SELECTED SIGNIFICANT RECENT LABOR DECISIONS

(June 15, 2006)

Decision Upholding Secretary of Labor's Tighter Union Financial Reporting Requirements Becomes Final: *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005).

In October 2003, the Secretary of Labor issued an administrative rule that requires more detailed and more informative data in the financial reports that large private-sector unions must file annually with the Department of Labor under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 433(b), 438. This rule requires a covered union to itemize its receipts and disbursements in functional categories in the report (LM-2) it must file about its own finances. The rule also requires the union to file a financial report (T-1) concerning any "significant trust" in which it is "interested." The AFL-CIO sued, alleging that the Secretary lacks authority to impose these new requirements. The AFL-CIO also alleged that the new rule is arbitrary and capricious, because compliance is unduly burdensome, and that the Secretary did not give unions sufficient time to make the accounting changes necessary to comply.

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 104, 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.

On May 31, 2005, a three-judge panel of the Court of Appeals unanimously upheld the portion of the rule that requires itemization of receipts and disbursements in functional categories in the LM-2 reports in which unions must disclose their own finances. 409 F.3d at 380-86. However, the panel majority (Circuit Judges Edwards and Rogers) ruled that the section of the rule that required financial reports concerning any "significant trust" in which such unions are "interested" was not a reasonable application of the Secretary's authority under the LMRDA. *Id*. at 386-91. Then Circuit Judge Roberts dissented from the latter ruling. *Id*. at 391-95. On July 15, 2005, the Secretary petitioned for rehearing, and rehearing en banc, of the latter ruling. The Court denied that petition on September 28. Neither side having petitioned for certiorari in the U.S. Supreme Court by December 27, the Court of Appeals' decision is now final.

Second Circuit Reviews District Court Decision That NLRA Preempts N.Y. Statute Prohibiting Use of State Funds to Encourage or Discourage Union Organizing: *Healthcare Ass'n of N.Y. State, Inc., v. Pataki*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005), *argued*, No. 05-2570 (2d Cir. Feb. 10, 2006).

The State of New York enacted a statute that prohibits the use of any "state funds," including Medicaid, for "encourag[ing] or discourag[ing] union organization," requires employers receiving state funds to make detailed reports showing that state funds are not used for the prohibited purposes, and authorizes financial penalties for violation of the statute. A group of health

care organizations brought suit in federal court seeking to overturn the law as, among other things, preempted by the National Labor Relations Act (NLRA).

On May 17, 2005, the U.S. District Court for the Northern District of New York held that the statute is preempted. The court first ruled that the state was acting as a regulator, not a market participant, because the statute "is broadly drafted to apply to *all state contracts*," and "allow[s] unions to actively participate in union organization campaigns while at the same time significantly curtailing the ability of employers to voice their opposition to unions." 388 F. Supp. 2d at 13-20. The court then held that the statute is preempted under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), because, by directly regulating the organizing process and imposing substantial compliance costs and litigation risks on employers who oppose union organizing, the statute interferes with an area of labor relations that Congress intended to leave free from state regulation. *Id*. at 21-25. The court noted that section 7 of the NLRA gives employees the right to join a labor union and the right to refuse to join, but that it "is difficult, if not impossible, to see . . . how an employee could exercise such rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's." *Id*. at 23.

The state appealed to the U.S. Court of Appeals for the Second Circuit. Numerous amicus briefs were filed on both sides, including a brief for the National Right to Work Legal Defense Foundation in support of the plaintiffs. A three-judge panel of the Court of Appeals heard oral argument on February 10, 2006.

NLRB Orders Full Compliance with Fourth Circuit Ruling Establishing Nonmembers' Right Not to Wear Union Label: *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005), *remanded to* 346 N.L.R.B. No. 59, 2006 WL 516370 (Feb. 28, 2006).

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 the nonmembers' right to refrain from union activity guaranteed by section 7 of the NLRA, 29 U.S.C. § 157. The NLRB's General Counsel agreed and issued a complaint against BellSouth and CWA. However, the NLRB upheld the logo requirement. 335 N.L.R.B. 1066 (2001).

