United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership) *and* Laura Sands. Case 25–CB–008896

September 10, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

This case concerns the timing of a union's notification to employees subject to a union-security clause of the specific amount of reduced fees and dues they would pay if they become nonmembers and object to paying for union activities not germane to its duties as their collective-bargaining representative. Under established Board precedent, a union is not required to calculate and provide such detailed information until an employee elects nonmember status and then takes the additional step of objecting to paying for nonrepresentational expenses. Here, the Union properly relied on that precedent when it did not advise the Charging Party of the specific amount of the reduced dues and fees applicable to nonmember objectors upon her hire by Kroger Limited Partnership (Employer), but did timely provide her with that information once she resigned her membership and requested objector status. The General Counsel and the Charging Party concede that the Union complied with Board law, but nevertheless argue that we should overrule that precedent. They urge us to hold that the duty of fair representation requires every union to provide each one of its represented employees with specific reduced payment information when the union first informs the employee of her obligations under a union-security clause, even in the absence of an employee request for information about or objection to the union's regular fees and dues. The Charging Party argues that decisions of the Supreme Court and the United States courts of appeals compel us to make this change. We have carefully considered these arguments. We have concluded, however, that the Board's established rule is not only permissible, but also that it strikes the most reasonable balance between the competing interests at stake. Accordingly, we have decided to adhere to our precedent.[1]

[1] On March 7, 2008, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel and the Charging Party filed exceptions, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

I.

In revisiting this issue, we are mindful that the United States Court of Appeals for the District of Columbia Circuit has reached a different conclusion. That court has concluded that a union must provide specific reduced payment information to all employees when it initially notifies them of their obligations under a union-security clause.[2] But, in examining the court's rationale, we believe the court erroneously read the Supreme Court's decision in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), to compel the result it reached. Below, we explain why we believe *Hudson* in fact does not compel a particular result on this issue. Then, applying the duty of fair representation standard,[3] we examine new employees' need for detailed reduced payment information before they have asserted their right to be a nonmember objector. We then consider the burden on unions to calculate and provide that information in their initial notices to employees. Finally, we explain why, in our view, the balance of interests does not warrant compelling unions to include more specific reduced payment information in those initial notices.

II.

The facts are undisputed.[4] The Union is the exclusive bargaining representative of multiple bargaining units of employees of the Employer. The Union and the Employer were parties to a collective-bargaining agreement that required, as a condition of employment, that all bargaining unit employees join or pay fees to the Union. The Employer hired Charging Party Laura Sands on December 10, 2004, to work at its Crawfordsville, Indiana facility.

On January 11, 2005,[5] the Union sent Sands a membership application packet and notice advising her of her right to be and remain a nonmember of the Union and to object to paying any fees or dues not germane to the Union's representational duties. The notice stated, in part:

> The right by law, to belong to the Union and to participate in its affairs is a very important right. Currently, you also have the right to refrain from becoming a member of the Union. If you choose this option, you may elect to satisfy requirements of a contractual union security provision by paying the equivalent of an initiation fee and monthly dues to the Union. In addition, non-members who object to payment in full of the

[2] *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *Abrams v. Communications Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995).

[3] *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

[4] The parties in this case waived a hearing and submitted a joint motion and stipulation of facts to the judge.

[5] All dates hereafter are in 2005, unless otherwise noted.

> equivalent of dues and fees may file written objections to funding expenditures that are not germane to the Union's duties as your agent for collective bargaining. If you choose to be an objector, your financial obligation will be reduced very slightly. Individuals who choose to file such objections should advise the Union in writing at its business address of this choice. The Union will then advise you of the amounts which you must pay and how these amounts are calculated, as well as any procedures we have for challenging our computations.[6]

On January 25, the Union sent Sands another application packet and a letter setting forth the applicable initiation fees and dues. Sands joined the Union a few days later. On June 25, however, Sands resigned her membership and objected to paying fees for any purpose other than collective bargaining, contract administration, and grievance adjustment. In response, the Union promptly notified Sands that its auditors had calculated the amount of expenses attributable to the Union's representational duties to be 86.07 percent and that her monthly financial core fee would, therefore, be $21.84. This amount represented a reduction of $3.55 from her monthly union dues of $25.39. The Union also provided Sands with portions of the auditor's report and the procedure for objecting to and challenging the Union's calculation of the nonmember fees. Sands did not challenge the calculations.

III.

A.

In *Communications Workers of America v. Beck* (*Beck*),[7] the Supreme Court held that Section 8(a)(3) of the Act does not permit a collective-bargaining representative, over the objection of a dues paying nonmember employee, to expend funds collected from the objector under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. In *California Saw & Knife Works*,[8] the Board announced a comprehensive set of procedures designed to implement the *Beck* decision. The Board created a three stage process: the initial notice stage (stage 1), the objection stage (stage 2), and the challenge stage (stage 3).

At stage 1, before the union has collected any money from an employee under a union-security clause, the union is required to inform the employee that she has the right not to join the union and that employees who choose to remain nonmembers have the right (a) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (b) to be given sufficient information to enable the employee to decide intelligently whether to object; and (c) to be apprised of any internal union procedures for filing objections.[9] That bundle of information is often referred to as the "initial notice" under *Beck*.[10] If an employee decides not to join the union and also exercises her *Beck* right to object, *California Saw* mandates under stage 2 that the union apprise the "*Beck* objector" of the percentage of dues reduction she will receive, the union's basis for that determination, and the right of an objector to challenge those figures.[11] stage 3 concerns those objectors who, unlike Sands, challenge the union's determination of which of its expenses are chargeable (those related to representation) or the computations underlying that determination.[12]

The Seventh Circuit enforced *California Saw* in full, explaining that neither the *Beck* decision nor the National Labor Relations Act itself defines or resolves the design of procedures for assuring that workers learn of and are able to exercise their *Beck* rights.[13] Regarding the Board's three-stage framework, the court stated:

> All the details necessary to make the rule of *Beck* operational were left to the Board, subject to the very light review authorized by *Chevron*. It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision (more precisely, of the statute as authoritatively construed in

[6] As the Union's notice indicated, employees in bargaining units covered by the National Labor Relations Act may select one of three distinct relationships with a union: they may be members, nonmembers, or nonmember objectors. Unlike members, nonmembers typically do not have the right to participate in internal union matters, but they also are not subject to internal union discipline; for example, a union cannot fine nonmembers for engaging in strikebreaking activities. See *NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213 (1972). Whether a nonmember takes the additional step of objecting to paying for the union's nonrepresentational expenses is a separate matter. Some employees may file such an objection; others may be content to exempt themselves from internal union affairs while still fully supporting the union financially.

[7] 487 U.S. 735 (1988).

[8] 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied, sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[9] Id. at 233.

[10] E.g., *Teamsters Local 738 (E.J. Brach Corp.)*, 324 NLRB 1193, 1193–1194 (1997).

[11] *California Saw*, above, 320 NLRB at 233.

[12] Id. at 242–243; see also *Teamsters Local 579 (Chambers & Owen Inc.)*, 350 NLRB 1166, 1167 fn. 6 (2007) (describing the three stage *California Saw* procedure).

[13] *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

Beck) into a workable system for determining and collecting agency fees.[14]

Following its decision in *California Saw*, the Board has consistently applied the three-stage framework of notice-objection-challenge in considering cases dealing with *Beck* rights.

B.

Underlying the *California Saw* decision was the Board's determination that a union's performance of its obligations under *Beck* is to be judged under the duty of fair representation standard. The duty of fair representation derives from a union's status under Section 9(a) of the Act as the exclusive representative of all employees in a particular bargaining unit.[15] As the exclusive representative, the union is required to fairly represent all employees in the bargaining unit. This obligation inevitably requires a bargaining representative to make discretionary choices in order to reconcile divergent interests among individual employees, classes of employees, and the union as a whole.[16] Accordingly, under the fair representation standard, the union is lawfully entitled to choose among competing interests as long as its actions are not arbitrary, discriminatory or in bad faith.[17] Because the *Beck* arena likewise requires unions to make those sometimes difficult judgments in balancing competing interests, and consistent with the Supreme Court's explicit directive that the duty of fair representation applies to all union activity,[18] the Board in *California Saw* found "inescapable the conclusion that a union's obligations under *Beck* are to be measured" by the duty of fair representation standard.[19] The Board has recently reaffirmed *California Saw* on this point,[20] and we take this opportunity to confirm our agreement that the duty of fair representation standard is the appropriate one.

IV.

