3-1-1989

The Beck Decision: Will it Divide Entertainment Unions

Brian E. Cooper

Recommended Citation

Available at: http://digitalcommons.lmu.edu/elr/vol9/iss2/11
THE BECK DECISION: WILL IT DIVIDE ENTERTAINMENT UNIONS?

INTRODUCTION

In the late 1980s, it is commonplace to hear the argument that labor unionism in the United States is dead or dying. The contention is not that unions no longer wield any power,¹ but only that their power in American life has already reached its epoch and is now in inexorable decline. A recent Supreme Court decision, Communications Workers of America v. Beck,⁴ dealing with the power of labor unions to use dues for "political purposes," does not assuage the fears of union leaders worried about their ability to run their unions as they see fit. Justice Brennan, writing for the majority, declared that in "agency shops," unions may exact "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues.'"³

Under current labor law, unions and employers may enter into agreements whereby workers who choose not to join the union which represents them must nevertheless pay union dues to support the bargaining activities of the union.⁴ In Beck,⁵ the Supreme Court held that unions may use these fees of nonmembers solely for collective bargaining purposes and may not spend them on political activities.⁶ In this way,

¹. Witness the recent passage of legislation mandating that corporations must give notice to workers before plants are shut down. It is an example of how unions can still lobby and win in cases where the goal is sharply defined. Congress passed the bill despite President Reagan's veto. Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379 (1988).


³. Id. at 2657 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

⁴. This "agency shop" scheme is authorized by § 8(a)(3) of the National Labor Relations Act. The pertinent part of this section declares: "[N]othing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." Section 8(a)(3) goes on to state that: no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


⁶. Id. at 2657.
the autonomy of the unions has been curtailed and their power reduced. The *Beck* decision's resulting limits upon union expenditures of certain types of dues have especially affected the entertainment industry, whose unions have already suffered deep declines in membership and influence in the last fifteen years. The *Beck* decision threatens to divide entertainment unions upon economic lines because a majority of members are frequently out of work while a minority command huge salaries. Only time will tell whether union leaders in the entertainment industry can avoid such a split.

**FACTS**

The *Beck* decision involved twenty individuals employed by various Maryland subsidiaries of American Telephone and Telegraph ("AT&T") and the Chesapeake and Potomac Telephone Company ("C&P") who chose not to become members of their union, the Communications Workers of America ("CWA"). Under the contract between the CWA and the employers, the workers who abstained from union membership must still pay dues, designated as agency fees, to the Union or risk termination. The workers who chose not to join the Union filed suit in district court, challenging the Union's use of their agency fees. The workers alleged that the Union's use of these agency fees for purposes such as the funding of pro-labor candidates, lobbying for pro-labor legislation, encouraging the organization of other employees working for different employers, and the Union's participation in certain political events, violated the CWA's duty of fair representation and the first amendment.

Section 8(a)(3) of the National Labor Relations Act ("NLRA") authorizes unions and employers to enter into contracts which contain provisions mandating that every employee, desiring to be a member of the union or not, pay full dues to the union if he is to remain employed. The contracts commonly provide for termination of employees who refuse to pay these agency fees.

In *Beck*, the workers contended that the law allowed for parties to enforce the payment of agency fees for collective bargaining purposes.

---

7. *Id.* at 2645.
8. *Id.*
9. *Id.*
11. The United States Supreme Court has consistently upheld this provision of the NLRA which expressly allows these types of contracts. See NLRB v. Gen. Motors Corp., 373 U.S. 734, 735 (1963); Oil Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 409 (1976).
only. All workers, whether or not they chose to join the Union, would pay the fees to insure that both members and nonmembers of the Union supported the cost borne by the Union of negotiating labor agreements. Benefits won through negotiation by the Union were shared by all employees, not just those who chose to join the Union. Thus, the costs should be equally shared as well. The nonunion workers did not object to sharing this cost. The workers argued, however, that limits should exist on how the unions may spend agency fees. The workers viewed the purpose of agency fees as solely that of subsidizing the expenses incurred by the Union in the negotiation of labor agreements. According to the workers, any use of agency fees beyond this narrow purpose violated both the NLRA and the United States Constitution.

In opposition, the Union argued that when Congress drafted the NLRA the regulation of union expenditures was debated but rejected. Therefore, the Union argued that the legislation does not warrant an interpretation restricting union expenditures of agency fees to collective bargaining activities only. Second, the Union contended that an earlier decision, International Association of Machinists v. Street, where the Supreme Court held that a union may only use agency fees for political purposes, not for collective bargaining, was not controlling because it interpreted a different statute.

