SIGNIFICANT RECENT DECISIONS
ON ISSUES OF COMPULSORY UNIONISM

Cases Enforcing Employees' Existing Legal Rights:

Nonmember's Hiring Hall Rights Vindicated: *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003). Stage Employees Local 720 in Las Vegas, Nevada, voted to expel 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. When an employer requested Lucas by name, the union refused to refer him. Lucas filed unfair labor practice charges with the National Labor Relations Board (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 the ALJ's decision. 332 N.L.R.B. No. 3 (Sept. 12, 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 use of its exclusive hiring hall and thus deny him referrals to work. The court reversed and remanded to the Board 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 National Labor Relations Act (NLRA) in the hiring hall context. *Id*. at 934-35. After the Ninth Circuit denied the union's belated motion to intervene and for rehearing, the NLRB did not petition for certiorari, and accepted the remand.

Oklahoma Right to Work Law Upheld:

(1) *Transport Workers Local 514 v. Keating*, No. 02-7077, 2004 WL 267752 (10th Cir. Feb. 13, 2004). In 2001, Oklahoma's voters by referendum added a Right to Work provision to Oklahoma's Constitution, prohibiting requirements that workers join or pay fees to unions to keep their jobs. Section 14(b) of the NLRA authorizes such state laws. 29 U.S.C. § 164(b). Moreover, the U.S. Supreme Court has ruled that such state laws are constitutional. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949). Yet, seven unions sued in U.S. District Court to have the Right to Work amendment declared invalid, because parts of it are preempted as to some classes of workers by federal labor statutes. Three Oklahoma workers, represented by a National Right to Work Legal Defense Foundation Staff Attorney, intervened to defend the provision. The District Court ruled that the Right to Work amendment is valid and enforceable, even though sections prohibiting hiring halls and regulating dues check-off arrangements are preempted in the private sector by federal law. 212 F. Supp. 2d 1319 (E.D. Okla. 2002). The unions appealed. In April 2003, the U.S. Court of Appeals for the Tenth Circuit accepted the unions' new, and ironic, argument that the section of the Right to Work provision that guarantees the right to join unions also is preempted as to private-sector workers. 66 Fed. Appx. 768, 775-78 (10th Cir. 2003). At the request of the intervening workers' attorney, the Court of Appeals certified to the Oklahoma Supreme Court the state law question as to whether the Right to Work provision is valid despite the partial preemption. *Id*. at 778-80. In December 2003, the Oklahoma Supreme Court unanimously upheld the amendment. It held "that rulings by federal courts

applying federal law to the effect that certain provisions of the right to work law are subject to preemption (but not 'invalidation') of some of its terms as to some but not all workers in some but not all situations fails to overcome the presumption of validity to which the right to work law is entitled under Oklahoma law." 2003 Okla. 110, 2003 WL 22952807, at *6. That decision became final when no petition for rehearing was filed. Therefore, on February 13, 2004, the Tenth Circuit affirmed the federal District Court's judgment that the amendment is valid and enforceable to the extent not preempted. 2004 WL 267752, at *2.

(2) *Eastern Oklahoma Building & Construction Trades Council v. Pitts*, 82 P.3d 1008 (Okla. 2003). This was a collusive action filed quietly in the Tulsa County District Court in May 2003, by a union council against an employer to have the Oklahoma Right to Work constitutional amendment declared unlawful under state law. The employer's attorney previously represented a union in the plaintiff Council. A National Right to Work Legal Defense Foundation Staff Attorney learned about this suit when it was mentioned in passing in an *amicus* brief filed in *Transport Workers Local 514 v. Keating*. The Foundation attorney immediately moved to intervene in *Pitts* for worker Stephen Weese, who would have been forced to pay union dues if the state courts had voided the Right to Work provision. At first, without ruling on intervention, the trial court granted the Council judgment on the ground that the employer had not timely opposed the Council's motion for summary judgment. After the Foundation's Legal Information Department alerted the Oklahoma press to this outrageous development, the court vacated its judgment. In the meantime, Weese's attorney moved for summary judgment approving the amendment and opposed the Council's motion, and the court permitted Weese to intervene. In July 2003, the court upheld the Right to Work amendment. After its motion for reconsideration was denied, the Council appealed. On December 16, 2003, the Oklahoma Supreme Court unanimously affirmed, rejecting the union's arguments that the Right to Work provision violated the Oklahoma Constitution's due process and equal protection clauses and technical requirements for ballot propositions. No petition for rehearing was filed by the deadline, so this decision is final.

