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, even when an employer requested him by name. 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. 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 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. On June 2, 2004, the Board finally 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.

Oklahoma Right to Work Law Upheld:

(1) *Transport Workers Local 514 v. Keating*, 358 F.3d 743 (10th Cir. 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. 358 F.3d at 750-54. 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

755-56. 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." 83 P.3d 835, 841. 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. 358 F.3d at 745.

(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.

Reinstatement and Back-Pay Won for Worker Denied His *Beck* Rights: *Gally v. United Auto Workers Local 376*, 342 N.L.R.B. No. 6, 2004 WL 1400255 (June 18, 2004). In *Communications Workers v. Beck*, a 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 (UAW), 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 Staff 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. 337 N.L.R.B. 237, 242 (2001). In December 2003, after a trial on damages, an ALJ ordered the union to pay $30,773 in lost wages, plus interest. 2004 WL 1400255, at *9. The union filed exceptions to this decision. However, on June 18, 2004, the Board affirmed the ALJ's decision. *Id*. at *1.

Cases Designed to Win New Legal Precedents:

President's Executive Order Requiring Posting of *Beck* Notices Successfully Defended: *UAW-Labor & Employment Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), *cert. den.*, 124 S. Ct. 2014 (2004). Several unions and a union-funded corporation filed this case against Secretary of Labor Elaine Chao. It challenged 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. 325 F.3d 360. The unions petitioned for review *en banc*, which was denied 7 to 2 on September 11, 2003. The unions then petitioned the U.S. Supreme Court for certiorari. On April 19, 2004, the Supreme Court denied the petition.

Secretary of Labor's Authority to Issue Stricter Union Financial Reporting Requirements Successfully Defended: *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, effective January 1, 2004, for 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 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 filed an appeal 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. On August 11, 2004, the Foundation filed another *amicus* brief supporting the new administrative rule.

"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 Staff Attorneys filed this federal court action 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 not oppose union organizing and must recognize the union without a secret-ballot election if a majority of employees sign union authorization cards, and must permit the union access to company premises and give the union employees' names and home addresses to aid it in soliciting signatures. 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. 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. Discovery is now proceeding.

Even a "New" Union Must Give Advance Notice of the Basis for Compulsory Fees: *Robinson v. Pennsylvania State Corrections Officers Ass'n*, 299 F. Supp. 2d 425 (M.D. Pa. 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." 299 F. Supp. 2d at 430. "Neither the First Amendment nor *Hudson* supports a 'new union' exception to the advance notice requirement." *Id*. This was not a National Right to Work Legal Defense Foundation case, but was based on the Foundation-won precedents in *Hudson* and *Otto*, described below.

NLRB Reconsiders Policy Blocking 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 union authorization 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 for Review 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. On July 15, 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 parties filed reply briefs on July 29, 2004. The Board has not yet ruled. The briefs in these cases are available on-line at http://www.nlrb.gov/nlrb/home/default.asp.

Graduate Students' Freedom from Forced Unionism Restored: *Brown University v. UAW*, 342 N.L.R.B. No. 42, 2004 WL 1588744 (July 13, 2004). In a case called *New York University (NYU)*, the NLRB overturned more than 25 years of precedent in ruling that graduate student assistants are employees under the National Labor Relations Act (NLRA) and, thus, subject to compulsory exclusive representation. 332 N.L.R.B. 1205 (2000). In 2001, a NLRB Regional Director applied *NYU* and ordered an election for an exclusive representative in a bargaining unit of graduate student teaching and research assistants at Brown University in Rhode Island. The university filed a Request for Review asking the Board to reconsider *NYU*. The Board granted review. In May 2002, the National Right to Work Legal Defense Foundation filed an *amicus* brief arguing that teaching assistants "are students and not employees," and that allowing union officials monopoly bargaining power over teaching assistants would undermine academic freedom and infringe on the First Amendment freedom of association of those assistants who do not want union representation. On July 13, 2004, the Board, 3-2, concluded that the prior "25-year precedent was correct," overruled *NYU*, and held that "graduate student assistants are not statutory employees," because "the imposition of collective bargaining on graduate students would improperly intrude into the educational process." 2004 WL 1588744, at *1, *7, *15. This decision is final, because there is no appeal from a Board decision in a representation case.

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, 467 (2003). This action was brought in U.S. District Court by National Right to Work Legal Defense Foundation Staff Attorneys to enforce the rights of nonunion Pennsylvania 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 nonchargeable 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. Both sides petitioned for certiorari. 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 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 *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 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. The District Court has scheduled a trial to begin January 21, 2005.

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*, 539 U.S. 927 (2003). National Right to Work Legal Defense Foundation Staff 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*, 354 F.3d 1036 (9th Cir. 2004). National Right to Work Legal Defense Foundation Staff 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*. 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. 354 F.3d at 1042; *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. 354 F.3d at 1043, 1050. 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 filed for plaintiffs in the District Court. *Id*. at 1044-50. The nonmembers are free to pursue this claim in subsequent litigation after a new notice is issued. *See id*. at 1041 n.2.

Punitive Damages Claim Against Municipal Employees' Union Sent to Jury: *Wessel v. City of Albuquerque*, No. CIV 00-65 LH/KBM, 2004 WL 1736800, and *Harrington v. City of Albuquerque*, No. CIV 01-531 LH/WDS, 2004 WL 1736781 (D.N.M. July 27, 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 under *Hudson*. 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 and attorneys' fees the City incurred as a result of 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 "fair share" 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*. *Id*. at 1196. The District Court held the required hearing in December 2003. In the meantime, after the District Court's partially favorable decision, a companion class action called *Harrington v. City of Albuquerque* was filed for about 300 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. *Wessel*, 2004 WL 1736800, at *3-*9; *Harrington*, 2004 WL 1736781, at *4-*5. The City was ordered to return the indemnification it had received from the union. *Wessel*, 2004 WL 1736800, at *10-*12. 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. 2004 WL 1736781, at *5-*7.