

No. 14-1185

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

LAURA SANDS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART
Supervisor Attorney

DOUG CALLAHAN
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2988

RICHARD F. GRIFFIN
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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

LAURA SANDS,)	
)	
Petitioner)	No. 14-1185
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case No.
Respondent.)	25-CB-08896
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties and Amici***: Laura Sands (“Sands”) has filed with the Court a petition for review and was also the charging party before the Board. United Food & Commercial Workers International Union, Local 700 (“the Union), was the respondent before the Board.

B. ***Ruling Under Review***: This case involves Sands’ petition for review of the Decision and Order of the Board, issued on September 10, 2014, and published at 361 NLRB No. 39, dismissing the complaint against the Union.

C. ***Related Cases***: The Board’s ruling under review has not previously been before this Court or any other Court. As explained in the Board’s brief, the Court

has ruled on related legal issues in *Abrams v. Communications Workers of America*¹ and *Penrod v. NLRB*.²

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1099 14th Street, N.W.

Washington, D.C. 20570

Dated at Washington, D.C.
this 17th day of April 2015

¹ 59 F.3d 1373 (D.C. Cir. 1995).

² 203 F.3d 41 (D.C. Cir. 2000).

GLOSSARY

1. ActThe National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
2. BoardThe National Labor Relations Board
3. Br.....Opening Brief of Petitioner Laura Sands
4. Sands.Petitioner Laura Sands, the charging party before the Board
5. Union.....United Food and Commercial Workers, International Union, Local 700, the respondent before the Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of Jurisdiction.....	1
Statement of the Issues Presented.....	2
Statement of the Case.....	3
Statement of the Facts.....	5
I. The Board’s Findings of Fact.....	5
A. The Parties and Their Collective-Bargaining Agreement	5
B. The Union Informs Sands of Her <i>Beck</i> rights; Sands Becomes a Member of the Union	6
C. Sands Optes Out of Union Membership and Becomes a <i>Beck</i> Objector.....	9
II. The Board’s Conclusions and Order.....	10
Summary of Argument.....	13
Standard of Review.....	16
Argument.....	17
The Board Reasonably Determined that the Union Did Not Violate Its Duty of Fair Representation by Providing Employee Laura Sands with Specific Payment Reduction Information Only Upon Her Electing To Become a Nonmember and File a <i>Beck</i> Objection	17
A. Applicable Principles Regarding Union-Security Clauses— <i>General</i> <i>Motors, Beck</i> , and the <i>California Saw</i> Framework.....	20
B. <i>Abrams</i> and <i>Penrod</i> Misinterpret Hudson as Requiring the Union To Provide Specific Reduced Fee Information at Step One and Should Be Reconsidered by the <i>En Banc</i> Court.....	24

TABLE OF CONTENTS

Headings – Cont’d

Page(s)

C. The Board Reasonably Determined that a Union Satisfies Its Duty of Fair Representation by Providing Specific Fee Reduction Information Only Upon Employees Exercising Their *Beck* rights31

D. Substantial Evidence Supports the Board’s Finding that Sands Was Not Impeded in Her Decision To Refrain from Supporting the Union by the Union’s Omission from the Initial *Beck* Notice of the Specific Reduction in Fees She Would Receive if She Were To Become a *Beck* Objector.....42

Conclusion43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Aboud v. Detroit Bd. of Ed.</i> , 431 U.S. 209 (1977).....	23, 26
* <i>Abrams v. Communications Workers of America and Penrod v. NLRB</i> , 203 F.3d 41 (D.C. Cir. 2000)	5, 11, 14, 24, 25, 26, 27, 28, 29, 31, 37
<i>Air Line Pilots Ass'n v. O'Neill</i> , 499 U.S. 65 (1991).....	18, 19
<i>Aka v. Washington Hosp. Ctr.</i> , 156 F.3d 1284 (D.C. Cir. 1998) (en banc).....	29
<i>Allentown Mack Sales & Serv. v. NLRB</i> , 522 U.S. 359 (1998).....	17
<i>Andrews v. Education Ass'n</i> , 829 F.2d 335 (2d Cir. 1987)	39
<i>Branch 6000, Nat. Ass'n of Letter Carriers v. NLRB</i> , 595 F.2d 808 (D.C. Cir. 1979)	18
<i>Breining v. Sheet Metal Workers</i> , 493 U.S. 67 (1989).....	18
* <i>California Saw & Knife Works</i> , 320 NLRB 224 (1995), <i>enforced sub nom. Machinists v. NLRB</i> , 133 F.3d 1012 (7th Cir. 1998)	4, 5, 10, 11, 13, 21, 22-40, 42
<i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	13, 16, 23

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
* <i>Chicago Teachers Union, Local No. 1 v. Hudson</i> , 475 U.S. 292 (1986).....	3, 11, 14, 23-31, 38
<i>Connecticut Limousine Service, Inc.</i> , 324 NLRB 633 (1997)	22
* <i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988).....	3, 6, 12, 13, 15, 21, 25, 27, 31, 32-34, 36, 39
<i>Dameron Hosp. Ass'n</i> , 331 NLRB 48 (2000)	22, 28
* <i>Dyncorp Support Services</i> , 327 NLRB 950 (1999), <i>enforced denied sub nom.</i> <i>Penrod v. NLRB</i> , 203 F.3d 41 (D.C. Cir. 2000)	3, 5, 10-12, 13, 24, 31
<i>Ferriso v. NLRB</i> , 125 F.3d 865 (D.C. Cir. 1997).....	35
<i>Finerty v. NLRB</i> , 113 F.3d 1288 (D.C. Cir. 1997).....	35
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953).....	18
<i>Gwirtz v. Ohio Educ. Ass'n</i> , 887 F.2d 678 (6th Cir. 1989)	39
<i>Hudson v. Chicago Teachers Union, Local No. 1</i> , 573 F. Supp. 1505 (N.D. Ill. 1983).....	27, 30
<i>Humphrey v. Moore</i> , 375 U.S. 335 (1964).....	33

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>ITT Indus., Inc. v. NLRB</i> , 251 F.3d 995 (D.C. Cir. 2001)	16
<i>Jibson v. Mich. Educ. Ass'n</i> , 30 F.3d 723 (6th Cir. 1994)	39
<i>Jones v. Trans World Airlines</i> , 495 F.2d 790 (2d Cir. 1974)	33
<i>KGW Radio</i> , 327 NLRB 474 (1999)	22
<i>Laborers Local 265</i> , 322 NLRB 294 (1996)	36
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992).....	16
* <i>Machinists v. NLRB</i> , 133 F.3d 1012 (7th Cir. 1998)	4, 5, 17, 23, 36-37
<i>Machinists v. Street</i> , 367 U.S. 740 (1961).....	23, 32-33
<i>Marquez v. Screen Actors Guild, Inc.</i> , 525 U.S. 33 (1998).....	18, 19
<i>N.Y., N.Y., LLC v. NLRB</i> , 313 F.3d 585 (D.C. Cir. 2002).....	16
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963).....	20, 21, 39
<i>NLRB v. United Food & Commercial Workers Union, Local 23</i> , 484 U.S. 112 (1987).....	16

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Northern Illinois Gas Co. v. United States</i> , 743 F.2d 539 (7th Cir. 1984)	39
* <i>Penrod v. NLRB</i> , 203 F.3d 41 (D.C. Cir. 2000)	3, 5, 11-14, 21-25, 28, 29
<i>Price v. UAW</i> , 927 F.2d 88 (2d Cir. 1991)	28
<i>Radio Officers' Union v. Labor Board</i> , 347 U.S. 17 (1954).....	20
<i>Railway Clerks v. Allen</i> , 373 U.S. 113 (1963).....	23
<i>Reading Anthracite Co.</i> , 326 NLRB No. 143 (1998)	19
<i>Scheffer v. Civil Serv. Emps. Ass'n, Local 828</i> , 610 F.3d 782 (2d Cir. 2010)	35, 41
<i>Seidemann v. Bowen</i> , 584 F.3d 104 (2d Cir. 2009)	36
<i>Teamsters Local 738 (E.J. Brach Corp.)</i> , 324 NLRB 1193 (1997)	21
<i>Teamsters Local Union No. 579 (Chambers & Owen, Inc.)</i> , 350 NLRB 1166 (2007)	22, 28
* <i>Thomas v. NLRB</i> , 213 F.3d 651 (D.C. Cir. 2000).....	16-19, 35
<i>Thomas v. United Parcel Serv., Inc.</i> , 890 F.2d 909 (7th Cir. 1989)	33

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Truck Drivers and Helpers, Local Union 568, Teamsters v. NLRB</i> , 379 F.2d 137 (D.C. Cir. 1967).....	18
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	17
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	12, 18
<i>Warehouse Union, Local 860, v. NLRB</i> , 652 F.2d 1022 (D.C. Cir. 1981).....	18

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

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	17, 18
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))	4, 10, 18, 19
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	20, 21, 32, 33
Section 10(a) (29 U.S.C. § 160(a))	1
Section 10(e) (29 U.S.C. § 160(e))	17
Section 10(f) (29 U.S.C. § 160(f))	2
29 U.S.C. §§ 401-531	40
29 U.S.C. § 431(b)	40, 41
Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983)	25, 30
 Rules:	
Rule 35(b) of the Federal Rules of Appellate Procedure	24
 Other Authorities:	
<i>Benefits of Retirees: Negotiation and the Duty of Fair Representation</i> , 21 J. Marshall L. Rev. 513 (1988)	33
68 Fed. Reg. 58374-01 (Oct. 9, 2003)	41

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1185

LAURA SANDS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Laura Sands for review of an Order of the Board dismissing an unfair-labor-practice complaint. The Board possessed jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”).¹ The Board’s Decision and

¹ 29 U.S.C. § 160(a).

