<sup>16</sup> 320 NLRB 224, 236 fn. 62, enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). The Board cited *Abrams*, *Kidwell*, and *Tierney*, supra.

union a wide range of reasonableness, *Marquez and Vaca v. Sipes*, 386 U.S. 171, 177 (1967); that by framing the complaint as a duty of fair representation breach, the General Counsel concedes that the Section 7 right to become and remain a *Beck* objector is qualitatively different from the Section 7 right to resign from membership; that the right to resign membership is an unfettered right, while the right to be a *Beck* objector may be limited so long as the restrictions are not arbitrary, discriminatory or imposed in bad faith; that Federal courts have ruled that the annual renewal requirement does not breach the duty of fair representation; and that the Sixth Circuit in *Tierney*, supra at 1506, stated as follows:

Since *Hudson* [*Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986)] places the burden of objection upon the employees (as contrasted to burden of proof), we do not consider unreasonable the plan's provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.

Respondent further contends that the court in *Abrams*, at 1381 and 1382, citing *Tierney* and *Machinists v. Street*, 367 U.S. 740, 774 (1961), stated that “[t]he annual renewal requirement is permissible in light of the Supreme Court’s instruction that ‘dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee’”; that the court at 1382 in *Abrams*, citing *Tierney*, stated that “we do not consider unreasonable the provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made”;<sup>17</sup> that other Federal courts have found the annual requirement unlawful in nonduty of fair representation cases and in different legal contexts; that *Shea v. Auto Workers*, 154 F.3d 508 (5th Cir. 1998), *Seidemann & Lutz v. Auto Workers*, 121 F.Supp.2d 498, 506 (E.D. Vir. 2000), rest on scrutiny under the First Amendment which is significantly more rigorous and less differential than a duty of fair representation review; that because the First Amendment does not apply to agency fee objection procedures under the NLRA, *White v. Communication Workers, Local 13000*, 370 F.3d 346 (3d Cir. 2004), the Board has rejected the proposition “that precedent under public sector labor law and the RLA grounded in constitutional considerations are binding in the context of the NLRA,” *California Saw*, supra at 227; that consequently federal judicial precedent supports Respondent’s procedure; that Respondent cannot be accused of bad faith for following an annual objection procedure that had been expressly approved by the Office of the General Counsel and the courts, *Electrical Workers v. NLRB*, 41 F.3d 1532, 1538 (D.C. Cir. 1994); that despite the protestations of the Charging Parties, the burden of sending one letter annually, at a date that has been clearly identified, is minimal, if not inconsequential; that

<sup>17</sup> Respondent cites *Price v. Auto Workers*, 722 F.Supp. 933, 938, 940 (D. Conn. 1989), affd. 927 F.2d 88 (2d Cir. 1991), cert. denied 502 U.S. 905 (1991), where the court upheld an annual renewal requirement noting that “[t]he Union’s new objection procedures, . . . closely track guidelines established in a recent internal NLRB memorandum (Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck*, NLRB Office of the General Counsel, Nov. 15, 1988).”

*California Saw* sanctions 30-day window periods in the regulation of the filing of employee *Beck* objections; that the “gotcha” argument lacks merit in that objectors are clearly advised of the date for renewing an objection, they are given ample time to renew their objections, and as Jury testified in practice when an employee belatedly renews his or her objection the Union has tended to renew that objection status prospectively from the renewal; that Respondent’s procedure cannot be found arbitrary when Respondent follows the guidelines established in GC Memorandum 88-14 which prescribed an annual objection procedure—a procedure whereby the Union annually recalculates the amount charged to objectors, annually provides objectors with notice of the objection right, and, as an integral component of this annual objection procedure, “require[s] nonmembers to file new objections . . . each year,” GC Memorandum 88-14, p. 3; that the Board cannot fault the Respondent for using a procedure that was upheld long before the General Counsel changed its position, *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46 (1998); that a union’s reliance on prior decisions or other precedent cannot be viewed as arbitrary conduct, at least not until the Board has ruled on the issue; that because Respondent gives an annual *Beck* notice to existing objectors, along with information such as audits and reports, it is not unreasonable to require the objector to mail in a letter once a year; that by providing for an annual objection, the Respondent’s procedure gives it reasonable assurance that only employees who are moved by an objection to providing financial support to activities not germane to collective bargaining will be entitled to pay a reduced agency fee; that since the Respondent’s expenditures change each year, it is appropriate to ask an objector to bear that in mind; that the renewal requirement provides some assurance to the Respondent to be certain that it is not paying amounts to persons who are no longer employed within covered bargaining units, whether such persons leave employment due to a plant closure, layoff, retirement, or resignation; that it is not irrational for the Respondent to seek to avoid making advanced reduction payments to persons who no longer are subject to union security fee withholding; that the Respondent’s annual renewal requirement is lawful since it serves legitimate purposes; and that the Respondent’s policies regarding checkoff authorization/membership versus nonmember objections are not inconsistent but based on differences in the law and how these matters are regulated.

#### Analysis

The issue presented here is whether the Union breached its duty of fair representation and thereby violated the Act.

In 1944 the duty of fair representation originated with *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), under the Railway Labor Act (RLA).

In 1953 the United States Supreme Court, in ruling on the duty of fair representation for the first time under the National Labor Relations Act (NLRA or the Act), indicated:

[T]he authority of bargaining representatives . . . is not absolute as recognized in *Steele*. . . . Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those

members without hostility to any. [*Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).]

