SIGNIFICANT RECENT DECISIONS
ON ISSUES OF COMPULSORY UNIONISM

Cases Enforcing Employees' Existing Legal Rights:

Jacoby v. NLRB, 325 F.3d 301 (D.C. Cir. 2003) (*Jacoby II*): Joe Jacoby received work through Steamfitters Local 342's exclusive hiring hall in Contra Costa County, California. In an exclusive hiring hall, employers hire only employees the union refers. Under the hiring hall's rules, Jacoby was eligible for a job at the Tosco Refinery. However, the union operated its referral system negligently and failed to refer him to Tosco for months. Jacoby filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In 1995, an Administrative Law Judge (ALJ) ruled that the union violated the National Labor Relations Act (NLRA), by failing to dispatch Jacoby in violation of its own rules, and ordered it to pay his lost wages. The NLRB reversed, overruling long-established Board precedent and refusing to follow federal court decisions that any departure from established hiring hall rules is unlawful. 329 N.L.R.B. No. 65 (Sept. 30, 1999) (2-1 decision). Jacoby then contacted the National Right to Work Legal Defense Foundation, and Staff Attorneys filed an appeal. The U.S. Court of Appeals for the D.C. Circuit reversed and ordered the NLRB to reconsider, holding that unions have a "heightened duty" of fair representation in operating hiring halls and that any departure from established hiring hall rules is unlawful. 233 F.3d 611 (D.C. Cir. 2000). On remand, while purporting to apply that standard, the Board again ruled that the union did not violate the NLRA, because its departure from the hiring hall rules was merely negligent, not intentional. 336 N.L.R.B. No. 44 (Sept. 28, 2001). On a second appeal to the D.C. Circuit, a different panel upheld the Board's decision, reasoning that "an act of simple negligence, unaccompanied by ill will, discrimination, unlawful favoritism, or other obviously unreasonable business practices" does not violate the "heightened duty" standard. 325 F.3d at 309. National Right to Work Legal Defense Foundation attorneys petitioned for rehearing *en banc* based on the Ninth Circuit's contrary decision in *Lucas v. NLRB*, but that petition was denied on May 20, 2003.

Lucas v. NLRB, 172 N.L.R.B. 2206, 2003 WL 1878280 (9th Cir. Apr. 16, 2003). Stage Employees Local 720 in Las Vegas, Nevada, voted to expel nonmember Steven Lucas permanently from its exclusive hiring hall, thus denying him referrals to trade show and convention jobs to which he was otherwise entitled under its own rules. When an employer later requested Lucas by name, the union again refused to refer him. Lucas then filed unfair labor practice charges with the NLRB. An 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. However, 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." 172 L.R.R.M. at 2212. In so ruling, the Ninth Circuit held, contrary to the D.C. Circuit in *Jacoby II*, 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 2211.

Transport Workers Local 514 v. Oklahoma, 172 L.R.R.M. (BNA) 2394, 2003 WL 2007934 (10th Cir. Apr. 24, 2003). In 2001, Oklahoma's voters by referendum added a Right to Work provision to Oklahoma's Constitution. Section 14(b) of the NLRA authorizes such state laws. Moreover, the U.S. Supreme Court ruled in 1949 that state Right to Work 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 provision declared invalid. They claim that the provision is void, because parts of it are preempted by federal labor statutes. Three Oklahoma workers who will be forced to join or pay union dues to keep their jobs if the courts strike down the provision, represented by a National Right to Work Legal Defense Foundation Staff Attorney, intervened to defend the Right to Work provision. The District Court ruled that the Right to Work provision is valid and enforceable, even though sections attempting to prohibit hiring halls and regulate dues check-off arrangements are preempted by federal law. 212 F. Supp. 2d 1319 (E.D. Okla. 2002). The unions then appealed. On April 24, 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 by federal law. The Court of Appeals certified to the Oklahoma Supreme Court the state law question as to whether the preempted sections are severable and, thus, the remainder of the Right to Work provision is valid. On April 30, 2003, the state court ordered simultaneous filing of briefs and answer briefs on the certified question, briefing to be completed by June 9, 2003.