We turn now to the heart of this case: the General Counsel's and Sands' contentions, which our dissenting colleagues embrace, that we should revise *California Saw's* established three-stage framework to hold that every union, in its initial *Beck* notice to each employee it represents, must inform the employee of the specific details of the reduced fees and dues to be paid if she elected to remain a nonmember and then chose to become a *Beck* objector.

We have carefully considered their supporting arguments. In particular, we have given due attention to Sands' argument, endorsed by our colleagues, that we are compelled to make this change by the Supreme Court's decision in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), as interpreted by the United States Court of Appeals for the District of Columbia Circuit in *Abrams*[21] and *Penrod*.[22] For the reasons that follow, we are not persuaded by their arguments. Instead, balancing the competing interests at stake, we find that a union does not breach its duty of fair representation when it chooses not to calculate and include in its initial *Beck* notice detailed information about the specific amount of reduced fees and dues that would apply to *Beck* objectors. Accordingly, we affirm the judge's finding that the Union did not violate Section 8(b)(1)(A) of the Act.

A.

Contrary to Sands' and our dissenting colleagues' argument, *Hudson* does not require us to change our precedent.[23] They argue that the Board's *California Saw* process disregards *Hudson's* statement that "[b]asic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[24] Pointing to *Abrams* and *Penrod*, they argue that courts have concluded that this portion of *Hudson* requires unions to disclose specific reduced payment information in their initial *Beck* notices, and that we must reach the same conclusion. Careful examination of *Hudson*, however, reveals the flaws in this argument.

At the outset, we observe that *Hudson* was decided by the Supreme Court years before both *Beck* and *California*

[14] Id.
[15] See *Ford Motor Co. v. Huffman*, above, 345 U.S. at 337.
[16] See *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).
[17] See *California Saw*, above, 320 NLRB at 228–230.
[18] See *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991).
[19] *California Saw*, above, 320 NLRB at 230.
[20] See *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1064 (2010).
[21] 59 F.3d 1373.
[22] 203 F.3d 41.
[23] The General Counsel expresses no view on this argument. Sands also argues that *California Saw*'s notice requirements disregard employees' Sec. 7 right to choose freely between union membership and nonmembership, on the theory that an employee cannot make an informed choice about membership without knowing the financial consequences of that decision. Nothing in *California Saw* can fairly be read to impede an employee's Sec. 7 right to become or remain a nonmember of a union. Indeed, *California Saw* mandates that initial *Beck* notices inform employees of that right by clearly describing that they have a choice between membership and nonmembership. Moreover, we find Sands' argument puzzling because that choice is financially neutral—there is no financial difference between being a union member and being a nonmember. Both pay the same amount to the union, either in the form of union dues or dues equivalents. It is only when nonmembers take the additional step of becoming *Beck* objectors that less than the full dues equivalent may be paid. We accordingly find no merit in this argument, and we shall not address it further.
[24] *Hudson*, above, 475 U.S. at 306.

Saw, making it highly unlikely that the Court had in mind the question presented in this case. Certainly, this question was not before the Court. *Hudson* involved a public sector union whose relationship with unit employees was governed by state law. In *Hudson*, unlike here, there were only *two* relationships—not three—that an employee could have with the union: member or nonmember.[25] As to nonmembers, applicable state law provided that all nonmembers would be required to "pay their proportionate share of the cost of the collective bargaining process and contract administration."[26] Although *Beck* had not yet been decided, the effect of that statutory provision was to make all nonmembers the equivalent of nonmember *Beck objectors*, entitling them to pay reduced fees and dues and to challenge the union's calculations of those payments. That point—that *Hudson* involved nonmembers who were *already* objecting to the amount of payments they were making to the union—is essential to understanding the dispute in *Hudson* and why the Court's disposition of it does not control the present case.

Hudson arose because the union calculated and collected proportionate share payments from nonmembers without any prior explanation of how those reduced payments had been calculated. In addition, although the union had implemented a procedure for considering nonmembers' challenges to the proportionate share payment, that procedure was controlled largely by the union. It required employees to make prescribed payments to the union before any challenge would be permitted. And, even if a nonmember challenger prevailed in challenging the amount of the payment, the only remedy was an immediate reduction in the proportionate share payment for all nonmembers and a rebate for the challenger. Employees had to pay up front, with the possibility of later being reimbursed following a successful challenge.

The Court found "three fundamental flaws" in the union's procedure.[27] First, the Court condemned the rebate remedy for successful challengers. The Court found that even the temporary use by the union of dissenters' funds for nonrepresentational purposes impermissibly impinged upon the dissenters' First Amendment rights.[28] Second, the Court found unlawful the union's failure to explain to nonmembers making reduced payments the basis for the amount of the reduction in advance of collecting those payments.[29] On this point, the Court reasoned that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake" required the nonmembers to "be given sufficient information to gauge the propriety of the union's fee."[30] The Court went on to say that leaving the employees "in the dark about the source of the figure for the agency fee – and requiring them to object [assert a "challenge" in *California Saw* terms] in order to receive the information – did not adequately protect the careful distinctions drawn in [*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)]."[31] Finally, the Court concluded that the union's challenge procedure was improper because it failed to provide nonmembers with a reasonably prompt decision by an impartial decision maker.[32]

As the foregoing explanation demonstrates, and as the Board has previously observed,[33] *Hudson* did not address the question presented here: whether, under a different, multistep dues system, a union must calculate and specify in its initial notice to employees the specific amount of reduced fees and dues that would apply if the employee chose to become a nonmember and then elected to become an objector. Rather, *Hudson* concerned a union's dealings with employees who *already* had the status of objectors and from whom the union *already* was collecting reduced fees. Those circumstances, in particular, were the predicate for the Court's statement that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake" required the nonmembers to "be given sufficient information to gauge the propriety of the union's fee." As the Court explained, the employees bore the initial burden of objecting to paying for the union's nonrepresentational expenses, but once they had done so, the burden was on the union to explain the basis for its proportionate share payment.[34] That reasoning does not apply to the present case, which concerns only employees who have not yet chosen to become nonmembers, who are not yet paying any dues, and who have never voiced any objection to paying full dues.

[25] As noted, in bargaining units covered by the Act an employee may choose from among three relationships with a union: member, nonmember, or nonmember objector.

[26] *Hudson*, above, 475 U.S. at 295 fn. 1.

[27] Id. at 304–305.

[28] Id. at 305.

[29] Id. at 306.

[30] Id.

[31] Id. In *Abood*, the Court held that, although a public union may expend funds on political or other ideological causes not germane to its representational duties, it could not, constitutionally, finance those efforts with the funds of objecting employees. 431 U.S. at 235–236.

[32] *Hudson*, above, 475 U.S. at 307. The Court also rejected the union's belated attempt to save its procedure by escrowing 100 percent of the fees collected from the dissenters pending resolution of their challenges. Id. at 309.

[33] See *Teamsters Local 166 (Dyncorp Support Services)*, 327 NLRB 950, 952 fn. 10 (1999) ("*Dyncorp*"), rev. granted *Penrod v. NLRB*, above, 203 F.3d 41.

[34] *Hudson*, above, 475 U.S. at 306.

In arguing to the contrary, Sands and the dissent point to the District of Columbia Circuit's opinion in *Penrod*, above. There, as stated, the court denied enforcement of a case in which the Board considered and rejected a request, identical to the one here, to require unions to provide reduced payment information in their initial *Beck* notices. In adopting that requirement, the *Penrod* court relied exclusively on its previous decision in *Abrams*. In *Abrams*, the court took the position that, although *Hudson* arose in the public sector union context, it "applies equally" to a union's statutory duty of fair representation inasmuch as it in "rooted in [b]asic considerations of fairness, as well as concern for the First Amendment rights at stake."[35] In addition, the *Abrams* court found that, although *Hudson* did not concern initial notices to employees, the same "basic considerations of fairness" necessarily extended to a union's notice to workers of their right to object to paying for nonrepresentational expenses.[36] The *Penrod* court thus concluded that *Hudson*, as interpreted in *Abrams*, required unions to give potential *Beck* objectors the same information provided to actual *Beck* objectors.[37]

The Board subsequently adopted the *Penrod* court's decision as the law of the case, but it has not since applied *Penrod* to find that a union violates its duty of fair representation by failing to provide specific reduced payment information in its initial *Beck* notices. With due respect to the District of Columbia Circuit, we decline to do so here. For the reasons discussed, we remain convinced that *Hudson* does not resolve the question presented in this case. Moreover, we respectfully disagree with the court that the "fairness" rationale of *Hudson* warrants requiring all unions to treat every employee at stage 1 of the *Beck* process the same as those employees who have become nonmembers and who, at stage 2 of that process, actually have objected to paying for the union's nonrepresentational expenses. As *Hudson* makes clear, the key difference between those classes of employees is that the nonmember objectors, by the very act of objecting, have triggered the union's obligation to inform them not only of any proportionate share payments but also of the basis for those payments.[38]