The Court rejected the Union’s arguments and held that the statute interpreted in Street was controlling. Moreover, the Court failed to conclude that Congress’ earlier reluctance to limit union expenditures foreclosed the courts from doing so in the future. While the Court based its ruling on statutory interpretation, rather than questions of constitutional rights, it nevertheless did not agree with the Union’s statutory argument. The result is a new set of limits on the spending of agency fees by unions and a narrowing of union discretion on how to allocate resources.

13. Id. at 2645.
14. Id.
15. Id.
16. Id. at 2654.
20. Id.
21. Id.
BACKGROUND

Beck turned primarily on the interpretation of two statutes: the Railway Labor Act and the National Labor Relations Act. Both Acts represent landmarks in labor history and an understanding of their background and meaning is crucial to put the present discussion in perspective.

The Railway Labor Act ("RLA") was passed in 1926. The goal of the Act was the peaceful settlement of labor disputes in the railroad industry. A board was established to settle contract and other disputes. Section 2 of the RLA prevents companies from interfering in the process of union organization.

The RLA was a precursor to the NLRA which was passed in 1935. The NLRA was vital to labor because, for the first time, legal backing was given to the proposition that unions had the right to organize. Beyond that, the NLRA made the encouragement of union organization a goal of the federal government. Full support by the federal government was a turning point in labor history because the government previously had done little to encourage, and in fact did much to discourage, labor organization. Finally, the NLRA authorized the creation of

\[\text{References}\]

24. For example, the National Labor Relations Board rules on questions such as whether an action by a union or an employer represents an unfair labor practice.
27. Section 7 of the original Wagner Act provided that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1973).
28. Section 1 of the NLRA in pertinent part states:

\[\text{It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.}\]
29. Police frequently broke up strike demonstrations and arrested union organizers. See S. Perlman, HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1922).
the National Labor Relations Board ("NLRB") to settle labor disputes.30

The most important provision of the NLRA, for purposes of this note, is the right of unions to negotiate "closed shop" provisions with employers. A "closed shop" means that all workers who worked for the company or industry covered by the labor agreement had to join the union and pay its dues.31 If the workers refused, they could not work; otherwise many workers would abstain from joining the union and avoid paying union dues, creating a "free rider" problem.32 At the same time, however, the workers were free to enjoy the benefits of labor agreements negotiated by the union. The advent of the closed shop resolved the free rider problem.33

In the years between 1935 and 1947, before the amendments to the NLRA were enacted, the ability of unions to negotiate closed shop agreements with employers was criticized by those concerned with the rights of free association.34 This criticism led Congress to modify some of the provisions of the NLRA in the Taft Hartley Act.35 Taft Hartley was bitterly opposed by labor because it prohibited many labor practices.36 For purposes of this note, however, the focus will be on Taft Hartley's prohibition of the closed shop.

The provisions of the Taft Hartley Act evidence a recognition by Congress of the problems created by the closed shop. In particular, Congress recognized that the closed shop restricted the rights of workers to associate freely with whom they chose.37 The free association issue had led to frequent attacks on the closed shop in the years prior to the Taft

---

30. The creation of the National Labor Relations Board was authorized by 29 U.S.C. § 153 (1973).
32. In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Court explained that, "Congress recognized that in the absence of a union-security provision (i.e., the closed shop or the agency shop) many employees sharing the benefits of what unions are able to accomplish like collective bargaining, will refuse to pay their fair share of the cost." Id. at 740-41.
33. Senator Taft declared in debate on the issue in Congress, "[Closed Shop] agreements prevent nonunion workers from sharing in the benefits resulting from union activities without also sharing in the obligations." Beck, 108 S. Ct. at 2650 n.5.
34. Id. at 2650.
36. Secondary boycotts as well as strikes to compel an employer to commit some unfair labor practice such as discharging an employee for belonging to a particular union, were now held to be "unfair labor practices" and illegal. See 29 U.S.C. § 158(a)(3) (1973).
37. Closed shops allowed the union to deny membership in the union for dubious reasons and in some cases exact a price for membership beyond regular dues. Failure to join the union allowed the union to demand that the employer fire the employee as this was part of all closed shop agreements between unions and employers. See Beck, 108 S. Ct. at 2661.
While Congress sought to curtail the problems associated with the closed shop, it did not forget the countervailing free rider problem which resulted from open shops where union membership was optional.

