SIGNIFICANT RECENT DECISIONS
ON ISSUES OF COMPULSORY UNIONISM

Cases Designed to Win New Legal Precedents:

Fourth Circuit Rules Nonmembers Cannot Be Forced to Wear Union Label: *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005). In 1996, a National Right to Work Legal Defense Foundation Staff Attorney filed unfair labor practice charges with the National Labor Relations Board (NLRB) against BellSouth Communications and the Communications Workers union (CWA) for two nonunion technicians employed by BellSouth in Charlotte, NC. The charges alleged that, by forcing nonmembers to wear a union logo on their uniforms as a condition of employment, BellSouth and CWA violated their right to refrain from union activity guaranteed by section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. The NLRB's General Counsel agreed and issued a complaint against BellSouth and CWA. However, in August 2001, the NLRB upheld the logo requirement. 335 N.L.R.B. 1066. The workers' attorney then petitioned for review in the U.S. Court of Appeals for the Fourth Circuit, raising statutory and First-Amendment claims. The court heard oral argument in February 2002. The courts had never before decided whether forcing nonmembers to act as a bulletin board for union propaganda violates the NLRA or the First-Amendment guarantee of free speech. On January 4, 2005, the court reversed the Board and held that the logo requirement violates the NLRA, because there is "no evidence" that display of the union insignia enhances the company's public image. 393 F.3d at 496. Indeed, the court said "rather than view the union logo as representing a labor-management partnership which makes labor disputes less likely and a reflection of a stable work environment, the public may view the union logo with suspicion and associate it with service disruptions and labor disputes." *Id*. The court did not reach the constitutional issue.

Secretary of Labor's Authority to Issue Stricter Union Financial Reporting Requirements Argued in D.C. Circuit: *AFL-CIO v. Chao*, 298 F. Supp. 2d 104 (D.D.C. 2004). In October 2003, the Secretary of Labor issued an administrative rule that, beginning with the reports due in 2005, requires more detailed and more informative data in the financial reports (LM-2s) that large private-sector unions must file annually with the Department of Labor under section 201(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 433(b). The AFL-CIO sued, alleging that the Secretary lacks authority under the LMRDA to require unions to report their receipts and disbursements in the detail and functional format the new rule requires. The AFL-CIO also alleged that the new rule is arbitrary and capricious, because the costs of compliance are unduly burdensome, and because the Secretary did not give unions sufficient time to make the accounting changes necessary to comply. The new reporting requirements are not as stringent as the National Right to Work Legal Defense Foundation had urged the Secretary to make them. Nonetheless, the Foundation filed an *amicus* brief arguing that the Secretary had the necessary statutory authority to impose the new requirements and that the costs of complying with them are not unduly burdensome. On December 31, 2003, the U.S. District Court for the District of Columbia postponed the effective date of the rule for one year. 297 F. Supp. 2d 155. On January 22, 2004, the court held that the Secretary had the statutory authority to issue the rule, 298 F. Supp. 2d at 111-16, and concluded that the rule is reasonable and not arbitrary, *id*. at 124-26. The court also ordered that the rule could take effect on July 1, 2004, for unions that use a fiscal year beginning on or after that date. *Id*. at 128. The AFL-CIO

appealed to the U.S. Court of Appeals for the D.C. Circuit. On July 13, 2004, the District Court denied the AFL-CIO's request that the effective date of the new requirements be further delayed. They are now in effect. The Foundation also filed an *amicus* brief in the Court of Appeals supporting the new administrative rule. That court heard oral argument on December 8, 2004.