This is not to suggest that the "fairness" rationale of *Hudson* is irrelevant to our consideration of a union's obligations with respect to its initial *Beck* notice. To the contrary, as Sands and our colleagues point out, the Board actually relied on *Hudson*'s "fairness" concept in *California Saw*. There, the Board agreed that *Hudson* was instructive insofar as "fairness" required unions, under the duty of fair representation, to inform all employees in the stage 1 notice of their basic *rights* under *Beck*.[39] The Board also looked to *Hudson* in *Chambers & Owen*,[40] where the Board agreed with the *Penrod* court's additional finding that *Hudson* requires unions to provide *Beck* objectors with information regarding the per capita taxes paid to affiliates at the second, rather than the third, stage of the *California Saw* process. Without passing on whether *Chambers & Owen* was correctly decided, we again observe that, like *Hudson*, *Chambers & Owen* concerned employees who already had become nonmembers and objected to paying for the union's nonrepresentational expenses. In those circumstances, it is clear why the *Chambers & Owen* majority so readily relied on *Hudson*. But the circumstances are different here, where we are concerned only with whether a union is required to give specific reduced payment information to employees who are being fully informed of their right to choose membership, nonmembership, or *Beck* objector status, but have not yet made known their choice.

For all of those reasons, we are not persuaded that *Hudson*, either on its own terms or as interpreted by the District of Columbia Circuit, compels us to revise the *California Saw* framework to require unions to include specific reduced fee and dues information in their initial *Beck* notices.

B.

Instead, the task before us is to determine whether, on balance, the Union breached its duty of fair representation by not providing that information in its initial *Beck*

[35] 59 F.3d at 1379 fn. 7, citing *Hudson*, above, at 306.

[36] Id. at 1379 fn. 6.

[37] *Penrod*, above, 203 F.3d at 48.

[38] Moreover, any broader reading of *Hudson* would ignore the fact that cases involving public sector unions are grounded in constitutional considerations, whereas cases involving private sector unions are rooted in the duty of fair representation. See *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 108, 111, 121 fn.16 (1982) (pointing out that conduct by private sector unions does not involve state action and cautioning against uncritical application of First Amendment principles to their internal rules); *Machinists v. NLRB*, above, 133 F.3d at 1017 ("*Hudson* was a constitutional case; it involved the First Amendment rights of public employees, not the statutory rights of workers covered by the National Labor Relations Act."). With due respect to the District of Columbia Circuit, we believe *Abrams* and *Penrod* do not give this distinction sufficient weight.

For similar reasons, the dissent's reliance on *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012), is misplaced. Both of those cases arose in the public sector and were decided under First Amendment principles. Moreover, in neither case did the Court address the requisite content of a union's initial notice to employees of their membership options and their obligation to pay regular dues and fees.

[39] *California Saw*, above, 320 NLRB at 233 & 233 fn. 50.

[40] *Teamsters Local 579 (Chambers & Owen Inc.)*, above, 350 NLRB 1166.

notice to Sands.[41] As stated, a union breaches its duty of fair representation only if its actions are arbitrary, discriminatory, or undertaken in bad faith.[42] The record in this case contains no evidence of discrimination or bad faith by the Union. Accordingly, the sole question presented is whether the Union's actions were arbitrary, i.e., "if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational."[43] "This 'wide range of reasonableness' gives the union room to make discretionary decisions and choices" in order to reconcile the competing individual and collective interests implicated.[44] A union's discretion is not boundless, however.[45] Drawing the necessary lines requires us, as the *California Saw* Board put it, "to bring the values of reasonableness and practicality into our own considerations of the facts of each case," and we shall do so here.[46]

At the outset, we acknowledge, as indicated, that the Board has previously engaged in this balancing in *Dyncorp*.[47] There, as here, the General Counsel sought to require that the initial *Beck* notice include the percentage of union funds that was spent on nonrepresentational activities. In rejecting the General Counsel's request, the Board reasoned that stage 1 notice requirements were designed in part to avoid unnecessarily burdening unions with the time consuming and costly task of calculating the reduced fees and dues that would apply to a nonmember objector. As the Board explained:

> The Board in *California Saw* held that a union is required to inform only objectors, not nonmembers in general, of the percentage by which dues and fees are reduced for objectors. That is because, to calculate the percentage reduction in dues and fees for objectors, a union must break down all of its expenditures into chargeable and nonchargeable categories and have its expenditure information independently verified.[48]

The Board concluded that this "expensive and time-consuming undertaking" is not required of a union simply because "some employees may object in the future."[49] Rather, the full-fledged undertaking of calculating chargeable and nonchargeable expenses, and its attendant verification and subsequent challenge procedures, is required of unions that are in fact attempting to collect fees and dues from *Beck* objectors.[50] The Board reasoned that, where there are no objectors in the unit, for example, the duty of fair representation does not require a union to go to the expense of preparing this information in case some employee might object in the future. Although acknowledging that some unions might choose to provide the information in their initial *Beck* notices, the Board made clear that "the decision whether or not to do so [is] a judgment call" falling within the wide range of reasonableness accorded union conduct under the arbitrary prong of the duty of fair representation.[51] Thus, the Board in *Dyncorp* declined to change the *California Saw* framework to require that all unions calculate and provide reduced fee and dues figures in their initial *Beck* notices to all bargaining unit employees.

As discussed, the District of Columbia Circuit rejected the Board's view in *Dyncorp*.[52] But the court expressly did not consider the Board's interests-based rationale. Instead, the court simply applied the holding of *Abrams* that *Hudson* requires unions' initial *Beck* notices to specify the reduced fees and dues applicable to nonmember objectors. We recognize that a three-member panel of that court will, if this case comes before it, be constrained to apply *Abrams* and *Penrod* as they stand. Nevertheless, because of the importance of this issue, we have independently considered the balance struck by the Board in *Dyncorp*. As we now explain, we find that under the duty of fair representation standard unions permissibly may choose not to provide the specific detailed information involved here at the time of the initial *Beck* notice.

1.

We first examine the purpose of a union's initial *Beck* notice and whether a new employee, in order to determine whether to choose objector status, needs to know beforehand the specific amount by which her fees and dues would be reduced. As described, the stage 1 notice established in *California Saw* informs employees of their basic rights to choose membership or nonmembership and, if the latter, to object to paying full dues, and the

[41] Because we disagree with our dissenting colleagues' view that this case is controlled by *Hudson* and *Chambers & Owen*, we disagree with their contention that it is inappropriate to balance the competing interests because, in their words, "the relevant balance has already been struck."

[42] See *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998).

[43] *O'Neill*, above, 499 U.S. at 67, quoting *Huffman*, above, 345 U.S. at 338.

[44] *Marquez*, above, 525 U.S. at 45.

[45] See, e.g., *Machinists Local 2777*, above, 355 NLRB 1062 (holding that a union arbitrarily required *Beck* objectors to annually renew their objections).

[46] *California Saw*, above, 320 NLRB at 230.

[47] 327 NLRB 950.

[48] Id. at 952 (footnotes omitted).

[49] Id.

[50] Id.

[51] Id.

[52] *Penrod*, above, 203 F.3d 41.

procedures for filing an objection. It thus makes clear the employee's options in light of the fundamental nature of a *Beck* objection. The right to file a *Beck* objection arises from the Supreme Court's determination that "Congress [in enacting Section 8(a)(3)] did not intend 'to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.'"[53] Thus, *Beck* and the objection it established are grounded in the notion that an employee deciding whether to object is deciding whether her political beliefs are compromised by paying full fees and dues to the union, which absent an objection may expend those funds on causes with which the employee disagrees. In other words, as the Court recognized, we can reasonably expect that a *Beck* objection will usually turn on ideological concerns, the precise reduction in fees and dues often being less important.[54]

We do not assume, however, that financial considerations play no role in an employee's decision whether to object. To the contrary, we recognize that some employees considering requesting nonmember objector status may be motivated by the prospect of paying reduced fees and dues, and would prefer to know the precise reductions beforehand.[55] But the duty of fair representation does not require a union to perfectly anticipate every interest of every employee.[56] For example, courts have held that unions may require *Beck* objections to be filed during certain months of the year, so-called "window periods," in the interest of timely resolving obligations and disputes, notwithstanding that employees naturally might prefer to file objections whenever they wish.[57] Board and judicial acceptance of such compromises is essential to ensuring that unions have the "wide latitude" they need to effectively perform their representational duties.[58] So here, the duty of fair representation is not automatically breached merely because some potential *Beck* objectors might prefer advanced disclosure of specific payment reduction information as opposed to the general information provided in this case.[59]