In 1961, the United States Supreme Court in *Machinists v. S.B. Street*, 367 U.S. 740 (1961), held that that section of the RLA authorizing a union shop denies a union, over an employee's objection, the power to use his exacted funds to support political causes which he opposes. At 774, the Court indicated that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."

In 1962, the Board, in *Miranda Fuel Co.*, 140 NLRB 181 (1962), first recognized that a breach of the duty of fair representation was an unfair labor practice, as here pertinent, under Section 8(b)(1)(A) of the Act.<sup>18</sup>

In 1967, the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), ruled that:

[T]he exclusive agent's statutory authority to represent all members of a designated unit 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

....

In 1986, the United States Supreme Court in *Chicago Teachers AFT Local 1 v. Hudson*, 475 U.S. 292, 306 (1986), indicated:

In *Abood*, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Abood* [*v. Detroit Bd. of Edu.*], 431 U.S. at 239–240 fn. 40, . . . [unofficial citation and citation of the original source of the quoted language omitted] (1963).<sup>16</sup>

<sup>16</sup> The nonmember's "burden" is simply the obligation to make his objection known. See *Machinists v. Street*, 367 U.S. [740] at 774 (1961) . . . ("[D]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee") . . . [unofficial and additional citation omitted].

In 1987 the United States Sixth Circuit Court of Appeals in *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987), a case involving nonunion member police officers who did not want part of their required service fees to the union to be contributed to political candidates and causes unrelated to the union's duty as exclusive bargaining representative, concluded that:

Since *Hudson* places the burden of objection upon the employees (as contrasted to burden of proof), we do not consider unreasonable the plan's provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made.

In June 1988, the United States Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988), held that, as here pertinent, that section of the NLRA which permits an employer and a union to enter into an agreement requiring all employees in a bargaining unit to pay periodic union dues and initiation fees as condition of continued employment, whether or not employees otherwise wish to become union members, does not also permit the union, over objections of dues-paying nonmember employees to expend funds so collected on activities unrelated to collective-bargaining activities.

In November 1988 the General Counsel issued a memorandum, GC Memorandum 88-14, and on page 3 thereof indicated "a union can require nonmembers to file new objections . . . each year."

In 1990, a United States District court in *Kidwell v. Transportation Communications International Union*, 731 F.Supp 192, 205 (D. Md. 1990), indicated as follows:

The Court finds that the requirements for the annual renewal of objections and the 30-day window for making objections are not unduly restrictive of plaintiffs' rights. These are reasonable requirements of notice, since objections are not to be presumed on an on-going basis. The employee has the burden of notifying the union of his or her objection. See *Street*, 367 U.S. at 774 . . . ("[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.") Moreover, 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. See *Tierney*, 824 F.2d at 1506 (annual objection requirement not unreasonable).

When this decision was appealed, the United States Fourth Circuit Court of Appeals at 946 F.2d 283 (4th Cir. 1991), reversed the district court's conclusion as to the right of a union member in an agency shop to pay less than full dues but affirmed the district court's disposition of the remaining issues. The Fourth Circuit at 285 noted that:

[T]he union . . . in an agency shop may arrange to collect the costs of collective bargaining from all employees, but may not compel objecting nonmember employees to pay for union activities other than those related to collective bargaining. The union thus must have an objection procedure with respect to noncollective bargaining activities available to nonmembers.

For example, under the union's current procedure, in each calendar year, for thirty days after receiving an April notice, nonmember employees may object to the expenditure of their fees on activities unrelated to collective bargaining.

At 286, the Fourth Circuit noted that "[t]he judge also held that the union's procedure for handling objections was permissible . . ." At 287, the court noted that "[t]he plaintiffs . . . have not appealed from the judge's conclusion that the procedures did

<sup>18</sup> The United States Second Circuit Court of Appeals reversed the Board at 326 F.2d 172 (2d Cir. 1963), without ruling on whether the Board was correct in finding that a breach of the duty of fair representation was a violation of the Act. Over 20 years later, the Second Circuit in *NLRB v. Teamsters Local 282*, 740 F.2d 141 (2d Cir. 1984), found that a union's breach of the duty of fair representation violates Sec. 8(b)(1)(A) of the Act.

not violate the union's duty of fair representation." And finally at 306 the Fourth Circuit indicated:

The judgment is REVERSED as to whether a union member can object to paying the portion of union dues attributable to noncollective bargaining activities, and otherwise AFFIRMED.

In March 1991 the United States Supreme Court in *Air Line Pilots Assn. International v. O'Neill*, 499 U.S. 65, 67 (1991), indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 . . . (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 . . . (1953), as to be irrational.

In 1993, a United States District court in *Abrams v. Communication Workers*, 818 F.Supp. 393, 399 (D.D.C. 1993), indicated:

CWA's duty of fair representation is a duty that is judicially implied from its statutory duty—under 29 U.S.C. §§ 158(a)(3), 159 to represent all bargaining unit employees of a particular employer. See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 . . . (1944). This duty requires a union to "represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective bargaining agreements." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 . . . (1979)

A breach of a union's duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 . . . (1967); *Price v. Int'l Union, UAW*, 927 F.2d 88, 92 (2nd Cir. 1991). This standard applies to a union's contract administration, enforcement, and negotiation, as well as any other instances where a union acts in a representative role. *Air Line Pilots v. O'Neill*, 499 U.S. 65 . . . (1991). Under this standard, the court's review of CWA's actions must be highly deferential. *Id.* The court can find a breach of this duty only if CWA's actions "can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that [those actions] are wholly 'irrational' or 'arbitrary.'" (citation omitted).