Cases Designed to Win New Legal Precedents:

Mulder v. NLRB, 307 F.3d 760 (9th Cir.) (en banc), *cert. denied*, 123 S. Ct. 551 (2002). In *Ellis v. Railway Clerks*, which National Right to Work Legal Defense Foundation attorneys litigated, the U.S. Supreme Court held that the Railway Labor Act (RLA) prohibits charging union organizing costs to objecting nonmembers forced to pay union fees to keep their jobs. 466 U.S. 435, 451-53 (1984). In *Communications Workers v. Beck*, another case National Right to Work Legal Defense Foundation attorneys litigated, the Court ruled that the NLRA also authorizes unions to charge objecting nonmembers only for collective bargaining and contract administration. The Court held that, in this respect, the two statutes are "in all material respects identical," and "Congress intended the same language to have the same meaning in both." 487 U.S. 735, 745-47 (1988). This case was filed to extend to the NLRA *Ellis*' ruling concerning organizing. A four-to-one NLRB majority declined to follow *Ellis*. 329 N.L.R.B. 730 (1999). A three-judge Ninth Circuit panel unanimously reversed the Board, because, if "the language in one [statute] has the same meaning as the language in the other, then organizing expenses cannot be nonchargeable under one statute and chargeable under the other." 249 F.3d 1115, 1119 (2001). However, the full court ordered rehearing *en banc*. The eleven-judge *en banc* panel deferred to the NLRB and held that, under the NLRA, a union may lawfully charge organizing to objecting nonmembers "when organizing employers within the same competitive market as the bargaining unit employer." 307 F.3d at 774-75. A petition for *certiorari* pointed out that the Fourth Circuit had ruled to the contrary in *Beck*, 776 F.2d 1187, 1211 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (1986), *aff'd*, 487 U.S. 735 (1988). The Solicitor General and NLRB opposed the petition. The Supreme Court denied review on November 12, 2002.

Building & Construction Trades Department, AFL-CIO v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 992 (2003). The AFL-CIO filed this case to challenge President Bush's executive order prohibiting federal agencies and entities receiving federal aid for construction

projects from requiring contractors to enter into project labor agreements (PLAs). PLAs mandate that all employees on a construction site be represented by a union, be hired through a union hiring hall, work according to wasteful union work rules, and, often, pay compulsory union dues. The U.S. District Court for the District of Columbia enjoined enforcement of the executive order, finding that the President lacked authority to issue it and that it is prohibited by the NLRA. 172 F. Supp. 2d 138 (2001). The Administration then appealed to the D.C. Circuit. On July 12, 2002, the court of appeals reversed, declaring the executive order valid. The National Right to Work Legal Defense Foundation filed *amicus* briefs defending the executive order in both courts. On January 27, 2003, the U.S. Supreme Court denied the BCTD's petition that the high court hear the case. Thus, the Court of Appeals' decision is final.

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 to challenge President Bush's executive order requiring 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 this executive order, too, 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 executive order. On April 22, 2003, the Court of Appeals' panel, 2-1, reversed and upheld the executive order.

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (*en banc*). The Pueblo of San Juan is located in New Mexico, which has no Right to Work law. In 1996, the Pueblo passed a Right to Work ordinance. The NLRB sued, claiming that the NLRA prohibited the ordinance. The U.S. District Court for New Mexico and a three-judge panel of the Tenth Circuit both held that the ordinance is a valid exercise of tribal sovereign authority. 30 F. Supp. 2d 1348 (1998), *aff'd*, 280 F.3d 1278 (2000) (2-1 decision). The Tenth Circuit then granted rehearing *en banc*. On January 11, 2002, the full Court of Appeals issued a precedent-setting 9-1decision upholding the right of Native American tribes to enact and enforce Right to Work laws. A National Right to Work Legal Defense Foundation attorney assisted the Pueblo's attorneys at all stages of the case, and the National Right to Work Legal Defense Foundation filed *amicus* briefs in both courts, to establish the new precedent that Indian tribes can enact Right to Work laws. On April 22, 2002, the *en banc* decision became final when no one requested Supreme Court review.

Lee v. NLRB, 325 F.3d 749 (6th Cir. 2003). Earl Lee is employed by the Saturn Corporation in Tennessee. His exclusive bargaining agent is the United Auto Workers (UAW). Mr. Lee resigned his union membership and stopped paying dues, as is his right under Tennessee's Right to Work law. The UAW later announced that former members who resign and stay in the bargaining unit cannot rejoin unless they pay all back dues for the period they were not members. New employees who do not immediately join the union, or former members who resign when promoted out of the bargaining unit, do not have to pay back dues if they later seek to join the union. A National Right to Work Legal Defense Foundation Staff Attorney filed unfair labor practice charges for Lee with the NLRB to establish that this discriminatory policy unlawfully discourages resignations and penalizes employees who resign. The NLRB ruled that the policy is lawful, because an employee's decision to rejoin is voluntary. 333 N.L.R.B. No. 43 (Feb. 13, 2001). An appeal was filed with the U.S. Court of Appeals for the Sixth Circuit. The appeal contended that the policy unlawfully impairs the NLRA's

fundamental policy of not permitting restrictions on the right to resign, a policy the Supreme Court recognized in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985). The Court of Appeals affirmed the Board's ruling on April 8, 2003.