We find it significant, moreover, that the *California Saw* framework imposes no economic consequences on potential *Beck* objectors. A timely *Beck* objection is effective when filed, and the employee is entitled to a reduction in his fees and dues from that date forward.[60] Thus, deferred disclosure of the reduced figures themselves creates no risk that potential *Beck* objectors will end up paying for nonrepresentational expenses any longer than they desire.[61] All the employee needs to do is make her objection known and she will secure the full benefit of whatever reduction is applicable.[62]

For those reasons, we find that *California Saw*'s stage 1 notice, as currently constituted, reasonably fulfills the interest of potential objectors in being notified of their rights and in easily registering an objection without any undue burdens. The present case is illustrative. The Union's stage 1 notice fully informed Sands that she had the right to be a member or a nonmember, that nonmembers could object to funding the Union's nonrepresentational activities, and that by filing an objection she could obtain a reduction in fees and dues for such activities. This notice provided Sands a clear opportunity to assert her rights, which she eventually did. We observe, as did the judge, that Sands never complained that a lack of information delayed or otherwise hindered her objection. Nor is there any evidence that she ever asked the Union to provide the reduced payment information before she made her decision.[63] Finally, once Sands did object, the

[53] *Beck*, above, 487 U.S. at 751, quoting *Machinists v. Street*, above, 367 U.S. at 764.

[54] See *Hudson*, above, 475 U.S. at 305.

[55] See *Machinists Local 2777*, above, 355 NLRB at 1065, 1075–1076 (Member Pearce, dissenting in part).

[56] See *Humphrey v. Moore*, above, 375 U.S. at 349 ("The complete satisfaction of all who are represented is hardly to be expected.").

[57] See, e.g., *Abrams*, above, 59 F.3d at 1381–1382.

[58] *Air Line Pilots Assn. v. O'Neill*, above, 499 U.S. at 78.

[59] The dissent suggests that we should adopt the across-the-board rule proposed by the General Counsel and the Charging Party in order to align our law with other Federal statutory and regulatory schemes requiring a variety of prechoice notices to consumers and others. But, as discussed, Board law already requires a prechoice notice to employees: Before the union has collected any money from an employee under a union-security clause, the union must inform the employee (a) that she has the right not to join the union and (b) that employees who choose to remain nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to decide intelligently whether to object; and (3) to be apprised of any internal union procedures for filing objections. The dissent regards that initial notice as inadequate, but its solution fails to give proper weight to competing legitimate interests under the duty of fair representation. We believe that there are compelling reasons to find that existing law strikes the appropriate balance.

[60] See, e.g., *Machinists Lodge 160 (American National Can Co.)*, 329 NLRB 389, 391 (1999) (finding that the respondent union violated its duty of fair representation by delaying the effective date of employee's timely filed *Beck* objections).

[61] Compare *Machinists Local 2777*, above, 355 NLRB at 1064–1065 (union's requirement that *Beck* objectors renew their objections annually was unlawful in part because the requirement created a risk that employees who did not remember to renew would lose the opportunity to object for the following 11 months).

[62] Not requiring disclosure of the reduced payment figures in the initial *Beck* notice is consistent with the Supreme Court's instruction in *Machinists v. Street*, above, 367 U.S. at 774, that dissent "is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." See also *Abood v. Detroit Board of Education*, above, 431 U.S. at 238.

[63] By way of highlighting, again, the contrast with *Hudson*, above, 475 U.S. 292, when the Supreme Court required the union there to

Union timely reduced her fees and dues and provided her with all the information she needed to challenge those reduced payments.

On the other side of the balance, we find that unions could be subjected to considerable burdens were we to require that they calculate and provide in their stage 1 notice the specific reduction in fees and dues that would apply to nonmember objectors. Initially, we observe, contrary to the dissent's suggestion, that the Union's ability in this case to timely provide to Sands specific dues information as required under *California Saw* does not establish that all unions have or even can develop such capability. Unions that currently have no *Beck* objectors may not have expended the resources to track and calculate their chargeable and nonchargeable expenses, yet under the General Counsel's and Charging Party's proposal those unions would be forced to immediately undertake those efforts without knowing whether they would ever have a nonmember objector, let alone how many. If no employee objects, the union will have expended significant sums to perform unnecessary record-keeping and an unnecessary audited accounting.[64] These burdens are significant and subject to annual revision. See, e.g., *Abrams*, above, 59 F.3d at 1381 (upholding union *Beck* system where 1 week of every 13 weeks union employees recorded their activities according to 1 of 24 categories; an outside firm retained by the union determined from the time sheets how much time was spent on chargeable and nonchargeable expenses; the outside firm also randomly telephoned union employees to verify the information provided; and independent certified public accountants annually audited the allocations). Many smaller local or regional independent unions, moreover, may not even have the resources to develop those record-keeping and accounting systems, or to implement them by administering a full-fledged *Beck* system.[65] Nor are we convinced that recent computerized record-keeping and technological developments eliminate these burdens. The cost of such technological capabilities may well be beyond the means of smaller unions, which are disproportionately burdened, especially given their limited resources to devote to their representational obligations.[66] Other unions reasonably may choose not to invest in such systems until they are actually faced with an objection or objections, not due to complacency but to other appropriate priorities. We would be hard pressed, for example, to label "irrational" a union's decision to devote its resources to collective bargaining and contract administration until a sufficient number of objections arise that investing in a *Beck* system becomes cost-effective.

Further, even when a union does receive an objection, it lawfully may accommodate that objection by means that are less costly than the kind of preobjection audited accounting of its expenses that the General Counsel and Sands urge. For example, a union that is affiliated with an international union might forgo that audit and adopt what is called the "local presumption" to calculate its nonmember objector fees and dues.[67] Still other unions

inform existing employees what their proportionate share would be and the basis for it, it was a calculation that was germane to all nonmembers receiving the notice because they already were entitled to pay reduced fees and dues and to challenge the union's calculations by virtue of their statutorily imposed status as objectors. Here, the reduced payment calculation is not essential at stage 1 of the notice process because employees are only making the initial decision whether to be a member, nonmember, or nonmember objector.

[64] In arguing that these tasks are not so burdensome, Sands and the dissent point to *Chambers & Owen*, above, 350 NLRB 1166. That case is inapposite. As noted, *Chambers & Owen* concerned whether unions—that had already received *Beck* objections—should be required to provide certain affiliate expenditure information to objectors at the second stage, rather than the third stage, of the *California Saw* process. In answering that question affirmatively, the Board observed that unions are well aware of their obligations to account to *Beck* objectors for the way their dues are spent, and found that any administrative burdens faced by unions in providing the affiliate information would not be particularly onerous because of advancements in computer and internet technology that have facilitated unions' *Beck*-related disclosure requirements. Id. at 1169–1170. Although it may not be particularly onerous to require a union that is *already* obligated to compile certain information to provide it a step earlier in the *California Saw* process, here we are potentially dealing with unions that have not yet compiled any information at all.

[65] For Fiscal year 2013, the Department of Labor, Office of Labor Management Standards, lists approximately 808 active, unaffiliated unions of which approximately 574 have 200 members or fewer and total receipts of $200,000 or less. Of those 574 unions, approximately 452 have 100 members or fewer and total receipts of $100,000 or less. See http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm, last visited August 21, 2014. The dissent asserts that "regulatory disclosure requirements" imposed by the Department of Labor, namely LM-2 reporting, "already require unions to report their expenditures on representational activities." (Footnote omitted.) But sharing the concern motivating our decision today, the Department of Labor has exempted from LM-2 reporting any labor organization with annual receipts of less than $250,000. See 68 Fed.Reg. 5837401, 58383 (October 9, 2003); *AFL–CIO v. Chao*, 409 F.3d 377, 380 (D.C. Cir. 2005).

[66] Nor do we agree with the dissent that the burdens on a small union should be proportionally lighter, because the funds to be analyzed are smaller. The same multistep process of developing and updating a system that tracks and calculates chargeable and nonchargeable expenses would still be required.