In *Hudson*, the Supreme Court applied a higher, constitutional standard of scrutiny to the procedures that the union there used to exact funds from nonmembers, but the Supreme Court did so because the employees involved worked in the public sector. The union involved was the Chicago Teachers Union, and it had the approval of the Chicago Board of Education to be the exclusive collective bargaining agent for the Board's educational employees. *Hudson*, 475 U.S. at 294. . . . As this court already has concluded, no such state action ex-

ists in this case. 702 F.Supp. at 921–923. In the absence of state action, the court has no basis for imposing *Hudson's* heightened constitutional review.

At 400, the court indicated:

The duty of fair representation allows a wide range of reasonableness. *O'Neill*. . . . Such a reasonableness standard is not equivalent to "the stringent tests applied in the First Amendment context." *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982). . . . [footnote omitted.]

And at 403 the court indicated:

[The] . . . fourth argument is that CWA violates its duty of fair representation by requiring nonmembers to object to the agency fee each year and by limiting the objection period to just a few months. Plaintiffs rely on *Hudson* and *Railway Clerks v. Allen* [373 U.S. 113 (1963)] for this position. The cases plaintiffs rely upon for this position are inapposite at best.

*Hudson* does not support plaintiffs' claim. If anything *Hudson* supports CWA's position that nonmembers have the obligation of making their objection known. *Hudson* 475 U.S. at 306. . . . The footnote that plaintiffs cite to in *Hudson* . . . states that "[d]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee." 475 U.S. at 306 . . . citing *Railway Clerks v. Allen*, 373 U.S. at 119. . . . This statement suggests that CWA is within its rights to require annual objections.

In *Railway Clerks v. Allen*, the Supreme Court stated that by filing a complaint against the union the nonmembers sufficiently had made their objection known. 373 U.S. at 119 n. 6. . . . Plaintiffs also try to use this statement in support of their claim. In *Allen*, however, the union had not established an objection system and the filing of a legal action was the nonmembers only recourse. That factual distinction makes *Allen* unsupportive of plaintiff's position.<sup>10</sup>

CWA's requirement that nonmembers repeat their objections every year during a specific time period provides an efficient yet fair system for objection. Because objection is not to be presumed, *Street*, 367 U.S. at 774 . . . , CWA has a valid basis for requiring yearly objections. Nor can the objection period be never ending if CWA wishes to resolve nonmembers' disputes, tally its budget, and put the advance reduction process into motion. [footnote omitted] CWA's procedure is not arbitrary but reasoned, and its basis in law shows the procedure also is not discriminatory or in bad faith. The court concludes that CWA's requirement of annual objections during a limited window period does not violate its duty of fair representation.

<sup>10</sup> If anything, *Allen* supports CWA's requirement of repeated objections because there the Supreme Court concluded that those who filed the complaint had to repeat those objections through testimony if their objections were to survive to the end of the action. 373 U.S. at 119. . . .

In 1994, a United States District court in *Electrical Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), in reviewing a Board order holding that a union breached its duty of fair representation by in bad faith maintaining a union security agreement which the Board viewed as ambiguous retroactively after the Board reversed longstanding NLRB policy, indicated at 1534:

[W]e find no substantial evidence, indeed no evidence whatsoever, to support the Board's conclusion that the union acted in bad faith merely by maintaining a union-security provision that was in conformity with longstanding, well-established Board precedent. Because there is no evidence in the record to support the Board's finding of bad faith, we find no basis for a duty-of-fair representation violation in this case. . . .

The Board is free to reconsider its policy regarding the permissible scope of union-security agreements, with an eye toward requiring unions to give full disclosure to employees regarding their right to decline union "membership." In fact, from this date forward unions are on notice that they risk breaching their duty of fair representation if they adopt union-security provisions of the sort at issue here without appropriate "notice" to employees who are covered by such provisions. In the instant case, however, we hold that no violation occurred because the Union's actions were fully consistent with established law.

At 1537 and 1538, the court indicated:

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

In June 1995, a United States District court in *Nielsen v. Machinists Local Lodge 2569*, 895 F.Supp. 1103, 1114–1115 (N.D. Ind. 1995) indicated:

Further support for the Union Defendant's position is found in *Kidwell v. Transportation Com Intern. Union*, 731 F.Supp. 192 (D. Md. 1990), in which the court held that the annual renewal of objections and the thirty-day window for objecting to the Union's proposed fee were not "unduly restrictive of plaintiffs rights." *Id.* at 205.

The court granted the Union's motion for Summary Judgment holding that a window period does not violate the union's duty

of fair representation. Plaintiff Nielsen's Motion for Summary Judgment was denied.

In July 1995 a United States Court of Appeals in *Abrams v. Communications Workers*, 59 F.3d 1373, 1381–1382 (D.C. Cir. 1995), indicated:

Finally, the employees argue that CWA's objection procedure violates its duty of fair representation by requiring them to object within a limited "window period" each year and to renew their objections annually. As did the district court and other courts considering similar union procedures,<sup>11</sup> we find neither procedure unduly burdensome. Regarding the window period, "[t]he union, as well as the employees, have an interest in the prompt resolution of obligations and disputes. The . . . window facilitates prompt resolution and leaves no doubt as to the timing of the requirement for an objection." *Kidwell v. Transportation Communications Int'l Union*, 731 F.Supp. 192, 205 (D. Md. 1990), *aff'd in part and rev'd in part on other grounds*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 . . . (1992). [footnote omitted] Similarly, the annual renewal requirement is permissible in light of the Supreme Court's instruction that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Street*, 367 U.S. at 774. . . . "We do not consider unreasonable the [policy] provision that each member be required to object each year so long as the union continues to disclose what it must before objections are required to be made." *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987).