Order, issued on September 10, 2014, and reported at 361 NLRB No. 39 (JA 78-95),² is a final order under Section 10(f) of the Act.³

The charging party before the Board, Laura Sands, petitioned for review of the Board's Order on September 23, 2014. The Court has jurisdiction over Sands' petition pursuant to Section 10(f) of the Act, which permits persons aggrieved by a Board order to petition for review in this court.⁴ The petition was timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

The ultimate issue is whether the Board reasonably determined that the Union did not violate its duty of fair representation when (1) it provided Employee Laura Sands with notice of her right to refrain from becoming a full union member and to object to paying for nonrepresentational union expenses and, (2) only after Sands elected to exercise those rights, advised her of the specific amount of reduced fees and dues she would be charged, absent a challenge to the union's calculation of its representational expenses.

The subsidiary issues on which the ultimate issue turns are:

² "JA" refers to the "Joint Appendix" filed by Petitioner Laura Sands; "Br." refers to Petitioner's Opening Brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

³ 29 U.S.C. § 160(f).

⁴ *Id.*

- 1) Whether this Court incorrectly held in *Abrams v. Communications Workers of America*⁵ and *Penrod v. NLRB*⁶ that the Supreme Court's decision in *Chicago Teachers Union, Local 1 v. Hudson*⁷ requires that unions include specific reduced-fee information in their initial notice to employees of their rights and obligations under a union security-clause.
- 2) Whether the Board reasonably interpreted the Act in determining that a union seeking to collect money pursuant to a union-security clause does not violate the duty of fair representation by providing an employee with specific payment reduction information only after the employee elects to become a nonmember and file an objection pursuant to *Communications Workers of America v. Beck*.⁸
- 3) Whether substantial evidence supports the Board's finding that Sands possessed all the information she needed to make an informed decision whether to file an objection pursuant to *Beck*.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice-charge filed by Petitioner Sands (JA 37), the Board's General Counsel issued a complaint against the Union alleging a

⁵ 59 F.3d 1373 (D.C. Cir. 1995).

⁶ 203 F.3d 41 (D.C. Cir. 2000).

⁷ 475 U.S. 292 (1986).

⁸ 487 U.S. 735 (1988).

violation of Section 8(b)(1)(A) of the Act.⁹ United Food & Commercial Workers International Union, Local 700 (the Union) had provided Sands, a new employee of Kroger grocery stores, with an initial notice of her rights and obligations under a union-security clause, including the right to refrain from joining the Union and, if she chose to remain a nonmember, the right to refuse to pay for any activities unrelated to the Union's fulfillment of its collective-bargaining obligations. The General Counsel alleged that the notice violated Section 8(b)(1)(A), however, because it did not "advise Sands of the percentage reduction in dues" that she would receive if she objected to paying for activities non-germane to collective bargaining. (JA 38-40.) The General Counsel, Union, and Sands jointly agreed to waive their right to a hearing and submitted a joint stipulation of facts to an administrative law judge. (JA 11-50.) On March 7, 2008, the judge issued his decision and recommended order, in which the judge reasoned that he was bound by extant Board case law and that such case law required that he dismiss the complaint. (JA 92-95.)¹⁰ The General Counsel and Sands both filed exceptions to the judge's decision. (JA 51-68.)

On September 10, 2014, the Board issued its Decision and Order. (JA 79-95.) While acknowledging that this Court's decisions in *Abrams v.*

⁹ 29 U.S.C. § 158(b)(1)(A).

¹⁰ See JA 93 (citing *California Saw & Knife Works*, 320 NLRB 224, 229-30 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998)).

*Communications Workers of America*¹¹ and *Penrod v. NLRB*¹² would require reversal of the administrative law judge, the Board explained the basis for its respectful disagreement with the Court's reasoning in those cases and reaffirmed its own previous holdings in *California Saw & Knife Works*¹³ and *Dyncorp Support Services (Penrod)*.¹⁴ (JA 81-84.) Consistent with those prior decisions, the Board affirmed the judge's findings and dismissed the complaint. (JA 87.)

As discussed below (pp. 24-31), the Board acknowledges that its decision conflicts with *Abrams* and *Penrod* and has concurrently filed a petition for hearing *en banc* requesting that the Court reconsider those decisions.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Parties and Their Collective-Bargaining Agreement

The Union serves as the exclusive bargaining representative of the employees at the Crawfordsville, Indiana, facility of Kroger Limited Partnership ("Kroger"), a retail grocery chain. (JA 79, 92; JA 12, 47-48.) Kroger hired Sands on December 10, 2004. (JA 79, 92; JA 48.) At the time, the Union and Kroger

¹¹ 59 F.3d 1373 (D.C. Cir. 1995).

¹² 203 F.3d 41 (D.C. Cir. 2000), *granting petition for review, Dyncorp Support Services*, 327 NLRB 950 (1999).

¹³ 320 NLRB 224 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

¹⁴ 327 NLRB 950 (1999), *petition for review granted sub nom. Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

had a collective-bargaining agreement that included a valid union-security clause. (JA 79, 92; JA 11-14, 48.) Under that clause, every employee represented by the Union was required to either (1) maintain Union membership and pay the associated dues and fees, or (2) pay an agency fee to the Union. (JA 79, 92; JA 12-13, 48.) With the employees' consent, Kroger would automatically deduct the appropriate amount from employees' paychecks and transfer it to the Union. (JA 79 n.1, 92; JA 13.)

B. The Union Informs Sands of Her *Beck* Rights; Sands Becomes a Member of the Union

Upon being hired, Sands automatically became part of the bargaining unit represented by the Union and came under the coverage of the collective-bargaining agreement negotiated by the Union. (JA 79 n.1, 92; JA 12.) As a result, Sands received the wages and benefits provided for in the negotiated collective-bargaining agreement but was also subject to the collective-bargaining agreement's union-security clause. (JA 79 n.1, 92; JA 12, 47.)

Prior to collecting any money from Sands, the Union sent her a letter on January 11, 2005, advising her of her rights under *Communications Workers of America v. Beck*,¹⁵ the Supreme Court case which established employees' rights under a union-security clause to refrain from union membership and pay a reduced agency fee to the union. (JA 79, 92-93; JA 15-18, 48-49.) In this "initial *Beck*

¹⁵ 487 U.S. 735 (1988).

notice,” the Union notified Sands that she was working under a union-security clause and informed her of her right to be and remain a non-member of the Union and to object to paying any dues or fees not germane to the Union’s duties as the exclusive collective-bargaining representative. The initial *Beck* notice additionally identified the privileges that Sands would forfeit if she were to choose to remain a non-member. The notice stated:

Important Information Concerning Your Opportunity to Become an Active Member of the United Food and Commercial Workers International Union, AFL–CIO, CLC, Local 700 and Your Rights Under the Law.

The right, by law, to belong to the Union and to participate in its affairs is a very important right. Currently, you also have the right to refrain from becoming a member of the Union. If you choose this option, you may elect to satisfy requirements of a contractual union security provision by paying the equivalent of an initiation fee and monthly dues to the Union. In addition, non-members who object to payment in full of the equivalent of dues and fees may file written objections to funding expenditures that are not germane to the Union’s duties as your agent for collective bargaining. If you choose to be an objector, your financial obligation will be reduced very slightly. Individuals who choose to file such objections should advise the Union in writing at its business address of this choice. The Union will then advise you of the amounts which you must pay and how these amounts are calculated, as well as any procedures we have for challenging our computations.