[67] Under settled Board law, a local union—as an alternative to determining its nonmember objector fee by conducting an audit of its own chargeable and nonchargeable expenditures—may use the "local presumption" to calculate this fee. The "local presumption" allows a local union to use the same allocation of chargeable and nonchargeable expenses as that of its parent affiliate. The Board permits this alternative because the Board has found that parent organizations almost always have more nonchargeable expenses than their locals, which means the *Beck* objector will actually pay a smaller amount when the "local presumption" is used. See *Thomas v. NLRB*, 213 F.3d 651, 661 (D.C. Cir.

reasonably may choose to waive their right to collect any money from objectors rather than expend time and money calculating and administering the reductions.[68] These judgments fit comfortably within the "wide range of reasonableness" afforded unions under the duty of fair representation.[69] In those circumstances, imposing the threshold burden on unions to conduct an audit of their local expenses would serve no meaningful purpose.[70]

Considering all of the above, we have found, on the one hand, that the potential benefits to employees of requiring unions to include detailed reduced payment information in their initial *Beck* notices appear to be marginal, at best. The Board's established initial notice requirements already meet employees' fundamental need for information about their right to object, without imposing any significant burdens on their decisions whether to do so. On the other hand, imposing that requirement risks saddling unions with administrative and financial burdens that many unions might find impossible or impractical to meet. To be sure, not every union will be adversely affected to the same degree, and some unions may be better equipped than others to meet those burdens. But those variances only highlight that the rigid rule sought in this proceeding is at odds with basic fair representation principles affording unions a "wide range of reasonableness" in reconciling the interests of individual employees and those of the organization as a whole. In the end, we simply are not persuaded that the General Counsel's and Sands' proposed revision to the *California Saw* framework is necessary or justified. Rather, we conclude that *California Saw* continues to strike a reasonable balance between the competing interests involved, and we reaffirm it today.

V.

We therefore affirm the judge's finding that the Union did not violate Section 8(b)(1)(A) of the Act by failing to provide the Charging Party with the reduced fees and dues applicable to nonmember objectors when it first advised her of her obligations under the union-security clause.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBERS MISCIMARRA AND JOHNSON, concurring in part and dissenting in part.

Employees subject to union-security arrangements must pay their share of representational expenses—i.e., for collective bargaining, contract administration, and grievance handling. However, among the rights guaranteed employees under Section 7 of the Act is the right to refrain from union activity. The "refrain from" right entitles employees to choose not to subsidize a union's nonrepresentational expenditures, such as political contributions.[1] Unions have the corresponding statutory duty to offer information sufficient to enable employees to make an informed choice.

That much is simple. It is more complex to decide what information a union must furnish employees, and when. Unlike our colleagues, we believe the Act requires that a union provide more information earlier in order for employees to make that informed choice.

A brief review of the relevant legal framework is helpful here. Employees subject to a union-security clause must choose among three types of union participation: union membership, with full union dues; nonmember status, with "agency fees" generally equivalent to full union dues; or nonmember *Beck* objector status, with a requirement to pay only the percentage of agency fees expended by the union for representational purposes.

The decision to become a *Beck* objector is no trivial matter. As stated, it involves the exercise of the statutory right to refrain from union activities—specifically, to refrain from subsidizing union activities that further poli-

2000). When a local union uses the local presumption, it will receive less dues money from those paying the nonmember objector fee, but it will also be able to avoid the Board's requirement of a local audit. *Auto Workers Local 95 (Various Employers)*, 328 NLRB 1215, 1217 (1999), petition for review denied in relevant part, *Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000). The parent organization, however, still has to provide "verified supporting expenditure information" justifying its chargeable and nonchargeable expenses. *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 477 fn. 15 (1999).

[68] See *Laborers Local 265*, 322 NLRB 294, 296 (1996) (union's waiver of payment of any dues or fees moots a challenge to the union's calculations and makes unnecessary the provision of financial information).

[69] See *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981) (a union balancing individual and collective interests may validly determine that "an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.").

[70] We also observe that the proposed revision of *California Saw* could impose significant burdens even on unions, such as the one in this case, that already have established *Beck* systems. Here, for example, as described by the judge, the Union stated that providing employees it represents with an initial *Beck* notice that includes specific reduced fee and dues information for objectors is complicated because, in Kroger bargaining units alone, the Union maintains 36 separate dues rates covering thousands of employees in 5 different bargaining units. In order to provide a meaningful and accurate amount of dues deduction, the revised stage 1 notice sought in this proceeding thus would require an individualized calculation for each employee receiving an initial *Beck* notice, adding a level of complexity and imposing significant additional burdens.

[1] *Communication Workers v. Beck*, 487 U.S. 735 (1988). Employees who choose to so refuse are called "*Beck* objectors."

cies or political views with which an employee may disagree. Only nonmembers may exercise the *Beck* objector right, so an employee must also assess whether doing so is worth forfeiting the benefits of union membership and the right to participate in internal union affairs.

In *California Saw*,[2] the Board for the first time set forth its view of the information a union must provide to potential and actual *Beck* objectors at each of three stages. At stage 1, a union must inform new employees of their right to become nonmembers and their *Beck* right to object to subsidizing nonrepresentational expenditures. At stage 2, a union must inform the *Beck* objector of the percentage reduction in union fees, the basis for the calculation, and the right to challenge the calculations. At stage 3, once an objector challenges the union's calculations, the union must supply further information supporting those calculations.

In this case, the General Counsel and Charging Party request the Board to hold that unions must disclose the percentage fee reduction to new employees and nonmembers at stage 1—when providing initial notice of their *Beck* rights and *before* employees must decide whether to object—rather than at the postobjection stage 2. In this regard, the General Counsel and Charging Party request that we overrule *Teamsters Local 166 (Dyncorp Support Services)*,[3] where the Board followed *California Saw* and held that a union does *not* have a duty to provide information about the percentage reduction in union fees for a *Beck* objector until after an employee exercises the objection right.

Prior Board and court decisions provide guidance here. First, the Supreme Court instructs that "basic considerations of fairness" dictate that employees "be given sufficient information to gauge the propriety of the union's fee." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986). Second, in deciding what information unions must provide to employees, it is not appropriate to engage in a balancing of interests analysis. Although the adequacy of union disclosures is evaluated under the duty of fair representation standard, and although that standard generally accords unions a wide range of reasonableness, "that range does not extend to conduct that contravenes *Hudson*" and denies employees "information essential to the exercise of their *Beck* and statutory rights." *Teamsters Local 579 (Chambers & Owen Inc.)*, 350 NLRB 1166, 1169 (2007). Third, the United States Court of Appeals for the District of Columbia Circuit has decided the precise issue presented here. Applying *Hudson*, the court held that "basic considerations of fairness" require disclosure of the percentage reduction before employees are required to make the decision to become *Beck* objectors. *Penrod v. NLRB*, 203 F.3d 41, 47 (D.C. Cir. 2000).

Our colleagues cling to the rationale of *Dyncorp*. They distinguish *Hudson* and find it does not "compel[]" a revision of *California Saw*; they balance the putative respective interests of unions and employees in defining what is arbitrary conduct within a wide range of reasonableness under the duty of fair representation; and they decline to follow the D.C. Circuit's reasoning in *Penrod*. On the other hand, we believe *Hudson*, *Chambers & Owen*, and *Penrod* warrant a conclusion that the union must provide the dues reduction percentage information to new employees and nonmembers before they must decide whether to become *Beck* objectors. We therefore respectfully dissent from our colleagues' refusal to modify the *California Saw* framework as the General Counsel and Charging Party request.

The Board in *California Saw* accepted *Hudson's* "basic considerations of fairness" standard as applicable in our *Beck* jurisprudence: "[W]e agree with the Court of Appeals for the District of Columbia that the same 'basic considerations of fairness' necessarily extend to a union's notice to nonmembers of their right to object to payment of nonrepresentational expenses." 320 NLRB at 233 fn. 50 (citing *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 fn. 6 (D.C. Cir. 1995)). In *Chambers & Owen*, the Board reiterated its view that the "animating principles of *Hudson*" are applicable to a determination of whether a union acts in arbitrary breach of its duty of fair representation under the Act.[4] Although the majority claims that the Board's agreement with the D.C. Circuit applies only to the notice of *rights* at stage 1, the D.C. Circuit subsequently concluded that "since *Abrams* applies *Hudson* to new employees . . . , they too must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors." *Penrod*, supra. Indeed, it stands to reason that the notice of rights at stage 1 is insufficient by itself without information directly relevant to the exercise of those rights.[5]

[2] *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[3] 327 NLRB 950 (1999), rev. granted *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

[4] 350 NLRB at 1166–1167.