<sup>11</sup> 818 F.Supp. at 403. . . .

In 1995, the Board in *California Saw & Knife Works*, 320 NLRB 224, 236 fn. 62 (1995) indicated:

The IAM's [International Association of Machinists and Aerospace Workers, AFL–CIO] requirement that *Beck* objections be registered annually is not alleged to be unlawful by the General Counsel. We note that courts have approved the annual objection requirement in the NLRA, RLA, and public sector context. See *Abrams v. Communication Workers*, *supra*, 59 F.3d at 1381; *Kidwell v. Transportation Communications Union*, *supra*, 731 F.Supp. at 205; *Tierney v. City of Toledo*, 824 F.2d at 1506.

There the Board concluded that, as alleged by the General Counsel, the window period involved in that case—as it applied solely to individuals who resign their union membership after the expiration of the window period, effectively operated as an arbitrary restriction on the right to be free to resign from union membership.

In 1996, the United States Seventh Circuit Court of Appeals in *Nielsen v. Machinists Local Lodge 2569*, 94 F.3d 1107, 1116–1117 (7th Cir. 1996), in affirming the judgment of the aforementioned district court in its entirety, utilized some language which in the situation at hand may be instructional. The court indicated:

It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion and to be aware that the price of not doing so will be to wait at most ten or eleven months be-

fore implementing their new status. Life is full of deadlines and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. Other courts that have considered “window periods” have come to the same conclusion. See *Abrams*, 59 F.3d . . . ; *Tierney* . . . 824 F.2d . . . ; *Kidwell* . . . 731 F.Supp. . . .

The Board’s position in this respect has been inconsistent. In the *General Counsel’s Guidelines Concerning CWA v. Beck* it stated clearly that “if the union has a ‘time window’ for filing objections, the notice must set forth that information and the time period must be reasonable.” . . . The obvious implication of this statement is that at least some “window periods” are permissible. In its more recent decision in *California Saw and Knife Works*, however, the Board found that the IAM’s January “window period” operated as an arbitrary restriction on the right to be free to resign from union membership and this violated the duty of fair representation. 320 NLRB . . . [224] (1995). The Board’s position in *California Saw and Knife*, however, gives no weight at all to the union’s legitimate administrative needs—indeed, it almost requires the union to find the system that imposes the least restriction on *Beck* rights possible. Such exacting scrutiny is inconsistent with *Vaca* and *O’Niell*, which require us to uphold the union’s actions as long as they fall within a generous range of reasonableness. Because the IAM has offered valid administrative justifications for its system here, we conclude that it has not violated its duty of fair representation by imposing an annual “window period” for registering fee objections. [Emphasis added.]

In January 1997 the United States Sixth Circuit Court of Appeals in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1243–1244 (6th Cir. 1997), indicated:

In 1990, the Supreme Court ruled that prohibiting corporations, but not labor unions, from making political expenditures from their general treasuries does not violate the Constitution. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660–666 . . . (1990).

The Chamber [Michigan Chamber of Commerce] then shifted its focus from litigation to legislation, seeking to have the statutory restrictions on corporate political expenditures applied to unions as well. With the Chamber’s support, Michigan’s legislature in May of 1994 enacted Public Act 117, amending its Campaign Finance Act, Mich. Comp. Laws Ann. §§ 169.201–282 (West 1996). See 1994 Mich. Pub. Acts 117.

The involved union plaintiffs, as here pertinent, challenged labor unions being required to obtain affirmative consent at least once a year from members making contributions to a separate segregated fund by means of an automatic payroll deduction. As here pertinent, the court ruled that the statute requiring labor unions to obtain affirmative consent at least once per year from members utilizing automatic payroll deduction to make

contributions to a political contribution fund did not violate the First Amendment, under an intermediate scrutiny analysis.

In September 1998 the United States Fifth Circuit Court of Appeals in *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998), which involved airline employees subject to RLA, ruled against the involved union with respect to the requirement that an objector annually renew his or her objection status. In taking this action the Fifth Circuit reversed the lower Federal court, the United States District Court for the Northern District of Texas, which found that IAM’s procedures do not violate the union’s duty of fair representation and had entered summary judgment in favor of the union. The Fifth Circuit at 514 indicated that “since *Abood* [*v. Detroit Bd. of Edu.*], 431 U.S. 209 (1977), it is clear that there is no legal reason to require more than a written, continuing objection to all expenditures or activities not germane to collective bargaining.” At 515, the court indicated

The objection procedure at issue in this case fails to meet the *Hudson* standard [*Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)]; it does not minimize the infringement. The current procedure is cumbersome to both the union and the objecting employees because it requires annual computer entries. If the IAM recognized continuing objections made expressly and in writing, the employee would notify the union only once and neither the union nor the individual would be bothered with the annual database entries.

....

Certainly the procedure that least interferes with an employee’s exercise of his First Amendment rights is the procedure by which an employee can object in writing on a continuing basis.