In an effort to solve problems inherent in both closed and open shop agreements, Congress, through the Taft Hartley Act, allowed employers and unions to enter into agreements containing what are termed "union security agreements." These are also sometimes known as "agency shop agreements." In an agency shop, employees are free to abstain from union membership. At the same time, however, employees who refuse to join the union must pay agency fees which are equivalent to regular union dues. This was a compromise. Forcing every employee to pay either regular dues or agency fees to the union resolved the "free rider" problem. Unions received financial support from all workers rather than allowing some workers to simply abstain from joining while continuing to enjoy the contract benefits garnered through union negotiation. Employees, however, were still free to abstain from actually joining the union, thereby protecting their freedom of association. In 1951, Congress amended the National Railroad Act, which had dictated labor rules in railroads, to include the provision in the Taft Hartley Act allowing for union security agreements. The intent of Congress in enacting the Taft Hartley Act and the amendment to the National Railroad Act was the major concern of the Supreme Court in Communications Workers of America v. Beck.

PRIOR RULINGS

The Supreme Court in Beck was not the first to address the issue of the constitutionality of the agency shop. Beginning in 1956, the Court attempted to draw the boundaries of union organization.

The first ruling in this area was Railway Employes' Department v. Hanson. Hanson involved a railroad union and the application of special railroad regulatory laws. The special importance of the railroad industry in the early United States economy resulted in congressional

38. Id. at 2649-50.
40. Beck. 108 S. Ct. at 2648.
42. Beck. 108 S. Ct. at 2649.
43. Id. at 2641.
44. 351 U.S. 225 (1956).
45. The building of railroads was crucial for the early American economy for two reasons. First, it provided for the transportation of raw material, finished goods and people to places
attention almost from the beginning to prevent strikes in the railroad industry that would literally shut down the newly industrializing economy.\textsuperscript{46}

This special importance ascribed to the railroad industry resulted in the Railroad Labor Act.\textsuperscript{47} The RLA, enacted in 1926, emphasized the negotiated settlement of labor disputes.\textsuperscript{48} At the same time, however, no part of the RLA required nonunion workers to contribute dues to the union.\textsuperscript{49} This omission can be traced to the railroad industry's long history of "voluntary unionism."\textsuperscript{50} When Congress, through Taft-Hartley, created the agency shop, the law did not affect the railroad industry because that industry was controlled by the RLA. Therefore, in an effort to give railroad unions the same rights to compel contributions from workers as authorized under the Taft Hartley Act, Congress amended the RLA to allow for union security agreements.\textsuperscript{51}

\textit{Hanson} turned on the amended part of the RLA section 2, Eleventh which authorized union security agreements. Workers who had chosen not to join the Union, but who nevertheless paid agency fees, challenged the Union's expenditure of those agency fees on noncollective bargaining activities.\textsuperscript{52} The workers contended that the expenditure of agency fees on noncollective bargaining activities violated both the first amendment and the due process clause of the fifth amendment.\textsuperscript{53}

\begin{itemize}
\item where they were needed. Second, the need to construct the vast rail systems created great demand for steel and helped build the American steel industry. See S. PERLMAN, HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1922).
\item 46. \textit{Street}, 367 U.S. at 755-56 n.11.
\item 47. \textit{Id.} at 755.
\item 48. \textit{Id}.
\item 50. \textit{Street}, 367 U.S. at 750.
\item 51. The amended section 2, Eleventh provides in pertinent part:
\begin{quote}
Any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted,

(A) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; \textit{Provided}, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any other reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership . . . .
\end{quote}
\item 52. \textit{Hanson}, 351 U.S. at 236.
\item 53. \textit{Id}.
\end{itemize}
The Supreme Court disagreed with the workers and held that the creation of section 2, Eleventh of the RLA was a valid exercise of the commerce power under the Constitution and that it did not violate the first and fifth amendments. The majority refused to find that the Railway Labor Act violated the Constitution without a showing that the Union actually had or was engaging in political activities. In one passage the Hanson Court noted that it was not making a finding about bill of rights violations. "If in a similar future case, the record showed that agency shop workers were forced to contribute their agency fees to a union which was contributing a substantial or even partial percentage of their collected dues toward political purposes, this case would not be controlling." 

According to the Court, the trial court record in Hanson disclosed no evidence showing the extent of union spending of agency fees on political noncollective bargaining purposes. In other words, the workers in Hanson made no showing of political expenditures by the Union. The possibility that section 2, Eleventh of the RLA would have been unconstitutional, had there been a showing of political activity by the Union, was not foreclosed. In this way, the Supreme Court held merely that section 2, Eleventh on its face did not violate the Constitution. Hanson also held that agency shop agreements did not violate the Constitution and were authorized by a valid congressional exercise of the commerce clause.