[5] Of course, an employee's choice whether to exercise the statutory objector right may be based on practical economics rather than any philosophical opposition to a union's nonrepresentational activities. The Respondent describes the percentage of nonrepresentational expenses in this case—13.93 percent—as "slight," but employees may well disagree with that characterization. But even if 13.93 percent is not enough to affect an employee's decision, the percentage in some cases is more than enough to affect it. See, e.g., *Knox v. Service Em-*

Despite these Board and court pronouncements, the majority declines to apply *Hudson*, finding its application not "compelled" because *Hudson* involved employees who were already paying reduced fees. The Board relied on this very reasoning in *Dyncorp*,[6] and the D.C. Circuit in *Penrod* rejected it as foreclosed by its decision in *Abrams*. In *Abrams*, the D.C. Circuit took the Supreme Court at its word, saying that the Court in *Hudson* "*held* that '[b]asic considerations of fairness . . . dictate that the *potential objectors* be given sufficient information to gauge the propriety of the union's fee.'"[7] The *Abrams* court acknowledged that *Hudson* presented the issue in a different factual setting, but it found that difference did not permit it to avoid *Hudson*'s holding "that *potential* objectors must be given adequate notice"[8]—a holding the D.C. Circuit in *Penrod* found dispositive of the precise issue presented here.[9] And even setting aside the D.C. Circuit's holdings, we believe our colleagues' approach—asking whether *Hudson* "compels" the fee-reduction disclosure at stage 1—fails to accord sufficient deference to *Hudson*'s animating principles. Those principles apply to all employees, including new hires deciding whether to exercise their right to object.

In further reliance on *Dyncorp*'s rationale, our colleagues argue that the Union's failure to provide the Charging Party with the percentage reduction before she decided whether to object was not irrational. In their view, this makes it lawful under the "arbitrary" prong of the duty of fair representation standard. They engage in a balancing test, weighing the perceived burden on unions to produce the percentage reduction at stage 1 against the benefit to employees of knowing the percentage before deciding whether to subsidize nonrepresentational expenditures. The problem with this analysis is that the relevant balance has already been struck in *Chambers & Owen* in favor of requiring disclosure. The specific issue decided there was whether a union must furnish objectors an adequate explanation of the basis for the fee charged to objectors at the time they object (stage 2), and that objectors should not be required to challenge the union's calculations (stage 3) before receiving the relevant information. The Board found that the information must be provided at stage 2 to allow an objector to make an informed decision about *whether* to challenge the union's fee. Indeed, the Board held that withholding information that "actually impedes a nonmember employee from exercising his *Beck* rights and interferes with the statutory right under Section 7 to refrain from assisting a union is unreasonable and arbitrary."[10]

Importantly for the present case, the Board's analysis in *Chambers & Owen* transcends the specific issue addressed there. As previously stated, the Board reaffirmed its finding in *California Saw* that the Supreme Court's reasoning in *Hudson*, supra, was dispositive of unions' disclosure duties under *Beck*. Rejecting the dissenting view that post-election disclosure of information was adequate, the Board stated that

> [t]he reason for requiring adequate disclosure to *Beck* objectors is so that they can decide whether to challenge the union's fee calculations. As the Supreme Court observed, and contrary to the dissent, that purpose would be thwarted by keeping objectors in the dark and requiring them to challenge the union's figures. Although, as the dissent notes, unions generally enjoy a wide range of reasonableness under the duty of fair representation standard, that range does not extend to conduct that contravenes *Hudson* and denies to nonmember objectors information essential to the exercise of their *Beck* and statutory rights. Nor can we agree, in light of the plain language of *Hudson*, that it is appropriate to engage in the balancing analysis advocated by the dissent.[11]

The same analysis applies here: basic considerations of fairness require a union to provide new employees and nonmembers with the percentage by which their union fees would be reduced *before* they decide whether or not to object under *Beck*. Only then can the employee make a fully informed decision. Applying the animating principles of *Hudson*, as defined and applied in *Chambers & Owen*, to the facts of this case compels the conclusion that the percentage must be supplied at stage 1.

The foregoing precedent also renders inappropriate our colleagues' reliance on a balancing of interests analysis to hold that the union's failure to provide preelection information relevant to the exercise of *Beck* rights is not arbitrary. Moreover, even assuming such an analysis is appropriate, it does not favor permitting a union to wait until after an employee objects before disclosing the percentage of dues reductions for *Beck* objectors. In *Chambers & Owen*, the Board found the burden on unions of furnishing the more detailed information underlying such a reduction at stage 2 rather than stage 3 would not be particularly onerous, in large measure because of ad-

ployees International Union, Local 1000,132 S. Ct. 2277 (2012) (43.65 percent).

[6] 327 NLRB at 952 fn. 10.

[7] *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 (D.C. Cir. 1995) (quoting *Hudson*, 475 U.S. at 306) (emphasis added).

[8] Id. at 1379 fn. 6 (emphasis in original).

[9] 203 F.3d at 47–48.

[10] 350 NLRB at 1169.

[11] Id.

vances in computer and internet technology.[12] Further advances in computer technology make this rationale even more compelling today than it was then. And, as the Board further noted in *Chambers & Owen*, regulatory disclosure requirements already require unions to report their expenditures on representational activities.[13] Based on those figures, it should be relatively easy to calculate the remainder of total expenditures devoted to nonrepresentational purposes.[14]

The majority acknowledges that the burden on most unions of furnishing the percentage reduction at stage 1 would be slight because most unions already have the percentage in hand as part of their *Beck* procedures. As a case in point, the Union produced the requested percentages within four days of a request. Clearly, the information was readily available, and producing it was no burden at all. The majority expresses concern, however, for small unions that may not have *Beck* procedures or nonrepresentational calculations in place. Presumably this problem would involve only those small unions that had never dealt with a *Beck* objection and would therefore have to calculate the percentage reduction for the first time. However, it seems likely that the burden of doing so would be proportional to the size of the union: the smaller the union, the simpler the calculation, and the lighter the burden. Thus, we are not convinced that the burden on small unions to produce the percentage at stage 1 is significant. It is certainly no reason to excuse all unions from providing employees with the information they need to exercise their statutory rights.

The Act refers to the Board's role, in part, as assuring employees the "fullest freedom" in exercising their protected rights.[15] In the present context, this means ensuring that employees have sufficient information to make an informed choice about their *Beck* rights. The change sought by the General Counsel and Charging Party is not earthshaking. Nonetheless, our colleagues decline to make this modest adjustment to the *California Saw* framework because they believe directly controlling legal precedent does not compel it. We disagree. We believe that *Hudson*, *Chambers & Owen*, and *Penrod* collectively persuade that there is only one reasonable view of a union's duty of fair representation in this case.

Besides this direct persuasive authority, we believe that analogous legal rules and developments support our view as well. First, throughout Supreme Court jurisprudence on employees' mandatory dues obligations to a union serving as their bargaining representative, there is strong concern for protection of employees against compelled speech in derogation of their First Amendment rights. See, e.g., *Machinists v. Street*, 367 U.S. 740, 788–789 (1961) ("There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it. . . . But a different situation arises when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by Congress, cannot be used in a way that abridges the specifically defined freedoms of the First Amendment. *And whether there is such abridgment depends not only on how the law is written but also on how it works*.") (citations omitted and emphasis supplied). Indeed, in the context of an agency fee imposed on nonmember employees by state law, the Supreme Court has recognized prior notice as an important contributor to protection of employees' First Amendment rights. In that context, "an agency-fee provision imposes 'a significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *Knox v. Service Employees*, 132 S. Ct. 2277, 2289 (2012)). The Court continued:

> In *Knox*, we considered specific features of an agency-shop agreement—allowing a union to impose upon nonmembers a special assessment or dues increase *without providing notice* and without obtaining the nonmembers' affirmative agreement—and we held that these features could not even satisfy the [commercial speech protection] standard employed in *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001), where we struck down a provision that compelled the subsidization of commercial speech.

Id. (italics for emphasis). The Court's reasoning in *Knox*, as restated by *Harris*—that in public sector cases, First Amendment freedoms require prior notice in order to secure nonmember employees' affirmative agreement to agency fees—supports our view that some greater and earlier notice to private sector employees under our Act is required. Otherwise, even under a duty of fair representation standard, judicial assessment of how our Act works, i.e., the rules of

[12] Id. at 1169–1170.

[13] 350 NLRB at 1169–1170 fn. 14 (noting that U.S. Department of Labor Form LM-2 requires unions to disclose the amount of disbursements for all representational activities).

[14] The majority, citing again to the Board's 1999 decision in *Dyncorp*, argues that calculating nonrepresentational expenditures would be "an expensive and time-consuming undertaking." The exponential advancement in technology and computerized record keeping in the past 15 years effectively blunts any force this argument may have had in 1999.

[15] Sec. 9(b).

disclosure mandated by a Federal agency, will inevitably be that it impermissibly abridges those freedoms.

