United Nurses and Allied Professionals (Kent Hospital) *and* Jeanette Geary. Case 01–CB–011135

December 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

This case presents several novel issues arising from the Supreme Court's decision in *Communications Workers v. Beck*.[1] The first issue is whether the Respondent Union violated the Act by failing to provide Charging Party Jeanette Geary, a nonmember objector, with an audit verification letter. We adhere to precedent and find that it did not. The remaining issues concern whether the Union unlawfully charged the Charging Party for expenses the Union incurred while lobbying for bills pending in the Rhode Island and Vermont legislatures. We hold that, like all other union expenses, lobbying expenses are chargeable to objectors to the extent that they are germane to collective bargaining, contract administration, or grievance adjustment. We further hold that otherwise germane lobbying activities are chargeable even if they are extra-unit, provided, that the expenses are reciprocal in nature, i.e., that the contributing local reasonably expects other locals to contribute similarly on its behalf. However, because we have never substantively addressed the extent to which lobbying expenses are germane for the purposes of chargeability, we invite briefing to provide the parties and amici an opportunity to assist us in giving content to the framework set forth herein.[2]

I. BACKGROUND

The Employer is a private acute care hospital in Warwick, Rhode Island. Since November 2008, the Respondent Union, United Nurses and Allied Professionals (UNAP), has been the exclusive bargaining representative of the Employer's full-time, part-time and per diem registered nurses (over 600 at the time of the hearing). In July 2009, the Union and the Employer entered into a collective-bargaining agreement, effective through June 2011, that included a union-security provision. The provision required all new unit members to join the Union by their 30th day of employment.

II. AUDIT VERIFICATION LETTER

A. Facts

In late September 2009, Jeannette Geary and several other unit employees resigned their membership in the Union and, citing *Beck*, objected to the assessment of dues and fees for activities unrelated to collective bargaining, contract administration, or grievance adjustment. By letter dated September 30, 2009, the Union provided the objectors with their reduced fee amounts, as well as several charts setting forth the major categories of expenses for the UNAP international and the Kent Hospital local. The Union's letter asserted that "[t]he major categories of expense have been verified by a certified public accountant." The judge implicitly credited testimony by Richard Brooks, executive director of the Union, that the Union's accounts had been examined and verified by an independent auditor, and that the financial figures presented to the objectors were culled from the auditor's report. Brooks testified that a verification letter from the auditor had accompanied the report, but that the Union did not provide the letter to objectors because it was not required to do so by law.

The Acting General Counsel alleged that the Union violated Section 8(b)(1)(A) by "fail[ing] to provide Geary and other similarly situated employees with evidence beyond a mere assertion that the financial data [enclosed with the letter] was based on an independently verified audit." In his opening statement, counsel for the Acting General Counsel clarified that the allegation concerned the Union's failure to provide a copy of the accountant's audit verification letter to objectors along with the financial information. He acknowledged that the Board had never previously required the production of an audit verification letter, but made clear that he was seeking to establish a new requirement. He confirmed repeatedly during the hearing that his allegation did not go to the accuracy of the figures that the Union provided, or to whether an audit was actually performed, but only to the

[1] 487 U.S. 735 (1988). There, the Court held that the Act does not privilege a collective-bargaining representative, over the objection of nonmember employees it represents, to expend funds collected from those employees under a union-security agreement on activities unrelated to collective bargaining, contract administration, and grievance adjustment. Id. at 745.

[2] On March 30, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Acting General Counsel and the Charging Party each filed exceptions and supporting briefs, the Respondent Union filed an answering brief and the Charging Party filed a reply brief. The Respondent Union filed exceptions and the Charging Party filed an answering brief.

The 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 only to the extent consistent with this Decision and Order.

The Charging Party moves for disqualification of Members Block and Griffin from ruling in this proceeding on the ground that their recess appointments to the Board by the President were invalid. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), the motion is denied.

Union's failure to provide a separate verification letter from the accountant.

The judge found that the Union did not violate the Act. Although he acknowledged that the Ninth Circuit in *Cummings v. Connell*[3] had imposed a similar audit verification letter requirement, he noted that the Board had never ruled on the issue, and that *Cummings* was a public-sector employee case. The Acting General Counsel and Charging Party except to the judge's dismissal. The absence of such a letter, they argue, created uncertainty for the objectors as to whether the Union's claimed expenses were actually incurred, and thereby prevented the objectors from making an informed decision about whether to challenge the Union's chargeability calculations.[4]

B. Legal Landscape

In *California Saw & Knife Works*,[5] the Board's 1995 seminal decision on the procedural and substantive issues arising under the Supreme Court's decision in *Communications Workers v. Beck*,[6] the Board held that once an employee objects to paying dues for nonrepresentational activities and seeks a reduction in fees, she must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge the union's figures. To ascertain whether the information provided to objectors satisfied the union's duty of fair representation, the Board stated that it would assess whether the information was sufficient to enable objectors to determine whether to challenge the union's dues-reduction calculations.[7]

In 1999, the Board in *Television Artists AFTRA (KGW Radio)*[8] found that a union did not satisfy this standard where it failed to have its expenditure information verified by an independent audit.[9] Specifically, the Board held that the union was required to have an accountant confirm the reliability of its expenditures through procedures such as gathering information from outside entities and testing selected information.[10] Not presented in *KGW Radio* was the issue whether the union was also required to provide objectors with a letter from an accountant verifying that an audit had been conducted.

The Ninth Circuit, in its 2003 decision in *Cummings*, supra, held that a public-sector union was required to provide objectors with an independent verification that an audit had been performed. There, the union provided objectors with a breakdown of its major categories of expenditures, and informed them that the figures were taken from an independent audit that had been prepared by a certified public accounting firm.[11] Applying *Chicago Teachers Union Local 1 v. Hudson*,[12] another public-sector employee case, the court held that the information provided was not adequate to assure objectors that the expenditures cited had been independently verified.[13] In so finding, the *Cummings* court observed that the union's disclosure "essentially required the [objectors] either to accept that the expenditures were indeed audited or to go through the trouble of requesting a copy of the audit report to verify the Union's summary."[14] Although the court did not require the union to provide objectors with a full copy of the underlying audit, it held that the union's expenditure information should "include certification from the independent auditor that the summarized

[3] 316 F.3d 886 (9th Cir. 2003).

[4] Throughout the hearing, and in his exceptions brief, counsel for the Charging Party expressed repeatedly his dissatisfaction with the Acting General Counsel's theory of the case, arguing that the financial information that the Union provided had not been audited and was not accurate. In support of this allegation, counsel for the Charging Party sought to adduce extensive evidence that was beyond the scope of the complaint, including: (1) in a subpoena duces tecum, 26 documents relating to the Union's communications with outside accountants, and the calculation of specific expenses set forth in the Union's disclosure to objectors; and (2) expert testimony from a certified public accountant regarding proper accounting procedures. The judge granted the Union's petition to revoke the subpoena and sustained the Union's objection to the expert testimony, reasoning that the evidence would not have been relevant to the complaint. The judge also sustained the Union's objection to testimony by several *Beck* objectors who were presented by the Charging Party to discuss their "real-life experiences." In so doing, the judge emphasized that the complaint raised a purely legal issue and that the proffered testimony would not help him resolve it. The Charging Party now contends that she was unduly prejudiced by the judge's decision to exclude this evidence. We disagree. A charging party cannot enlarge upon or change the General Counsel's theory of the complaint. See *Penntech Papers*, 263 NLRB 264, 265 (1982). The judge correctly found that the proffered evidence was simply not relevant to the complaint. (Notably, counsel for the Acting General Counsel agreed.) Similarly, we decline to consider arguments in the Charging Party's brief that are inconsistent with the Acting General Counsel's theory of the case as set forth in the complaint.

[5] 320 NLRB 224, 233 (1995), enf. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied mem. sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[6] 487 U.S. 735 (1988).

[7] 320 NLRB at 239.

[8] 327 NLRB 474 (1999), petition for review dismissed 1999 WL 325508 (D.C. Cir. 1999).