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 courts had never before decided whether forcing nonmembers to wear union propaganda violates the NLRA or the First-Amendment guarantee of free speech. On January 4, 2005, the court reversed 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. No petition for certiorari was filed.

When the case returned to the NLRB, BellSouth and CWA argued that the Board should merely order them not to coerce employees who object to wearing the CWA logo. In a supplemental decision on February 28, 2006, the Board agreed with the workers' attorney that stronger, affirmative remedies were required. It ordered BellSouth and CWA to rescind the contractual provisions that mandated wearing of the union's logo and to notify BellSouth's approximately 20,000 employees in some 2,500 locations who must wear BellSouth uniforms that they are free to wear the patch or not without fear of reprisal for either choice. 346 N.L.R.B. No. 59.

Seventh Circuit Strikes Down Milwaukee County Ordinance Requiring Private Employers to Assist Union Organizing: *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).

Milwaukee County, Wisconsin, enacted an ordinance that requires employers that contract with the County to provide services for elderly and disabled County residents to sign so-called "labor peace agreements" with any union seeking to organize employees who work on County contracts. Under the agreements the ordinance mandates, employers must give union organizers access to their facilities and provide them employees' names, addresses, and telephone numbers, and cannot express opposition to unionization. A business association that includes contractors affected by the ordinance sued to enjoin enforcement of the ordinance on the ground that it is preempted by the NLRA.

The U.S. District Court for the Eastern District of Wisconsin granted summary judgment for the County, reasoning that the ordinance was not preempted because it reasonably served the goal of reducing "the likelihood of service disruptions caused by labor disputes." *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 359 F. Supp. 2d 749, 763 (E.D. Wis.), *rev'd*, 431 F.3d 277 (7th Cir. 2005). The business association appealed to the U.S. Court of Appeals for the Seventh Circuit, where the National Right to Work Legal Defense Foundation filed an amicus brief supporting the association. The Foundation's brief argued that the NLRA prohibits "labor peace agreements" in contracts of private employers outside the construction industry, and government agencies should be held to the same standard.

On December 5, 2005, the Seventh Circuit reversed the District Court's judgment with directions to enter judgment for the association, ruling that the ordinance is preempted by the NLRA as an attempt "to substitute [the County's] own labor-management philosophy for that of the [NLRA]." 431 F.3d at 281. The court pointed out, as the Foundation's brief argued, that "labor-peace agreements . . . are not recognized by the [NLRA]." *Id*. at 282. It explained that such an agreement "would give the union a leg up to organize the company's entire workforce even if the vast majority of the employees' time was devoted to the employers' private contracts," "favoritism that the [NLRA] anathematizes." *Id*. at 280. Moreover, the court emphasized that "a labor peace agreement is as likely to increase as to decrease work stoppages," because if more contractors' workforces are unionized "there will be an increased risk of strikes." *Id*. at 281. Milwaukee County did not petition for review by the U.S. Supreme Court within the time required, so the Court of Appeals' decision is final.

Ninth Circuit Considers *En Banc* Whether NLRA Preempts State Statute Barring Employers' Use of State Funds to Oppose Union Organizing: *Chamber of Commerce of the U.S. v. Lockyer*, 422 F.3d 973 (2005) (2-1 decision), *reh'g en banc granted*, 435 F.3d 999, *panel opinions withdrawn*, 437 F.3d 890 (9th Cir. 2006).

California enacted a statute that prohibits employers who receive state funds from "us[ing] any of those funds to assist, promote, or deter union organizing." Cal. Gov't Code § 16645.7(a). Employer associations sued alleging that the statute is preempted by the NLRA and, therefore, unconstitutional under the Supremacy Clause. In 2002, the U.S. District Court for the Central District of California granted the associations summary judgment, except as to provisions of the statute that deal with state contractors and public employers. 225 F. Supp. 2d 1199. The state and intervening unions appealed. In 2004, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that the statute is preempted under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), because, by directly regulating the organizing process and imposing substantial compliance costs and litigation risks on employers who advocate or oppose union organizing, the statute interferes with an area of labor relations that Congress intended to leave free from state regulation. 364 F.3d 1154, 1164-72.