The court went on to explain why it did not agree with the Sixth Circuit in *Tierney*, the D.C. Circuit in *Abrams*, the Maryland District court in *Kidwell*, and the Seventh Circuit in *Nielsen* (apparently to the extent that that court relied on the duty of fair representation to decide that case). Also, the court indicated that both *Nielsen* and *California Saw & Knife Works* are distinguishable from the current case because they were decided under the NLRA; and that some Supreme Court decisions may have arguably indicated that under the NLRA there is not sufficient state action to trigger constitutional protections. At 516 and 517 the court in *Shea* indicated:

Because the RLA is subject to constitutional limits, a reviewing court may properly invoke the protections of the First Amendment and need not rely on the arguably weaker DFR [duty of fair representation] standard. For this reason we apply the *Hudson* First Amendment standard rather than the DFR standard.

The district court in this case, however, did not follow *Hudson*, and instead reviewed the objection procedures under the DFR standard. Under the DFR, the court found that the objection procedure must be upheld because it is not arbitrary, discriminatory, or in bad faith towards the objecting nonunion employees. The lower court’s reliance on the DFR standard is misplaced. First the DFR standard is not the appropriate standard of review in this case, and

second, even if the DFR were the appropriate standard, the annual objection requirement violates it.

Since the union can give no justification of this annual objection procedure, and since it is more cumbersome and less efficient than a system that allows continuing written general objections, the procedure is unreasonable and arbitrary. It is an unnecessary and arbitrary interference the employees' First Amendment rights that fails to meet the union's duty of fair representation as it has been defined in *Vaca* and *O'Neill*. . . .

More fundamentally, we remain unconvinced that the union's objection procedures should even be reviewed under the DFR standard. Even though other union shop cases have been decided under the DFR, we will not apply the DFR standard in this case.

But this is a dispute between the union and the objecting employees that does not require us to second-guess the union's judgment. . . . Rather we are called upon to protect the free speech rights of objecting employees from intrusive union procedures.

We hold that the IAM's procedure violates *Hudson's* requirements that the First Amendment infringement be minimized. Alternatively, we hold that the annual objection requirement violates the IAM's duty of fair representation.

In November 1998 the United States Supreme Court in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46 (1998), which involves the issue of whether a union breached its duty of fair representation merely by negotiating a union security clause that tracks the language of Section 8(a)(3) of the NLRA, indicated:

That our holding in *Beck* did not alter the standard for finding conduct "arbitrary" is confirmed by our decision in *Air Line Pilots*. In this case, decided three years after *Beck*, we specifically considered the appropriate standard for evaluating conduct under the "arbitrary" prong of the duty of fair representation. We held that under the "arbitrary" prong, a union's actions breach the 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.'" 499 U.S. at 78 . . . (quoting *Ford Motor Co. v. Huffman*, supra at 338 . . .). This "wide range of reasonableness" gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.

In 2000 the United States District Court for the Eastern District of Virginia in *Lutz v. International Association of Machinists & Aerospace Workers*, 121 F.Supp. 498 (E.D. Va. 2000), which involved airline nonunion employees subject to RLA challenging union policy requiring nonmembers to submit their objections to paying fees unrelated to costs of collective bargaining each year rather than permitting continuing objections, indicated that the IAM rejected continuing objections and

would not even accept them as an objection for the year they were submitted.<sup>19</sup> At 504 and 505, the court indicated:

The threshold merits determination is whether the annual objection procedure is subject to scrutiny under the First Amendment or the DFR. This is not an inconsequential determination as scrutiny under the First Amendment is significantly more rigorous and less deferential than DFR review. [footnote omitted]

At 507, the court indicated:

In sum, the annual objection requirement fails First Amendment scrutiny because the requirement is without valid justification and imposes an undue burden that creates a risk that funds "will be used . . . to finance ideological activities unrelated to collective bargaining." *Hudson*, 475 U.S. at 305. . . .<sup>27</sup> Accordingly, because the procedure is in violation of the nonmembers' First Amendment rights, summary judgment should be granted in favor of the [employee] plaintiffs.

<sup>27</sup> The IAM also argues that the annual objection requirement is justified because the Supreme Court placed the burden of objecting on the employee. See *Street*, 367 U.S. 740. . . . This argument fails because there is an important difference between placing the burden of objection on an employee and imposing yet a further restriction that makes the burden onerous. An employee's burden to make an affirmative objection may easily be satisfied through submission of a continuing objection.

The General Counsel indicates on brief that "[u]ntil 2003, the General Counsel had never taken the position that an annual renewal requirement for nonmember *Beck* objectors violated the Act." General Counsel's brief, page 12.

In 2007, the United States Second Circuit Court of Appeals in *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir. 2007), which involved a professor suing a public sector union, and the United States District Court for the Eastern District of New York granting the union summary judgment, indicated:

This Circuit has mandated that unions use "narrowly drawn" objection procedures to protect the First Amendment rights of agency fee payers, while allowing unions and government to pursue their needs in "establishing a rational system to consummate labor negotiations." *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987). Although we have not required that objection procedures be the "least restrictive" means available, they must, nonetheless, be "narrowly drawn" to comply with the strictures imposed by *Hudson*. *Andrews* . . . at 339–340; cf. *Price v. Int'l Union UAW*, 927 F.2d 88, 92 (2d Cir. 1991) (distinguishing cases involving private employee unions from public sector union cases, where constitutional concerns warrant the *Hudson* safeguards). The issue of principal concern to us in this case is whether requiring agency fee holders to object annually to payment of expenses other than for costs of collective bargaining meets this mandate.

<sup>19</sup> It appears that IAM elevated form over substance.

At 126 the court indicated “[w]e hold the annual objection requirement imposed by PSC in this case is an unnecessary burden on an employee’s exercise of First Amendment rights. See *Hudson*, 475 U.S. at 303. . . .”