[9] Id. at 477. Alternatively, the Board found dues reduction information provided by a local union to a charging party could be based on a "local presumption," which permits a local union to presume that its allocation of chargeable and nonchargeable expenses is the same as that of its international affiliate. Id. at 477. Here, because the Union did not rely on a local presumption, it is appropriate to analyze the sufficiency of the Union's disclosure of its allocations under *California Saw*. Id. at 477 fn. 15.

[10] Id. at 476–477.

[11] Id. at 889–890.

[12] 475 U.S. 292 (1986).

[13] *Cummings*, 316 F.3d at 890–891.

[14] Id. at 891.

figures have indeed been audited and have been correctly reproduced from the audited report."[15]

C. Analysis

Contrary to the Acting General Counsel's request, we decline to incorporate into Board law a requirement similar to the one imposed in *Cummings*. Unlike cases involving public-sector unions, such as *Hudson* and *Cummings*, in which unions' conduct is evaluated under a heightened First Amendment standard, the Union's conduct here is properly analyzed under the duty of fair representation.[16] A union violates its duty of fair representation only if its actions are "arbitrary, discriminatory, or in bad faith,"[17] and its actions are considered arbitrary "only 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."[18]

Although not disputing the standard for evaluating the conduct of unions toward objectors, the Acting General Counsel and the Charging Party in essence assert that, without an audit verification letter, the objectors lacked an unequivocal assurance that the Union's claimed expenses were incurred.[19] But the Board has long endeavored in this area of the law to achieve a "careful balance between the competing interests involved," rather than promote the unqualified interests of the individual or the union.[20] In our view, the Board's current approach strikes the appropriate balance.

Additionally, we find that the Union acted reasonably by promptly providing the objectors with its major categories of expenditures, along with an assurance that the figures were independently verified. Significantly, the Acting General Counsel does not allege that the Union failed to have the information audited, or that its audit did not comport with the requirements set forth in *KGW Radio*. Under these circumstances, we find that the Union acted well within the "wide range of reasonableness" permitted it under the fair representation standard. Absent an allegation that the Union has failed to comply with *KGW Radio*'s audit requirement, we need not address whether, in other circumstances, a union might be required to produce an audit verification letter.[21] The only question before us here is whether the duty of fair representation imposes a per se obligation on unions to provide objectors with an audit verification letter. We find that it does not.

Finally, the Charging Party, in her exceptions brief, argues that requiring the Union to provide an audit verification letter would prevent the Union "from blurring the lines between chargeable and non-chargeable expenses." This assertion confuses the issue. As the Board stated in *KGW Radio*, supra, "the function of the auditor is to verify that the expenditures that the union claims it made were in fact made for the purposes claimed, not to pass on the correctness of the union's allocation of expenditures to the chargeable and nonchargeable categories."[22] The Charging Party's assertion goes not to the veracity of the underlying expenditure figures, but to the Union's chargeability designations, which are properly contested via the Union's challenge procedure. An audit verification letter would not provide objectors with any new or useful information regarding chargeability.

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[15] Id. at 892. See also *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1193–1194 (10th Cir. 2002) (public-sector case in which the court held that a union was required to provide objectors with "a report expressing the auditor's opinion on the schedule.")

[16] *California Saw,* 320 NLRB at 230, 240–241; *Machinists Local 2777 (L-3 Communications),* 355 NLRB 1062, 1063 (2010); see *Office Employees Local 29 (Dameron Hospital Assn.),* 331 NLRB 48, 48 fn. 1 (2000).

[17] *Vaca v. Sipes,* 386 U.S. 171, 190 (1987).

[18] *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 66, 67 (1991) (citation omitted) (quoting *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953)). As the Board stated in *California Saw*, supra, "the procedures required to protect the constitutional rights of objectors in the public sector, including those defined and elaborated on in *Hudson* . . . were not formulated to comport with a union's obligations under *Beck* to represent its employees fairly." 320 NLRB at 240–241.

Even accepting *Hudson*'s applicability, we disagree with the Ninth Circuit's suggestion that the Supreme Court's holding would require the production of an audit verification letter. The Court in *Hudson*, supra, stated that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 fn. 18. What the Acting General Counsel seeks here, however, is verification of a verification, namely written proof that an audit occurred. There is simply nothing in *Hudson* to suggest that a union would be required to provide anything more to objectors than its major categories of expenditures.

[19] This amounts to a suggestion that the Union should be presumed to be lying about the verification of its expenses. We decline to so presume.

[20] *California Saw*, 320 NLRB at 230.

[21] Cf. *Food & Commercial Workers Local 4 (Safeway, Inc.)*, 355 NLRB 634 (2010) (incorporating by reference 353 NLRB 469 (2008)) (finding that the union violated Sec. 8(b)(1)(A) by failing to sufficiently verify its expenditure information), enf. denied and order vacated and remanded No. 10-72655 (unpublished) (9th Cir. 2011). The dissent mistakenly asserts that the Board's holding in *Safeway* somehow suggested that a union is required to provide an audit verification letter to objectors. There, the *only* issue before the Board was whether the financial information the union provided the objector had been sufficiently verified. The issue of whether the union was required to provide an audit verification letter to the objector was not presented in that case, and at no point in its decision did the Board state or even imply that such a requirement would be appropriate under the duty of fair representation.

[22] Id. at 477 (citing *California Saw*, 320 NLRB at 241).

For all of these reasons, we find that the Union did not violate the Act by failing to provide objectors with an audit verification letter.

III. CHARGEABILITY OF LOBBYING EXPENSES

A. Facts

UNAP comprises 15 local unions in Rhode Island, Vermont, and Connecticut. The locals range in size from 2269 unit employees at the Rhode Island Hospital to 5 registered nurses at the Putnam Board of Education in Connecticut. Members of each local pay monthly dues, a portion of which is remitted to UNAP as per capita payments. UNAP deposits the per capita payments into its general operating fund, which it uses to pay for programs and services it undertakes for all of the locals. UNAP acts on behalf of the locals in all representational matters, including contract negotiations, grievance processing, and arbitrations. The degree to which each local benefits from UNAP's services is not necessarily proportional to the amount it pays into the fund. A small local, for instance, that pays relatively little into the fund may receive services that exceed the value of its contributions in any given year. Executive Director Brooks testified that UNAP adopted this arrangement, in part, because its locals "vary greatly in size and none of them would be in a position to[,] on their own, fund the array of supports and services that they receive [from] the UNAP by pooling their resources."

In 2009, UNAP used money from its general operating fund to subsidize lobbying efforts for various bills that were before the Rhode Island and Vermont State legislatures. Brooks testified that he spent approximately 33 hours lobbying for bills in Rhode Island. The Union also indicated that from July 1, 2008, through June 30, 2009, it spent $22,650 lobbying for bills in Vermont, $21,970 of which it deemed chargeable to objectors.

The Acting General Counsel alleged that the Union violated Section 8(b)(1)(A) by charging objectors dues that it used to fund lobbying, which the Acting General Counsel categorized as nonrepresentational activity. Specifically, he contested the chargeability of lobbying expenses related to the following seven bills:

(1) The Hospital Merger and Accountability Act (Rhode Island): This bill, among other things, would have empowered a state government council to monitor and regulate hospitals that own more than 50 percent of hospital beds in the state.

(2) Public Officers and Employees Retirement bill (Rhode Island): This bill would have raised the cap on post-retirement earnings that former state-employed registered nurses could earn without reducing their retirement benefits.

(3) Hospital Payments bill (Rhode Island): This bill, among other things, would have provided all acute care hospitals in Kent County (home of Kent Hospital) with $800,000 in funding.

(4) Center for Health Professions bill (Rhode Island): This bill would have created a center tasked with developing a sufficient, diverse, and well-trained healthcare workforce in the state.

(5) Safe Patient Handling bill (Vermont): This bill would have required hospitals to establish a safe patient handling program, which would entail, among other things, establishing rules to protect nurses and purchasing new equipment to improve patient-handling procedures.

(6) Mandatory Overtime bill (Vermont): This bill, among other things, would have prohibited hospitals from requiring any employee to work more than 40 hours a week.