On May 13, 2005, the court granted panel rehearing and withdrew its original opinion. 408 F.3d 590. The panel then ruled 2 to 1, on September 6, that the state statute is completely preempted as to any NLRA-covered employer under not only *Machinists*, but also under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). 422 F.3d at 994. *Garmon* bars state regulation of conduct that the NLRA actually or arguably prohibits or protects, because such regulation would interfere with the NLRB's administration of the NLRA. *See id*. at 985-86.

The panel majority held "that Section 8(c) of the [NLRA], codified at 29 U.S.C. § 158(c), explicitly protects the right of employers to express their views about unions and union organizing efforts." 422 F.3d at 982. Therefore, the state statute "is completely preempted under the *Garmon* doctrine," because the "statute stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the [NLRB] to uphold its election speech rules and administer free and fair elections." *Id*. at 985.[1] The court reiterated that *Machinists* preemption applies, because, though "cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers" and "runs roughshod over the delicate balance between labor unions and employers" Congress mandated in the NLRA. *Id*. at 988.

On January 17, 2006, a majority of nonrecused regular active judges of the Ninth Circuit ordered rehearing en banc. 435 F.3d 999. On February 9, a majority of the en banc court ordered that the panel opinions "are withdrawn." 437 F.3d 890. Oral argument en banc has not yet been scheduled.

---

[1] The panel emphasized that it "'is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right.'" 422 F.3d at 984 (quoting *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971)).

Court Approves Settlement of Punitive Damages Claim Against Municipal Employees' Union, Tenth Circuit Hears Argument on Remedies in Companion Individual Suit: *Wessel v. City of Albuquerque*, 327 F. Supp. 2d 1332 (D.N.M. 2004), *argued*, No. 04-2212 (10th Cir. Mar. 6, 2006); *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. Ignoring 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, 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. The court also ruled that the union, an American Federation of State, County & Municipal Employees (AFSCME) local, had not complied with the requirement that it give nonmembers adequate notice of the independently audited financial basis for the fee, a requirement established in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986).

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 fees. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1190-92. However, the workers' appeal succeeded in three respects. Setting a new precedent, the court held that a union does not satisfy *Hudson*'s notice requirement by merely stating that its expenses were audited, but must put the independent auditor's report in the notice. *Id*. at 1192-94. The court 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 also 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 other nonunion City employees. Moreover, all fee deductions ended in July 2000, because the union did not send nonmembers a notice of the fee's basis for subsequent fiscal years. *Harrington* 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, which ultimately included 761 nonmember City employees.

On July 27, 2004, the court granted final judgment for the *Wessel* plaintiffs and a partial summary judgment for the *Harrington* class. 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. Moreover, the court ruled in *Harrington* that a jury should decide whether the class was 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*, contending that the union had proven that all fees were collected for lawfully chargeable purposes, and that the City should not be required to disgorge the attorneys' fees it received from the union contrary to public policy. A three-judge panel of the Tenth Circuit heard oral argument on March 6, 2006. No decision has yet been issued.

On March 24, 2005, the parties agreed to settle *Harrington*. The court approved those terms, after notice to the class, at a hearing on August 2. Under the settlement, the union has paid 479 class members $62,561 in fee refunds, interest, and nominal damages and another $95,000 in lieu of punitive damages. The union had also refunded fees and interest totaling $21,627 during the litigation and has agreed that it will pay class members another $30,000 in lieu of punitive damages if the Tenth Circuit upholds the *Wessel* order that the City return the indemnification it received from the union.

Suit Forces Union to Refund Nonmembers' Monies Seized to Fight Ballot Propositions: *Liegmann v. California Teachers Ass'n*, 395 F. Supp. 2d 922 (N.D. Cal. 2005).