Please be advised that non-member status constitutes a full waiver of the rights and benefits of UFCW membership. More specifically, this means that you would not be allowed to vote on contract

modifications or new contracts; would be ineligible to hold union office or participate in union elections and all other rights, privileges, and benefits established for and provided to active UFCW members by the UFCW International Constitution, Local 700 Bylaws, or established by the local Union.

We are confident that after considering your options, you will conclude that the right to participate in the decision making process of your Union is of vital importance to you, your family and your co-workers, and you will complete your application for membership in the United Food and Commercial Workers.

Your involvement in your union is vital to the protection of job security, wages, benefits, and working conditions.

(JA 79-80, 92-93; JA 21, 48-49) (boldface in original.) Enclosed with the letter were a copy of the union-security clause, a union membership application form, and a check-off authorization for the employer to make appropriate deductions from the employee's wages. (JA 79 n.1, 92; JA 16-17.)

Two weeks later, Sands received a second letter from the Union. (JA 80, 93; JA 19-21, 49-50.) The letter stated the dues required to become a full member of the Union—*viz.*, \$25.39/month, as well as a one-time initiation fee of \$66. (JA 80, 93; JA 19.) Enclosed with the letter was another union membership application form, along with a second copy of the *Beck* notice reproduced above. (JA 80, 93; JA 20-21.)

After receiving the second letter, Sands filled out and submitted a membership application, which the Union accepted. (JA 79 n.1, 80, 93; JA 50.) For the next five months, Sands maintained membership in the Union, and union dues of \$25.39/month were automatically deducted from her paycheck. (JA 79 n.1, 92-93; JA 13, 50.)

C. Sands Opts Out of Union Membership and Becomes a *Beck* Objector

On June 25, 2005, Sands decided to both opt out of union membership and also become a *Beck* objector. (JA 80, 93; JA 22, 50.) Sands sent a letter to the Union on that date, resigning from the Union, exercising her *Beck* rights, and providing her specific reasons for doing so. (JA 80, 93; JA 22, 50.) Within four days, the Union responded to Sands' request via letter. (JA 80, 93; JA 23-36, 50.) The Union stated that independent auditors had reviewed the Union's allocation of chargeable vs. non-chargeable expenses and determined that 86.07% of the Union's expenses were chargeable; Sands' agency fee would accordingly be reduced to 86.07% of the full amount of union dues (*viz.*, \$21.84). (JA 80, 93; JA 23.) In support of this figure, the Union included portions of the auditors' report, in which the Union's expenses were broken down by category and by their chargeable vs. non-chargeable nature. (JA 80, 93; JA 24-34.) The Union additionally informed Sands that she could challenge the Union's calculation of

these figures, and an explanation of the procedure for challenging those calculations was included. (JA 80, 93; JA 23, 35-36.)

The agency fee deducted from Sands' paycheck was subsequently reduced to \$21.84/month. (JA 80, 93; JA 23, 50.) Although the Union had advised Sands of her right under the law to challenge the Union's calculation of her reduced fee, Sands did not avail herself of that opportunity. (JA 80, 93; JA 50.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 10, 2014, the Board (Chairman Pearce and Members Schiffer and Hirozawa; Members Johnson and Miscimarra dissenting) issued a Decision and Order, agreeing with the administrative law judge that the Union had not violated Section 8(b)(1)(A) of the Act and that the complaint should be dismissed. (JA 79-95.) The Board noted that it had previously decided the same issue—namely, whether a union violates Section 8(b)(1)(A) by not including in its initial notice of the employee's right to refrain from union membership and to object to being charged for a union's nonrepresentational expenses, a statement of the specific amount of reduced fees and dues that would apply if the employee exercised those rights. In both *California Saw* and *Dyncorp (Penrod)*, the Board had ruled that although a union must provide specific details of the reduced fees and dues to actual *Beck* objectors, it need not provide such information to

employees who have yet to voice any opposition to paying the full amount of union dues. (JA 79, 84.)¹⁶

Acknowledging that these holdings stood in conflict with the Court's precedents in *Abrams* and *Penrod*, the Board expressed its respectful disagreement with the conclusion of the panel majorities in those cases that the Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*¹⁷ compelled the conclusion that unions were required to include specific reduced fee and dues information in their initial *Beck* notices. (JA 81-83.) The Board pointed out that *Hudson* did not address, let alone determine, the rights of employees like Sands who have yet to express any opposition to paying the full amount of union dues, and thus did not resolve the question presented in this case; rather, *Hudson* concerned a union's dealings with employees who already had the status of objectors. (JA 81-82.)

In so reasoning, the Board took note of the statement in *Hudson* that "basic considerations of fairness" required that nonmembers have "sufficient information to gauge the propriety of the union's fee." The Board explained that *Hudson* made that statement in the context of a complaint by employees who already had elected objector status and who were seeking to learn the basis for the reduced fees that were being deducted from their wages. (JA 81-82.) That reasoning, the Board

¹⁶ See JA 84 (citing *California Saw and Dyncorp (Penrod)*).

¹⁷ 475 U.S. 292 (1986) (hereinafter "*Hudson*").

found, does not apply to “employees who have not yet chosen to become nonmembers, who are not yet paying any dues, and who have never voiced any objection to paying full dues.” (JA 82.) The Board accordingly concluded that its decision in *Dyncorp (Penrod)* controlled the case before it. (JA 83.)

Nevertheless, the Board went on to “independently consider[] the balance struck . . . in *Dyncorp*.” (JA 84.) Evaluating the Union’s actions according to the duty of fair representation owed to the employees it represents, the Board queried whether the Union’s treatment of Sands had been “arbitrary, discriminatory, or undertaken in bad faith.” (JA 84.)¹⁸ The Board answered this question in the negative, after weighing the respective burdens upon the individual and collective interests involved. With regard to the individual interests at stake, the Board observed that the Supreme Court’s decision in *Beck* is “grounded in the notion that an employee deciding whether to object is deciding whether her political beliefs are compromised by paying full fees and dues to the union.” (JA 85.) Thus, while employees may generally prefer to have more rather than less information when making their decision, the specific amount by which their agency fee will be reduced represents an economic concern remote from the principle of freedom of expression that animates *Beck*. (JA 85.) With regard to the collective interests at stake, the Board took note of the many unions that are currently spared the need to

¹⁸ See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

undertake a *Beck* accounting, because they have no *Beck* objectors. (JA 86-87.) In order to comply with the rule proposed by the General Counsel, these unions would have to either incur the unnecessary cost of an “expensive and time-consuming” *Beck* accounting or waive their right to all or part of the fees to which they are entitled. (JA 84, 86-87.)

Weighing the collective economic interest in husbanding the union’s resources against the individual’s economic interest in knowing ahead of time the precise amount she would save by filing a *Beck* objection, the Board concluded that a union does not act discriminatorily, arbitrarily, or in bad faith when it decides to wait until an employee files a *Beck* objection before informing her of the amount that she will save thereby. (JA 87.) Having reaffirmed its holdings in *California Saw* and *Dyncorp (Penrod)*, the Board adopted the judge’s recommended order and dismissed the complaint. (JA 87.)

SUMMARY OF ARGUMENT

Contrary to *Sands*, the question before the Board was not whether it was possible for the Union to provide specific reduced agency-fee information to *Sands* earlier nor whether some employees would prefer to have that information earlier; the question was whether a union violates its duty of fair representation and acts arbitrarily by providing an employee with that information only after the employee has actually exercised her *Beck* rights. Given the *Chevron* deference owed this

determination, the Board's Order should be affirmed and the unfair-labor-practice complaint against the Union dismissed.

As a threshold matter, the Board acknowledges that its holding in this case conflicts with the Court's decisions in *Abrams* and *Penrod*. In those decisions, the Court held that the Supreme Court in *Hudson* had already determined that reduced payment information must be given to employees in their initial *Beck* notice. The Board contends that *Abrams* and *Penrod* misread *Hudson*. All of the plaintiffs before the *Hudson* Court had already chosen not to pay union dues; their grievance was that the union was nonetheless collecting reduced fees from them without ever having provided them with any information about how that reduced fee was calculated. *Abrams* and *Penrod* thus wrongly interpreted *Hudson* as extending to employees who have yet to decide whether to pay the full amount of union dues—a category of employees whose rights the Supreme Court had neither the opportunity nor the need to determine. Thus, concurrently with the filing of this brief, the Board has filed a petition for hearing *en banc*, requesting that the Court correct this misreading of Supreme Court precedent.