(7) Mental Health Care Funding bill (Vermont): This bill would have provided additional funding for mental healthcare services at three facilities at which the Union has bargaining units.

B. The Judge's Decision

The judge found, with relatively brief analysis, that the Union violated the Act by charging objectors for lobbying expenses related to the Public Officers and Employees Retirement bill (2), above; the Center for Health Professions Act (4); the Safe Patient Handling Act (5); and the Mandatory Overtime Act (6). In so finding, he reasoned that the Union's support for these bills, although well-intentioned, was not germane to its bargaining obligations. The Union excepts to these findings.

The judge dismissed the allegations regarding the Union's lobbying for the three other bills: the Hospital Merger and Accountability Act (1); the Hospital Payments Act (3); and the Mental Health Care Funding Act (7). He reasoned that the Hospital Merger and Accountability Act would have given the Union some say in whether hospitals in the State could merge, which would have an effect on its bargaining strength. And he found that both the Hospital Payments Act and the Mental Health Care Funding Act would have provided additional funding to facilities where UNAP represented employees. Accordingly, he found that the Union lawfully charged objectors for those expenses. The Acting General Counsel and the Charging Party except to these findings.

C. Issues before the Board

These allegations raise two fundamental questions: (1) What is the appropriate standard for assessing whether lobbying expenses are germane for purposes of charge-

ability? and (2) Under what circumstances can objectors be charged for extra-unit lobbying expenses? The Charging Party argues that, under the Supreme Court's decision in *Beck*, lobbying expenses incurred by private sector unions are per se nonchargeable. In her view, Court precedent requires an outright prohibition against charging objectors for any activities that are political or ideological in nature. Because lobbying expenses can never be chargeable, the Charging Party contends, the question of extra-unit expenses is irrelevant in this case.

The Acting General Counsel, citing the Supreme Court's plurality opinion in *Lehnert v. Ferris Faculty*,[23] a public-sector employee case, contends that lobbying expenses are only chargeable if oriented toward the ratification or implementation of a collective-bargaining agreement.[24]

Finally, the Union argues that, like other union expenses, lobbying expenses may be chargeable if they are germane to its representational functions. Citing the Supreme Court's decision in *Locke v. Karass*,[25] it also contends that objectors may be charged for extra-unit lobbying expenses, including those incurred on behalf of out-of-state units, where all of the locals contribute to the national's general fund and benefit from a reciprocity arrangement.

D. Key Principles

Although the Board has never specifically addressed chargeability in a case involving lobbying expenses, we do not write on a blank slate.[26] In *Beck*, the Supreme Court held that the first proviso to Section 8(a)(3) of the Act does not privilege a collective-bargaining representative, over the objection of nonmember employees, to expend funds collected from the employees under a union-security agreement on activities unrelated to collective bargaining, contract administration, and grievance adjustment.[27] As the Court has explained more fully, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.[28]

Applying these principles, the Board and the Supreme Court have found a wide range of union activities to be chargeable to objectors, including certain litigation[29] and organizing expenses,[30] as well as expenses for conventions, social activities, and publications.[31] For expenses that are attributable to activities outside the objector's bargaining unit, the Board has held, consistent with Court precedent, that, in order to be chargeable, the charges must be incurred for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."[32] In so holding, the Board noted that it does not require "a direct relationship between the expense at issue and some tangible benefit to the dissenter's bargaining unit."[33] A unanimous Court affirmed this principle recently in *Locke*, in which it held that a public-sector union could lawfully charge objectors for extra-unit litigation expenses.[34] The Court observed that "a local nonmember [can] benefit from national litigation aimed at helping other units if the national or those other units will similarly contribute to the cost of litigation on the local

[23] 500 U.S. 507 (1991).

[24] Id. at 520.

[25] 555 U.S. 207, 210 (2009).

[26] We note that the parties and the judge largely failed to address relevant case law. Contrary to the judge, we find *Fell v. Independent Assn. of Continental Pilots*, 26 F.Supp.2d 1272 (1998), to be inapplicable. In that Railway Labor Act (RLA) case, a district court held that a union lawfully charged objectors for expenses related to the union's merger with another union in anticipation of a possible airline merger. Unlike here, those expenses were directly related to the union's internal administrative functions.

In addition, we reject the Union's reliance on *Transport Workers Local 525 (Johnson Controls World Services)*, 329 NLRB 543 (1999), for the broad proposition that the Board has already established that lobbying expenses are chargeable. There, the Board held that expenses incurred by a union in representing its unit members before Federal agencies were chargeable to objectors. Significantly, the union represented employees of a private sector employer that performed service contracts with governmental agencies. The Board found that the Federal Government, through its contractual relationship with the employer, played a unique role in setting terms and conditions of employment for unit employees. Thus, the union's dealings with government officials on issues such as hours and job security resembled traditional representational activities. We rely on that case for the general principle that chargeable expenses need not be incurred within the narrow confines of a union-employer relationship, and we find the case instructive on the chargeability of lobbying activities that directly advance the union's representative role. Nonetheless, the case is not dispositive of the chargeability of legislative lobbying generally.

[27] 487 U.S. at 752–754. See *California Saw*, 320 NLRB at 239.

[28] *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).

[29] Id. at 453; *California Saw*, 320 NLRB at 237–239.

[30] See *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 733 (1999), enf. denied in relevant part sub nom. *Food & Commercial Workers v. NLRB*, 284 F.3d 1099 (9th Cir. 2002), modified and superseded 307 F.3d 760 (2002).

[31] *Ellis*, 466 U.S. 435, 448–451.

[32] *California Saw*, 320 NLRB at 239 (quoting *Lehnert*, 500 U.S. at 524).

[33] Id. at 237 fn. 66 (quoting *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123, 1127–1128 (10th Cir.1991)).

[34] 555 U.S. at 218.

union's behalf should the need arise."[35] Because the local union paid an affiliation fee that gave it general access to the national's financial resources, the Court concluded that objectors could be charged for national litigation expenses.[36]

Finally, and contrary to our dissenting colleague's contention, we emphasize that although RLA cases and public sector cases may provide limited guidance on what types of lobbying may be chargeable to objectors under the Act, neither category of cases is determinative. As the Board explained at length in *California Saw*, public sector and RLA cases both implicate State action and are therefore subject to constitutional scrutiny.[37] In contrast, private sector union-security clauses pursuant to the Act do not involve State action implicating constitutional considerations.[38] Accordingly, the Board found the less stringent duty of fair representation applies to chargeability issues under the Act.[39] The RLA and public sector cases in effect establish a floor, rather than a ceiling, on chargeable expenses under the Act: any expense that is chargeable under the more stringent constitutional standard is chargeable under the less stringent duty of fair representation standard; however, not every expense that is nonchargeable under the more stringent standard is likewise nonchargeable under the less stringent standard.

E. Analysis

Next, we apply these principles to answer the two questions before us: (1) What is the appropriate standard for assessing whether lobbying expenses are germane for the purposes of chargeability? and (2) Under what circumstances can objectors be charged for extra-unit lobbying expenses?

1. Chargeability

First, consistent with *Beck* and existing Board precedent, we hold that lobbying expenses are chargeable to objectors if they are germane to collective bargaining, contract administration, or grievance adjustment. Thus, we will carry out a "case-by-case analysis"[40] to determine whether expenses incurred toward securing a specific legislative goal are sufficiently related to the union's core representational functions.

The approach that the Board and the Supreme Court have used in evaluating litigation expenses is particularly instructive here. In *California Saw*, the Board found litigation expenses to be chargeable "as long as the categories of litigation charged to objecting employees are related to the union's basic representational functions."[41] Rather than creating a per se rule, the Board acknowledged that the chargeability of litigation expenses is contingent on the substantive character of the litigation being pursued. The Supreme Court has taken a similar approach, holding that

> [t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of . . . any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative.[42]

Lobbying, like litigation, is a means rather than an end——a strategic activity that a union undertakes to advance the interests of its members. When a union engages in lobbying activity, it seeks to influence legislators to pass legislation. The question of whether such activity is representative in nature necessarily turns on the legislative goals that the lobbying is used to pursue. Thus, as in all other chargeability cases, we will ask whether the union's lobbying expenses are germane to collective bargaining, contract administration, or grievance adjustment.