Federal Court Case Challenging "Top-Down" Organizing Advances: *Patterson v. Heartland Industrial Partners*, 225 F.R.D. 204 (N.D. Ohio 2004). National Right to Work Legal Defense Foundation Staff Attorneys filed this federal court action for six employees at the Collins & Aikman Corp. auto interior components plant in Holmesville, Ohio. Collins & Aikman's employees had previously rejected union efforts to obtain recognition through the NLRB's election process. The defendants are the Steelworkers union, Collins & Aikman, and Heartland, an investment firm that acquired Collins & Aikman and required it to comply with a so-called "neutrality" agreement. Under this agreement, any company Heartland acquires must not oppose union organizing, must give the union access to company premises and employees' names and home addresses to aid it in soliciting signatures on union authorization cards, and must recognize the union without a secret-ballot election if a majority of employees sign such cards. Moreover, if the union is recognized, the company must force employees to join the union or pay union dues to keep their jobs. This case was filed to establish a precedent that such "neutrality" agreements violate the Taft-Hartley Act's provision that prohibits employers from giving any "thing of value" to a union seeking to represent its employees and prohibits unions from accepting such things. 29 U.S.C. § 186. Defendants moved to dismiss on the grounds that there is no private cause of action to enforce the prohibition and that the "neutrality" agreement is not a "thing of value." On January 12, 2004, the court denied that motion, because the motion disputed some of the plaintiffs' factual claims, and "the record . . . should be as factually complete as possible" given the likelihood of appeals. The court also denied defendants' motion for certification of an interlocutory appeal of the denial of dismissal. Desperate to stop this action, defendants then petitioned the U.S. Court of Appeals for the Sixth Circuit for a writ of mandamus ordering the District Court to dismiss the case. On April 28, 2004, the Sixth Circuit, explicitly recognizing that there is a private cause of action under the statutory provision, denied mandamus. Order, No. 04-3290. During discovery, the union refused to produce hundreds of documents concerning its organizing strategy and the negotiations between it and the company defendants. On October 13, 2004, a Magistrate Judge ordered production of those documents. On December 14, 2004, the District Judge rejected the union's objections to the Magistrate's order, holding "that the First Amendment associational privilege does not apply"and that an "NLRA privilege does not exist." 225 F.R.D. at 205.

NLRB Delays Reconsideration of Its Policy That Blocks Secret-Ballot Elections Where Employers Recognize Unions Based on "Neutrality and Card Check" Agreements: *Dana Corp*., 341 N.L.R.B. No. 150, 2004 WL 1329345 (June 7, 2004). Two auto parts suppliers, Dana Corporation and Metaldyne Corporation, have "neutrality and card check" agreements with the United Auto Workers (UAW). Under these agreements, the employers promised not to oppose the union, to allow union agents access to their facilities to solicit employee support, to give the union the employees' names and home addresses, to conduct "captive audience speeches" at which union and management personnel urged employees to sign union authorization cards, and to recognize the union as the exclusive bargaining agent without a secret-ballot election conducted by the NLRB if a majority of their workers signed such cards. Later, based on card checks, Dana declared the UAW to be the exclusive bargaining agent for its employees in a plant

in Upper Sandusky, Ohio, and Metaldyne did so at a plant in St. Marys, Pennsylvania. Employees at those plants promptly circulated petitions for decertification elections and filed them with the NLRB. The Dana petition was signed by 35% of the workforce (only 30% is needed to get an election), and that at Metaldyne was signed by a majority. NLRB Regional Directors dismissed both petitions without a hearing, applying a Board-created policy barring a decertification election after an employer voluntarily recognizes a union, based on a good faith belief that majority union support exists, until a "reasonable time" to negotiate a collective bargaining agreement has elapsed. *See Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966). National Right to Work Legal Defense Foundation Staff Attorneys filed Requests for Review for the employee petitioners at Dana and Metaldyne. These Requests asked the Board to eliminate its "voluntary recognition bar" where recognition is obtained through a "neutrality and card check" agreement. On June 7, 2004, a three-member Board majority granted review and solicited *amicus* briefs, over the strenuous dissent of the two other members. In July 2004, the parties' briefs and twenty-five *amicus* briefs were filed. Twelve of the *amicus* briefs supported the employees' position, twelve opposed it, and the NLRB General Counsel's brief urged that the Board adopt only a limited exception to the voluntary recognition bar in card check cases. The briefs are available on-line at http://www.nlrb.gov/nlrb/home/default.asp. On November 5, 2004, Board Chairman Robert Battista announced that a decision in these cases is "probably not" likely before spring, because two Members' terms would expire in December. "*Dana* and *Metaldyne* are important cases. I made a decision early on that being important cases, they should be treated by the full board," Battista said.