In the present case, the Board undertook to reconsider whether the duty of fair representation requires that an initial *Beck* notice include the specific amount of money a *Beck* objector would save. Because the Act is silent about this issue,

the Board carefully considered the different interests involved in order to decide which rule would best serve the policies of the Act.

The Board explained that, although some employees might prefer to have such reduced fee information before they exercise their *Beck* rights, that information is not necessary for them to decide intelligently whether to support the union's political and ideological activities and is remote from the concerns that motivated the Supreme Court in *Beck*. The instant case was illustrative, as the record did not indicate that the lack of such information affected Sands' exercise of her *Beck* rights.

On the other hand, the need to provide that information would impose significant costs on many unions, which will either be forced to undertake an unnecessary *Beck* accounting or to forego agency-fee funds to which they are entitled. Weighing these potentially significant costs to unions against the marginal benefit to employees, the Board reasonably concluded that a union does not act "arbitrarily" (1) by providing employees with an initial notice of their basic right to refrain from union membership and to object to being charged for the nonrepresentational expenses of their union representative and (2) by providing notice of the specific amount that dues and fees would be reduced only to those employees who exercise their right to become nonmember *Beck* objectors. This reasonable construction of the Act should be affirmed.

STANDARD OF REVIEW

When the Board interprets an ambiguous or silent provision of the Act, “the NLRB is entitled to judicial deference.”¹⁹ The Act is silent concerning the processes a union must follow under *Beck* when collecting money pursuant to a negotiated union-security clause. Accordingly, the Board’s interpretation of the Act in this regard is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰ and will be upheld “as long as its interpretation is rational and consistent with the statute.”²¹ The Court does not defer to the Board’s interpretation of Supreme Court precedent.²²

In words that have received this Court’s approval,²³ the Seventh Circuit states the strong case for deference to the Board’s determinations in this particular area of labor relations:

[The Act] says nothing about agency fees and so provides no guidance to the formulation of rules governing them. . . . All the details necessary to make the rule of *Beck* operational were left to the Board, subject to the very light review authorized by *Chevron*. It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court

¹⁹ *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001) (quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

²⁰ 467 U.S. 837, 842-43 (1984).

²¹ *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (quoting *Chevron*, 467 U.S. at 843).

²² *N.Y., N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

²³ *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000).

of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees.²⁴

The Court additionally affords special deference to decisions by the Board interpreting a union's duty of fair representation, given that the Board itself "reviews the [u]nion's actions with deference."²⁵ Although this nested deference "does not mean that [the Court's] review is toothless," it does mean that the Court "must be very cautious in entertaining an invitation to reverse the Board."²⁶

Finally, the Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.²⁷

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT THE UNION DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION BY PROVIDING EMPLOYEE LAURA SANDS WITH SPECIFIC PAYMENT REDUCTION INFORMATION ONLY UPON HER ELECTING TO BECOME A NONMEMBER AND FILE A *BECK* OBJECTION

Section 7 of the Act guarantees employees "the right to . . . form, join, or assist labor organizations" as well as the right to "to refrain from any or all of such

²⁴ *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

²⁵ *Thomas*, 213 F.3d at 657.

²⁶ *Id.*

²⁷ 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *See also Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 366-67 (1998) (stating that a Board finding is supported by substantial evidence if "on this record it would have been possible for a reasonable jury to reach the Board's conclusion").

activities.”²⁸ Section 8(b)(1)(A) of the statute implements this guarantee against unions by making it an unfair labor practice for a union to “restrain or coerce” employees in the exercise of their Section 7 rights.²⁹ A violation of a union’s duty of fair representation constitutes a violation of Section 8(b)(1)(A).³⁰

The duty of fair representation, which derives from a union’s status under Section 9(a) of the Act as exclusive bargaining representative, requires a union “to represent all employees in the bargaining unit fairly.”³¹ This duty “applies to all union activity”³² and prohibits conduct toward represented employees that “is ‘arbitrary, discriminatory, or in bad faith.’”³³ Provided a union does not act discriminatorily or in bad faith, the duty of fair representation provides unions great leeway in balancing the collective interests of the union against the individual interests of the employees it represents.³⁴ When “considering [duty of fair representation] complaints that are premised on assertions of arbitrary action, the

²⁸ 29 U.S.C. § 157.

²⁹ *Id.* § 158(b)(1)(A).

³⁰ *See, e.g., Warehouse Union, Local 860, v. NLRB*, 652 F.2d 1022, 1024-25 (D.C. Cir. 1981); *Branch 6000, Nat. Ass’n of Letter Carriers v. NLRB*, 595 F.2d 808, 811-13 & n.13 (D.C. Cir. 1979); *Truck Drivers and Helpers, Local Union 568, Teamsters v. NLRB*, 379 F.2d 137, 141-42 (D.C. Cir. 1967).

³¹ *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953)).

³² *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991).

³³ *Thomas v. NLRB*, 213 F.3d 651, 656 (D.C. Cir. 2000) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

³⁴ *See Breininger v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989) (“Most fair representation cases require great sensitivity to the tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals.”).

courts and the Board accord deference to a union, finding a [duty of fair representation] breach only if the union's action can be fairly characterized as so far outside a wide range of reasonableness that it is entirely irrational.”³⁵ To fulfill its duty, a union need not “prove ‘that the choices it makes are better or more logical than other possibilities,’ but, instead, that the union ‘act[s] on the basis of relevant considerations,’ not arbitrary ones.”³⁶

Here, the Board determined that the Union did not violate its duty of fair representation—and, accordingly, did not violate Section 8(b)(1)(A) of the Act—by not providing Sands with specific reduced fee information in its initial *Beck* notice. As explained below, the Supreme Court's decision in *Hudson* did not address, let alone determine, the information that must be given to employees who have yet to express any opposition to paying the full amount of union dues. This issue was therefore left to the Board's determination under the Act. Weighing the burden on a union of providing such information against an employee's interest in having it, the Board concluded that a union's decision to wait until an employee actually exercises her *Beck* rights cannot be fairly characterized as “arbitrary.”

³⁵ *Thomas*, 213 F.3d at 656-57 (quoting *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)) (internal quotation marks omitted).

³⁶ *Id.* at 656 (quoting *Reading Anthracite Co.*, 326 NLRB No. 143 (1998)). See also *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998) (stating that the union must have “room to make discretionary decisions and choices, even if those judgments are ultimately wrong”).

Because the Board's determination is consistent with the Act, it should be affirmed, and the complaint against the Union should be dismissed.

A. Applicable Principles Regarding Union-Security Clauses—*General Motors, Beck, and the California Saw Framework*

When Congress passed the Taft-Hartley amendments to the Act in 1947, Congress authorized unions to negotiate union-security clauses that make the payment of union dues a condition of employment. “Congress recognized the validity of unions’ concern about ‘free riders,’ i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union.”³⁷ Accordingly, Congress deliberately retained language in Section 8(a)(3) that “gave unions the power to contract to meet that problem.”³⁸

Section 8(a)(3) restricts the scope of such union-security clauses, however, as the Supreme Court determined in two subsequent decisions. In *NLRB v. General Motors Corp.*, the Court held that a union enforcing a union-security clause can only require from employees the “financial core” of union membership,

³⁷ *NLRB v. General Motors Corp.*, 373 U.S. 734, 742-43 (1963) (quoting *Radio Officers’ Union v. Labor Board*, 347 U.S. 17, 41 (1954)).

³⁸ *Id.* See 29 U.S.C. § 158(a)(3) (“[N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.”).

i.e., the payment of fees and dues to the union.³⁹ In *Beck*, the Supreme Court went further, holding that Section 8(a)(3) of the Act does not permit unions to collect and expend funds over the objections of its nonmembers if those funds are used for purposes besides collective bargaining, contract administration, and grievance adjustment.⁴⁰

In *California Saw & Knife Works*, the Board established a framework to integrate the teaching of *General Motors* and *Beck* with the duty of fair representation that a union owes its members.⁴¹ As Judge Tatel has explained, the Board, in particular, sought “[t]o protect employees’ *Beck* rights” by “craft[ing] a three-step process, calibrating the nature and amount of information that unions must give employees to the decision they must make at each stage.”⁴²

At stage 1 of the *California Saw* framework, prior to collecting any money from employees subject to the union-security clause, the union must give the employees an “initial *Beck* notice.”⁴³ As part of that notice, the union must inform the employees of their rights under *General Motors* and *Beck*. These rights include

³⁹ 373 U.S. at 742. *See also id.* (“It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues.”).