In *Teachers Local 1 v. Hudson*, a case National Right to Work Foundation attorneys won, the U.S. Supreme Court ruled that nonmember public employees forced to pay union fees must receive a notice explaining the proportion of dues related to collective bargaining and contract administration and an opportunity to refrain from paying the balance used for other purposes. During the summer of 2005 the California Teachers Association (CTA) and California Faculty Association (CFA) imposed special assessments on members and nonmembers that increased the money seized from educators' paychecks by more than 10%. The special assessments were targeted primarily to defeat certain state ballot propositions in a special election, fight Governor Schwarzenegger's education policies, and for other political and nonbargaining uses. Judith Liegmann, a fifth grade teacher in the Sunnyvale School District, and numerous other educators contacted the Foundation when they learned of this power grab, because they supported the ballot initiatives and opposed the unions' other political and nonbargaining agendas. The unions refused to provide educators the required *Hudson* notice and objection procedures for the special assessments and, instead, relied on their usual *Hudson* procedures. This allowed the unions to secure forced loans from nonmembers, denied their constitutional right to prevent the unions' spending of their money on politics, and delayed refund of the special assessments for six to eighteen months from the seizure of those monies from educators' paychecks.

A Foundation attorney filed this federal class action complaint against CTA and CFA on September 22, 2005, for Liegmann and five other educators seeking to establish a precedent that unions imposing special assessments for political purposes must give both nonmembers and nonmembers immediate notice and opportunity to opt out of the assessments. He quickly sought a temporary restraining order (TRO) to escrow the increases in dues and fees collected from members and nonmembers. On October 7, the court denied a TRO. 395 F. Supp. 2d 922. However, in response to the lawsuit, on October 15 the CTA notified its 15,000 nonmember agency-fee payers that they could receive an immediate refund of its full $60.00 special assessment for the 2005-06 school year. However, the CTA refused to notify its members that they could resign and

receive that refund. On November 8, all initiatives on the California ballot were defeated. On November 9, the one CTA member plaintiff resigned, and requested and received a refund of the $60.00 assessment plus $320.00 that CTA admitted was spent on political and other nonbargaining activities during its most recently audited fiscal year. The extensive publicity the lawsuit generated increased the numbers of members who resigned and nonmembers who requested and received rebates from CTA averaging about $400.00, including the $60.00 political assessment.

On November 10, an amended complaint was filed dismissing the CTA, because it had provided nonmembers the relief the original complaint sought, and there was no longer any CTA member plaintiff. However, the case continues against CFA for two nonmember California State University professors. On November 18, the CFA moved to dismiss on the basis that *Hudson* only requires an annual notice and does not mandate any interim notice for special assessments. On January 3, 2006, the court denied that motion "without prejudice" and without an opinion. On March 22, the court certified the case as a class action for more than a thousand nonmember faculty of state colleges and universities and appointed the Foundation attorney as class counsel. The case is now in discovery, and the court has scheduled a hearing for June 26 on cross-motions for summary judgment.

Court Challenge to Top-Down Organizing Goes to Sixth Circuit: *Patterson v. Heartland Indus. Partners*, 179 L.R.R.M. (BNA) 2684, 2006 WL 1064191 (N.D. Ohio Apr. 21, 2006).

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 agreements violate the Taft-Hartley Act's provision that prohibits an employer 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 under § 186 and that the "neutrality" agreement is not a "thing of value." In January 2004, the court denied that motion, because defendants disputed some of the plaintiffs' factual claims, and "the record . . . should be as factually complete as possible" given the likelihood of appeals. The court later declined to certify an interlocutory appeal. 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 negotiations with the company defendants. A Magistrate Judge ordered

those documents produced. In December 2004, the District Judge rejected the union's objections to that 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. Cross-motions for summary judgment were filed in April 2005, but the case was temporarily automatically stayed due to Collins & Aikman's bankruptcy. On October 24, the bankruptcy court lifted the stay to allow the District Court to decide the motions for summary judgment.

The District Court granted summary judgment for the defendants on April 21, 2006. It held that the plaintiff employees had standing to bring the suit and a private right of action under § 186. 2006 WL 1064191, at *4-*8. The court also found that the employers "gave, and the union received, certain benefits from the agreements related to access for the organizing drive and future benefits related to a collective bargaining agreement if the union was chosen through the card check procedure." *Id*. at *9. Nonetheless, the court inconsistently held that the "neutrality" agreement is not a thing of value under § 186. *Id*. at *9-*10.

