

# ***A District Judge Versus the President of the United States***

By Lloyd Rain, February, 2002

## ***Introduction***

The President of the United States issues an executive order. A district judge reviews it and nullifies it. Basically, the judge tells the most powerful man in the country that he just can't do that. And the president accepts this rebuff without question. Amazing. There are only a few countries on our planet in which that could happen. And without contest. America. Canada. England. Australia. Perhaps a few others. And what does this have to do with purchasing? In the case we'll look at, the president tried to use the federal purchasing rules to create social change. And a district judge, said, "No.!" The case which led up to this January's decision was the true landmark. The U. S. Supreme Court handed down that decision on June 29th, 1988. It became known as the *Beck* decision.

## ***The Beck Decision***

The term "Agency Fee," is the legal term for a member of an organization paying a fee for representation by that organization. It primarily applies to union members who pay a membership fee to their union ("agency") that represents members for germane expenditures.

This term was used while attempting to distinguish the difference between funds that actually pertain to "contract bargaining, enforcement", and "grievance adjustment", as opposed to those funds which are used for other purposes (social activities, support for political candidates, lobbying for legislation, etc.). In *Beck versus Communication Workers of America* ("CWA"), there were twenty employees of a closed union shop that challenged the CWA.

Harry Beck was a member of the CWA. Mr. Beck paid dues to his union, with the understanding that those dues covered the costs of negotiating the periodic renewal of the union's contract.

Mr. Beck began to realize that his dues were being used for other purposes, too — that the union was spending a portion of those dues promoting a political agenda which was not necessarily that of Mr. Beck — endorsing candidates, making political contributions, even donating manpower to partisan campaigns.

Union dues are rarely "optional." If the First Amendment acknowledges a right of free speech, Mr. Beck reasoned, shouldn't it also free him from being required to financially support political speech not to his liking?

With the assistance of the National Right to Work Foundation, telephone worker Beck filed the lawsuit which was to become known as *Beck versus Communication Workers of America*, or "*Beck*," for short.

In 1988 the United States Supreme Court handed down the decision now known as the *Beck* decision. In *Beck*, the high court ruled that unions cannot legally require dues-payers to support any activities other than collective bargaining, contract administration or grievance adjustment. Union members, or non-members required to pay union dues in states where such payments can be required, must be informed what portion of their dues are going to other purposes, and must then be afforded the right to withhold or be refunded that share of their dues.

The decision was obviously seen as a blow to unions and a general triumph for non-union shops and management.

Because *Beck* is a ruling of the Supreme Court, it is the law of the land, and has been since 1988. Because of union pressures, the National Labor Relations Board has never enforced the *Beck* decision — especially the mandate to post “*Beck* notifications” informing members of their rights under the *Beck* decision.

Late in the George H. W. Bush administration, roughly 1991, the government ordered federal contractors to post notices, informing their workers of these **Beck rights**. But as one of its first actions upon taking office, the Clinton Administration ordered federal contractors to tear down any remaining *Beck* notifications.

As an attorney and a former professor of law, President Clinton knew all this. Nevertheless, as one of its first actions upon taking office in 1993, the Clinton Administration, heavily supported by union dues not part of the “germane amounts,” ordered federal contractors to tear down any remaining *Beck* notifications.

The best possible notification, of course, would have been sensible federal enforcement of the *Beck* decision itself, with each union dues-payer being handed an accounting of the percentage of his or her dues which goes to non-contract-related expenditures, with a simple check-box where he or she could indicate: “Yes, keep the non-germane amounts.” or, “No thanks, please return this extra money to me in my weekly paycheck.” This, of course, could be disastrous to large unions, with the refunds or dues reductions being in the billions of dollars. Thus, notification of **Beck rights** is a very sensitive subject around all unions and lawmakers.

And that is why three consecutive presidents have issued executive orders in favor of, or in opposition to, posting *Beck* notifications. In each case, their stance on the issue is directly relative to the political philosophy of their respective parties.

### ***Executive Order 13,201***

Enter George W. Bush on January 20, 2001. It takes him no time at all to reinstate notification of **Beck rights**.

Executive Order 13,201 was signed into law by the President on February 17, 2001, and became effective on April 18, 2001. The Order operates by requiring all government contracting departments and agencies to include a number of clauses in every government contract worth over \$100,000 solicited after the Order's effective date. The first clause mandates that the contractor post at its workplaces a notice that

includes the following information:

### **“Notice to Employees**

“Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter in a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to **collective bargaining, contract administration, and grievance adjustment**.

“If you do not want to pay that portion of dues or fees used to support activities not related to **collective bargaining, contract administration, or grievance adjustment**, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to **collective bargaining, contract administration, or grievance adjustment**, you may be entitled to a refund and to an appropriate reduction in future payments.” {NLRB address omitted.} {Bold print mine.}

The second and third clauses of the Order authorize the Secretary of Labor (Elaine L. Chao) to impose substantial penalties on those employers (or) contractors who do not post the above notice, including canceling their current government contracts and barring them from obtaining future government contracts. The fourth clause applies the notice requirement to subcontractors and "those who sell goods to" prime contractors (i.e., vendors), and requires prime contractors to take such action as may be directed by the "Secretary" towards subcontractors and vendors, including imposing sanctions, for noncompliance with the Order.