⁴⁰ *Beck*, 487 U.S. at 745.

⁴¹ 320 NLRB 224 (1995).

⁴² *Penrod*, 203 F.3d at 49-50 (Tatel, J., concurring) (discussing Board’s *California Saw* framework).

⁴³ *See, e.g., Teamsters Local 738 (E.J. Brach Corp.)*, 324 NLRB 1193, 1193-94 (1997).

the right to remain a nonmember of the union; the right as a nonmember to object to paying for union activities not germane to the union's duties as bargaining agent; the right to receive a corresponding reduction in monies owed; and the right to be informed of any procedure for challenging the union's computation of the reduced fee.⁴⁴ At stage 2, if an employee should choose both to remain a nonmember and file an objection, the union must inform the "*Beck* objector" of the specific amount by which her dues will be reduced; the basis for the union's calculations of that reduction, including the major categories of union expenditures; and the right to challenge those calculations.⁴⁵ At stage 3, if an objector exercises her right to challenge the union's calculation, the "challenger" is entitled to information that will "establish finally and definitively, with facts and figures, that [the union's] expenditures are chargeable to the degree asserted."⁴⁶

As Judge Tatel observed in *Penrod*, by "[b]alancing employees' need for information against the burden on unions of providing the information, this process reflects the Board's application of the duty of fair representation in the *Beck*

⁴⁴ *California Saw*, 320 NLRB at 231.

⁴⁵ *See KGW Radio*, 327 NLRB 474, 476 (1999) (citing *California Saw*, 320 NLRB at 233, 239). *See also Teamsters Local Union No. 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166, 1167 n.6 (2007) (defining "objectors" and "challengers").

⁴⁶ *Dameron Hosp. Ass'n*, 331 NLRB 48, 51 n.10 (2000). *See also Connecticut Limousine Service, Inc.*, 324 NLRB 633, 634-35 (1997); *California Saw*, 320 NLRB at 242-43.

context.”⁴⁷ The process is also generally consistent with the Supreme Court’s agency-fee jurisprudence in the public sector and under the Railway Labor Act, according to which the initial burden rests upon the employee to express her dissent,⁴⁸ whereupon the burden shifts to the union to support its calculations.⁴⁹

The Seventh Circuit enforced the Board’s order in *California Saw*.

Observing that the Act contains no “directive language” regarding the collection of agency fees, the court accorded the Board deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵⁰ and held that *California Saw* was consistent with the Act and constituted a reasonable exercise of the Board’s discretion.⁵¹

⁴⁷ *Penrod*, 203 F.3d at 50 (Tatel, J., concurring). See also *California Saw*, 320 NLRB at 230 (“We are mindful of the tension between individual, collective, and public policy interests that lies at the core of the duty of fair representation. What is required here is a careful balance between the competing interests involved.”), enforced *sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

⁴⁸ See *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 n.16 (1986) (“[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.”) (quoting *Machinists v. Street*, 367 U.S. 740, 774 (1961)). See also *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 238 (1977); *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963).

⁴⁹ See *Abood*, 431 U.S. at 239-40 (quoting *Allen*, 373 U.S. at 122).

⁵⁰ 467 U.S. 837, 842-43 (1984).

⁵¹ *Machinists v. NLRB*, 133 F.3d 1012, 1015, 1019 (7th Cir. 1998) (“[W]e cannot say that the Board, balancing the needs of the union against the interests of workers wishing to exercise their rights under *Beck*, acted unreasonably.”)

B. *Abrams* and *Penrod* Misinterpret *Hudson* As Requiring the Union to Provide Specific Reduced Fee Information at Step One and Should Be Reconsidered by the *En Banc* Court

In its Decision and Order, the Board reaffirmed its holdings in *California Saw* and *Dyncorp (Penrod)* that a union does not violate its duty of fair representation by waiting until an employee chooses to become a nonmember and files a *Beck* objection before providing her with the specific amount by which her dues and fees will be reduced. The Board recognized that this ruling conflicts with the Court's decisions in *Abrams* and *Penrod* and acknowledged that, pursuant to the law-of-the-circuit doctrine, "a three-member panel of that court will, if this case comes before it, be constrained to apply *Abrams* and *Penrod* as they stand." (JA 79, 84.)

Accordingly, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the Board has filed a Petition for Hearing *En Banc* concurrently with the filing of the instant brief. In that Petition, the Board requests that the Court hear this case *en banc* to reconsider *Abrams* and *Penrod*, which misapply Supreme Court precedent and were wrongly decided.

As the Board here explained (JA 81-83), *Abrams* and *Penrod* misinterpreted the Supreme Court's decision in *Hudson*, which issued years before *Beck* and *California Saw*. *Hudson* addressed the rights of employees who had already elected not to become union members and, as a result, could only be required

under Illinois law to pay their proportionate share of the union's expenses for collective bargaining and contract administration.⁵² In other words, as the Board recognized (JA 82), the effect of the state statute was to give these employees a status tantamount to that of *Beck* objectors at step two of the *California Saw* framework. For years, the union representing these nonmembers had made no attempt to collect fees from them. But then, in a change of policy, the union negotiated a collective bargaining agreement that permitted the deduction from nonmembers' paychecks of the cost to the union of representing them in collective bargaining, which the union claimed to be 95% of full union dues. The Union began collecting fees from the nonmembers without ever having provided any explanation of the basis for its claim that 95% of full union dues were owed. Seven of those nonmembers who had previously elected not to pay any dues or fees sued the union, alleging that the union's dues-collection process violated the First and Fourteenth Amendments.⁵³ The Supreme Court agreed, finding, among other violations, that the union had failed to provide the plaintiffs with "sufficient information to gauge the propriety of the union's fee."⁵⁴

As the Board correctly recognized (JA 81-82), *Hudson* did not address the question presented in *Abrams*, *Penrod*, and here of what information employees

⁵² *Hudson*, 475 U.S. at 295 n.1 (citing Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983))

⁵³ *Hudson*, 475 U.S. at 297-98.

⁵⁴ *Id.* at 306.

have a right to receive prior to expressing their opposition to paying the full amount of union dues; rather, *Hudson* addressed and answered only the question of what information is owed by a union to nonmembers who have already chosen not to pay union dues. Each of the seven plaintiffs before the *Hudson* Court had already made the choice, prior to any attempt by the union to collect reduced fees, not to pay union dues and not to become a member of the union. And in the relevant portion of its opinion, the *Hudson* Court made clear that its holding was intended to adjudicate the rights of “nonmembers” and “nonunion employees” to be informed of the basis for the union’s fee calculation.⁵⁵

Nevertheless, *Abrams*, which, like *Hudson*, issued before *California Saw*, concluded that the specific holding in *Hudson* applies to all employees subject to a union-security clause, including those employees who have yet to express any opposition to paying the full amount of union dues. *Abrams* anchored its decision in an interpretation of the phrase “potential objectors.” According to *Abrams*, when *Hudson* stated that “potential objectors [must] be given sufficient

⁵⁵ *Hudson*, 475 U.S. at 306. As the Court explained, “the [union’s] ‘advance reduction of dues’ was inadequate because it provided *nonmembers* with inadequate information about the basis for the proportionate share. . . . Leaving the *nonunion employees* in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in [*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)]. In this case, the original information given to the *nonunion employees* was inadequate.” *Id.* (emphasis added). In context, those terms clearly referenced employees who had already opted not to pay union dues.

information to gauge the propriety of the union’s fees,” it intended to refer to potential *Beck* objectors; and since every bargaining unit employee is a potential *Beck* objector, the *Abrams* Court concluded that *Hudson* applies to every bargaining unit employee.⁵⁶ On this basis alone, *Abrams* rejected Judge Tatel’s more narrow construction of *Hudson*, which is consistent with the Board’s *California Saw* framework.⁵⁷

A misunderstanding of the terminology used by the Court in *Hudson* explains why *Abrams* arrived at this incorrect conclusion. As the Board explained (JA 82), the complaining employees in *Hudson* had already opted out of paying full union dues, but they still retained the right to further file an “objection” to the union’s calculations of the ratio of chargeable vs. non-chargeable expenses⁵⁸; the Supreme Court therefore referred to these employees as “potential objectors.”

Under the *California Saw* framework for implementing *Beck* rights, by contrast, the Board uses the term “objectors” to refer to employees who merely oppose paying for union expenses unrelated to core collective-bargaining activities. If objectors subsequently seek to challenge a union’s calculations of the

⁵⁶ *Abrams*, 59 F.3d at 1379 & n.6 (citing *Hudson*, 475 U.S. at 306).