Another instructive analogy arises from the area of attorney fee disclosures to potential class members in Rule 23 class action litigation monetary settlements. There, attorneys who serve as class counsel hold duties to class members similar to a union's duty of fair representation to employees.[16] Thus, such attorneys, in their capacity representing the class, and in order to receive judicial approval for any class settlement, must disclose the amount of the claimed attorneys' fees in the proposed class action settlement—and how that amount was calculated—to class members. This disclosure must happen *before* such members make the decision whether to stay in the class or "opt out" of the class (and thus "opt out" of representation by class counsel), so that potential class members can make an informed choice to (1) accept the claimed fee amount, (2) reject it entirely by "opting out," or (3) contest the fee claim with an objection. See generally Newberg on Class Actions § 8:22–8:225 (5th ed.); Manual for Complex Litigation, Fourth, §§ 21.722–21.724 (Federal Judicial Center, 2004). Similarly, providing notice of the exact amount of nonrepresentational expenditures that the union will charge *before* employees must decide whether to forego membership and object to that amount allows those employees to make an informed choice as to whether to object to both union membership and payment. See Newberg on Class Actions § 8.25 ("Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members.") (quoting *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 994 (9th Cir. 2010)).

Finally, the trend in federal law is to require more prechoice disclosure, not less. This is especially true where a consumer or employee is involved. Consider, for example, the expansion of mortgage loan and credit card disclosure requirements in the Truth in Lending Act of 1968, Mortgage Disclosure Improvement Act of 2008, Credit Card Disclosure Act of 2008, 15 U.S.C. §1601 et seq., and their implementation in rules promulgated by the Federal Reserve Board, 74 FR 23289 (2009), and 75 FR 7658 (2010), and by the Consumer Financial Protection Bureau, 77 FR 69738 (2012); the imposition of food labeling and nutrition disclosure requirements in the Nutrition Labeling and Education Act (NLEA) of 1990 (the 1990 amendments), which added section 403(q) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 343(q)), and the implementation and proposed expansion of these requirements by the Food and Drug Administration, 79 FR 11880 (2014). The majority offers no compelling reason why employees, who are essentially the consumers of union services, should be afforded less notice concerning fees and less "truth-in-labeling" than the average American consumer receives. Similarly, it is a mystery why employees should not be fully informed by a union so they can exercise their dues objection rights, even while they must be fully informed of their rights under federal employment laws by federal contractor employers, per the Department of Labor. See 75 FR 28368 (2010). Significantly, when the federal government participates in the market as a consumer, it demands far more detailed notice from its service providers, e.g., their past history of legal compliance troubles, than what the Board here is willing to require for employees, who are expressly protected by our Act, about where their own money may be going. See Executive Order 13673, "Fair Pay and Safe Workplaces," 79 FR 45309 (July 31, 2014). What's sauce for the goose is sauce for the gander. Employees should not receive less notice, just because the relevant facts are in possession of a union.

Requiring that unions provide employees with the percentage of nonrepresentational expenses at stage 1, before the employees must decide their status under a union-security clause, comports with basic considerations of fairness, is essential to the exercise of their statutory rights, and is consistent with the overwhelming national approach of "more notice, not less." Thus, we would require a union to provide represented employees with its reduced fee calculation for nonchargeable expenses at stage 1.[17]

Michael Beck, Esq., for the General Counsel.
Jonathan D. Karmel, Esq., of Chicago, Illinois, for the Respondent Union.
James Plunkett, Esq., of Springfield, Virginia, for the Individual Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Deputy Chief Administrative Law Judge. On June 5, 2005, a charge was filed against the United Food and Commercial Workers Union, Local 700 (Local 700 or Union)[1] alleging that Local 700 failed to inform the Individual Charging Party, Laura Sands (Sands), of her right to become a nonmember and of her right as a nonmember to ob-

[16] Fed.R.Civ.P. 23(g) ("Class counsel must fairly and adequately represent the interests of the class").

[17] We would apply this requirement prospectively, and accordingly we concur in the dismissal of the complaint.

[1] All dates are 2005, unless otherwise indicated.

ject to paying the equivalent of union dues and fees. This portion of the charge alleging that Sands was not provided with information in compliance with the legal standards established in *Communications Workers v. Beck,* 47 U.S. 735 (1988), and *NLRB v. General Motors,* 373 U.S. 734 (1963), was dismissed by the Regional Director for Region 25. On October 15, 2005, however, a complaint issued alleging that Local 700 violated Section 8(b)(1)(A) of the Act by failing to provide Sands with the percentage reduction of dues and fees for nonmember objectors when the Union first informed her of her obligations under the union-security clause.

On July 10, 2007, the General Counsel, Respondent Union, and Individual Charging Party submitted a joint motion and stipulation of facts pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations waiving a hearing and submitting this case to an administrative law judge for issuance of findings of fact, conclusions of law and order. The parties agreed that the stipulation of facts, charge, complaint, answer, exhibits attached to the stipulation, statement of issues presented, and each party's statement of position would constitute the entire record in this case and that no oral testimony was necessary or desired.

On August 22, 2007, I issued an Order granting the joint motion and directing the parties to file briefs by September 24, 2007. The Individual Charging Party and the Respondent Union filed briefs.

On the entire record, and after considering the parties' position statements and the briefs filed by the Individual Charging Party and the Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Kroger Limited Partnership I (Kroger or Employer), a corporation, with its principal office in Cincinnati, Ohio, and a facility located, among other places, in Crawfordsville, Indiana, is engaged in the retail sale of groceries, pharmaceuticals, and sundry goods. During the 12-month period preceding the filing of the complaint, Kroger, purchased and received at its Crawfordsville, Indiana facility, goods valued in excess of $50,000 directly from points outside the State of Indiana. At all material times, Kroger has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, United Food and Commercial Workers Union, Local 700, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Local 700 and Kroger have a collective-bargaining agreement which requires as a condition of employment all bargaining unit employees to join or pay fees to the Union. On December 10, 2004, Sands was hired by Kroger to work at the Crawfordsville, Indiana facility.

By letter, dated January 11, 2005, the Union advised Sands that as a new employee she was represented by the Union. It also asked her to complete and return a membership application packet, which contained a copy of the collective-bargaining agreement's valid union-security clause, a membership application with check-off authorization, and the following separate statement:

> Important Information Concerning Your Opportunity to Become an Active Member of the United Food and Commercial Workers International Union, AFL–CIO, CLC, Local 700 and Your Rights Under the Law.
>
> The right by law, to belong to the Union and to participate in its affairs is a very important right. Currently, you also have the right to refrain from becoming a member of the Union. If you choose this option, you may elect to satisfy requirements of a contractual union security provision by paying the equivalent of an initiation fee and monthly dues to the Union. In addition, non-members who object to payment in full of the equivalent of dues and fees may file written objections to funding expenditures that are not germane to the Union's duties as your agent for collective bargaining. If you choose to be an objector, your financial obligation will be reduced very slightly. Individuals who choose to file such objections should advise the Union in writing at its business address of this choice. The Union will then advise you of the amounts which you must pay and how these amounts are calculated, as well as any procedures we have for challenging our computations.
>
> Please be advised that non-member status constitutes a full waiver of the rights and benefits of UFCW membership. More specifically, this means that you would not be allowed to vote on contract modifications or new contracts; would be ineligible to hold union office or participate in union elections and all other rights, privileges, and benefits established for and provided to active UFCW members by the UFCW International Constitution, Local 700 Bylaws, or established by the local Union.
>
> We are confident that after considering your options, you will conclude that the right to participate in the decision making process of your Union is of vital importance to you, your family and your co-workers, and you will complete your application for membership in the United Food and Commercial Workers.
>
> **Your involvement in your union is vital to the protection of job security, wages, benefits, and working conditions.**

(Jt. Exh. 2.)

On January 25, 2005, the Union sent Sands a second letter which explained her financial obligations to the Union. With regard to the amount of dues and the initiation fees, the letter stated:

> Currently, full regular monthly dues and fees based on your hire date of **December 10, 2004** are set forth below.
>
> | **Dues for February 2005** | |
> |---|---|
> | at $25.39 per month | $25.39 |
> | Initiation fees | $66.00 |
> | Total | $91.39 |

(Jt. Exh. 3.)

Enclosed with the letter was a duplicate membership application packet, including the above-reference notice informing Sands, among other things, of her right to be and remain a nonmember of the Union and to object to paying any dues or fees not germane to the Union's duties as the exclusive collective-bargaining representative. A few days later, Sands joined the Union.

