SIGNIFICANT RECENT DECISIONS ON ISSUES OF COMPULSORY UNIONISM

(May 6, 2005)

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, particularly in a right-to-work State such as North Carolina." *Id*. (citation omitted). The court did not reach the constitutional issue. The time for requesting Supreme Court review has expired, so this decision is final.

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) *appeal docketed*, No. 04-5057 (D.C. Cir. Feb. 26, 2004).

In October 2003, the Secretary of Labor issued an administrative rule that 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 that 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 that the Secretary did not give unions sufficient time to make the accounting changes necessary to comply with the new rule. 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 rule's effective date 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 be further delayed. 2004 WL 1557786, 175 L.R.R.M. (BNA) 2202. The new requirements 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.

Discrimination Against Nonmembers in Health Benefits Successfully Attacked: *Brannian v. San Diego Municipal Employees Ass'n*, No. 02CV1726-BTM(WMC), 2005 WL 831812 (S.D. Cal. Mar. 29, 2005)

Susan Brannian is an assistant chemist employed by the City of San Diego. The Municipal Employees' Association (MEA) exclusively represents her bargaining unit. She is not a union member. She pays no representation fees, because the employees in her unit have twice voted against agency shop. The City offers a flexible benefits plan in which employees can spend pre-tax dollars on various benefits, such as health and life insurance. MEA runs the dental and eye care insurance plans, but by agreement with the City only members or agency fee payers could buy into these plans. Employees who did not pay union dues or fees could not use flex benefits dollars to buy dental or eye care insurance. National Right to Work Legal Defense Foundation attorneys filed a federal class action for Brannian and other nonmembers alleging that this scheme violated the First Amendment.

In October 2003, the U.S. District Court for the Southern District of California denied the union's motion to dismiss. In May 2004, the union and City amended their collective bargaining agreement to allow nonmembers who do not pay agency fees to participate in the union's dental and eye care insurance plans with flex benefits dollars. Consequently, on September 27, 2004, the court found that the plaintiffs' claims for declaratory and injunctive relief were moot and denied class certification. On March 29, 2005, the court granted plaintiffs summary judgment for $1 in nominal damages each year for 2002 and 2003. The court held "that Defendants infringed Plaintiffs' First Amendment rights in June 2002 by providing optional insurance plans to union members only." 2005 WL 831812, at *7. The court also ruled that a requirement imposed in 2003 that nonmembers pay a "voluntary agency fee" to enroll in the insurance plans also "was impermissibly coercive in violation of the First Amendment." *Id*. at *8.

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 Corporation's auto interior components plant

in Holmesville, Ohio. Collins & Aikman's employees had previously rejected union efforts to obtain recognition through the secret-ballot election process supervised by the NLRB. 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, arguing that there is no private cause of action to enforce the statutory prohibition and that the "neutrality" agreement is not a "thing of value." In January 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 the 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, denied mandamus. Order, No. 04-3290. During discovery, the union refused to produce hundreds of documents concerning its organizing strategy and the negotiations with the company defendants. 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. On March 25, 2005, the Magistrate denied a union motion for a protective order against public disclosure of most of the disputed documents. The District Judge has not yet ruled on the union's objections to that decision. Cross-motions for summary judgment were filed in April 2005.

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 the Metaldyne petition 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 *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 2004. "*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. The two NLRB vacancies have not yet been filled, and no decision has been issued in these cases.

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 NLRA and, thus, subject to compulsory exclusive representation. 332 N.L.R.B. 1205 (2000). In 2001, an 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

Court Enforces Back-Pay Remedy Ordered for Hiring-Hall Discrimination Against Nonmember: *Lucas v. NLRB*, 333 F.3d 927 (2003), *review denied after remand*, No. 04-75194 (9th Cir. Feb. 11, 2005).

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. The Board and Lucas' attorney asked the court to summarily deny the union's petition and enforce the Board's order to make Lucas whole. On February 11, 2005, the court did so. The NLRB Region is now calculating the amount of back-pay and lost benefits due Lucas.