Cases Enforcing Employees' Existing Legal Rights:

Union Resists Remedy Ordered for Hiring-Hall Discrimination Against Nonmember: *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003). Stage Employees Local 720 in Las Vegas, Nevada, expelled nonmember Steven Lucas permanently from its exclusive hiring hall, denying him referrals to trade show and convention jobs to which he was entitled under its own rules. even when an employer requested him by name. Lucas filed unfair labor practice charges with the NLRB. An Administrative Law Judge (ALJ) found that the union's refusal to readmit Lucas to the hiring hall breached its duty of fair representation, because the union presented no evidence that its actions were necessary to operate the hiring hall effectively. The NLRB reversed. 332 N.L.R.B. 1 (2000). National Right to Work Legal Defense Foundation Staff Attorneys then petitioned for review by the U.S. Court of Appeals for the Ninth Circuit to enforce the established principle that a union may not arbitrarily bar a nonunion worker for life from referral out of its exclusive hiring hall. The court reversed the NLRB and remanded for an order in Lucas' favor, because the union's refusal to readmit Lucas to the hiring hall "was not guided by any objective criteria." 333 F.3d at 936. The court held that an aggrieved employee need not prove that a union's conduct was intentional to establish a violation of the NLRA in the hiring-hall context. *Id*. at 934-35. The NLRB accepted the remand. On June 2, 2004, the Board ordered Local 720 to make Lucas whole for his loss of earnings and benefits as a result of the union's refusal to refer him to jobs. 341 N.L.R.B. No. 147, 2004 WL 1251918. The union then petitioned for review by the Ninth Circuit. On November 24, 2004, the Board asked the court to summarily deny the union's petition and enforce the Board's order to make Lucas whole. The NLRB's motion is now pending.

Cases Enforcing Employees' Existing Legal Rights and Designed to Win New Precedents:

Suit Challenging Airline Mechanic's Discharge Goes to Trial: *Mackay v. Aircraft Mechanics Fraternal Ass'n Local 14*, 85 Fed. Appx. 605, 2004 WL 61237 (9th Cir. 2004). Bernard Mackay was a nonunion skilled mechanic for Alaska Airlines at the Seattle, Washington, airport. The Aircraft Mechanics Fraternal Association (AMFA) and Alaska entered into a contract requiring all mechanics to join the union. Mackay never took any affirmative step to acquire membership nor participated in any activities he thought were only for members. He was never given any notice that he had been inducted into membership. AMFA nonetheless considered him to be a "voluntary" member based upon a unilateral "decree" it posted in the shop that, at best, merely implied that all mechanics were members. AMFA also never gave Mackay the procedural safeguards required to collect dues from nonmembers under the National Right to Work Legal Defense Foundation's victories in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991) (*Dean* held that the requirements the U.S. Supreme Court established in *Hudson* must be followed under the Railway Labor Act, which applies to railway and airline employees). Moreover, AMFA's objection policy was woefully inadequate under *Hudson*. AMFA had Alaska Airlines fire Mackay for not paying full dues. A Foundation Staff Attorney sued for him in U.S. District Court for the Western District of Washington, alleging that the discharge was unlawful under *Hudson*, and to establish a precedent that a union cannot impose membership by fiat. However, the court upheld the discharge. It ruled that *Hudson* did not protect Mackay, because AMFA's unilateral "decree" automatically made him a member. Mackay's attorney appealed to the U.S. Court of Appeals for the Ninth Circuit. On January 13, 2004, that court reversed the summary judgment for AMFA, finding "genuine issues of material fact, and law, in dispute as to whether Mackay was a member of the Union." 85 Fed. Appx. at 606. The court affirmed the judgment for Alaska, because Mackay had "filed and abandoned a grievance against [Alaska] regarding his discharge." *Id*. at 607. A bench trial in the District Court began on January 24, 2005.