On June 25, Sands sent a letter to the Union resigning as a member "effective immediately" and stating:

> . . . I object to the collection and expenditure by the union of a fee for any purpose other than my pro rata share of the union's costs of collective bargaining, contract administration, and grievance adjustment, as is my right under *Communications Workers v. Beck*, 487 U.S. 735 (1988). Pursuant to *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995), I request that you provide me with my procedural rights, including: reduction of my fees to an amount that includes only lawfully chargeable costs, notice of the calculation of that amount, verified by an independent certified public accountant; and notice of the procedure that you have adopted to hold my fees in an interest-bearing escrow account and give me an opportunity to challenge your calculation and have it reviewed by an impartial decisionmaker. Accordingly, I also hereby notify you that I wish to authorize only the deduction of representation fees from my wages.

(Jt. Exh. 4.)

Four days later, on June 29, the Union responded in writing advising Sands of the percentage of her dues reduction and the reduced dollar amount. She also was provided with a copy of portions of the auditors' report and the procedure for objecting to and challenging the Union's calculation of the nonmember fees.[2] Sands did not challenge the Union's calculations.

III. ISSUE SUBMITTED

Did the Respondent violate its duty of fair representation under the National Labor Relations Act by failing to include in its *initial Beck* notice to the Charging Party the amount of full Union dues and the percentage reduction in dues that objecting members would receive?

IV. THE PARTIES' POSITIONS

All of the parties acknowledge, and agree, that under current Board law new employees must receive an initial notice informing them of their right not to become a union member, of their right not to pay full union dues and fees, and of their right to object to payment of full dues and fees. See *California Saw & Knife Works*, 320 NLRB 224, 229–230 (1995). If an employee objects to funding union activities that are unrelated to collective-bargaining, contract administration, and grievance adjustment, the Union must advise the *Beck* objector of the percentage of reduction in fees, the basis for the union's calculation, and of the right to challenge these figures.

The Individual Charging Party and the General Counsel do not assert that under current Board law a violation occurred. Rather, they argue that current Board law should be reconsidered and reversed to require that unions inform employees in the initial *Beck* notice of the percentage reduction in dues that an objecting employee would receive and the total amount of dues to which the percentage applies. They argue that current Board law conflicts with the Supreme Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986), a public sector case, where nonunion employees challenged an agency shop agreement on the grounds that it violated their First and Fourteenth Amendment rights because it did not adequately prevent the use of their proportionate share of dues for impermissible purposes. The Court stated that "[b]asic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[3]

The General Counsel and Individual Charging Party therefore assert that *Hudson* directs and fairness dictates that notice of the percentage deduction, along with the full dues, should be given to potential objectors, like Sands, in the initial notice in order for them to decide intelligently whether or not to object. They also argue that a change in current Board law is warranted in light of the appellate court decision in *Penrod v. NLRB*, 203 F.3d 41, 47 (D.C. Cir 2000), and the Board's decision in *Teamsters Local 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166 (2007).

Finally, the General Counsel argues that requiring the Union to provide this information in the initial notice will not be burdensome because many major national and international unions have developed *Beck* systems with the percentage information readily available. In addition, the General Counsel asserts that local unions can make use of a "local presumption" that the percentage of a local's expenditures chargeable to objectors is at least as great as the chargeable percentage of its parent union and can rely on their international's *Beck* system to comply with their duty of fair representation.

Local 700 argues that a union breaches it duty of fair representation only if its actions are arbitrary, discriminatory, or in bad faith. Unions are given a "wide range of reasonableness" in meeting this standard. The current Board law is clear with regard to the initial notice unions must give to new employees. There is no argument or evidence that Local 700 violated its duty under current Board law. Rather, the stipulated facts show that the Union initially provided Sands with all the information required by law. Thus, the Union asserts that its conduct was not arbitrary, discriminatory or in bad faith.

Local 700 further asserts that providing Sands and thousands of other employees with individual calculation of their reduced dues and fees would be burdensome notwithstanding the fact

[2] The Union maintains 36 separate dues rates, covering 5 Kroger bargaining units, including 9 separate dues rates covering the Kroger clerks and meat bargaining units.

[3] It should be pointed out that the "potential objectors" in *Hudson*, where not potentially objecting to being union members (because they already were nonunion members). Rather, as nonunion members they were potential objectors to the use of agency shop fees for purposes other than collective-bargaining and contract administration, which makes them more akin to second stage *Beck* objectors, who may potentially challenge a union's financial calculations.

that national and international unions have *Beck* systems in place. It points out that in Kroger bargaining units alone, the Union maintains 36 separate dues rates covering thousands of employees in five different Kroger bargaining units. Local 700 therefore argues that providing specific calculations of reduced dues and fees for all nonmembers would be overly burdensome.

Finally, Local 700 argues that reliance on *Hudson*, supra, is misplaced. It asserts that *Hudson* involved public sector employees and First Amendment rights and concerned nonunion employees who had already qualified for a reduced fee.

V. ANALYSIS AND FINDINGS

It is well settled law that a Board administrative law judge must "apply established Board precedent which the Supreme Court has not reversed" (citation omitted), leaving for the Board, not the judge, to determine whether that precedent should be varied. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). All parties here agree that under current Board law Local 700 has not acted arbitrary, discriminatory, or in bad faith in violation of Section 8(b)(1)(A) of the Act. In addition, a careful reading of the Board's recent decision in *Chambers & Owens, Inc.* does not establish a basis for finding a violation.

In *Chambers & Owens, Inc.*, the issue before the Board was whether the union was required to provide a nonmember *Beck* objector with information concerning its affiliates' activities and the extent to which those activities were chargeable or nonchargeable prior to the nonmember objector's filing a challenge to the Union's reduced dues and fees calculation. 350 NLRB 1166, 1168 (2007). In other words, the question presented to the Board was how much information is a union required to furnish a *Beck* objector at the *second* stage of the *Beck* objections procedure in order for the objector to decide whether or not to challenge the unions' reduced fee computations.

In that context, the Board agreed with the Supreme Court's reasoning in *Hudson* that "basic considerations of fairness" dictate that adequate information regarding dues and fees reductions be provided to objectors to allow them to challenge unions' reduced fees computations. It also found, in accord with the District of Columbia Circuit in *Penrod*,[4] that as to affiliate expenditures, *Hudson* is dispositive of the issue, i.e., unless a union demonstrates that none of the amount paid to affiliates was used to subsidize activities for which nonmembers may not be charged, then an explanation of the share that was so used is surely required. *Penrod*, 203 F.2d at 47. Notwithstanding the Board's favorable discussion of *Hudson* and *Penrod*, the Board in *Chambers & Owens, Inc.*, did not address the issue of whether a union is required to provide a potential *Beck* objector with financial information in the initial *Beck* notice. Despite the appellate court's holding in *Penrod* on that very issue, the Board to date has not applied the *Penrod* holding on that issue, thereby indicating a reversal of current Board law. An administrative law judge is bound to apply established Board precedent which neither the Board nor Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). As a matter of current Board law, therefore, Local 700's conduct did not violate the Act.

Nor do the factual circumstances here warrant a violation. The thrust of the General Counsel and Individual Charging Party's argument is that more financial information in the initial notice is essential to helping a potential objector make an informed decision on whether or not to object to union membership. The undisputed facts show, however, that on June 25, 2005, Sands resigned as a union member "effective immediately" without any financial information other than the amount of union member dues. She also objected to the collection and expenditure by the Union of a fee for any purpose other than collective-bargaining, contract administration, and grievance adjustment, and demanded the percentage of her dues reduction and the reduced dollar amount, which she promptly received and did not challenge. Thus, it is quite apparent that Sands had all the information she needed to make an informed decision to object. In *Chambers & Owens, Inc.*, the Board found that where a union's procedure purporting to implement *Beck* actually impedes a nonmember employee from exercising his *Beck* rights and interferes with the statutory right under Section 7 to refrain from assisting a union, its conduct is arbitrary and unreasonable and therefore violated of Section 8(b)(1)(A) of the Act. 350 NLRB 1166, 1168. The undisputed facts here do not support such a conclusion.

For these reasons, I find that the Respondent did not violate Section 8(b)(1)(A) of the Act as alleged in the complaint. Accordingly, I shall recommend that complaint be dismissed.

CONCLUSIONS OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

[4] In *Penrod*, the DC Circuit decided three issues: Did the NLRB engage in reasoned decisionmaking in determining that a list of general expenditure categories provided by the union, in response to a *Beck* objection, was sufficient to allow employees to determine whether to challenge reduced fee calculations; was the union required to explain how its affiliated unions used money that the union considered chargeable to *Beck* objectors; and was the union required to identify in the initial *Beck* notice given to new employees and financial core payors, i.e., those employees who are not full union members, the percentage reduction in dues that would result from a *Beck* objection?

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.