The Charging Party contends that the Supreme Court's decision in *Beck* created an outright prohibition on charging objectors for any expenses related to the political process. Specifically, the *Beck* Court stated that the Railway Labor Act section 2, Eleventh, which it found to be the statutory equivalent of Section 8(a)(3), did not permit unions "to expend compelled agency fees on political causes."[43]

But that was hardly the Court's final word on the subject. Indeed, 3 years later, the Court expressly acknowledged that some political expenses are in fact chargeable. In *Lehnert*, a plurality of the Court recognized that "[t]o represent their members effectively . . . public-sector

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[35] Id.
[36] Id. at 219–220.
[37] 320 NLRB at 226–228.
[38] Id. at 228.
[39] Id.
[40] *California Saw*, 320 NLRB at 238. The Acting General Counsel points out that the *California Saw* Board, in finding extra-unit litigation to be chargeable, stated that "[t]he kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors under a union-security clause would not be the kinds of lawsuits that are 'akin to lobbying.'" Id. at 238, quoting *Lehnert*, 500 U.S. at 528. He argues that this was an implicit acknowledgement that lobbying expenses are not chargeable. We disagree. In the context of the decision, the Board was merely explaining why *Lehnert*'s Constitution-based restrictions on charging litigation expenses were not applicable under the Act. Lobbying was not before the Board at that time and the decision includes no substantive discussion of that issue.
[41] 320 NLRB at 239.
[42] *Ellis*, 466 U.S. at 453.
[43] 487 U.S. at 745, citing *Machinists v. Street*, 367 U.S. 740 (1961).

unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other 'political' arenas."[44] To this end, the Court reasoned that

> [p]ublic-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body . . . . Similarly, union efforts to acquire appropriations for approved collective-bargaining agreements often serve as an indispensable prerequisite to their implementation.[45]

This principle applies to representation of employees in the private sector as well. As the Court has recognized, "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context."[46] Legislative proposals involving core employee concerns such as wages, hours, and working conditions all clearly raise issues that relate to a union's most essential representative functions.[47] And even outside the public sector, legislative action can substantially alter the context in which collective bargaining takes place. Here, for instance, Kent Hospital, a private employer, relies on public funding that is allocated by the Rhode Island State legislature. Contrary to the Charging Party's characterization, political expenses and representational expenses are not mutually exclusive.

The *Beck* Court's formulation of chargeability supports this approach. Significantly, the Court did not define chargeability to exclude all union expenses that are political or ideological in nature. Instead, the Court specifically interpreted chargeable expenses as those "germane to collective bargaining, contract administration, and grievance adjustment."[48] This standard places the focus squarely on a union's representative duties rather than other secondary concerns. We reject the Charging Party's contention that such a reading of *Beck* improperly gives a union carte blanche to charge objectors for any and all political expenses. Indeed, because chargeable expenses must be closely tethered to a union's representative duties, a union may not lawfully charge objectors for purely partisan expenses.

The Acting General Counsel contends that the Board is bound by the *Lehnert* plurality's conclusion that chargeable lobbying expenses must be limited to those made in support of "the ratification or implementation of a dissenter's collective-bargaining agreement."[49] We disagree. In setting out this standard, the *Lehnert* plurality stated expressly that its primary consideration was the protection of objectors' First Amendment interests.[50] For the reasons set forth in *California Saw* and discussed above, such constitutional considerations are not relevant under the Board's less stringent inquiry pursuant to the duty of fair representation.[51] Thus, we do not read *Lehnert* as foreclosing our conclusion that a wider range of lobbying expenses may be chargeable.[52] Moreover, to restrict chargeability to such a small subset of lobbying expenses would inevitably exclude many other activities that further the representational goals emphasized by the Court in *Beck*.

The *Lehnert* Court also based its holding on the fact that "worker and union cannot be said to speak with one voice."[53] But an objector's mere disagreement with a union's decision to pursue its representational objectives via lobbying activity surely does not render the related expenses nonchargeable. Given the absence here of the First Amendment concerns that dominate in the public sector, an objection to the union engaging in lobbying is no different from disagreeing with the union over *any* strategic representational action, e.g., filing a lawsuit or taking a grievance to arbitration. The fact that the activity

[44] 500 U.S. at 520, quoting *Lehnert v. Ferris Faculty Assn.*, 881 F.2d 1388, 1392 (6th Cir. 1989).

[45] Id.

[46] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). See also *Bethlehem Shipbuilding Corp. Limited v. NLRB*, 114 F.2d 930 (1st Cir. 1940) ("But the right of employees to self-organization, and to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection', including appearance of employee representatives before legislative committees.").

[47] The *Eastex* Court found that employees engaged in protected conduct by distributing fliers in support of prounion legislation. In so doing, the Court explained that the "mutual aid or protection clause" of the Act protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected—irrespective of location or the means employed—would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. 437 U.S. at 565–567.

[48] 487 U.S. at 745.

[49] 500 U.S. at 520.

[50] Id. at 521.

[51] 320 NLRB at 240-241.

[52] For the same reasons, *Miller v. Air Line Pilots Assn.*, 108 F.3d 1415 (D.C. Cir. 1997), is inapplicable here. In holding that a union's advocacy-related expenses were not chargeable to objectors under the RLA, the court made clear that its central consideration was the protection of the objectors' constitutional interests. Id. at 1422. Thus, contrary to the dissent, we reject the notion that the court's holding in *Miller* carries controlling weight under our duty of fair representation analysis.

[53] 500 U.S. at 521.

occurs within the political sphere does not change our core analysis. So long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors.

2. Extra-unit expenses

Next, we address the chargeability of extra-unit lobbying expenses. This issue is before us because the Union here lobbied for three bills in Vermont which, by the Union's admission, would not provide a direct benefit to members of the Kent Hospital unit in Rhode Island. Consistent with precedent, we hold that a union may charge objectors for extra-unit lobbying expenses as long as they are "for services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization."[54] In so holding, we emphasize that a union can make this showing where the charge was reciprocal in nature, i.e., where "the contributing local reasonably expects other locals to contribute similarly to the [parent union's] resources used for costs of similar [activity] on behalf of the contributing local if and when it takes place."[55]

In our view, this formulation best accounts for "the unified-membership structure under which many unions . . . operate."[56] When a local union pools its resources with other locals into a national, intermediate, or regional fund, it enters into an arrangement that is "akin to insurance."[57] Its primary benefit is the promise of protection: that the national union will use the pooled assets to "bring to bear its often considerable economic, political, and informational resources when the local is in need of them."[58] When the contributing local partially subsidizes a chargeable activity that more immediately benefits another local, it does so with the assurance that its own costs of the same type will be similarly subsidized by the other locals. In this way, "[i]t is indisputable that, by pooling its resources on a union-wide basis, a union, which is the bargaining representative of *all* its members, provides some benefit to members of the various local unions."[59]

The Board has already acknowledged this principle in the context of extra-unit litigation by holding that such activity "may confer benefits on employees beyond those units immediately affected."[60] The same holds true for lobbying. When a participating local contributes to otherwise chargeable lobbying on behalf of the parent union or another local, it can reasonably expect that its own lobbying costs will be partially covered by the contributions of other locals.[61] Here, for instance, although employees in the Kent Hospital local in Rhode Island would be unlikely to benefit directly from State legislation that UNAP supported in Vermont, the contributions of other units to the Union's general operating fund were clearly intended to subsidize similar efforts on their behalf. Indeed, the record evidence makes clear that UNAP's fund also covered lobbying efforts intended to benefit its Rhode Island members. Moreover, as the Union asserts, the Kent Hospital local would not have the financial resources to engage in lobbying on its own but for its participation in the pool.[62] Thus, assuming that the Vermont legislation is otherwise chargeable, UNAP may lawfully charge Kent Hospital objectors their pro rata share of the lobbying expenses incurred through this reciprocal arrangement.