CASES ENFORCING EMPLOYEES' EXISTING LEGAL RIGHTS & DESIGNED TO WIN NEW PRECEDENTS

Appeal Establishes that All Class Members Are Entitled to Nominal Damages for Inadequate Compulsory Fee Notices: *Cummings v. California State Employees Ass'n*, 402 F.3d 936 (9th Cir. 2005).

National Right to Work Legal Defense Foundation Staff Attorneys filed this civil rights action to enforce the right of nonmember public employees to receive an independent audit of the proportion of dues charged to them for collective bargaining and contract administration. *See Teachers Loca1 1 v. Hudson*, 475 U.S. 292, 306-07 & n. 18 (1986). The U.S. District Court for the Eastern District of California certified the case as a class action. 163 L.R.R.M. (BNA) 2086, 1999 WL 1256772 (1999). Granting summary judgment against the union, the District Court ordered 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. 2d 1079 (E.D. Cal. 2001). On appeal, 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 886, 890-92 (2003). 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. 539 U.S. 927 (2003).

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 was appealed to the Ninth Circuit, which reversed it on March 29, 2005. The court held "that when nominal damages are awarded in a civil rights class action, every member of the class whose constitutional rights were violated is entitled to nominal damages." 402 F.3d at 940. The case was remanded with instructions to award nominal damages to the entire class. *Id*. at 948.

Suit Challenging Airline Mechanic's Discharge Appealed Again: *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 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 Mackay in U.S. District Court for the Western District of Washington, alleging that the discharge was unlawful, 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 conducted a four-day bench trial beginning on January 21, 2005. On March 22, 2005, the court issued its decision. It found that MacKay told the local union president that "he did not want to be a union member," and that the other facts "did not . . . make

plaintiff a *de facto* member of the union." Yet, the court held, inconsistently, that the union lawfully demanded Mackay's discharge, because the facts "reasonably led union officials to believe that plaintiff was a member rather than a nonmember." MacKay's attorney filed a second appeal to the Ninth Circuit on April 12, 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 1237 (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 not complied with *Hudson*'s requirement that it give nonmembers adequate notice of the financial basis for the fee.

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 succeeded 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, a companion class action called *Harrington v. City of Albuquerque* had been 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*. Their brief is due on May 23, 2005. In *Harrington*, the District Court approved a class notice in October 2004 that was mailed to 771 putative class members, only ten of whom asked to be excluded from the case. On March 24, 2005, the parties agreed to settle *Harrington*. The settlement will not be final until class members are given notice of its terms and an opportunity to object to it, and the court approves those terms after a fairness hearing.

Adequate Advance Notice of the Basis for Compulsory Fees Must Link Total Chargeable Expenses to Revenues Generated by the Fees: *Robinson v. Pennsylvania State Corrections Officers Ass'n*, 299 F. Supp. 2d 425 (2004), *further proceedings*, 176 L.R.R.M. (BNA) 2717, 2005 WL 273157 (E.D. Pa. Feb. 4, 2005).

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 partial 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*.

In subsequent proceedings, the court considered the adequacy of the notice eventually given by the union. On February 4, 2005, the court again granted the nonmembers partial summary judgment, holding that the notice was constitutionally inadequate because it was "based on *union dues*, rather than the revenues necessary to cover chargeable expenses." 176 L.R.R.M. (BNA) at 2722. The court explained that "the cardinal purpose of the *Hudson* notice is disclosure of the relationship between the fair share fee and nonunion employees' *pro rata* share of union expenses attributable to collective bargaining activities." *Id*. at 2721. However, union "dues may bear little or no relation to chargeable (or total) expenses of the union, and are essentially irrelevant to computation of the fair share fee." *Id*. at 2722 (footnote omitted). Thus, it is not enough for a *Hudson* notice to merely "list the prior year's expenditures, reasonably categorized to indicate their use, with verification by an independent auditor," and "divided into 'chargeable' and 'nonchargeable' costs, with a general explanation of the basis for these allocations. Most importantly, the notice must link the total chargeable expenditures to the revenues to be generated by the fair share fee, if applied to all employees." *Id*. (citations omitted).[1]

[1] *Robinson* was not a National Right to Work Legal Defense Foundation case, but was based on Foundation-won precedents in *Hudson* and its progeny.