Hawaii Public Employees' Rights Not to Pay for Union Politics and Other Nonbargaining Activities Protected: *Swanson v. University of Hawaii Professional Assembly*, 269 F. Supp. 2d 1252 (D. Haw. 2003). In *Teachers Local 1 v. Hudson*, a case National Right to Work Legal Defense Foundation attorneys won, the U.S. Supreme Court ruled that nonmember public employees forced to pay union fees must receive certain procedural protections. Those protections include a notice explaining the basis for the proportion of dues that is related to collective bargaining, with an independent auditor's verification of the proportion, a reasonably prompt reduction or advance rebate to the chargeable amount, and a reasonably prompt opportunity to challenge the union's calculations before an impartial decisionmaker, with an escrow of disputed amounts. 475 U.S. 292, 306-10 (1986). This case was brought by a Foundation Staff Attorney to enforce those protections for Sandra Swanson, an instructor at Maui Community College, and other nonmember employees of the University of Hawaii. The U.S. District Court certified the case as a class action for what ultimately turned out to be more than 1100 nonmembers. 212 F.R.D. 574 (2003). In June 2003, the court granted a preliminary injunction against the collection of union fees from all nonmembers, ruling that "Plaintiff has demonstrated a reasonable probability of success on the merits." 269 F. Supp. 2d at 1261. The parties subsequently entered into a settlement agreement. The union agreed to send out a notice that complies with *Hudson* and recalculates the reduced fee as specified in the agreement.

Nonmembers who paid fees before the injunction went into effect can object retroactively and receive refunds with interest. The union waived all rights to fees for the period that the injunction has been in effect. The union sent out a notice in September 2003, reducing the fees from 98% of dues before suit was filed to 78%. However, Swanson's attorney refused to stipulate that the injunction could be lifted, because the notice and fee did not comply with the settlement agreement. The court approved the agreement on December 15, 2003. It also ruled that the notice did not comply with the agreement. Thus, the injunction remains in effect until another notice is distributed that does comply.

Reinstatement and Back-Pay Won for Worker Denied His *Beck* Rights: *Gally v. United Auto Workers Local 376*, 337 N.L.R.B. No. 36, 2001 WL 1699621 (Dec. 20, 2001). In *Communications Workers v. Beck*, another case National Right to Work Legal Defense Foundation attorneys won, the U.S. Supreme Court recognized that under the NLRA workers cannot be required to be union members. The Court held that objecting nonmembers can be forced to pay union fees only for collective bargaining and contract administration. 487 U.S. 735 (1988). In 1991, after George Gally, an employee of Colt Manufacturing in West Hartford, Connecticut, resigned from membership in the Auto Workers, he was fired at the union's insistence for not complying with its demand that he pay full union dues. The union never informed Gally what his reduced fees would be if he made a *Beck* objection. Gally filed an unfair labor practice charge with the NLRB, and subsequently retained a Foundation attorney to represent him. Shortly before the NLRB General Counsel issued a complaint against the union, Gally was reinstated by Colt. The Board sat on this case until August 1999, when it ruled that Gally's discharge was lawful because he had not submitted a *Beck* objection to the union. 328 N.L.R.B. 1215. Gally's attorney filed a petition for review. The U.S. Court of Appeals for the D.C. Circuit reversed, relying on its decision in an earlier Foundation-won case, *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). *Thomas v. NLRB*, 213 F.3d 651, 655-56 (D.C. Cir. 2000). In *Penrod*, the court held that ***potential*** objectors must "be informed of the amount by which their fees would be reduced were they to become *Beck* objectors." *Thomas*, 213 F.3d at 655-56. On remand, the Board determined that Gally was entitled to recover his lost wages, unless the union demonstrated that he "willfully and deliberately sought to evade" his obligation to pay union fees. 2001 WL 1699621, at *9. On December 24, 2003, after a trial on damages, an ALJ ordered the union to pay $30,773 in lost wages, plus interest. No. 34-CB-1447-1, JD(NY)-59-03 (Biblowitz, A.L.J.). The union filed exceptions to this decision on February 6, 2004.

<u>Cases Designed to Win New Legal Precedents</u>:

President's Executive Order Requiring Posting of *Beck* Notices Defended: *UAW-Labor & Employment Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003). Several unions and a union-funded corporation filed this case against Secretary of Labor Elaine Chao. It challenges President Bush's executive order that requires employers given federal contracts to post notices informing employees of their *Beck* rights not to join unions and not to subsidize union nonbargaining activities. The National Right to Work Legal Defense Foundation filed an *amicus* brief defending the order. However, the U.S. District Court for the District of Columbia enjoined enforcement of the executive order, declaring it prohibited by the NLRA. 169 L.R.R.M. (BNA) 2073, 2002 WL 21720 (2002). The Bush Administration then appealed to the D.C. Circuit, where the Foundation filed a second *amicus* brief defending the order. On April 22, 2003, the Court of Appeals' panel, 2-1, reversed and upheld the executive order. The unions petitioned for

review *en banc*, which was denied 7 to 2 on September 11, 2003. On December 10, 2003, the unions petitioned the U.S. Supreme Court for certiorari. 72 U.S.L.W. 3421 (No. 03-858).