⁵⁷ *Id.* at 1379 n.6 (“The dissent takes issue with our interpretation of *Hudson* but the quoted language makes clear that *potential* objectors must be given adequate notice.”) (emphasis in original).

⁵⁸ Plaintiff Annie Lee Hudson was the only plaintiff who took the additional step of objecting to the union’s calculations. See *Hudson v. Chicago Teachers Union, Local No. 1*, 573 F. Supp. 1505, 1509-11 (N.D. Ill. 1983).

chargeable vs. non-chargeable ratio, the Board terms them “challengers.”⁵⁹ Thus, applying the *California Saw* framework to *Hudson*, the *Hudson* plaintiffs were objectors who also were “potential challengers,” not “potential objectors.”

Regardless of terminology, however, it is perfectly clear that *Hudson* did not address the rights of employees at stage one of *California Saw*. The right to specific payment reduction information established in *Hudson* was a right afforded only to nonmembers who had already asserted their right to reduced fees and who were seeking to assess the accuracy of the union’s claim that they owed 95% of full union dues.

Abrams failed to observe this distinction, however, and directly applied the holding in *Hudson* to potential *Beck* objectors, *viz.*, all employees, regardless whether they have expressed any opposition to paying the full amount of union dues. In doing so, *Abrams* “applied *Hudson* to an issue *Hudson* did not consider,”

⁵⁹ See *Teamsters Local Union No. 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166, 1167 n.6 (2007) (defining “objectors” and “challengers”); *Dameron Hosp. Ass’n*, 331 NLRB 48, 51 n.1 (2000) (“Although the judge referred to ‘objections’ and ‘challenges’ inter-changeably in his decision, these terms designate distinct phases in the process by which a nonmember unit employee opposes paying dues and fees required under an applicable union-security clause.”). See also, *e.g.*, *Price v. UAW*, 927 F.2d 88, 94 (2d Cir. 1991) (“Under the post-*Beck* procedures implemented by the Union, any *objector* need not accept the Union’s [calculation of its chargeable vs. non-chargeable ratio] but may *challenge* it in arbitration.”) (emphasis added); *California Saw*, 320 NLRB at 233 (similar distinction between “the right to object” and “the right to challenge”).

as Judge Tatel explained in his dissent⁶⁰; it also ignored the context of the Supreme Court's use of the phrase "potential objectors," which made clear that the Court was referring only to nonmembers who had already expressed their desire to not pay any union dues.⁶¹

Penrod subsequently relied on *Abrams* in deciding the same issue presented in the instant case. While recognizing that *Hudson* concerned employees who had already chosen not to pay any union dues, the *Penrod* Court understood itself obligated to follow *Abrams* under the law-of-the-circuit doctrine.⁶² *Penrod* accordingly applied *Abrams* and granted the petition for review. In his concurrence, Judge Tatel stated his continued belief that *Abrams* had been wrongly decided. According to Judge Tatel, *Abrams* "produced a result that [it is dubious] *Hudson* intended" and "commandeer[ed] a judgment that should have been left to the Board's expertise."⁶³

In her opening brief, Petitioner Sands (Br. 24) attempts to defend *Abrams*' reading of *Hudson* by contending that, when they filed suit, three of the plaintiffs

⁶⁰ See *Abrams*, 59 F.3d at 1384 (Tatel, J., dissenting). See also *Penrod*, 203 F.3d at 49-50 (Tatel, J., concurring).

⁶¹ See *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291 (D.C. Cir.1998) (en banc) ("The [Supreme] Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intent and with other language in the same opinion.").

⁶² *Penrod*, 203 F.3d at 47-48.

⁶³ *Penrod*, 203 F.3d at 50 (Tatel, J., concurring).

in *Hudson* had not yet objected to paying the full amount of union dues; therefore, argues Sands, *Hudson* should be read as also applying to employees who have yet to object to paying the full amount of union dues. Sands' argument fails because all of the plaintiffs were nonmembers, and under Illinois law, declining to join the union was tantamount to objecting to payment of full union dues. Illinois law did not entitle the union to collect the full amount of union dues from any nonmember.⁶⁴ Thus, simply by declining to join the union, all seven plaintiffs had acted to prevent the union from collecting the full amount of union dues from them. The failure of three of the plaintiffs to additionally send letters of protest to the union (Br. 24) was therefore irrelevant as a matter of law and did not distinguish them in this respect from the employees who had sent such letters. As the union stated in response to those letters, it was already treating those nonmember employees as reduced fee payors, as it was required to do under state law, and it had accordingly only deducted 95% of union dues from their paychecks.⁶⁵

For these reasons, the Board was “not persuaded that *Hudson*, either on its own terms or as interpreted by [this Court],” compelled it to revise its *California Saw* framework to require unions to include specific fee reduction information in

⁶⁴ See *Hudson*, 475 U.S. at 294-95 & n.1 (quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983)).

⁶⁵ See *Hudson*, 573 F. Supp. at 1510. “For an unknown reason,” the union never collected any money from one of the plaintiffs. *Hudson*, 475 U.S. at 297 n.2.

their initial *Beck* notices. (JA 83.) Rather, the Board retains the authority to independently determine under the Act what information must be contained in a union's initial *Beck* notice, as it did in the instant case.

C. The Board Reasonably Determined that a Union Satisfies Its Duty of Fair Representation by Providing Specific Fee Reduction Information Only upon Employees Exercising Their *Beck* Rights

After explaining its respectful disagreement with the Court's holdings in *Abrams* and *Penrod*, the Board proceeded to consider the issue presented by the General Counsel and Sands: whether a union, to satisfy its duty of fair representation, must provide an employee with specific fee reduction information in its initial *Beck* notice. The Board noted that it had already answered this question in the negative in *California Saw* and *Dyncorp* (*Penrod*); nevertheless, it undertook to once more "independently consider[]" the balance struck in those cases. (JA 84.)

Given the absence in the record of any evidence of discrimination or bad faith, the Board considered whether a union acts "arbitrar[ily]" by not providing specific fee reduction information until an employee has actually exercised her *Beck* rights. (JA 84.) The Board noted that such information is not necessary for an employee to determine whether she objects to supporting a union's political and ideological activities, as the record in the instant case demonstrated. (JA 85.) By contrast, the need to provide this information in an initial *Beck* notice would force

many unions to either undertake a costly yet potentially unnecessary *Beck* accounting or to forego agency fees to which they are entitled. (JA 86.) Weighing this “marginal” benefit to employees against the administrative and financial burden on unions, the Board determined that a union does not act arbitrarily by providing employees with specific reduced fee information at stage 2 of the *California Saw* framework, when the employee has actually exercised her *Beck* rights.

The Board’s weighing of these competing interests is attentive to the nature of the interests involved, reasonable, and thus entitled to deference.

On the one hand, the Board reasoned that the specific reduced payment information sought by Sands does not implicate the concerns that motivated the *Beck* Court and thus is not essential to the exercise of employees’ *Beck* rights. (JA 84-85.) The *Beck* Court interpreted Section 8(a)(3) of the Act as reflecting the same prohibitions and concerns as Section 2, Eleventh of the Railway Labor Act. This led the Court to hold that Section 8(a)(3) does not “provide the unions with a means for forcing employees, over their objection, to support political causes they oppose.”⁶⁶ Although this was a statutory holding, it was the result of the Court’s efforts to avoid the constitutional question whether the use of compelled union

⁶⁶ *Beck*, 487 U.S. at 741 (citing *Machinists v. Street*, 367 U.S. 740 (1961)).

exactions for political purposes violates the First Amendment.⁶⁷ Employees' individual interest, by contrast, is in knowing the precise amount of money they would save by exercising their *Beck* rights. That interest is thus economic in nature and well removed from the concerns for freedom of expression that motivated the *Beck* Court. The Board acknowledged that the decisions of some employees to exercise their *Beck* rights may turn on the amount of money they would thereby save. (JA 85.) But insofar as saving money is the motivating factor in their decision, these employees' interest in additional information is on par with the many other competing demands that a union must manage in its efforts to fairly represent all members of the bargaining unit.⁶⁸ (JA 85.)

⁶⁷ See *Street*, 367 U.S. at 750 (“The record in this case is adequate squarely to present the constitutional questions. . . . These are questions of the utmost gravity. However, the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union shop under § 2, Eleventh [of the Railway Labor Act] meant that the labor organization receiving an employee’s money should be free, despite that employee’s objection, to spend his money for political causes which he opposes.”); *Beck*, 487 U.S. at 761 (construing Section 8(a)(3) of the National Labor Relations Act to avoid potential First Amendment issues).