As the source of its authority, the Order cites the Federal Property and Administrative Services Act, 40 U.S.C. ("Procurement Act"), which provides the President with the authority to issue executive orders to promote "economy and efficiency" in government procurement. The Order states its relationship to this goal as follows: "When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw, facilitates the efficient and economical completion of its procurement contracts."

### ***The Order Challenged***

Challenging the Order were a non-profit corporation and three unions. They were:

UAW-Labor and Employment Training Corporation which provides job training and jobs for eligible economically disadvantaged persons and has several contracts with the federal government;

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") is an international labor organization that claims a

membership of over 800,000 employees and represents employees of federal government contractors;

Office and Professional Employees International Union (“OPEIU”) is an international labor organization that claims a membership of over 140,000 employees worldwide and represents employees of federal government contractors;

OPEIU Local 537.

### ***Process***

In these instances, it is common to name the government official responsible for implementing the order as the defendant; thus, Elaine L. Chao, Secretary of Labor, was named as the sole defendant. She was sued in the United States District Court for the District of Columbia. Hearing the case was Judge Henry H. Kennedy, Jr.

Contending that the Order was preempted by the National Labor Relations Act (29 U.S.C. [“NLRA”]), and was issued without authority, the plaintiffs sought a declaration that the Order was invalid and a ruling enjoining (prohibiting) Elaine Chao from continued implementation of the Order.

There were the standard defendant's motions to dismiss and the parties' cross-motions for summary judgment. All were summarily denied.

The plaintiffs made a number of arguments ranging from the restriction from opportunity to bargain the posting of the notice to the postulation that the notice could be interpreted as meaning that workers do not have to join unions. These also, were summarily dismissed by the judge.

### ***The Key Issue — NLRA Preemption***

Both plaintiffs moved for summary judgement on the basis that the Order was preempted by the NLRA which precludes Procurement Act regulation, including presidential executive orders. Plaintiffs and defendant took opposite sides on this very argument. The plaintiffs argued that the order sets a different standard for employees than that set by the NLRA. The defendant argued that the order simply enhances the NLRB which is supposed to be enforcing the *Beck* decision anyway.

Until this point, the issues were fairly clear.

Thereafter, ensued a number of case references and, to me, irrelevant arguments which strayed so far from the issue at hand, that I could not help but wonder which issue was actually being challenged. I have rarely read so many pages of convoluted irrelevancies as this case conjures up, with both the plaintiffs and the defendant spewing forth more and more obtuse contentions. The opinion memorandum appeared to depict a bevy of little children offering arguments further and further afield to rescue an obviously confusing case.

## ***The Finding***

In the final analysis, the Judge sided with the plaintiffs. He said,

“There is no need to address plaintiffs' additional claim that the Executive Order is invalid under the Procurement Act, because even if the court were to find for defendant on that claim, it would still hold the Order invalid under the NLRA.

“For the foregoing reasons, the court denies defendant's motions to dismiss and for summary judgment, and grants plaintiffs' motion for summary judgment and requests for a permanent injunction and declaratory judgment.”

Translation: the executive order was probably invalid under the Procurement Act but is definitely in conflict with the provisions of the NLRA.

## ***Order and Judgement***

The judicial order states:

“Pursuant to Fed. R. Civ. P.58, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is, this 2nd day of January, 2002, hereby

“ORDERED that Executive Order 13,201 is invalid and of no force and effect; and it is further

“ORDERED that defendant is permanently enjoined from implementing and enforcing Executive Order 13,201.

Henry H. Kennedy, Jr.  
United States District Judge”

## ***Comments***

The trial itself was meandering and, to me, mostly dealt with deviations and digressions. Never once, in fact, did it deal with the fact that **Beck rights** were mandated by the Supreme Court of the nation some fourteen years previous and had still to be implemented by employers, unions and the NLRB. Thus, all were breaking the law of the land and all the ensuing presidential orders were superfluous to the Supreme Court ruling. It is almost as if the Supreme Court ruling were simply a fantasy existing on some other planet and that everyone had the right to tamper with the ruling and observe it at each's own whim. I find that very disturbing. I find it even more disturbing that the National Labor Relations Board, which is supposed to interpret and implement the National Labor Relations Act, is the prime guilty party in the choice, obviously union coerced, to avoid implementing **Beck rights**.

What I find most gratifying though, is that regardless of how twisted this trial's process may have been and how remarkably inept the arguments may have been, the result was that a local district court overruled the president of the nation and that ruling stuck.

As it should have. That, my friends, is most reassuring.

### ***One Final Observation***

Obviously, **Beck rights** are at the heart of considerable dissension among unions and management. Right now, **Beck rights** are the law of the land. What we really need, regardless of political pressures from either side, is some government body, preferably a high court, to come forward and mandate that all federal contractors shall post **Beck notices** and each union dues-payer shall be given an accounting of the amount of his or her dues which goes to non-contract-related expenditures and a clear opportunity to affirm or deny the use of those dues for non-germane expenditures. It appears that type of clarity will be a long time coming.

•===== End =====•

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