On the heels of Hanson came International Association of Machinists v. Street. The facts of Street were similar to those in Hanson. A group of disgruntled railroad companies and their employees who had chosen not to enter their unions sued a group of labor organizations. The unions were accused of using the agency fees paid by these nonunion employees on both political campaigns of pro-labor candidates and other political causes on which the nonunion employees disagreed.

However similar the two cases were, Street differed from Hanson in two respects. First, the record in Street included clear examples of political activity by the Union and this issue was not disputed. The record in

54. Id. at 238.
55. Id.
56. Id.
57. Hanson, 351 U.S. at 238.
58. Id.
59. Id.
61. Id. at 768-69.
62. The trial court found clear evidence of political expenditures by the union. "Examples
Hanson, however, showed no evidence of such political activity. Second, workers did not challenge the constitutionality of section 2, Eleventh of the RLA on its face in Street. Rather, the workers who paid the agency fees in Street argued that the RLA violated the United States Constitution "as applied to infringe the particularized constitutional rights of any individual." These differences account for the different outcomes.

Justice Brennan, writing for the majority in Street, scanned the legislative history of section 2, Eleventh of the RLA in an attempt to assess the workers' argument that the RLA did not allow for the spending of agency fees for political purposes. The history seemed only to show a desire by Congress to force all workers, whether they joined the union or not, to help pay for the costs of negotiating a labor contract. Agreeing with the workers' argument, he stated: "[O]ne looks in vain for any suggestion that Congress also meant in section 2, Eleventh to provide the unions with a means for forcing employees over their objection, to support political causes which they oppose." For this reason, the Court held that such political expenditures of agency fees by the unions was a violation of the statute.

In Beck, the Supreme Court held that the Street decision was controlling and that it stood for the proposition that agency fees could only be used to support collective bargaining. However, several decisions prior to Beck suggest other interpretations of the Street decision. Perhaps the most notable of the circuit court decisions interpreting Street was Price v. International Union. In Price, nonunion workers challenged the expenditure of agency fees by the Union on political noncollective bargaining purposes. The main contention of the workers in Price was that the Union's political spending violated their right to be represented fairly by the Union.

include funds contributed to support the campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States." Street, 367 U.S. at 744 n.2.
63. Hanson, 351 U.S. at 238.
64. Street, 367 U.S. at 748.
65. Id. at 763-64.
66. Id. at 764.
67. Id. at 768-69.
68. Beck, 108 S. Ct. at 2657.
70. Id. at 1130. The duty of a union to fairly represent its members was held to exist for railroad unions in Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). The Court in that case stated that "[s]o long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft union." Id.
The court, however, disagreed with the workers' claim and held that the Union's duty of fair representation extended only to matters where the Union served as the workers' sole representative. The court explained that matters of union expenditures involved only the Union and the workers and not the employer. Therefore, the issue of union expenditures did not involve the Union acting as the workers' representative in negotiations with the employer. Rather, the Union's spending of dues was simply an internal matter between the workers and their representatives. For this reason, no duty of fair representation arose in the case. The workers disagreed and asserted that the employer was involved to the extent that failure to pay the agency fees, which they viewed as unfair, would result in the firing of the worker as authorized by the union security clause setting up the agency shop.

These contentions failed to convince the court. Even if a duty of fair representation did exist, the court did not believe that the Union violated its duty. The case turned on the amount of evidence required by the court. According to the court, in order to show that the Union breached its duty of fair representation, the workers must show that "the union acted arbitrarily, discriminatorily, or in bad faith either in negotiating, executing, or enforcing the security clause, or in spending the resultant funds."

By its application of the tests, the court examined the expenditures not related directly to collective bargaining and concluded that such spending was not arbitrary or irrational, but represented regular union spending. Additionally, the court concluded that the expenditures were not motivated by any "discriminatory animus," and that the workers were in fact not being treated any differently than regular dues-paying members of the Union, but rather were being treated the same. The nonunion workers contended that they should be treated differently be-

at 204. The same duty was held to exist for nonrailroad unions in United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1967), cert. denied, 389 U.S. 837, reh'g denied, 389 U.S. 1060 (1968). See also Kolinske v. Lubbers, 712 F.2d 471, 481 (D.C. Cir. 1983).