F. The Chargeability of Specific Lobbying Expenses

In sum, and consistent with the established precedent in this area of the law, we hold today that (1) lobbying expenses may be charged to objectors, but only if they are germane to the union's role in collective bargaining, contract administration or grievance adjustment, and (2) extra-unit lobbying expenses may be charged only if they were incurred for services that are otherwise chargeable

[54] *California Saw*, 320 NLRB at 239.

[55] *Locke*, 555 U.S. at 210.

[56] Id. at 216 (quoting *Lehnert,* 500 U.S. at 523).

[57] *Otto v. Pennsylvania State Educ. Assn.-NEA*, 330 F.3d 125, 138 (3d Cir. 2003). The court explained further that the pooling arrangement confers potential benefits on the plaintiffs. First, the arrangement generates economies of scale that redound to their benefit. Second, by spreading the costs of otherwise-chargeable expenses over a pool of employees whose chargeable-expense levels are not perfectly correlated with their own . . . education professionals reduce their risk of being assessed unusually high chargeable expenses in any given year. Moreover, this pooling arrangement does not necessarily increase the dollar amount of chargeable expenses assessed to plaintiffs for any particular year. Id. at 140.

[58] *Lehnert*, 500 U.S. at 523.

[59] *Finerty v. NLRB*, 113 F.3d 1288, 1292 (D.C. Cir. 1997) (emphasis in original). See also *Reese v. City of Columbus*, 716 F.3d 619 (6th Cir. 1995).

[60] *California Saw*, 320 NLRB at 238-239.

[61] Contrary to our dissenting colleague, nothing in *Locke* suggests that the Court's holding there should be limited to litigation expenses. As we have explained, the Court based its analysis on the general notion of reciprocity, i.e., the idea that a unit member may be required to subsidize a chargeable activity on behalf of a nonunit member where there is an expectation that her own expenses for the same activity will be similarly covered by the general fund. So long as the expenses incurred by the union are otherwise chargeable, the only relevant question is whether such an arrangement exists. Thus, we do not suggest here that all lobbying expenses may be chargeable to extra-unit members, but only those that are germane to the union's representative functions, consistent with *Beck*.

[62] See *Otto*, 330 F.3d at 136 ("Even if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an expense-pooling agreement: the availability of on-call resources greater than those it could muster individually.")

and that may ultimately inure to the benefit of employees in the objector's bargaining unit because of the union's participation in an expense-pooling arrangement. This latter requirement can be established by showing that the lobbying charge is reciprocal in nature.

To hold that intra- and extra-unit lobbying expenses are potentially germane and thus chargeable, however, leaves open the question of how, going forward, we should determine whether particular lobbying expenses satisfy the germaneness test. We propose an approach to this question using rebuttable presumptions of germaneness, and solicit the views of stakeholders in this process and other interested parties.

To begin, we adhere to the rule that, as in other chargeability contexts, a union has the ultimate burden to justify all of its claimed expenditures and the percentages of each that are chargeable and nonchargeable.[63] We propose, however, that, as to certain kinds of lobbying expenses, there may exist such a direct, positive relationship between the union's representational duties and the union's goals in pursuing legislative or other action that a rebuttable presumption of germaneness is warranted.[64]

For instance, proposed legislation may be so closely linked to the union's representational functions that it would directly affect subjects of collective bargaining. Where the legislature has effectively pulled up a seat at the bargaining table, it is hard to see how the union's effort to influence the legislature in such matters is not germane to collective bargaining. In those circumstances, we propose presuming that lobbying expenses are germane to the union's representative functions and thus chargeable. To give concrete examples, lobbying for or against minimum wage legislation, professional licensing and certification legislation affecting employees represented by the union, and State supplements to the Worker Adjustment and Retraining Notification (WARN) Act might be types of lobbying expenses that would reasonably be treated as presumptively germane and thus chargeable.

On the other hand, some union lobbying activities may bear a relationship to the union's representational duties so attenuated that a presumption of germaneness would seem difficult to justify. For example, lobbying related to general economic stimulus or broad social or environmental policies might be difficult to view as presumptively germane to a union's representative functions. In those circumstances, we propose that no presumption of germaneness apply.

Presumptions of germaneness would be useful to the public: they would simplify for unions the task of ensuring compliance with their *Beck* obligations and for objecting employees the determination whether their union is in compliance. As with any general rule, however, there may arise an exceptional case that demands an exception to even the most reasonable presumption. It would therefore be advisable for any such presumptions to be rebuttable based on the specific circumstances of a particular case. Thus, for those expenses that are presumptively germane, the General Counsel or a charging party might rebut the presumption by showing, for example, that the relationship of the expenses to the union's representative functions is too attenuated. For instance, lobbying for a minimum wage rate may not be chargeable where the union represents only employees in a highly compensated field of work that would not be affected by such a rate. By the same token, a lobbying expense that is not presumptively germane may still be shown to be chargeable if the particulars of the legislation, industry, or employee group, for example, make it germane to collective bargaining, contract administration, or grievance adjustment.

The Board invites all interested parties to file briefs in this case regarding the question of how the Board should define and apply the germaneness standard in the context of lobbying activities. In particular, we encourage interested parties to address the appropriateness of presumptions concerning germaneness and to provide examples of the types of lobbying activities that should or should not be subject to such presumptions. Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C. on or before February 19, 2013. No extensions will be granted. The parties to the matter may file responsive briefs on or before March 5, 2013, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at https://mynlrb.nlrb.gov/efile. If assistance is needed in filing through https://mynlrb.nlrb.gov/efile, please contact Lester A. Heltzer Secretary, Executive Secretary, National Labor Relations Board.

ORDER

The complaint allegation that the Respondent unlawfully failed to provide objectors with an audit verification letter is dismissed.

[63] *California Saw*, 320 NLRB at 242.

[64] See *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 738 (1999), enf. denied in relevant part sub nom. *Food & Commercial Workers v. NLRB*, 284 F.3d 1099 (9th Cir. 2002), modified and superseded 307 F.3d 760 (9th Cir. 2002) (expenses are germane where there is a "direct, positive relationship" between the activity and a representational objective).

IT IS FURTHER ORDERED that the complaint allegations pertaining to the chargeability of lobbying expenses to *Beck* objectors are severed from this case, and that the Board shall retain jurisdiction over those matters for further consideration.

Dated, Washington, D.C. December 14, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Contrary to my colleagues, I find that the Respondent-Union should be required to provide *Beck* objectors verification that the financial information disclosed to them has been professionally audited by an independent accountant. Furthermore, I disagree with their overly broad test for determining the chargeability of lobbying expenses. I find that the Respondent-Union improperly charged the *Beck* objectors for lobbying expenses associated with all seven bills because those lobbying activities are not so related to the Union's representational duties to employees in the objecting employees' bargaining unit as to justify their compelled financial support of them.

I

The complaint alleged that the Union violated Section 8(b)(1)(A) by "fail[ing] to provide [the objecting] employees with evidence beyond a mere assertion that the financial data [enclosed with the letter] was based on an independently verified audit." At the hearing, the Acting General Counsel clarified that the complaint allegation concerned only the Union's failure to accompany the expense statements provided to the objectors with a copy of the accountant's letter verifying that the audit actually occurred; it did not concern verification of the accuracy of the figures the Union provided to the objectors.[1]

Although the Board has not expressly stated that a union must provide a copy of an independent accountant's audit verification letter to the objectors, the Board has consistently held that a union must provide some form of verification of the information provided to nonmember objectors. Such a requirement is further consistent with the Board's policy that objectors receive reliable information necessary to making informed decisions. I would therefore require the Union to provide the verification letter at issue.

In *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. mem. *Strang v. NLRB*, 525 U.S. 813 (1998), the Board set out the information a union must provide potential and actual objectors at three stages. At stage 2, an employee who objects to paying dues for nonrepresentational activities under *Beck* must be apprised of the percentage of dues reduction, the basis for the calculation, and the right to challenge the union's figures. Id. at 233. In setting the notice requirements, the Board specifically relied on *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) finding that "basic considerations of fairness" dictate that potential objectors be given sufficient information to gauge the propriety of the union's fee. Id. at 232–233. As to the scope of the union's duty to verify its calculations, the Board stated that "*Hudson* requires only that the usual function of an auditor be performed, i.e. to determine that the expenses claimed were in fact made." Id. at 241 (citing *Price v. Auto Workers UAW,* 927 F.2d 88, 93 (2d Cir. 1991)).