⁶⁸ See, e.g., *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964) (“Conflict between employees represented by the same union is a recurring fact.”); *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 917 (7th Cir. 1989) (“[U]nions strive to equitably distribute to diverse memberships, with internally conflicting priorities, the remaining pieces of an ever shrinking pie.”) (quoting Bates, *Benefits of Retirees: Negotiation and the Duty of Fair Representation*, 21 J. Marshall L. Rev. 513, 513 (1988)) (internal quotation marks omitted); *Jones v. Trans World Airlines*, 495 F.2d 790, 798 (2d Cir. 1974) (“[T]he union has broad discretion to adjust demands of competing groups within its constituency as long as it does not act arbitrarily.”).

The Board concluded that its “established initial notice requirements already meet employees’ fundamental need for information about their right to object” (JA87), as the record in this case illustrates. Prior to making her decision whether to exercise her *Beck* rights, Sands received an initial *Beck* notice that informed her of her right to remain a nonmember, to object to paying a full agency fee, and to receive a reduction for any expenses incurred by the Union that are not related to collective bargaining, grievance adjustment, or contract administration. (JA 18, 21, 48-49.) As the Board observed, Sands made her decision to resign from the Union and to become a *Beck* objector after having received notice of her right to do so and without knowing the specific amount of reduced fees and dues she would be charged; the record contains no evidence that the absence of that reduced fee information in any way impeded her ability to intelligently make her decision. (JA 85-86.) The Board found Sands’ experience consistent with its conclusion that “the potential benefits to employees of requiring unions to include detailed reduced payment information in their initial *Beck* notices appear to be marginal, at best.” (JA 87.)

In contrast to the marginal benefit of providing detailed reduced payment information, however, the Board found that for certain unions the burden of providing this information at stage 1 is substantial. (JA 86.) While it is true that the Union in this case had already calculated the amount by which Sands’ agency

fee would be reduced, owing to other *Beck* objectors in the bargaining unit who predated Sands, there exists another entire category of unions that have no objectors and therefore are currently spared the cost and burden of a *Beck* accounting.

The rule urged by Sands would force these unions to choose among three options. Certain local unions would have the option of relying upon the “local presumption,” in which the local union adopts the *Beck* ratio of its international affiliate as its own, on the reasonable assumption an international union expends more on non-chargeable activities than its local.⁶⁹ Such local unions would accordingly forfeit some fraction of the chargeable representation fees owed them but would also avoid the expense of a *Beck* accounting. For unaffiliated unions, however, the “local presumption” is not available, and only two options remain: either (1) to incur the deadweight loss of an unnecessary *Beck* accounting—a costly process that involves subtle and debatable distinctions between categories of expenditures⁷⁰ that this Court’s jurisprudence suggests must be verified by an

⁶⁹ See *Thomas v. NLRB*, 213 F.3d 651, 657-63 (D.C. Cir. 2000) (finding that union had not violated *Hudson* by relying upon its international affiliate’s accounting of chargeable and non-chargeable expenses; evidence supported “assumption that locals almost always spend proportionately more on chargeable expenses than” their international affiliate); *Finerty v. NLRB*, 113 F.3d 1288, 1289-92 (D.C. Cir. 1997) (similar).

⁷⁰ See, e.g., *Scheffer v. Civil Serv. Emps. Ass’n, Local 828*, 610 F.3d 782, 787-91 (2d Cir. 2010) (finding that “under the circumstances presented here,” expenses of organizing private-sector disability workers are non-chargeable to public-sector

outside certified public accountant⁷¹; or (2) to include in the initial *Beck* notice a waiver of the union's right to collect *any* fees for representational services from its nonmember objectors.

Although these options differ from one another in important ways, they all lead to the same result: less money for the union to use toward core collective-bargaining activities. (JA 86.) The Board paid special attention to the situation of the many smaller, unaffiliated unions in the United States, which have significantly lower revenues and might be entirely incapable of developing the record-keeping and accounting systems necessary to “administer[] a full-fledged *Beck* system.” (JA 86 & nn. 65-66.) For such smaller unions, the only real option would be waiving their right to any fees for representational services in their initial *Beck* notice.⁷²

probation officers); *Seidemann v. Bowen*, 584 F.3d 104, 116-17 (2d Cir. 2009) (union may not charge objectors for “political” portion of union convention expenses).

⁷¹ See *Ferriso v. NLRB*, 125 F.3d 865, 872 (D.C. Cir. 1997) (stating that the audit of a union's *Beck* accounting of chargeable vs. non-chargeable expenses “should in general conform to a similar standard” as that used for “publicly traded firms” by using “certified public accountants or . . . licensed public accountants”); *id.* at 871-72 (finding it “unlikely” that union's auditing system evinced sufficient independence where “the audits of the district and local unions were conducted by employees of the international union who were not CPAs”). But see *Machinists v. NLRB*, 133 F.3d 1012, 1017 (7th Cir. 1998) (finding that a similar auditing system was “reasonable”).

⁷² See *Laborers Local 265*, 322 NLRB 294, 296 (1996) (union's waiver of payment of any dues or fees moots a challenge to the union's calculations and makes unnecessary the provision of financial information).

Weighing these two competing interests, the Board determined that an individual employee's interest in specific reduced fee information does not so outweigh the corresponding burden on the union of providing that information that a union acts "arbitrarily" and violates its duty of fair representation by choosing to provide that information only when the employee actually exercises her *Beck* rights. (JA 87.) The Act says nothing about when reduced fee information must be provided to nonmembers who object to paying for nonrepresentational services.⁷³ The rule adopted by the Board in this case should thus be affirmed under *Chevron* as a reasonable interpretation of a matter that the Act reserves for the Board's determination.⁷⁴

The Board's ruling is moreover consistent with the "basic considerations of fairness" articulated by the Supreme Court in *Hudson*. Contrary to Sands' claim (Br. 25-26), the Board acknowledged in *California Saw* that the "basic considerations of fairness" discussed in *Hudson* are "also a relevant concern in the context of a private sector union's duty of fair representation."⁷⁵ And, indeed,

⁷³ *Machinists v. NLRB*, 133 F.3d 1012, 1015, 1019 (7th Cir. 1998).

⁷⁴ *See id.* at 1015 ("[T]he details necessary to make the rule of *Beck* operational were left to the Board, subject to the very light review authorized by *Chevron*.").

⁷⁵ *California Saw*, 320 NLRB at 233. Insofar as the *Hudson* Court relied upon "concern for the First Amendment rights at stake," 475 U.S. at 306, the decision in *Hudson* is not applicable to private-sector labor relations, as this Court acknowledged in *Abrams*. *See Abrams*, 59 F.3d at 1379 & n.6 (citing "basic consideration of fairness," but not "concern for the First Amendment rights at

Board law precludes the result the *Hudson* Court found to be unfair. Specifically, at step 2 of its *California Saw* framework, the Board requires that a union not only notify an objecting nonmember of the specific amount by which her payments to the union will be reduced, but also provide her with information sufficient to “gauge the propriety of the union’s fee.”⁷⁶ This information includes the major categories of expenditures, an explanation of how the reduction was calculated, and notice of her right to challenge the union’s calculations.⁷⁷ The Board thus requires unions to give employees information sufficient “to gauge the propriety of the union’s fee” at precisely the moment that *Hudson* instructs.

In the instant case, Sands insists that the provision of this information be moved up from step 2 to step 1 of the *California Saw* framework. “Basic considerations of fairness” simply do not require such a result. Nothing in that abstract concept requires that a person be informed of their rights as well as the specific financial consequences of exercising those rights, especially when providing the latter information imposes nontrivial burdens and costs on other parties.

Overlooking the substance of the Board’s reasoning, Sands focuses (Br. 28) upon the ability of the Union in this case to promptly provide Sands with the

stake,” as the basis for its application of *Hudson* to the National Labor Relations Act).

⁷⁶ *Hudson*, 475 U.S. at 306.

⁷⁷ *California Saw*, 320 NLRB at 233.

information she requested, at apparently no additional cost. But as the Board stated, “the Union’s ability in this case to timely provide to Sands specific dues information as required under *California Saw* does not establish that all unions have or even can develop such capability.” (JA 86.) The Board’s decision carefully considered the burden placed upon these unions that do not already have a *Beck* accounting system in place. (JA 86-87 & nn. 65-66.) For them, the rule urged by Sands will result either in expending funds for an audited *Beck* accounting that may prove unnecessary or in forfeiting the fees for representational services to which they are entitled, thereby producing the “free rider” problem that Congress sought to prevent.⁷⁸ To be sure, the rule adopted by the Board applies alike to both large affiliated unions and smaller unaffiliated unions, but the selection of a bright-line rule is not unreasonable in this already complicated area of the law.⁷⁹ That decision should remain within the Board’s discretion.