71. Price, 795 F.2d at 1134.
72. Id. at 1135.
73. Id.
74. Id.
75. Id.
76. Price, 795 F.2d at 1135.
77. Id.
78. Id.
79. Id. The court pointed to "expenditures on organization and recruitment, insurance plans, strike funds, scholarship funds, union publications, and litigation unrelated to collective bargaining." Price, 795 F.2d at 1135.
80. Id. at 1136.
cause they disagreed with those who joined the Union voluntarily.81 The court, reasoning that treating people alike did not constitute discrimination, held against the workers and found that the Union did not breach its duty of fair representation.82

By applying the test this way, the court turned the duty of fair representation on its head, suggesting that the workers desired unequal representation. This finding of no discrimination is not without merit and seems to make sense if both the regular union members and the agency fee paying nonmembers are viewed alike. However, an argument can be made that they are not alike and deserve different but fair representation. The outcome in *Price* can be viewed as simply the result of the manner in which the workers presented their arguments. The workers claimed that the intent and meaning of section 8(a)(3) of the NLRA was equivalent to section 2, Eleventh of the RLA in that violations of either section represented state action, and not just agreements between private parties which could not be remedied by any court.83 The *Price* court found that state violation of the statutes did not constitute state action thereby challenging the equivalency of section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA.84

**THE Beck DECISION**

In many ways, the *Beck* decision is much less complicated than its progeny. Difficult and convoluted theories about state action and "internal" versus "external" matters were eschewed for a more simple analysis of statutory interpretation.

Prior to the Supreme Court's ruling in *Beck*, the case was subject to three lower court decisions, including a district court decision, an appellate court decision and a rehearing by an *en banc* court.

The *Beck* case involved twenty employees of various telephone companies who chose not to become members of their union, the CWA. The essence of the suit was that CWA's use of the agency fees for noncollective bargaining purposes violated the CWA's duty of fair representation as well as the first amendment.85

By spending agency fees for purposes other than collective bargaining, the Union was forcing nonmembers of the Union to support activities beyond collective bargaining. Workers who did not wish to join their

81. *Id.*
82. *Id.*
83. *Id.* at 1130-31.
84. *Price*, 795 F.2d at 1131.
industry's union were forced to pay for political activities as well as collective bargaining expenses. These political activities may represent the very aspect of unions to which agency fee paying workers objected. Yet, by allowing unions to spend agency fees on political activities, the nonunion workers were in essence supporting the activities which kept them from joining the Union.

The workers sought, in addition to declaratory relief, an injunction barring petitioners from exacting fees exceeding the amount necessary to carry out collective bargaining, as well as damages for the past collection of such excess fees.86

The district court held that the CWA could not spend a substantial portion of the agency fees it collected from nonunion member workers for purposes other than that allocable to "collective bargaining, contract administration and grievance adjustment." Such expenditures represented a violation of the workers' first amendment rights of free speech and association. In accordance with that ruling, the court forbade future collections of agency fees in excess of the amount needed for collective bargaining purposes. The court then ordered the parties to agree on a percentage which corresponded to the portion of the fees CWA had allocated to noncollective bargaining purposes. When the Union could not show, clearly and convincingly, that more than twenty-one percent of the agency fees had been spent on collective bargaining, the court ordered a refund to the workers. Under the ruling, the CWA was to refund all agency fees it had collected since 1976 which exceeded the amount necessary for collective bargaining to the workers who had paid them. In addition, the court ordered the CWA to keep adequate records in the future showing a division between expenditures for collective bargaining and expenditures for other purposes.

On appeal to the United States Court of Appeals for the Fourth Circuit, a divided panel upheld the district court's ruling of relief to the workers. Unlike the lower court, however, the appellate court refused to grant relief under the first amendment. Rather than finding a viola-

86. Id. at 2645.
88. Id. at 96.
89. Id. at 97.
90. Id.
91. Id.
94. Beck v. Communications Workers of Am., 800 F.2d 1280, 1291 (4th Cir. 1986).
95. Id. at 1283.
tion of the Constitution, the appellate court held that the Union expendi-
tures of agency fees for noncollective bargaining purposes was a violation
of section 8(a)(3) of the NLRA. A majority of the panel also found
that the lower court’s use of a clear and convincing evidentiary standard
was in error. However, because many of the union expenditures were
indisputably used for noncollective bargaining purposes, the error was
harmless. The majority then remanded the case to determine the
proper allocation between proper and improper expenditure of the re-
mainning agency fees collected by CWA but not specifically determined in
the appellate decision. By a six to four vote, the en banc court affirmed
the allocations by the appeals court.