The Board further explained its verification requirement in *Television Artists AFTRA (KGW Radio),* 327 NLRB 474 (1999), petition for review dismissed 1999 WL 325508 (D.C. Cir. 1999). The Board held that *California Saw* "clearly envisioned some type of verification of the information provided to nonmember objectors is necessary for a union to fulfill its obligations under the duty of fair representation to provide sufficient information." Id. at 476. In addition, under *California Saw,* verification meant "an audit within the generally accepted meaning of the term, in which the auditor independently verifies that the expenditures claimed were actually made" rather than merely accepted as correct.[2] Id. at 477.

[1] The Charging Party disagreed with the Acting General Counsel's limited theory of the case and argued that the accuracy of the expense information provided to the objectors must be verified by the Union. I agree with the Charging Party that an objector is entitled to verification by the independent auditor both that the expense information has indeed been audited and that the figures provided are accurately stated or extracted from the audited report. The Acting General Counsel, however, controls the litigation theory of the case and has limited the complaint allegation to the requirement that the Union provide the accountant's audit verification letter.

[2] The Board in *California Saw*, supra, held that, as an alternative to an audit, a union may utilize a "local presumption." Id. at 242. Here, the Union did not rely on a local presumption. I express no opinion on the use of "local presumption" as an appropriate alternative means of allocating chargeable expenses.

In *KGW Radio*, the union provided the objector a compilation of chargeable and nonchargeable expenses in a report prepared by the union's accountant. The accountant did not audit or verify the accuracy of the expenditures in the report and relied solely on representations by the union's executive director in compiling his report. Id. at 476. The Board concluded that the report did not satisfy its requirements that an accountant independently confirm the reliability of the union's financial figures in an audit consistent with standard accounting practices. Id. at 476. The Board confirmed that objecting nonmembers must be given a reliable basis for calculating the fees they must pay and determining whether to challenge the union's dues-reduction calculations. Id. at 477. See also *Ferriso v. NLRB,* 125 F.3d 865, 869–870 (D.C. Cir. 1997) ("nonmembers cannot make a reliable decision as to whether to contest their agency fees without trustworthy information about the basis of the union's fee calculation").

In *Food & Commercial Workers Local 4 (Safeway, Inc.)*,[3] the Board again found that the expenditure information provided to the objector was insufficiently verified. After the objector complained that the Union's initial statement was inadequate to explain how the agency fee was calculated, the union provided her with a copy of an "Independent Accountant's Report." The report stated that, although the accountant reviewed the expenditure statement, the information was based solely on the union's representations, "that it was substantially less in scope than an audit," and that the accountant expressed no opinion as to the financial statement as a whole. Id. at 469-470. As in *KGW Radio*, the Board found that the expenditure information provided by the Union had not been sufficiently verified. Id. at 470–471.

In *Safeway* and *KGW Radio*, the objectors received a report of the union's expenditures prepared or reviewed by an independent accountant. The Board nevertheless found that the union violated its duty of fair representation because the expenditure information in the accountant's report was not verified by an independent audit. Similarly, in this case, the objectors received a letter stating that the report was verified by a certified public accountant. That information, like the information in *KGW Radio* and *Safeway,* does not confirm that the accountant independently verified the Union's figures. That specific verification is in the accountant's letter.

The majority claims that the Acting General Counsel seeks a "verification of a verification." I disagree. As the Board stated in *Safeway,* lawful verification requires "that an audit must be prepared . . . *and* the auditor must independently verify that the expenditures claimed were actually made rather than accept the representations of the union." *Safeway*, supra, 353 NLRB at 471 (citing *KGW Radio,* supra, 327 NLRB at 477). Here, the Union has informed objectors that some sort of independent audit has occurred, but it did not provide the verification as described by the Board in *Safeway*.[4]

The Ninth Circuit, in *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003), makes explicit what seems implicit in the Board's decisions. The court held that a public sector union's disclosure to objectors was insufficient because it did not include an independent verification that an audit had been performed. There, the union's report provided to objectors broke down its annual expenditures into chargeable and nonchargeable categories. Id. at 889. As here, the union informed objectors that its figures were taken from an independent audit that had been prepared by a certified public accounting firm. Id. The court held that, under *Hudson*, the information provided was inadequate to assure objectors that the expenditures cited had been independently verified. It observed that the union's document "essentially required the [objectors] either to accept that the expenditures were indeed audited or to go through the trouble of requesting a copy of the audit report to verify the Union's summary." Id. at 891. Although the court did not require the union to provide objectors with a full copy of the underlying audit, because the union contended that it lifted the relevant figures from an audited statement, the court ordered it to "include certification from the independent auditor that *the summarized figures have indeed been audited and have been correctly reproduced from the audited report*."[5] Id. at 892 (emphasis added). I find the

[3] 353 NLRB 469 (2008), affd. by 355 NLRB 634 (2010). I recognize that the Ninth Circuit subsequently vacated the Board's Order as unreviewably ambiguous in an unpublished order issued on October 31, 2011. Still, the Board has never disavowed the two-member Board's rationale in the original 2008 decision. Even if it lacks precedential value, I find the rationale persuasive as to the issue presented here.

[4] I agree with my colleagues that the issue of an audit verification letter was not directly presented in *Safeway*. Obviously, I disagree with them that the Board's reasoning did not implicitly encompass to obligation to provide such a letter affirming that an independent audit has been done.

[5] The court cited other circuits' decisions that also require that the notice to objectors include some verification or certification by the independent auditor. See also *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1193–1194 (10th Cir. 2002) (holding that the union was required to provide, in its disclosure to objectors, "a report expressing the auditor's opinion on the schedule"); *Tierney v. City of Toledo,* 824 F.2d 1497, 1504 (6th Cir.1987) ("[A]ll nonmembers must receive an ade-

Ninth Circuit's rationale in *Cummings* persuasive and consistent with the Board's own precedent.

As the majority notes, the Board has long endeavored in this area to achieve "a careful balance of the competing interests involved." *California Saw*, 320 NLRB at 230. In my view, requiring the Union here to produce the auditor's verification letter is consistent with maintaining that careful balance. Objectors would be assured of the accuracy of the Union's nonchargeable expenses—as is their right—and the Union, which undisputedly possessed the letter, would incur no additional burden by providing that assurance.

II

I do not agree with the vague, overbroad test the majority proposes for determining whether the lobbying expenses are chargeable to objecting employees. Unlike my colleagues, I believe that relevant Supreme Court precedent compels holding that there are only very limited circumstances, if any, in which these costs may be chargeable as incurred during the union's performance of statutory duties as the objectors' exclusive bargaining agent.

The law governing what union expenses may be chargeable to objectors originated in public sector and Railway Labor Act (RLA) cases raising constitutional and statutory challenges to compulsory union dues that support activities not germane to collective bargaining. The Supreme Court upheld agency shop agreements under the RLA—*Machinists v. Street,* 367 U.S. 740 (1961)—and in the public sector—*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—but only insofar as employees who objected to the expenditure of their funds on nonrepresentational activities were shielded from the compulsion to support them.

In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court reaffirmed that the union's role as bargaining agent for all unit employees justified compelling dues from nonmembers to fairly distribute the costs of the union's performing its statutory duties which necessarily accrue to the nonmembers in the unit. The Court stated that "[w]e remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders-employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." Id. at 447(emphasis added). Thus, the test "when employees . . . object to being burdened with particular union expenditures, . . . must be whether the challenged expenditures are necessarily or reasonably incurred *for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues*." Id. at 448 (emphasis added).

My colleagues minimize RLA and public sector precedent as offering only limited guidance because those cases implicate governmental action and thus are subject to constitutional scrutiny. They contend, therefore, that under the Act a less stringent standard of the duty of fair representation applies to whether lobbying may be chargeable to objectors.