As indicated above, this case will be decided under the duty of fair representation standard. Of all the Federal courts which have considered the annual renewal requirement, only three, *Shea* (the Fifth Circuit since the Federal District court in that case found in favor of the union under a duty of fair representation standard), *Lutz*, and *Seidmann* (the Second Circuit since the Federal District Court in that case granted the union summary judgment) have found against the unions involved in those cases. As pointed out by the General Counsel on brief, none of those three cases arose under the Act. Two of those three, *Lutz* and *Seidmann*, decided the issue on the basis of the more rigorous First Amendment standard which is not applicable in the situation at hand. Only the Fifth Circuit in *Shea*, in deciding this issue using the First Amendment standard, in the alternative, spoke to the duty of fair representation standard. But as General Counsel on brief points out, the Fifth Circuit in *Shea* “continued to infuse First Amendment principles into its analysis of the union’s duty of fair representation” in that the court at 517 stated that the annual objection procedure is an “unnecessary and arbitrary interference with the employees’ First Amendment rights that fails to meet the union’s duty of fair representation. . . .” (GC Br., p. 19.) I agree with the General Counsel. Additionally, as noted above, the Fifth Circuit indicated at 517: “[s]ince the union can give no justification of this annual objection procedure, and since it is more cumbersome and less efficient than a system that allows continuing written general objections, the procedure is unreasonable and arbitrary.” The Fifth Circuit at 517 goes on to indicate that in duty of fair representation cases

A highly deferential standard of review is appropriate . . . because the court is being called upon to review the union’s performance of union functions and should not substitute its own judgment of how a union should conduct its affairs. . . . To avoid over-reaching, courts must give great leeway to unions in cases concerning such disputes. But this is a dispute between the union and the objecting employees that does not require us to second-guess the union’s judgment as exclusive bargaining representative. Rather we are called upon to protect the free speech rights of objecting employees from intrusive union procedures.

The Fifth Circuit does not explain how the fact that in the court’s opinion the union’s system is cumbersome and less efficient equates with arbitrary under the duty of fair representation standard, namely the union’s behavior is so far outside a wide range of reasonableness as to be irrational. While the Fifth Circuit professes not to second guess the union, this appears to be exactly what it did with respect to the duty of fair representation. In view of the above, it is questionable whether the Fifth Circuit’s reasoning with respect to the duty of fair representation can serve as precedent. If the position of the Fifth Circuit in *Shea* is not considered precedent regarding the duty of fair representation, then it has not been shown that any Federal court has found against a union, with respect to the annual re-

newal requirement, utilizing the duty of fair representation standard.<sup>20</sup>

As pointed out by the parties, a number of administrative law judges have issued decisions on this issue. However, the Board has not yet decided a case on this issue, and it has not ruled on the exceptions to any of these administrative law judges’ decisions. Therefore, the judges’ decisions are not precedent. Additionally, four of the five cited Administrative Law Judge decisions concluded that the union involved did not show a legitimate justification for the annual renewal requirement. As General Counsel points out on brief, in the instant case the union did show a justification for the annual renewal requirement. More specifically, counsel for the General Counsel on brief indicates:

Applying the above considerations to the instant case, no violation should be found, as Respondent has articulated a reasonable basis for its annual renewal requirement, and whatever slight burden suffered by Richards, Echeagaray, and Yost in having to annually renew their objection is outweighed by the [Respondent’s] justifications . . . . [Counsel for GC Br., p. 21.]

As indicated by Administrative Law Judge Biblowitz in *Auto Workers Local Union #376 (Colt’s Mfg. Co.)*, Case 34-CB-2631, JD(NY)-06-08 (2008), the Board in denying cross motions for summary judgment, remanded the proceeding for a determination of the extent of the burden that the annual renewal requirement places on objectors and the legitimacy of the union’s asserted business justification for the annual renewal requirement.

The United States Supreme Court, as noted above, in *Air Line Pilots Association, International v. O’Neill*, 499 U.S. 65, 67 (1991), indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171 . . . (1967)—that a union breaches its duty of fair representation if its actions are either ‘arbitrary, discriminatory, or in bad faith’—applies to all union activity, including contract negotiation. We further hold that a union’s actions are arbitrary *only if*, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness,’ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 . . . (1953), as to be irrational. [Emphasis added.]

Taking the last first, namely bad faith, the Charging Parties argue that the union is burdening their exercise of their Section 7 rights for the sole purpose of dissuading them from exercising these very rights and options; that this is the very epitome of an action taken in bad faith by an exclusive representative; and that the annual renewal requirement only makes it difficult for a member to exercise the right to withdraw from the union. Respondent submits on brief that it cannot be found to have acted in bad faith for following an annual objection procedure that has been expressly approved the Office of General Counsel and

<sup>20</sup> It is noted that the Second Circuit in *Seidmann* on remand directed the district court to address the issue of the State law duty of fair representation claim.

the courts.<sup>21</sup> As found below, the burden on the Charging Parties of the annual renewal is, at best, insignificant. The annual renewal requirement does not make it difficult for a member to exercise the right to withdraw from the union. As noted above, the court in *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537, 1538 (D.C. Cir. 1994), in reviewing a Board order holding that a union breached its duty of fair representation by acting in bad faith, indicated:

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

The Charging Parties have not made such a showing. The Charging Parties’ claims regarding bad faith have no merit.