Ohio State Building & Construction Trades Council v. Cuyahoga County Board, 781 N.E.2d 951 (Ohio 2002). In 1999, Ohio's legislature enacted a statute to prohibit state and local public bodies from including in construction project bid specifications "project labor agreements" that require a contractor to enter into an agreement with a union or require the contractor's employees to become members or pay union fees. A state trial court enjoined enforcement. 162 L.R.R.M. (BNA) 2521, 1999 WL 972477 (Ohio C.P. 1999). An Ohio Court of Appeals reversed and upheld the law. No. 2001-Ohio-4228, 2001 WL 1152900 (Ct. App. Sept. 27, 2001). However, the Ohio Supreme Court then reversed the appeals court, holding that the Ohio statute is preempted by the NLRA. That decision directly conflicts with the D.C. Circuit's decision in *Building & Construction Trades Department v. Allbaugh*, described above. The National Right to Work Legal Defense Foundation filed *amicus curiae* briefs in both Ohio appellate courts in support of the statute. It also urged Ohio's Attorney General to ask the U.S. Supreme Court to hear the case. However, on March 26, 2003, the Attorney General announced that he would not request Supreme Court review. Therefore, the Ohio Supreme Court's decision is final.

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

Foster v. Mahdesian, 268 F.3d 689 (9th Cir. 2001), *cert. denied*, 535 U.S. 1112 (2002). In *Teachers Local 1 v. Hudson*, a case National Right to Work Legal Defense Foundation attorneys litigated, the U.S. Supreme Court ruled that, before nonmember public employees can be forced to pay union fees, they must receive a notice that explains the basis for the proportion of dues that is related to collective bargaining and that includes verification of the proportion by an independent auditor. 475 U.S. 292, 306-07 & n.18 (1986). A U.S. District Court agreed that the California Teachers Association's notice was constitutionally inadequate, because its locals' expenses were not independently verified. The court also ruled that the school districts violated nonmember teachers' First Amendment rights by deducting fees from paychecks despite the defective notice. 1999 WL 1788185 (N.D. Cal. Oct. 22, 1999). No one appealed the ruling that the notice was inadequate, but the districts appealed the judgment that they were liable. The Ninth Circuit held that a public employer is not liable for deducting compulsory union fees before constitutionally adequate notice is given, even though it has a duty to ensure that the procedures *Hudson* requires are provided. This ruling conflicts with other rulings applying *Hudson*. *See*, *e.g.*, *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537-38 (6th Cir. 1992). However, on May 30, 2002, the Supreme Court declined to hear the case.

Prescott v. County of El Dorado, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1251 (2003). This civil rights action brought for nonmember county employees challenged the adequacy of the El Dorado County Employees Association's procedures for collecting agency fees. The Ninth Circuit agreed that the union's procedures were constitutionally inadequate under *Hudson* in certain respects. 177 F.3d 1102 (1999), *vacated on other grounds*, 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 984 (2000). However, on a second appeal, that court ruled that the nonmembers could not challenge the union's agreement to reimburse the County for any liability the latter incurred by unlawfully seizing the fees from the employees' wages, because, under *Foster*, the County has no

liability for deducting the fees. The validity of such agreements is an important issue, because unions regularly use such agreements to convince employers to agree to compulsory fee requirements. In this case, the National Right to Work Legal Defense Foundation attempted to extend the favorable precedent established in the Sixth Circuit in *Weaver* that such indemnification clauses are void as against public policy. After the Ninth Circuit's second decision, a petition for Supreme Court review asked the Court to reverse the Ninth Circuit in this case and overrule *Foster*. On February 24, 2003, *certiorari* was denied.