But in *Communications Workers v. Beck,* 487 U.S. 735 (1988), the Court extended its reasoning and holdings in those cases to the Act, concluding that Congress intended that Section 2, Eleventh of the RLA and Section 8(a)(3) function as statutory equivalents, thereby making the law developed in the Supreme Court's RLA and public sector decisions relevant to interpretation of the Act, even absent the element of State action. The Court stated:

> In *Street*, we concluded that our interpretation of § 2, Eleventh [Congress did not intend to permit unions to compel dues from objectors except for collective bargaining and grievance adjustment] was "not only 'fairly possible' but entirely reasonable," 367 U.S. at 750, and we have adhered to that interpretation since. We therefore *decline to construe the language of § 8(a)(3) differently from that of § 2, Eleventh* on the theory that our construction of the latter provision was merely constitutionally expedient. *Congress enacted the two provisions for the same purpose, eliminating "free riders" and that purpose dictates our construction of 8(a)(3) no less than it did that of 2, Eleventh, regardless of whether* the negotiation of union-security agreements under *the NLRA partakes of governmental action*. [487 U.S. at 762.] [Emphasis added.]

The Court, accordingly, concluded that "Section 8(a)(3), like its statutory equivalent, Section 2 Eleventh of the RLA, authorizes the exaction of 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.'" Id. at 762–763 quoting *Ellis,* supra at 448 (emphasis added).

In short, the Court has consistently treated the limits on compulsory union dues as rooted in the union's duty of fair representation regardless of the legal basis for challenging an expense. Consequently, the union's authority to compel nonmembers' financial support under the "free riders" rationale cannot go beyond the expenses "necessary to 'performing the duties of an exclusive representative,'" *Beck,* supra, 487 U.S. at 762, otherwise described as "the cost of performing the union's "statu-

quate accounting, certified by an independent auditor and setting forth the major categories of the union's budgeted expenses.").

tory functions," *Ellis,* 466 U.S. at 447. This is limiting language, far more so than my colleagues concede, fundamentally restricting chargeable expenses to those that can reasonably be defined as incurred when "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," *Abood,* 431 U.S. at 221.

Under *Ellis*, the challenged lobbying expenses for the seven bills here cannot be charged to the nonmembers because, though they may in general relate to terms of employment or may incidentally affect collective bargaining, the lobbying activity is not part of the union's statutory collective-bargaining obligation and therefore, is nonchargeable. Indeed, in *Lehnert v. Ferris Faculty*, 500 U.S. 507 (1991), the Court specifically concluded that a public sector union could not lawfully charge objectors for legislative lobbying expenses which were "related not to *the ratification or implementation of a dissenter's collective-bargaining agreement*, but to financial support of the employee's profession or of public employees generally." In such circumstances, "*the connection to the union's function as bargaining representative is too attenuated to justify compelled support* by objecting employees." Id. at 520. (Emphasis added.)

Although constitutional concerns were "[perhaps] most important," the *Lehnert* Court also rejected permitting the union to charge objectors for lobbying expenses unrelated to effectuation of the collective-bargaining agreement as not justified by governmental interests in promoting labor peace or any "free rider" concerns, which likewise limit compulsory dues under the RLA and the Act. Id. at 520–522.

Lobbying activity is not a representational function simply because the proposed legislation involves a matter that may also be the subject of collective bargaining. This argument was explicitly rejected by the D.C. Circuit in *Miller v Air Line Pilots Assn.*, 108 F.3d 1415 (D.C. Cir. 1997), where the court concluded that lobbying expenses incurred for the purpose of improving employee safety were not chargeable. The union argued that expenses related to making its views about Federal regulation of airline safety known to Congress and Government agencies were "interconnected with those airline safety issues that animate much of its collective-bargaining and therefore they should be regarded as germane to that bargaining." Id. at 1422. Finding "major difficulties with the union's position," the court observed that "[i]f there is any union expense that, given the logic of *Hudson* and its progeny, must be considered furthest removed from "germane" activities, it is that involving a union's political actions." Id. The court rejected the union's attempt to

> *have us see its lobbying on safety related issues as somehow nonpolitical because all pilots share a common concern with these activities. . . .*
>
> *That the subject of safety is taken up in collective-bargaining hardly renders the union's government relations expenditures germane*. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed *if the union's argument were played out, virtually all of its political activities could be connected to collective-bargaining*. Citing, *inter alia, Lehnert* at 516 (expenses are not germane to collective bargaining "at least in the private sector" if they involve political or ideological activities); *Ellis* at 447–48; *Street* at 768. [Emphasis added.]

Id. at 1422–1423.

Rather than narrowly defining chargeable lobbying expenses as limited to those few instances germane to representation of a particular objector's unit, the majority's test broadly permits a union to charge an objector even for extra-unit lobby expenses that "may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization." As applied, this test is essentially founded on the theory that a rising tide lifts all boats. Even so, the potential for extra-unit lobbying for changing the minimum wage or enacting State WARN legislation to realistically ever "inure" to the benefit of any specific objectors' unit is far too attenuated.

Recognizing that a union may still have difficulty proving that most extra-unit lobbying expenses inure to the benefit of objectors in a particular unit, the majority eliminates this proof problem by deeming the requirement satisfied where the charge is part of a reciprocal, pooling arrangement. They rely on *Locke v. Karass*, 555 U.S. 207 (2009), where the Court concluded that expenses of the national union's litigation, that did not directly benefit the nonmembers' local, were chargeable because those litigation expenses would otherwise be chargeable and the nonmembers' local had a reasonable expectation that the contributions of other locals to the national's resources would be available to support litigation on its behalf if and when it takes place. The majority, however, reads far too much into *Locke*.

First, the pooling arrangement in *Locke* concerned a national union's litigation expenses, not lobbying. Nothing about the Court's reasoning or findings suggests that

it should be construed as extending to lobbying expenses. Indeed, the Court noted that nonmembers in *Locke* were not charged for national expenses that were "political, public relations, *or lobbying activities"* (emphasis added) or national litigation costs associated with those activities. Id. at 211. It also observed that, under the Court's own precedent, a union could not charge a nonmember for "political or ideological activities" but "may charge non-members for activities more directly related to collective-bargaining." Id. at 213.

In reaching its conclusion that litigation expenses may be chargeable, the Court, furthermore, noted that in *Lehnert* "three irreconcilable" views as to the chargeability of national litigation expenses divided the Justices, and that the Court's "failure [in *Lehnert*] to find a majority [view]" had created "uncertain[ty] about the matter" in the lower courts. *Locke,* supra at 216. After examining the issue further, the Court could find "no significant difference between litigation activities and other national activities the . . . Court has found chargeable . . .[and] no sound basis for holding that national social activities, national convention activities, and activities involved in producing the nonpolitical portions of national union publications all are chargeable but national litigation activities are not." Id. Significantly, the *Locke* opinion did not disturb or question *Lehnert*'s nearly unanimous holding that lobbying expenses unrelated to contract ratification or implementation are not chargeable. *Lehnert* at 522.

Last, *Locke* does not support the majority's presumption that the existence of a pooling arrangement to pay for extra unit activity suffices as establishing that anything will "ultimately inure to the benefit of members of the local union." The parties in *Locke* did not challenge the "reciprocal nature" of the litigation charge so "the existence of reciprocity" was not in dispute. *Locke* at 807. See also *Locke* at 808 ("case does not require us to address what is meant by a charge being "reciprocal in nature," or what showing is required to establish that services "may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization'"). (Alito, J., concurring). Thus, *Locke* neither suggests it is applicable to lobbying expenses nor provides a basis for presuming that the mere existence of a pooling arrangement proves it will "inure" to benefit the objector's unit. On the contrary, a key requirement of *Locke* is that, even for extra-unit litigation expenses to be chargeable, "the subject matter of the (extralocal) litigation [must be] of a kind that would be chargeable if the litigation were local, e.g., litigation appropriately related to collective bargaining rather than political activities." Id. at 802.

In sum, my colleagues make an extraordinary effort in their analysis of the chargeability of lobbying expenses to narrowly read multiple decisions of the Supreme Court in an attempt to persuade that the Court did not say what it clearly did say about this specific issue, and that the Court did not mean to apply its reasoning to the definition of the duty of fair representation under our Act. They then turn about and expansively read one decision of the Court that does not involve lobbying expenses as opening the door wide to chargeability of even those extra-unit lobbying expenses, including lobbying for political purposes, whose inferential relationship to representation of a particular objector's unit is greatly attenuated.