With respect to whether the annual renewal requirement for objectors is discriminatory, the Charging Parties argue that this is the situation in that members do not have to annually renew their membership or dues-checkoff authorizations. Respondent on brief submits that the duty of fair representation affords a union a wide range of reasonableness while it makes it clear that the right to resign is unfettered; that a claim of inconsistency is not sufficient to make out a breach of the duty of fair representation when dealing with different matters; that union membership/checkoff is not similarly situated to *Beck* objections when viewed “in light of the factual and legal landscape,” *Air Line Pilots v. O’Neill*, supra; that union membership is regulated by the Labor Management Reporting and Disclosure Act, which specifically forbids a union to summarily terminate an employee’s membership for any reason other than nonpayment of dues, 29 U.S.C. § 411(a)(5); that checkoff authorization cards are expressly regulated by Section 302(c)(5) of the Labor Management Relations Act, which specifically states the period for which a dues authorization may be treated as irrevocable, 29 U.S.C. § 186(c)(5); that “[t]he union chooses to do exactly what Congress permits in Section 302(c)(4),” transcript page 63; that *Beck* objections are regulated by the duty of fair representation, which has, so far, been interpreted to allow unions to handle objections on an annual basis; that the union’s conduct has been fully consistent with the governing law as articulated by the authorities responsible for enforcing it; that any “inconsistency” must, therefore, be attributed to the author-

<sup>21</sup> While the position of the General Counsel may not be binding on the Board, unless and until the Board finalizes its position with respect to the annual renewal requirement, the fact that the Board may not be bound by the position of the General Counsel in and of itself does not mean that a union acted in bad faith or arbitrarily.

itative articulations of the law and not to the union; that the union’s policies regarding checkoff authorization/membership versus nonmember objections are not inconsistent but are based on differences in the law and how these matters are regulated; and that the allegation of inconsistency is a red-herring and is not a basis to find a duty of fair representation breach. For the reasons given by Respondent, it has not been shown that Respondent’s annual renewal requirement of objector status is discriminatory under the duty of fair representation standard.

Before embarking on an analysis of whether the union’s annual renewal requirement for objections is arbitrary, in light of all that has gone before, it appears that it is advisable to reiterate this aspect of the duty of fair representation standard. As noted above, the United States Supreme Court in *Air Line Pilots Association, International v. O’Neill*, 499 U.S. 65, 67 (1991) indicated:

We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171 . . . (1967)—that a union breaches its duty of fair representation if its actions are either ‘arbitrary, discriminatory, or in bad faith’—applies to all union activity, including contract negotiation. We further hold that a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness.’ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 . . . (1953), as to be irrational. [Emphasis added.]]<sup>22</sup>

The Charging Parties argue that the union’s action requiring objectors to annually renew their objection is arbitrary since, as an administrative matter, it is easier for the union to accept one continuing objection and charge only reduced financial core fees than to send out multiple quarterly mailings and refund checks in exchange for an annual objection; that the arbitrary nature of the policy is made particularly apparent by the existence of a 30-day window period and the use of the employee’s hire date since, with respect to the former why couldn’t the window be 45, 60, 90, or 120 days, and, with respect to the latter, the different hire dates of each employee must surely be a burden on the union (as well as employees) to coordinate all of these disparate renewal dates; that the choice of the hire date is arbitrary; that the Board in *California Saw & Knife Works*, 320 NLRB 224 (1995), struck down a window period that limited employees’ objections to a single calendar month, regardless of when they resigned; and that the same rationale applies here. The Board at 236 in *California Saw & Knife Works*, indicated that it agreed with the allegation of General Counsel that the window period in that case violated the Act as applied sole-

<sup>22</sup> As noted above, the Supreme Court at 45 and 46 in *Marquez v. Screen Actors Guild, Inc.*, subsequently indicated:

[A] union’s actions breach the 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.’” 499 U.S. at 78 . . . (quoting *Ford Motor Co. v. Huffman*, supra at 338 . . .). This “wide range of reasonableness” gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.

This slight change in the language, which was previously utilized by the Court at one point in *Air Line Pilots*, does not alter the standard.

ly to employees who resigned their membership following the expiration of the window period in that proceeding. There is no such allegation in this proceeding. Indeed, there is no showing that this is the case in the instant proceeding. With respect to the remaining arguments of the Charging Parties on brief regarding whether the union's procedure is arbitrary, while the Charging Parties may think that there are better approaches, this amounts to nothing more than an attempt to substitute judgment and does not demonstrate that the union has acted arbitrarily, breaching of the duty of fair representation.

With respect to whether its actions are arbitrary, Respondent on brief submits that the Charging Parties' burden of sending a letter annually at a date that has been clearly identified is minimal, if not inconsequential; that the renewal date is linked to the employee's hiring anniversary date, which is a reasonable time-frame; that the annual renewal requirement has been upheld by several Federal courts thus precluding any finding of arbitrariness; that Respondent acted in reliance upon existing authority; that while General Counsel no longer adheres to its original and longstanding position approving a procedure requiring nonmembers to file new objections each year, Respondent's reliance on prior decisions and other precedent cannot be viewed as arbitrary conduct, at least not until the Board—as opposed to the General Counsel—has ruled on this issue; that by providing for an annual objection, the union's procedure gives the union reasonable assurance that only employees who object will be entitled to pay a reduced agency fee; that because annually Respondent sends out information such as audits and reports, the chargeable versus nonchargeable data changes each year, and the objector is giving up important rights, Respondent believes that it is appropriate to ask an objector to bear this in mind and annualize his or her objections; that the union provides advanced reduction payments on a quarterly basis to those objectors whose employers withhold the union security fee at the full amount of regular dues, and the renewal requirement provides some assurance to the union to be certain it is not paying amounts to persons who are no longer employed within covered bargaining units, whether such persons leave employment due to a plant closure, layoff, retirement, or resignation; that surely it is not irrational for the union to seek to avoid making advanced reduction payments to persons who no longer are subject to union security fee withholding; and that Respondent's annual renewal requirement is lawful since it serves legitimate purposes.