Cummings v. California State Employees Ass'n, 316 F.3d 886 (9th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3668 (U.S. Apr. 09, 2003) (No. 02-1493). This case was filed to enforce nonmember public employees' rights under *Hudson* to independent verification of the basis for the reduced fee they must pay if they object to use of their compulsory union fees for nonbargaining purposes. The U.S. District Court ordered that the union return, for failure to provide the required audit, more than $2.5 million in forced fees to some 37,000 nonmember California state employees. 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 verification of that fact by the auditors. 316 F.3d at 890-92. The court also affirmed certification of a class of all nonmembers, rejecting an argument that the named plaintiffs are not adequate class representatives because some unidentified class members oppose plaintiffs' pursuit of full restitution. *Id*. at 895-96. However, the Ninth Circuit ruled 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 either the inadequate notice or a corrected notice given thirteen months after suit was filed, because the union made what the District Court called "good faith efforts" to correct the notice and that court may have caused the union's delay in issuing a proper notice. *Id.* at 893-95. The Ninth Circuit again held that nonmembers cannot challenge the union's agreement to indemnify the public officials who deduct the fees for any liability the latter incur for violating nonmembers' rights. *Id*. at 898. This ruling is directly contrary to that of the Tenth Circuit on the same issue in *Wessel v. City of Albuquerque*, discussed below. National Right to Work Legal Defense Foundation attorneys filed a petition for certiorari on the remedy and indemnification issues with the Supreme Court on April 9, 2003.

Otto v. Pennsylvania State Education Ass'n, 172 L.R.R.M. (BNA) 2452, 2003 WL 21031456 (3d Cir. May 8, 2003). This action was brought in U.S. District Court in Pennsylvania for seven nonunion public school teachers to enforce their rights 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 April 3, 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, and held that local unions, regardless of their size, must obtain formal independent audits of the financial statements disclosed to nonmembers. 172 L.R.R.M. (BNA) 2138, 2141-45, 2003 WL 1757648 (Apr. 3, 2003). However, it reversed the ruling that bargaining-related extra-unit litigation is nonchargeable and affirmed that the union could charge teachers for collective bargaining for other occupational groups. *Id*. at 2145-49. A favorable ruling on the latter issue would have set a new precedent.

National Right to Work Legal Defense Foundation attorneys plan to petition for *certiorari* on the chargeability issues. In the interim, the union filed for rehearing on the local audit issue based on the Ninth Circuit's contrary amended decision in *Harik v. California Teachers Ass'n,* discussed next. On May 8, 2003, the Third Circuit granted rehearing and reiterated its holding "that local unions, regardless of their size, are required to obtain audits of their financial statements." 2003 WL 21031456, at *5. The Third Circuit explicitly refused to follow *Harik*, because "*Hudson* implied no intent to make the audit requirement depend on the size of the reporting union." *Id*. at *4.

Harik v. California Teachers Ass'n, 326 F.3d 1042 (9th Cir. 2003). This is another civil rights action filed to challenge the constitutionality of a teacher union's procedures for collecting agency fees. On August 1, 2002, the Ninth Circuit decided cross-appeals that presented several issues. On the most important issue, the court held that a small local union is not excused from *Hudson*'s First Amendment due process requirement of providing nonmembers with independent verification of its calculation of the bargaining-related expenses lawfully chargeable to nonmembers. 298 F.3d 863, 868-70. The court ducked the issue of whether local unions must prove their own actual expenditures in arbitration, rather than expenditures of a sample of other locals, if nonmembers challenge their local's fee calculations, ruling that the issue can only be addressed on appeal from an arbitrator's decision on such challenges. *Id*. at 870-71. A favorable ruling on this issue would have established a new precedent. On April 15, 2003, the court denied the union's petition for rehearing on the local audit issue, but effectively granted it by issuing an amended opinion ruling that a small local union must either provide an audit or give objecting nonmembers an opportunity to themselves review its books and records. 326 F.3d at 1047-49. The Supreme Court explicitly rejected the latter option in *Hudson*, 475 U.S. at 297, 306-07 & nn.16, 18. National Right to Work Legal Defense Foundation attorneys will ask the Supreme Court to reverse the Ninth Circuit's ruling on the local audit issue.

Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002). An Albuquerque ordinance guarantees City employees the right to refrain from joining or participating in unions. Without following the procedural requirements for repealing 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, National Right to Work Legal Defense Foundation attorneys 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 found the resolution 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 under *Hudson*. Both sides appealed. In August 2002, the Tenth Circuit ruled that, because the ordinance does not explicitly prohibit "fair share" fees, the resolution lawfully authorizes such fees. 299 F.3d at 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. Rejecting the Ninth Circuit's contrary decision in *Prescott* (described above), the Tenth Circuit also voided as unlawful the union's agreement to reimburse the City for any liability the City incurred by unlawfully seizing fees from employees' wages. *Id.* at 1197-99 (2-1 decision). Neither side filed a petition for *certiorari*. The case was remanded for an evidentiary hearing to determine what part of the fee is attributable to the state and national AFSCME's costs of serving as exclusive representative in other bargaining units. The Court of Appeals ruled that such costs are not

constitutionally chargeable under *Lehnert*. 299 F.3d at 1195-96. The District Court held the required hearing on December 12, 2003.