Plaintiffs' Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit was filed on May 15. On the same day, the District Court took the unusual step of *sua sponte* entering an order denying the award of costs to Defendants. The court explained that it was doing so because the "neutrality agreements at issue offer a new way of negotiating a collective bargaining agreement and there was difficulty in terms of resolving the issues presented. . . . Further, significant public importance attaches to the resolution of this matter." Order, No. 5:03CV1596.

Michigan Court Rejects State Agency's Attempt to Impose Compulsory Union Representation on Religious Educational Institution's Faculty: *Michigan Education Ass'n v. Christian Brothers Institute of Michigan*, 706 N.W.2d 423 (Mich. Ct. App. 2005).

Brother Rice is a Roman Catholic high school for boys run by the Christian Brothers. The Michigan Education Association (MEA) petitioned for election with the Michigan Employment Relations Commission (MERC), seeking to be certified as the lay faculty's exclusive bargaining representative. The MERC ordered an election despite Brother Rice's objection that state regulation of its labor relations would violate the U.S. and Michigan constitutions' provisions protecting freedom of religion.

Brother Rice appealed to the Michigan Court of Appeals. A National Right to Work Legal Defense Foundation Staff Attorney filed an amicus brief for the Acton Institute, a religious liberty public policy group. This brief argued that the court should construe the relevant Michigan labor statute to exclude coverage over private religious schools, as the U.S. Supreme Court had earlier done with the nearly identical NLRA in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The brief contended that such a construction is necessary, because the imposition of compulsory union representation and monopoly bargaining on the faculty of a religious institution would constitute excessive entanglement with religion and interfere with the church's pursuit of its religious mission.

The Court of Appeals issued a unanimous decision on August 16, 2005, vacating the MERC's order. The court found that the MERC's involvement in the school's labor relations "would present more of a 'significant risk' of entanglement proscribed by the Michigan Constitution than the risk found by the Supreme Court in *Catholic Bishop*." 706 N.W.2d at 426. It,

therefore, held that, because "nothing in the [state statute] expressly grants the MERC jurisdiction over labor issues that arise in parochial schools," the legislature did not grant such jurisdiction. *Id*. No appeal was filed with the Michigan Supreme Court, so this decision is final.

Appellate Courts Reinstate Attack on Use of Member's Dues for Politics Without Consent: *Esquinance v. Polk County Education Ass'n*, 178 L.R.R.M. (BNA) 2419, 2005 WL 1798625 (Tenn. Ct. App. 2005), *appeal denied* (Tenn. Jan. 30, 2006).

Dewey Esquinance is a member of the Polk County, Tennessee, and National Education Associations, which have a unitary membership structure. He joined because only members can vote on the collective bargaining agreement, sit on the negotiating team, or serve on the committee which sets criteria for teacher evaluations. Although Esquinance opposes the unions' political activities, they require him to pay the part of the dues that they use for politics.

A National Right to Work Legal Defense Foundation Staff Attorney filed this case seeking to establish that union members have a right under the state constitution to withhold the part of their dues spent for political purposes. The claim is that teachers should not have to choose between their political autonomy and their right to a meaningful voice and vote concerning their terms and conditions of employment. The complaint alternatively alleged that, if teachers can be forced to support the union's political speech to have a voice and vote on their working life, then monopoly collective bargaining ("exclusive representation") violates Tennessee's constitutional prohibition of monopolies. A Tennessee trial court dismissed the complaint on June 2, 2004.

Esquinance appealed. On July 29, 2005, the Tennessee Court of Appeals reversed dismissal of the claim that under state law the union must permit members to object and refrain from supporting union political and ideological activities and remanded for further proceedings on that claim. The court ruled that teachers have a constitutional right to be members of their exclusive representative, and that Tennessee's teacher-bargaining statute can be construed to authorize compulsory dues only for the costs of collective bargaining. 2005 WL 1798625, at *9-*10. However, the court held that exclusive representation is not an unlawful monopoly, reasoning that the anti-monopoly provision of Tennessee's constitution allows the legislature to grant a monopoly if the monopoly reasonably tends to promote the general welfare. *Id*. at *11.

On January 30, 2006, the Tennessee Supreme Court denied the union's petition for review. The case has returned to the trial court, where Esquinance's attorney has moved to compel discovery.