Sands cites to cases involving public-sector unions (Br. 27, 30), contending that unions must comply with *Hudson* regardless of the associated burden and that

⁷⁸ See p. 20, *supra*. See also *Beck*, 487 U.S. at 748; *General Motors Corp.*, 373 U.S. at 742-43.

⁷⁹ *Cf.*, e.g., *Northern Illinois Gas Co. v. United States*, 743 F.2d 539, 542 (7th Cir. 1984) ([F]ormulas and classifications that may be overbroad or underbroad are often necessary to the efficient administration of the tax collection system.”).

certain unions have, in fact, successfully complied with that decision.⁸⁰ Again, Sands overlooks the fact that the Supreme Court decided a different issue in *Hudson* than in the present case. In *California Saw*, the Board held, consistent with *Hudson*, that when an employee files a *Beck* objection, the union must provide her with “information sufficient to gauge the propriety of the union’s fee,” including the specific agency-fee reduction that she will receive as well as the union’s basis for calculating that reduction. Contrary to Sands’ insinuations (Br. 30), the Board does not relax or remove this obligation because of the associated burden on unions of providing that information. This case does not concern the information owed to *Beck* objectors, however; it involves the information owed to employees who have yet to express any opposition to paying the full amount of union dues. Accordingly, the Board reasonably took into consideration the burden on unions of providing this non-essential information to employees. (JA 86-87.)

Finally, Sands incorrectly suggests (Br. 30) that a *Beck* accounting is less burdensome than the Board supposes, because private-sector unions must already disclose their expenditures under the Labor-Management Reporting and Disclosure Act (LMRDA).⁸¹ Sands ignores several relevant distinctions between the two reporting regimes. Although large unions filing LM-2 forms under the LMRDA

⁸⁰ See Br. 27 (citing *Gwartz v. Ohio Educ. Ass’n*, 887 F.2d 678 (6th Cir. 1989); *Jibson v. Mich. Educ. Ass’n*, 30 F.3d 723 (6th Cir. 1994)); see also Br. 30 (citing *Andrews v. Education Ass’n*, 829 F.2d 335 (2d Cir. 1987)).

⁸¹ 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-531).

must disclose their disbursements and “the purposes thereof,”⁸² including their expenditures for “representational” activities, they are not required to engage in the fine parsing of those representational expenses into chargeable and non-chargeable.⁸³ Nor does the LMRDA require that a union’s disclosures be verified by any accountant.⁸⁴ Furthermore, the Board’s decision focuses upon the burden upon smaller unions with \$200,000 or less in annual receipts. (JA 86 & n.65.) These smaller unions file LM-3 or LM-4 forms, which do not require that a union itemize its representational expenses.⁸⁵

⁸² 29 U.S.C. § 431(b)(6).

⁸³ For example, a union’s efforts to organize workers in a different industry than its membership may represent activities that, although “representational,” would nonetheless be non-chargeable. *See, e.g., Scheffer v. Civil Serv. Emps. Ass’n, Local 828*, 610 F.3d 782, 787-91 (2d Cir. 2010). *See also* 68 Fed. Reg. 58374-01, 58395 (Oct. 9, 2003) (“It is not and has not been the intent of the Department [of Labor] to collect information specific to the *Beck* requirements. . . . [T]he partial overlap of categories under the proposed rule and those established by *Beck* is unremarkable. . . . The information reported in the new LM-2 may be helpful to an agency fee payer to roughly evaluate his or her union’s *Beck* compliance, but it is not designed as a substitute for the *Beck*-specific reporting requirements. . . . The Department [of Labor] takes no position on whether disclosure of the information required by the Form LM-2 satisfies *Beck* requirements.”).

⁸⁴ *Cf.* 29 U.S.C. § 431(b) (requiring that union’s financial report be “signed by its president and treasurer or corresponding principal officers”).

⁸⁵ *See* 68 Fed. Reg. at 58383.

D. Substantial Evidence Supports the Board’s Finding that Sands Was Not Impeded in Her Decision To Refrain from Supporting the Union by the Union’s Omission from the Initial *Beck* Notice of the Specific Reduction in Fees She Would Receive if She Were To Become a *Beck* Objector

Consistent with its interpretation of the Act, the Board found that Sands had not been hindered in exercising her *Beck* rights when the Union provided her with specific agency-fee reduction information at step 2, rather than step 1, of the *California Saw* framework, and that she “had all the information she needed to make an informed decision to object.” (JA 79 n.1, 85, 94-95.) In its letters to Sands on January 11 and 25, the Union clearly stated Sands’ *Beck* rights, including her right to become a nonmember, to object to paying a full agency fee, and to receive a reduction for any expenses incurred by the Union that are not germane to the Union’s duties as collective-bargaining representative.⁸⁶ (JA 18, 21.) As the Board observed (JA 85), Sands never demanded that the Union additionally provide her with the specific reduction in fees she would receive, nor did she ever state that the lack of this information influenced her decisionmaking process (JA 22).

⁸⁶ JA 18 (“[Y]ou also have the right to refrain from becoming a member of the Union. . . . In addition, non-members who object to payment in full of the equivalent of dues and fees may file written objections to funding expenditures that are not germane to the Union’s duties as your agent for collective bargaining. If you choose to be an objector, your financial obligation will be reduced very slightly.”) (January 11, 2005 letter to Sands); JA 21 (same) (January 25, 2005 letter to Sands).

In her resignation letter, Sands claimed that she joined the Union because she was “misled” about her rights not to join but said nothing about the absence of information concerning the specific financial consequences of exercising her rights (*viz.*, a reduction in her agency fee by \$3.55/month). Petitioner’s claim (Br. 22-23) that “[i]t is likely that Sands would have resigned earlier, or not joined the [Union] at all, if it had told her the reduced fee amount initially” is thus unsupported by her own words. (JA 22.)

CONCLUSION

This case concerns the information a union, when seeking to enforce a union-security clause, must provide to employees who have not yet indicated any opposition to paying the full amount of union dues. As the Board explained, there was neither the opportunity nor the need for the Supreme Court in *Hudson* to address, much less determine, the rights of this category of employees: all of the plaintiffs before the *Hudson* Court had already chosen to become nonmembers and not pay union dues. For those reasons, the *en banc* court should hold that *Abrams* and *Penrod* were wrongly decided and that the Board retains discretion under the Act to resolve the issue presented.

Exercising that discretion, the Board carefully weighed the competing interests and reasonably determined that a union does not violate its duty of fair representation by providing an employee with the specific amount of money she

will save by exercising her *Beck* rights when she actually exercises those rights.

Accordingly, the Board's Decision and Order dismissing the complaint against the

Union should be affirmed.

/s/ ROBERT J. ENGLEHART
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ DOUGLAS CALLAHAN
DOUGLAS CALLAHAN
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2978
(202) 273-2988

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
April 2015
g:/acbcom/laurasands-final-brief-bedc

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

LAURA SANDS,)	
)	
Petitioner)	No. 14-1185
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case No.
Respondent.)	25-CB-08896

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that the foregoing Brief for the National Labor Relations Board contains 10,872 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 17th day of April 2015

RELEVANT STATUTORY PROVISIONS

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

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

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

It shall be an unfair labor practice for an employer. . .

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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

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

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

Section 10(a), (e), and (f) of the Act, 29 U.S.C. § 160(a), (e), and (f):**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to

be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

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

in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 431(b) of the Labor-Management Reporting and Disclosure Act (73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-531)), 29 U.S.C. § 431(b):

(b) Annual financial report; filing; contents

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

- (1) assets and liabilities at the beginning and end of the fiscal year;
- (2) receipts of any kind and the sources thereof;
- (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than \$10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;
- (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than \$250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof; all in such categories as the Secretary may prescribe.

Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983):

Non-member proportionate share payments in lieu of dues.

Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

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

LAURA SANDS,)	
)	
Petitioner)	No. 14-1185
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case No.
Respondent.)	25-CB-08896
)	

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben
 Linda Dreeben
 Deputy Associate General Counsel
 National Labor Relations Board
 1099 14th Street, NW
 Washington, DC 20570
 (202) 273-2960

Dated at Washington, DC
this 17th day of April 2015