Secretary of Labor's Authority to Issue Stricter Union Financial Reporting Requirements Defended: *AFL-CIO v. Chao*, 174 L.R.R.M. (BNA) 2097, 2004 WL 101605 (D.D.C. Jan. 22, 2004). In October 2003, the Secretary of Labor issued an administrative rule that, effective with January 1, 2004, for the reports due in 2005, requires more detailed and more informative data on the financial reports (LM-2s) that large private-sector unions must file annually with the Department of Labor under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The AFL-CIO sued the Secretary, alleging that she lacks authority under the LMRDA to require unions to report their receipts and disbursements in the detail and functional format required by the new rule. The union also alleges 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. Although the new reporting requirements are not as detailed as the National Right to Work Legal Defense Foundation had urged the Secretary to make them, the Foundation filed an *amicus* brief on December 17, 2003, arguing that the Secretary did have the necessary statutory authority and that the costs of compliance are not unduly burdensome. On December 31, the U.S. District Court for the District of Columbia granted a preliminary injunction postponing the effective date of the rule for one year. 173 L.R.R.M. (BNA) 3011, 2003 WL 23104826. On January 22, 2004, the court held that the Secretary had the statutory authority to issue the rule and concluded that the rule is reasonable and not arbitrary. The court also ordered that the rule can take effect on July 1, 2004, for unions that use a fiscal year beginning on or after that date. On February 13, the AFL-CIO filed notice of an appeal to the U.S. Court of Appeals for the D.C. Circuit.

"Top-Down" Organizing Challenged in Federal Court: *Patterson v. Heartland Industrial Partners*, No. 5:03CV1596 (N.D. Ohio). National Right to Work Legal Defense Foundation attorneys filed this federal court action in July 2003, for Wanda Patterson and five other 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 in the lawsuit 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 with the union. Under this agreement, any company Heartland acquires must remain neutral and recognize the union without a secret-ballot election if a majority of employees sign union authorization cards, must permit the union access to company premises, and must give the union employees' names and home addresses. Moreover, if the union is recognized, the company must compel 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 statutory provision 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. On February 19, the court also denied defendants' motion for certification of an interlocutory appeal of the denial of dismissal. The parties have until September 3, 2004, to complete discovery.

Even a "New" Union Must Give Advance Notice of the Basis for Compulsory Fees: *Robinson v. Pennsylvania State Corrections Officers Ass'n*, No. 1:02-CV-1124, 2004 WL 86433 (M.D. Pa. Jan. 15, 2004). Advance notice to nonmembers of the method by which compulsory union fees are calculated is one of the procedural prerequisites to the collection of such fees that was established in *Teachers Local 1 v. Hudson*, 475 U.S. 292, 306-07, 310 (1986). In this class action brought by corrections officers employed by the Commonwealth of Pennsylvania, the union gave nonmembers no notice until fourteen months after fee deductions began. The union made the novel argument that it did not have to comply with *Hudson*'s requirement, because it was newly organized and had no history of expenditures on which to base the fee calculation. The U.S. District Court for the Middle District of Pennsylvania granted the nonmembers summary judgment that the collection of fees before notice was given was unconstitutional, holding that a "union that cannot satisfactorily explain the method used to compute a fair share fee simply cannot impose the fee." 2004 WL 86433, at *4. "Neither the First Amendment nor *Hudson* supports a 'new union' exception to the advance notice requirement." *Id*. at *5.

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

Pennsylvania Teachers' Rights to Pay Only for Union Bargaining Activities Partially Vindicated: *Otto v. Pennsylvania State Education Ass'n*, 330 F.3d 125 (3d Cir.), *cert. denied*, 124 S. Ct. 466-67 (2003). This action was brought in U.S. District Court in Pennsylvania by National Right to Work Legal Defense Foundation attorneys to enforce the rights of nonunion public school teachers under the Foundation-won Supreme Court precedents in *Hudson* and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The court held that the union violated the teachers' First Amendment rights under *Hudson* by not giving them an audited statement of their local union's expenses and that, under *Lehnert*, the union could not charge nonmembers for litigation not directly affecting their own bargaining unit. However, the court ruled that the union could charge nonmember teachers for collective bargaining activities for health-care employees. 107 F. Supp. 2d 615 (M.D. Pa. 2000). Both sides appealed. On May 8, 2003, the U.S. Court of Appeals for the Third Circuit rejected the unions' argument that the nonmembers were required to object at the time of the fee collection, rather than in their complaint. 330 F.3d at 130. The court also held "that local unions, regardless of their size, are required to obtain audits of their financial statements." *Id*. at 134. The Third Circuit explicitly refused to follow the Ninth Circuit's contrary decision in *Harik v. California Teachers Ass'n*, 326 F.3d 1042, *cert. denied*, 124 S. Ct. 429 (2003), because "*Hudson* implied no intent to make the audit requirement depend on the size of the reporting union." 330 F.3d at 132. However, the court reversed the ruling that bargaining-related extra-unit litigation is non-chargeable and affirmed that the union could charge teachers for collective bargaining for other occupational groups. *Id*. at 135-40. A favorable ruling on the latter issue would have set a new precedent. The union petitioned for certiorari on the local audit issue. The nonmember teachers' attorneys petitioned for certiorari on the chargeability issues. On November 3, 2003, the U.S. Supreme Court denied both petitions.