Washington Supreme Court Rules That a State Cannot Require Unions to Get Nonmembers' Consent to Use Their Forced Union Fees for Politics: *State ex rel. Wash. State Pub. Disclosure Comm'n*, 130 P.3d 352 (Wash. 2006) (6-3 decision).

In 1992, Washington State's voters enacted by initiative a Fair Campaign Practices Act that included a section that prohibits unions from using a nonmember's compulsory agency fees for "contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Wash. Rev. Code § 760. In 2000, the Evergreen Freedom Foundation filed a complaint with the Public Disclosure Commission (PDC), the state agency that administers the Fair Campaign Practices Act, alleging that the Washington Ed-

ucation Association (WEA) had violated its prohibition of the use of agency fees for politics without affirmative consent. The PDC referred the case to the state Attorney General, who filed suit in October 2000 against the WEA in state court alleging that the union had violated § 760 from 1996 through 2000.

The WEA defended on the grounds that the statute was unconstitutional. It also argued that the affirmative consent requirement was satisfied by a nonmember's failure to object in response to the annual notice, required by the National Right to Work Legal Defense Foundation's U.S. Supreme Court victory in *Teachers Local 1 v. Hudson*, 475 U.S. 292, (1986), permitting nonmembers to object to use of their forced fees for purposes other than collective bargaining and contract administration.

The trial court ruled that § 760 is constitutional and that the WEA's *Hudson* objection procedures do not satisfy the affirmative consent requirement. The court found that the WEA had used for political purposes the agency fees of nonmembers who had not affirmatively consented but had not objected to such uses when sent a *Hudson* notice. The court, therefore, fined the WEA $400,000 for intentionally violating § 760, prohibited it from collecting agency fees equal to members' dues, and required the WEA to pay the PDC costs and fees of $190,375.

The State's suit did not request refunds for the nonmember public school employees whose agency fees WEA had spent for political purposes without their consent. Therefore, in March 2001, Foundation attorneys filed a class action for Gary Davenport and four other nonmembers who had not requested the *Hudson* rebate, seeking refunds for all similarly situated nonmembers. The trial court denied the union's motion to dismiss most of the plaintiffs' claims, holding that § 760 provides a private right of action. The court also certified the class. However, it dismissed the plaintiffs' breach of fiduciary duty claim and stayed further proceedings while the parties sought interlocutory appeals.

In the meantime, the WEA had appealed in the State's case. The Washington Court of Appeals issued decisions reversing the trial court in both cases in June 2003. It held two to one that § 760 is unconstitutional because the affirmative authorization requirement unduly burdens unions. *State ex rel. Wash. State Pub. Disclosure Comm'n*, 71 P.3d 244 (Wash. Ct. App. 2003), *aff'd*, 130 P.3d 352 (Wash. 2006). The *Davenport* case was remanded for dismissal without a ruling on the issue of whether the statute provides a private right of action.

The Washington Supreme Court granted petitions for review by both the State and the *Davenport* plaintiffs and consolidated the cases. That court heard oral argument on May 27, 2004, but did not issue a decision until March 16, 2006. The Supreme Court affirmed the Court of Appeals' decision by a six to three vote. The majority recognized that WEA's *Hudson* procedure does not satisfy § 760's requirement of affirmative authorization. However, like the Court of Appeals, it held that, although a union's right to collect agency fees is purely statutory, requiring affirmative authorization unduly burdens a union's First Amendment right to engage in political activity with monies seized from the wages of nonmembers. 130 P.3d at 359-65. The forceful dissenting opinion exclaimed that this "turns the First Amendment on its head," because "it would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether." *Id*. at 366 (Sanders, J., dissenting). The dissent also pointed out that the majority's ruling is contrary to the holding of the U.S. Court of Appeals for the Sixth

Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). In *Miller*, the court upheld the constitutionality of a state statute under which to "obtain funds that would be used for political purposes—even from its own members, let alone nonmembers—the union had to obtain 'affirmative consent' for the deduction every calendar year." 130 P.3d at 368.