In the Supreme Court decision, Justice Brennan relied on Street. As previously discussed, the Street Court held that the expenditure of
agency fees by certain railroad unions for political noncollective bargain-
ing purposes was a violation of section 2, Eleventh of the Railway Labor
Act. The RLA had been amended to allow for union security agree-
ments which set up the agency shop and made the closed shop illegal. The main question to be answered in the Court’s statutory interpretation
was whether the decision in Street, which involved the RLA, was con-
trolling in a case that involved a nonrailroad union, such as the CWA. The Court indicated that for the purposes of agency fee expenditures, the
statutes were equivalent.

Justice Brennan stated that the passage of the amendment to the
RLA, which occurred after the Taft Hartley amendment, was intended
to mirror the Taft Hartley Act in the creation of the agency shop. Both statutes simply sought to end the abuses associated with the closed
shop. Each statute drew a middle course ending the free rider problem but allowing for a degree of freedom by workers to abstain from

96. Id.
97. Beck v. Communications Workers of Am., 776 F.2d 1187, 1209-10 (4th Cir. 1985),
98. Id. at 1211.
99. Beck v. Communications Workers of Am., 800 F.2d 1280, 1288 (4th Cir. 1986), aff’d,
100. Id. at 1288.
102. Beck, 800 F.2d 1288. The court also vacated certain jurisdictional holdings that are
unimportant for this discussion.
105. Street, 367 U.S. at 768-69.
107. Id.
union membership.\textsuperscript{108}

The Court gave particular attention to a purported "Bill of Rights for Union Members" which was to accompany section 8(a)(3) and which would have set limits on the types of expenditures for which a union could spend its collected dues.\textsuperscript{109} Congress rejected the legislation.\textsuperscript{110} In turn, the unions interpreted Congress' rejection as a sign of reticence to regulate union expenditures.\textsuperscript{111} In this way, the Union argued that section 8(a)(3) did not intend to limit the ability of unions to choose how to spend agency fees.\textsuperscript{112} Justice Brennan rejected the argument because the legislation was directed solely at full union members rather than agency fee paying nonmembers.\textsuperscript{113} Little evidence, however, suggests such a narrow purpose of the bill of rights legislation. Justice Brennan reads distinctions into the bill through an overly literal interpretation.

The Court places exaggerated weight on other legislative history as well. For example, Justice Brennan cites statements made by Senator Taft during legislative debate to demonstrate the intent of section 2, Eleventh to exactly mirror section 8(a)(3).\textsuperscript{114} Senator Taft declared that the amendment to the RLA "inserts in the railway mediation law almost the exact provisions, so far as they fit, of the Taft Hartley law. . . ."\textsuperscript{115} Yet, the sentence is merely one in a lengthy debate that included other contradictory statements.\textsuperscript{116} In addition, Congress attempted to regulate union fees. In a provision not mentioned by the Court, Congress adopted a section of the Taft Hartley Act which limited union expenditures on federal elections.\textsuperscript{117} Thus, if Congress had intended to limit or regulate union expenditures further, they would have. The fact that Congress did regulate them, but only in a narrow way, demonstrates that it did not

\begin{itemize}
\item \textsuperscript{108} Id. at 2657.
\item \textsuperscript{109} Id. at 2654.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Beck, 108 S. Ct. at 2655.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 2654-55.
\item \textsuperscript{115} Id. at 2651.
\item \textsuperscript{116} Senator Taft stated: "The great difference [between the closed shop and the union shop], is that [under the union shop] a man can get a job without joining the union or asking favors of the union. . . . The fact that the employee has to pay dues to the union seems to me to be much less important." Beck, 108 S. Ct. at 2656 (quoting 93 CONG. REC. 4886 (1947)). The statement shows that the intent of § 8(a)(3) was to have nonunion workers pay dues to the union. By union dues, it is arguable that the Senator meant full union dues.
\item \textsuperscript{117} In section 304 of the Taft Hartley Act, which is now incorporated into the Federal Election Campaign Act of 1976, 2 U.S.C. § 441b, Congress made it unlawful for a union "to make a contribution or expenditure in connection with certain political elections, primaries or political conventions." 29 U.S.C. § 151 (1973).
\end{itemize}
intend to regulate them any further. Yet, Justice Brennan dismissed this argument without hesitation.¹¹⁸

These flaws in reasoning are important for they point to a desire to shape the facts narrowly to a predetermined opinion. Another problem in the *Beck* decision that was never raised in *Beck* or in any previous cases agreeing with *Beck*, relates to the definition of political noncollective bargaining expenditures. The Court treated this term as almost self-explanatory¹¹⁹ and yet the term is vague at best. The failure to adequately define political activities is problematic. Is the investment of pension funds in South Africa a political expenditure or solely an economic one? Must union publications be totally devoid of political content or is the inclusion of an editorial opinion section an infringement on first and fifth amendment rights of agency shop workers? If we narrowly construe the distinction, all expenditures not directly related to collective bargaining will be illegal.

