ORAL TESTIMONY OF RAYMOND J. LAJEUNESSE, JR.,
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ON
The National Labor Relations Board's Failure to Fully Enforce Workers' Rights under *Communications Workers v. Beck* Not to Subsidize Unions' Political and Other NonBargaining Activities

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
Wednesday, February 13, 2013

Chairman Roe and Members:

Under the National Labor Relations Act, employees who do not want union representation must accept the bargaining agent the majority in their bargaining unit selects. Then, if not in a Right to Work state, and their employer and the union agree, the law forces them to pay fees equal to union dues for that unwanted representation, or be fired. Union dues are spent for many political and other nonbargaining purposes.

In *Communications Workers v. Beck*, the Supreme Court ruled that under the Act employees cannot be compelled to subsidize unions' political and other nonbargaining activities.[1] Employees must overcome many hurdles to exercise that right, hurdles sanctioned or erected by the National Labor Relations Board.

[1] 487 U.S. 735 (1988).

My written statement details how the Board and its General Counsels have failed to process expeditiously, and procedurally impeded, charges of *Beck* violations. Here I address the worst instances of the Board's refusal to follow judicial precedent.

The most significant procedural hurdles to workers' exercise of *Beck* rights are union requirements that objections be submitted during a short "window period" and be renewed annually, obstacles approved in the Board's first post-*Beck* decision.[2] Thus, many employees' objections are rejected as untimely. Affirmative consent, not objection, to political funding should be required, as the Supreme Court held in *Knox v. SEIU* as to special assessments.[3]

At a minimum, *Beck* objections should be continuing. After three courts so held,[4] the Board reconsidered. But, instead of finding annual objection requirements per se unlawful, it decided to evaluate them union by union.[5] A Board majority upheld the UAW's annual objection requirement without even consider-

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[2] *California Saw & Knife Works*, 320 N.L.R.B. 224, 235-36 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

[3] *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012) (5-4 decision).

[4] *See Seidemann v. Bowen*, 499 F.3d 119, 124-26 (2d Cir. 2007); *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000).

[5] *Machinists Local Lodge 2777*, 355 N.L.R.B. No. 174, slip op. at 1 (2010) (3-2 decision).

ing its purported justifications, finding that the burden on nonmembers was "de minimis."[6]

Another hurdle nonmembers face is finding out how the union spends their fees so they can decide whether to object. In *Teachers Local 1 v. Hudson*, the Supreme Court held that "*potential* objectors [must] be given sufficient information to gauge the propriety of the union's fee."[7] Yet, the Board ruled that unions need not disclose *any* financial information until *after* nonmembers object.[8] Although the D.C. Circuit reversed, the Board continues to follow its own ruling.[9]

Hudson also specified that "adequate disclosure surely would include . . . *verification by an independent auditor*."[10] Yet, unions often do not give objecting

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[6] *UAW Local #376*, 356 N.L.R.B. No. 164, slip op. at 3 (2011) (2-1 decision).

[7] 475 U.S. 292, 306 (1986) (emphasis added).

[8] *Teamsters Local 166*, 327 N.L.R.B. 950, 952 (1999), *petition for review granted sub nom. Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *see California Saw*, 320 N.L.R.B. at 233.

[9] *E.g.*, *United Food & Commercial Workers Local 700*, No. 25-CB-8896, JD-14-08, slip op. at 6 (Mar. 7, 2008).

[10] 475 U.S. at 307 n.18 (emphasis added).

nonmembers an auditor's verification. The current Board recently approved that practice,[11] despite the D.C. Circuit's earlier contrary holding.[12]

The Board majority argued that unions' conduct under *Beck* "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases like *Hudson*.[13] But, the D.C. Circuit had previously ruled that *Hudson*'s holdings apply "equally to the statutory duty of fair representation."[14]

The Board also refuses to follow binding precedent as to what activities are lawfully chargeable. In *Beck*, the Court concluded that the forced fee provisions of the NLRA and RLA are "statutory equivalent[s]".[15] Moreover, *Beck* ruled that decisions limiting forced fees under the RLA are "*controlling*" under the NLRA.[16]

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[11] *United Nurses & Allied Professionals*, 359 N.L.R.B. No. 42, slip op. at 1-4 (Dec. 14, 2012) (3-1 decision).

[12] *Ferriso v. NLRB*. 125 F.3d 865, 866-70 (D.C. Cir. 1997).

[13] 359 N.L.R.B. No. 42, slip op. at 3.

[14] *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995); *accord Ferriso*, 125 F.3d at 868-70.

[15] 487 U.S. at 762-63.

[16] *Id.* at 745 (emphasis added).

In *Ellis v. Railway Clerks*, the Supreme Court held that union organizing is not lawfully chargeable under the RLA.[17] In *Beck*, the Fourth Circuit followed *Ellis* in ruling that organizing expenditures "were not allowable charges."[18] Despite the Supreme Court's clear mandate that RLA decisions concerning forced fees control under the NLRA, the Board held that "organizing within the same competitive market" is chargeable to nonmembers because of differences as to *other* aspects of the statutes.[19]

The current Board went even further, a majority holding chargeable *lobbying* for "goals that are germane to collective bargaining."[20] Worse, it proposed a "rebuttable presumption of germaneness" for bills that "would directly affect subjects of collective bargaining."[21]

The majority again ignored the Supreme Court's holding that RLA decisions are controlling. *Machinists v. Street* was the first Supreme Court case to limit forced union fees. Where *Street* held that the RLA does not authorize unions to

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[17] 466 U.S. 435, 451-53 (1984).

[18] *Beck v. Communications Workers*, 776 F.2d 1187, 1211 (1985), *aff'd on other grounds en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988).

[19] *United Food & Commercial Workers Locals 951, 7 & 1036*, 329 N.L.R.B. 730, 733-38 (1999) (4-1 decision), *enforced in pertinent part*, 307 F.3d 760 (9th Cir. 2002).

[20] *United Nurses*, 359 N.L.R.B. No. 42, slip op. at 6-8 (3-1 decision).

[21] *Id*., slip op. at 9.

use objecting employees' "exacted funds to support political causes," a footnote listed lobbying as a "use of union funds for political purposes."[22]

In *Knox*, the union contended, like the Board majority, that expenditures to defeat a ballot proposition were "germane" because the proposition would have affected bargaining agreements. The Supreme Court disagreed: "If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities."[23] In an RLA case, the D.C. Circuit similarly rejected the same argument as to lobbying.[24]

The Board majority also ignored NLRA precedent. The D.C. Circuit has held that, under the NLRA, the "***Beck*** and *Ellis* holdings foreclose the exaction of mandatory agency fees" for "'legislative activity.'"[25]

In sum, the problem is systemic. The Board has dismally failed to protect workers' *Beck* rights. Indeed, the current Board seems bent on totally eviscerating those rights.

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[22] *Machinists v. Street*, 367 U.S. 740, 769 & n.17 (1961).

[23] 132 S. Ct. at 2294-95; *accord id*. at 2296-97 (Sotomayor, J., concurring in pertinent part).

[24] *Miller v. Airline Pilots Ass'n* 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).

[25] *Abrams v. Communications Workers*, 59 F.3d 1373, 1380 (D.C. Cir. 1995) (emphasis added).

Nonmembers' *Beck* rights are "First Amendment-type interests."[26] As such, they deserve effective protection. Experience since *Beck* demonstrates that only statutes that prohibit compulsory union dues, i.e., Right to Work laws, effectively protect employees from being forced to subsidize union political and other nonbargaining activities.

[26] *Miller*, 108 F.3d at 1422.