Punitive Damages Claim Against Municipal Employees' Union Sent to Jury: *Wessel v. City of Albuquerque*, 327 F. Supp. 2d 1332 (D.N.M. 2004), and *Harrington v. City of Albuquerque*, 329 F. Supp. 2d (D.N.M. 2004). An Albuquerque, New Mexico, ordinance guarantees City employees the right to refrain from joining or participating in unions. Without following the procedural requirements for amending an ordinance, the City Council adopted a resolution authorizing agreements requiring City employees to pay "fair share" fees. When the City began enforcing such an agreement in 1999, a National Right to Work Legal Defense Foundation attorney filed an action for thirteen nonmember, blue collar City employees to have the agreement declared unlawful under the ordinance. The U.S. District Court for New Mexico held that the resolution was sufficient to authorize the fee requirement, but agreed that the union, a local of the American Federation of State, County & Municipal Employees (AFSCME), had given inadequate notice of the financial basis for the fee as *Hudson* requires. Both sides appealed. In August 2002, the U.S. Court of Appeals for the Tenth Circuit ruled that, because the ordinance does not explicitly prohibit "fair share" fees, the resolution lawfully authorized the fee requirement. 299 F.3d 1186, 1190-92. However, the workers' appeal was successful in two important respects. Setting a new precedent, the Court of Appeals held that a union does not satisfy *Hudson*'s notice requirement by merely stating that its expenses were audited, but must put the auditor's report in the notice. *Id*. at 1192-94. The court also voided as unlawful the union's agreement to indemnify the City for any liability the City incurred by unlawfully seizing

fees from employees' wages. *Id*. at 1197-99 (2-1 decision). The court ordered the District Court to hold an evidentiary hearing to determine what part of the fees is attributable to the state and national AFSCME's costs of serving as exclusive representative in other bargaining units. The Tenth Circuit ruled that such costs are not constitutionally chargeable under the Foundation's U.S. Supreme Court victory in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). *Id*. at 1196. The District Court held the required hearing in December 2003. Meanwhile, after the District Court's partially favorable decision, a companion class action called *Harrington v. City of Albuquerque* was filed for all nonunion City employees. That case was held in abeyance until after the Tenth Circuit's decision in *Wessel*. On June 30, 2004, the District Court certified the class. 222 F.R.D. 505. Then, on July 27, 2004, the court entered a final judgment for the plaintiffs in *Wessel* and a partial summary judgment for the class in *Harrington*. The court found that the union had not proven that any of the fees were collected for lawful purposes under the Tenth Circuit's decision. It ordered the union to refund, with interest, all fees collected. *Harrington*, 329 F. Supp. 2d at 1242-43; *Wessel*, 327 F. Supp. 2d at 1336-42. The City was ordered to return the indemnification it had received from the union. *Wessel*, 327 F. Supp. 2d at 1344-46. Most significantly, the court ruled in *Harrington* that a jury should decide whether the class is entitled to punitive damages because the union intentionally, or with callous or reckless disregard for nonmembers' First Amendment rights, collected fees that it knew or should have known were excessive. 329 F. Supp. 2d at 1243-45. In August 2004, the defendants noticed appeals from the final judgment in *Wessel*. The Tenth Circuit has not yet set a briefing schedule. In *Harrington*, the District Court approved a class notice on October 6, 2004, that was subsequently mailed to 771 putative class members. Only ten of the 771 asked to be excluded from the case. A pretrial conference is scheduled for March 24, 2005.