Therefore, spending money on union publications, union insurance plans, strike funds, and scholarship funds might be considered illegal since they do not relate directly to collective bargaining. Yet, can these expenditures be considered political? They are arguably merely benefits offered to union members which may not be available through the employer. In addition, strike funds are crucial to a union's bargaining power in the time of a strike. Without such a fund, it is doubtful that a union could galvanize its members for a strike of any duration. In labor negotiations, the appearance by a union of willingness to go on strike indefinitely can be crucial to convincing an employer not to force a strike. Thus, however political, many union expenditures are integral to a union's survival. Moreover, such expenditures are not discriminatory since they benefit nonmembers as much as members and are not political.

The problem is simply a matter of degree and the Court has done little to draw boundaries as to which type of expenditure is valid and which is not. The weakness is most clearly shown in the Court's description of every noncollective bargaining expenditure as somehow violating the rights of nonmembers when many, if not all, of these expenditures are simply aimed at benefitting both members and nonmembers alike through such programs as group insurance and scholarship funds. However, the majority in *Beck* is not the only culprit. The issue of how to define political spending was not raised in prior decisions either. There can be little doubt that this vague definition will be the subject of future litigation.

¹¹⁹. Id. at 2657.
Beck’s Effect on the Entertainment Industry

Had Beck been decided ten to fifteen years earlier, the decision’s effect on the entertainment industry would have had much more import. In past years, almost the entire entertainment industry was unionized. In order to work for any of the major studios or television networks, a potential employee had to become a member of the union representing that particular entertainment field. Before 1976, almost eighty percent of the entertainment industry was unionized. Agency shop agreements were in effect throughout the industry. As the power of craft unions waned in the last decade, so has that of the entertainment unions.

Every significant field in the entertainment industry is still unionized. The difference now is that unions are only part of the employment picture and for the most part, one need not join a union to work in many of the industries that make up the entertainment field. For example, in years past, the whole extra field was unionized, so that all producers came to the union to hire extras and the extras were paid on a union scale. Since then, only twenty percent of the extras remain union members. Although they are paid up to twice as much as nonunion extras, little of the work is supplied by workers who are members of any union. This lack of union control of the industry exists in many of the other fields, such as make-up artists and technicians. Therefore, because it applies only to unions, the Beck decision has little relevance for those aspects of the entertainment industry where union influence is negligible.

The erosion of union power in the industry has escaped some areas. One union, in particular, which is greatly affected by Beck, is American Federation of Television and Radio Artists (“AFTRA”). According to a Union representative, the Union is very concerned about the potential of

---

120. Telephone interview with Pam Fair, Publicity Representative for American Federation of Television and Radio Artists (“AFTRA”) (Nov. 6, 1988).
121. Id.
122. Id.
123. Id.
124. Id.
125. Telephone interview with Pam Fair, supra note 120.
126. Id.
127. Id.
128. Eighty dollars per day plus expenses for union members as compared with less than forty dollars per day for the average nonunion extra, according to the Screen Actors Guild. Id.
129. Telephone interview with Pam Fair, supra note 120.
LABOR LAW

the Beck decision to erode the power and influence of the Union. AFTRA has a union security agreement with the networks and producers it deals with. Thus, to get a job as a radio or television artist, it is necessary to join the Union. At the same time, an employee may elect to simply pay agency fees and remain a nonmember of the Union through the union security agreement.

Entertainment unions have exhibited many examples of political activity which the Beck decision would forbid if partially paid for through agency fees. The unions view the election by workers not to join the union and to keep the union accountable as a major threat. The threat is particularly dangerous because of the great percentage of unemployed artists that comprise the union at any one time. The temptation to many AFTRA members to go on financial core status, as it is called when a member elects to remain a nonmember and pay agency fees, is great in an industry where work is relatively scarce. Prior to Beck, agency fees were the same as regular union dues. Now, however, agency fees could presumably be less because they would comprise only those costs necessary for collective bargaining. In contrast, regular union dues would continue to be made up of both costs for collective bargaining as well as political causes financially supported by the union.