For the reasons given above, the Respondent has shown that it has legitimate justifications for its annual renewal requirement. As already noted, General Counsel agrees. With respect to the burden on the Charging Parties, the burden of an annual renewal requirement has been described as minimal, and as slight as in the cost of mailing a letter or postcard every year to the union and keeping themselves aware of when they have to do that.<sup>23</sup> The Seventh Circuit Court of Appeals at 1116 in

<sup>23</sup> The Charging Parties who testified herein indicate that they send their annual renewal notice to the union by certified mail. There is no requirement that the annual renewal be forwarded to the Union by certified mail. Indeed, such a requirement was found to be unlawful in *California Saw & Knife Works*. This approach is voluntary on the part

*Nielsen* in addressing the window period indicated that “[l]ife is full of deadlines and we see nothing particularly onerous about this one.” The only burden is for the objector to annually renew in writing his or her objection within a 30-day period which is linked to his or her hire date. If the objector does not annually renew his objector status there is a consequence. But technically the consequence is not part of the burden in that if the objector complies and submits to the union his annual objection, there is no consequence. The union controls the action which imposes the burden—the annual renewal requirement. The objector controls whether or not there is a consequence.

As noted above, the Charging Parties attorneys at one point in their brief indicate that, as an alternative to Respondent's procedure, the Union “could simply send a letter to the small number of objectors (estimated to be 300 by the union's witness, TR 64) asking them to verify their status as active workers instead of being ‘retired, resigned, or laid off,’” (Charging Parties' brief, pages 23 and 24) Apparently Charging Parties' attorneys do not view the physical writing of a letter or the physical filling out of a form by the Charging Parties and mailing it to the Union to be a burden since this is what they are recommending as an alternative. That being the case, apparently the Charging Parties' attorneys are arguing that the burden on the Charging Parties is limited to keeping track of their hire date and a 30-day period linked to the hire date. As one ages, one tends to want to forget his or her birth date, which at a certain stage of life is just a reminder of how old one is. But if one were to be rewarded monetarily for remembering the date, then there would be an incentive not to forget. All things considered, it is no real burden to remember one's hire date and a 30-day period linked to the hire date. The burden of writing and mailing a one-line note is insignificant. It has not been shown “in light of the factual and legal landscape at the time of the union's actions, [that] the union's behavior is so far outside a ‘wide range of reasonableness,’ Ford Motor Co. v. Huffman, 345 U.S. 330, 338 . . . (1953), as to be irrational. [Emphasis added.]

It has not been shown that Respondent in any way breached its duty of fair representation.<sup>24</sup>

of the Charging Parties. They did not show that there was any need for this approach.

<sup>24</sup> Although it is not a consideration in determining whether the union here breached its duty of fair representation, there are some practical problems with taking a continuing objection approach or variations thereof. One of the Charging Parties in one of the Administrative Law Judge decisions cited by the parties herein, *Auto Workers Local #376 (Colt's Mfg. Co.)*, Case 34-CB-2631, JD(NY)-06-08 (2008), wanted his objection to be valid for 3 years. Such an objection would not be an annual renewal or a continuing objection. If objectors can assert fixed periods for their objections, i.e., 2, 3, 4, or 5 years, or a number of months, or for the life of the current collective-bargaining agreement, it could become an administrative nightmare. Also, if objectors can have a continuing objection and if, as ruled by the Sixth Circuit regarding Michigan, unions are required to annually obtain consent from union members who do not object to political expenditures by the union, does this give rise to a disparity? Additionally, although it is not an issue here, the fact that a United States Circuit Court of Appeals, utilizing the First Amendment requires a union in a non-NLRA case to accept continuing objections does not, in my opinion, in and of itself mean that a

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union is acting arbitrarily when it continues its annual renewal requirement in NLRA situations where the duty of fair representation standard applies (instead of the First Amendment standard). The Federal courts which have ruled on annual renewal requirements indicate that the First Amendment standard is more rigorous (*Hudson's* requirements that the First Amendment infringement be minimized) than the duty of fair representation standard (that the action not be arbitrary, discriminatory or taken in bad faith). That being the case, in my opinion, the fact that a union might, after a court ruling, accept continuing objections under the RLA or in a public sector situation (both of which are subject to Constitutional limitations) while continuing to require annual renewal under the NLRA, which is not subject to review under the First Amendment, would not in and of itself justify a finding of a breach of the duty of fair representation. A number of Federal courts have ruled in favor of unions regarding annual renewal requirements. The First Amendment

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standard and the duty of fair representation standards differ. Unless and until this matter is resolved, any perceived inconsistency would not, in my opinion, justify a finding of a breach of the duty of fair representation standard. If a finding of arbitrary in a duty of fair representation case is based solely on the fact that the union also accepts continuing objections in a non-NLRA situation after a court ruled against the union on First Amendment grounds, then, in effect, the First Amendment is being utilized improperly to decide the NLRA case. As mentioned above, one should also consider in the mix the fact that unions, at least in one state (Michigan) of a United States Circuit Court of Appeals' jurisdiction, are required to obtain annually the authorization of members, who have dues deductions, to expend funds on political matters.