Foundation attorneys filed a petition on June 14, 2006, asking the U.S. Supreme Court to grant certiorari in *Davenport* and reverse the Washington Supreme Court (U.S. No. 05-1589) (petition posted at http://www.effwa.org/pdfs/Davenport_Cert_Petition_061306.pdf). The Washington Attorney General, at the unanimous request of the PDC, has requested U.S. Supreme Court review in the State's case, too.

NLRB Rules That a Union Cannot Lawfully Fine Members Whom It Did Not Tell That They Did Not Have to Join to Keep Their Jobs: *Teamsters Local 492*, 346 N.L.R.B. No. 37, 2006 WL 268755 (Jan. 31, 2006).

Teamsters Local 492 has for years had a collective bargaining agreement covering United Parcel Service (UPS) employees in New Mexico that requires those employees to "become and remain members in good standing" or lose their jobs. When the agreement expired on July 31, 1997, Local 492 struck UPS for about three weeks. Local 492 had never told any of the employees it represented that they nonetheless had a right not to be actual members (a right guaranteed by the 1947 Taft-Hartley Act as recognized by the U.S. Supreme Court in *NLRB v. General Motors Corp*., 373 U.S. 734 (1963)) and, if they did not join, to object and not pay for union politics and other nonbargaining activities (a right established in the Supreme Court by National Right to Work Legal Defense Foundation attorneys in *Communications Workers v. Beck*, 487 U.S. 735 (1988)). Several unit employees crossed the picket line during the strike, some of whom submitted resignations before they crossed. However, union agents advised those workers that their resignations were not effective until after the strike was over. Three workers who crossed the picket line did not submit resignations before doing so. Six workers who resigned also notified the union that they objected under *Beck.*

After the strike was over, Local 492 notified the workers who had crossed the picket line, including those who resigned, that internal union charges had been filed against them for crossing. It also notified the six workers who made *Beck* objections that they must pay reduced dues for the period when no contract was in effect and a second initiation fee. The union did not give the objectors independently verified information about its expenditures and the expenditures of affiliated union bodies that receive part of the forced dues.

A Foundation attorney then filed unfair labor practice charges against Local 492 for seven employees to establish an NLRB precedent that workers who were never informed of their *General Motors* and *Beck* rights are not voluntary members and cannot be disciplined for disobeying union rules and orders. The charges also were filed to enforce existing precedents that compulsory union dues provisions cannot be enforced retroactively, a member who resigns cannot be charged a second initiation fee, and objecting nonmembers must be given independently verified information about the union's major categories of expenditures.

In 1998, the NLRB General Counsel issued a complaint against Local 492 on all allegations and scheduled a hearing before an Administrative Law Judge. The parties subsequently

submitted a stipulation of facts and joint motion to transfer the case directly to the Board, waiving the hearing. The Board granted that motion in December 2000. However, it did not issue a decision until January 31, 2006.

The Board held that Local 492 committed unfair labor practices by not informing bargaining unit employees of their *General Motors* and *Beck* rights, failing to give effect to resignations as of 12:01 a.m. the day after the workers mailed them, demanding reduced dues for the contract hiatus and second initiation fees as a condition of employment, and processing internal union disciplinary charges against employees for conduct after they resigned. The Board also established a significant new NLRB precedent. It ruled that, because the union had not told them that they could resign, the workers who did not resign before crossing the picket line could resign retroactively to before the strike and, if they do, cannot be disciplined and any discipline already imposed must be rescinded. 2006 WL 268755, at *10. The Board also stated that it was an unfair labor practice to fail to provide *Beck* objectors with independently verified information concerning not only its own major categories of chargeable and nonchargeable expenditures, but also "those of other union bodies that receive a portion of union dues and agency fees." *Id*. at *8.[2] The union has indicated that it does not intend to appeal this decision.

[2] The Office of the General Counsel subsequently decided "that the Board in *Teamsters Local 492* did not squarely address the issue of whether objectors are entitled to the disclosures of affiliates to which their union forwards dues revenues, and that [this] language alluding to the issue is not controlling. Another case currently before the Board poses this issue directly." Letter from Nelson A. Levin, Assistant General Council, to William L. Messenger, Staff Attorney, National Right to Work Legal Defense Foundation (Apr. 11, 2006).