Although few have chosen to go on financial core status, one prominent member of AFTRA did. Bruce Herschensohn of Los Angeles TV Station KABC's "Eyewitness News" chose to declare his new found status live on television during a political commentary in which he hailed the Beck decision as a victory for freedom of association. This public declaration of financial core status deeply worries AFTRA officials who wonder whether allowing members to choose such status is even worth the problems such status creates. Allowing some members to pay less could create divisions and resentment within the union. Perhaps it would be more advantageous to simply oust members who refuse to pay normal dues rather than become financially accountable for every expenditure they make. But is such a move constitutional? If an industry

130. Id.
131. Id.
132. Id.
133. Id.
134. Telephone interview with Pam Fair, supra note 120.
135. Id.
138. Telephone interview with Pam Fair, supra note 120.
139. Id.
becomes totally unionized so that no one may work in the industry without being a member of the union, ousting a member would be equivalent to barring the former union member from ever working in his chosen field. This closed shop is exactly what the Taft Hartley legislation was meant to stop. Even more important, would ousting "core status members" divide the union along financial lines increasing the power of producers? Questions such as these are only beginning to surface.

Thus, even though most of the entertainment industry is not dominated by unions, the parts that still are seem particularly vulnerable to challenges by agency fee paying members. Such vulnerability stems from duality of both high unemployment and a high degree of political activity traditionally associated with entertainment unions. How the entertainment unions will react to the *Beck* decision is not known at this time. What is known is that they are worried, especially when high profile members publicly hail the Supreme Court ruling in *Beck* on live television. If the unions choose to drop members who choose such financial core status, the tactic could snowball and membership could drop dramatically. Yet, if they allow members to choose such status after *Beck*, the union may become financially accountable to a few members on how their agency fees may be spent. In the end, such accountability could be more trouble than it is worth.

**Conclusion**

Congress was reasonable and rational in attempting to solve the problems of the closed shop in the late 1940s. The authorization of the union shop was an attempt to insure freedom of association while at the same time preventing free riders from receiving the benefits of union negotiated contracts without helping pay for their costs. As the majority stated in *Street*: “compelling an individual to become a member of an organization with political aspects is an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process.” The agency shop forced workers to support union bargaining activities which resulted in benefits to all workers, whether or not they were members of the union. At the same time, however, by allowing workers not to join the union, union shop agreements guarded the rights of free association guaranteed by the first amendment. The approach was admittedly a compromise between competing interests.

Yet in reaching for that middle ground, Congress did not adequately define the limits of union expenditures of agency fees, possibly believing that such defined limits were unnecessary. The *Beck* decision is a realization that limits are in fact necessary and that the limit is when an expenditure is made for political purposes. Beyond that realization, however, *Beck* fails to clearly define those limits. The Court is satisfied to merely describe the limits as political noncollective bargaining expenditures. In this way, the Court does little to remedy the present situation. Moreover, the Court arrives at its conclusion by reading the statute far too literally and placing undeserved emphasis on a few statements by Senator Taft.

In addition, as demonstrated by its initial effect on entertainment unions, the decision threatens to undermine the cohesiveness of certain unions whose members are sharply divided in annual earnings. The result is a problem for the entertainment unions, which are now faced with the possibility of the evolution of two separate union constituencies: those who can afford to pay only the lower agency fees and those who choose or can readily afford to pay for political expenditures by the union.

When and if an alteration or modification of *Beck* occurs, the Court must strive to consider the delicate balance of policy considerations which make up the labor code. Although *Beck* dealt a serious and perhaps crippling blow to the agency shop, the Court need not restore in full a union's right to spend agency fees in any manner the union desires. Rather, the Court should clarify exactly what type of expenditures would constitute a violation of section 8(a)(3). This analysis should include a clear definition of a political expenditure and what in the nature of such an expenditure violates the rights of agency fee paying workers. Moreover, the Court should not attempt to set out the parameters by means of a list, exhaustive or otherwise, of examples of "political expenditures." The analysis should merely be clearer and more definitive than in *Beck*. Without such a clarification, the law in this area leaves the unions guessing. Such vagueness leads to a misunderstanding of the law and inevitably more litigation.

The *Beck* decision is important because for the first time limits are being placed on the agency shop. Some type of limits were overdue. The Court however, as often happens with important decisions, reached too far with too little analysis. With time, the decision can be clarified and

---

142. The main policies to weigh are the need to prevent free riders from exploiting union negotiated benefits without paying for them and at the same time maintain a sensitivity to the problem of agency fees going toward purposes which violate the rights of free association.
moderated to better take into account the real concerns of both unions and nonunion member workers.

Brian E. Cooper