Suit Challenging Airline Mechanic's Discharge Reinstated: *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 that required 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 *Hudson* 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 attorney sued in U.S. District Court for the Western District of Washington to enforce MacKay's *Hudson* rights, alleging that his discharge was unlawful, and to establish a precedent that membership cannot be imposed by union 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 grant of 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.

Ninth Circuit Limits Relief for Inadequate Compulsory Fee Notices:

(1) *Cummings v. California State Employees Ass'n*, 316 F.3d 886 (9th Cir.), *cert. denied*, 123 S. Ct. 2577 (2003). National Right to Work Legal Defense Foundation attorneys filed this case to enforce the right under *Hudson* of nonmember public employees to receive an independent audit of the proportion of dues charged to them for collective bargaining and contract administration. The union appealed a U.S. District Court order that it return more than $2.5 million in fees to some 37,000 nonmember California state employees, because it did not give a notice that included the required audit until thirteen months after the fee seizures began and eight months after suit was filed. 177 F. Supp. 1079 (E.D. Cal. 2001). The Ninth Circuit agreed that the union's original notice did not satisfy *Hudson*, because that notice merely represented that the figures had been audited but included no auditor's verification. 316 F.3d at 890-92. The court also affirmed certification of a class of all nonmembers, rejecting an argument that plaintiffs were inadequate class representatives because some unidentified nonmembers opposed plaintiffs' pursuit of full restitution, an important new precedent. *Id*. at 895-96. However, the Ninth Circuit held that the District Court erred in ordering the union to refund even the constitutionally nonchargeable portion of the fees to nonmembers who did not object in response to any of the union's notices, because the union made what the District Court called "good faith efforts" to correct the notice and that court itself may have caused the union's delay in issuing an adequate notice. *Id.* at 893-95. The U.S. Supreme Court denied a petition for certiorari. On remand, the District Court ruled that only the seven named plaintiffs, not all class members, are entitled to nominal damages of $1 each for the violation of their *Hudson* rights. 281 F. Supp. 2d 1187 (E.D. Cal. 2003). This ruling has been appealed to the Ninth Circuit.

(2) *Wagner v. Professional Engineers in California Government*, 174 L.R.R.M. (BNA) 2015, 2004 WL 57742 (9th Cir. Jan. 14, 2004). National Right to Work Legal Defense Foundation attorneys brought this case for two nonmember California state employees, as representatives for about 3,200 nonunion state employees forced to pay agency fees to the

Professional Engineers union. The case was filed to enforce the employees' Foundation-won rights under *Hudson* and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The U.S. District Court ruled that the union's notice to nonmembers of the fees' basis was constitutionally inadequate, because the expenses the notice listed were not independently audited. 169 L.R.R.M. (BNA) 3167, 3170, 2002 WL 1009596 (E.D. Cal. 2002). The court also held that the union wrongfully charged nonmembers for lobbying and initiative campaigns, because it failed to show that those expenses were germane to collective bargaining, as *Lehnert* requires. *Id*. at 3171. Both sides appealed. The union argued that the District Court erred in ordering it to pay the class members $337,000 in damages. The nonmembers contended that the court should have enjoined collection of the fees until the union complies with *Hudson*. The nonmembers also sought to establish that listing clearly nonchargeable lobbying and political expenses as chargeable in a *Hudson* notice is unconstitutional *per se*. On January 14, 2004, the U.S. Court of Appeals for the Ninth Circuit held that, "because the injury that fee payers suffer from an inadequate *Hudson* notice is the lack of an informed *opportunity* to object, the proper remedy is for the union to issue proper notice and give another opportunity for objection," not an automatic refund. 174 L.R.R.M. (BNA) at 2020; *contra Wessel v. City of Albuquerque*, 299 F.3d 1186, 1194-95 (10th Cir. 2002). The court, therefore, reversed the award of damages, and affirmed the denial of injunctive relief, even though the union (unlike the union in *Cummings*) still had not issued an adequate notice. *Id*. at 2021, 2026-27. The court also reversed, 2 to 1, the ruling that the union wrongfully charged for lobbying and initiative campaigns, finding that claim waived by a single sentence in a brief one of plaintiffs' attorneys had filed in the District Court. *Id*. at 2022-26.