Obviously, I disagree with that analysis and the resultant standard for chargeability. Consequently, I disagree that there is a need for further briefing and analysis of any of the lobbying activities at issue in this case. None of them can reasonably relate to the Respondent Union's performance of representational duties to the *Beck* objectors' as part of their bargaining unit. Accordingly, based on the clearly applicable restrictive standard for chargeability derived from a proper reading of *Ellis*, *Beck*, and *Lehnert*, I would find that the Respondent violated its duty of fair representation by charging nonmember objectors for expenses incurred as to any of these lobbying activities. I dissent.

Dated, Washington, D.C. December 14, 2012

Brian E. Hayes., Member

NATIONAL LABOR RELATIONS BOARD

Don Firenze, Esq., for the General Counsel.
Christopher Callaci, Esq., for the Respondent.
Matthew Muggeridge, Esq. (National Right to Work Legal Defense Foundation), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 14, 2011, in Boston, Massachusetts. The amended complaint herein, which issued on December 29, 2010, and was based on an unfair labor practice charge and an amended charge that were filed by Jeanette Geary on November 23, 2009, and May 27, 2010, alleges that United Nurses and Allied Professionals (the Union) and/or (the Respondent), while providing Geary and other nonmembers with certain information concerning its expenditures for representational activities, failed to provide them with evidence beyond a mere assertion that this information was based on an independently verified audit, and since September 2009, the Union has continued to seek from Geary and the other nonmembers, as a

condition of their employment at Kent Hospital (the Employer), dues and fees expended by the Union for lobbying activity, in violation of Section 8(b)(1)(A) of the Act.

I. JURISDICTION

The Respondent admits, and I find, that the Employer, an acute care hospital located in Warwick, Rhode Island, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The issue herein is whether the Respondent properly notified, and charged, its nonmember objectors pursuant to *Communication Workers v. Beck*, 487 U.S. 735 (1988). More particularly, there are two issues. One is a "normal" *Beck* issue: can objecting nonmembers, such as the Charging Party, be charged for lobbying expenses that the Union incurred in Rhode Island and Vermont, where the Union also represents health care employees. The other issue relates to the statement that the Union sent the Charging Party and other nonmember objectors concerning its expenditures for its representational activities for its fiscal year. Counsel for the General Counsel is not alleging that any of these expenditures were improperly charged to the objectors (with the exception of the lobbying expenses referred to above). Rather, Counsel for the General Counsel is alleging that the Union violated the Act by not including its independent auditors attached letter to this listing.

A. The Cover Letter

Richard Brooks is the executive director of the Union. He testified that prior to issuing its expenditures that was sent to its objecting nonmembers, the Union's accounts were examined by, and subject to, an independent auditor, who verified these figures. A letter from the auditor accompanied this verified audit, but the Union did not send the accompanying letter to the *Beck* objectors. He testified that the reason the auditor's letter was not sent to the objectors was because he understood that the law did not require it.

B. The Union and its Lobbying Expenses

There were seven bills that were lobbied in the State of Rhode Island. The Union admits that three of these were admittedly not chargeable to the *Beck* objectors leaving the chargeability of four Rhode Island bills to be litigated. In addition, the Union lobbied for three bills in the State of Vermont where it represents employees as well. Counsel for the General Counsel also alleges that the expenses for lobbying for these Vermont bills should not be chargeable to the *Beck* objectors.

Respondent is composed of 15 local unions in the States of Rhode Island, Vermont, and Connecticut. The locals range from 2269 bargaining unit employees at the Rhode Island Hospital, 619 at Kent Hospital, to five registered nurses at the Putnam Board of Education in Putnam, Connecticut. Because of this large discrepancy in the number of members in the different locals, there is a corresponding discrepancy in the amount of monthly per capita dues that the Union receives from these locals, from about $125 from the Putnam local to about $50,000 from the Rhode Island Hospital local. Regardless of the amount that the local unions pay to the Respondent monthly as per capita dues, it is the Respondent, rather than the local unions comprising the Respondent, that handles the local union's collective-bargaining obligations, from negotiating contracts to processing and handling grievances and arbitrations. In addition, the Union does not collect dues from employees until a contract has been signed with their Employer, so the Union did not have any per capita income from the Employer's employees until about July 2009 when the first contract with the Union was entered into.

The Hospital Merger Accountability Act (Jt. Ex. 6) was introduced in the Rhode Island General Assembly on March 5, 2009. The Findings state that "any entity that owns more than fifty percent (50%) of the hospital beds in Rhode Island would have extraordinary influence on the cost, quality, and access to health care services, the economy of Rhode Island, the health care labor market and the overall health of Rhode Islanders." Brooks testified that he spent between 25 and 30 hours lobbying the state legislature in support of this bill. At the time that this bill was introduced, Lifespan Corporation, which owns four hospitals in the state, including Rhode Island Hospital, where the Union represents about 2200 employees, and Care New England, which owns the Employer and two other hospitals, were discussing a merger. Brooks testified:

> UNAP actually initiated this bill. We were very concerned about the potential adverse impact of what would have been an enormous merger and consolidation of hospitals in Rhode Island had Lifespan and Care New England accomplished their merger they would have owned 75% of the hospital business in Rhode Island. And we were very, very concerned that that merger, if successful, would have the potential to severely threaten the jobs of members either at Kent or Rhode Island Hospital, as a result of likely consolidation or closure of services at one or more of the facilities.
>
> We were also concerned that a merger of that size could adversely impact those remaining hospitals in our union that weren't part of the system, because of the competitive disadvantage that they might find themselves at. And last, we were very concerned that If Lifespan and Care New England together had that type of market share that they might lower the standards of staffing levels for nurses at their hospitals. . . . So, it was jobs, it was the financial viability of non-affiliated hospitals and finally to preserve the adequate working conditions for nurses.

If this bill had passed, the Union would have been able to intervene before the Health Services Council of the Department of Health to present evidence in opposition to proposed mergers or consolidations that the Union felt could result in the loss of jobs by its members.

Brooks testified that he spent between 5 to 10 hours in 2009

lobbying on behalf of one of its locals that represent registered nurses employed by the State of Rhode Island for a bill entitled Relating to Public Officers and Employees-Retirement System-Contributions and Benefits (Jt. Ex. 7). The Union supported and lobbied for this law because it would have increased the cap on post retirement earnings that the former state employees could earn from $12,000 to $24,000 a year.

Brooks also spent 2 to 3 hours in 2009 lobbying in favor of a Hospital Payments Act (Jt. Ex. 12) in Rhode Island because this bill would have increased state funding to two hospitals where the Union represents employees, the Employer and Westerly Hospital in Washington County. At the time, the Union was involved in negotiations with the Employer and was preparing to begin negotiations with Westerly Hospital. If the bill had passed, the Employer would have received an additional $800,000 and Westerly Hospital would have received an additional $500,000. John Callaci, director of collective bargaining and organizing for the Union, testified to the effect that this bill would have had on the Union's members, more particularly those employed at Westerly Hospital and the Employer. In their negotiations with the Employer, the Employer was alleging large losses because of inadequate reimbursements. An infusion of an additional $800,000 would have amounted to approximately $1200 per full-time employee. The effect at Westerly was even more direct. He testified that the contract with Westerly Hospital provides that if they

> lost less than $500,000, then for every dollar that they lost less than $500,000 half of it would go into a pool of money that would be distributed equally among the employees. So, just in the way of an example, if they lost $100,000 that year, that means they were 400,000 under the benchmark. That 400,000 would be divided in two to make 200,000, and that 200,000 would be distributed in a bonus check to the employees.

Brooks spent about 1 hour in 2009 lobbying in favor of a bill before the Rhode Island General Assembly entitled An Act Relating to Health and Safety-Center for Health Professionals Act (Jt. Ex. 11). This bill was also favored by the Hospital Association of Rhode Island and would promote and focus on education, recruitment, and retention of registered nurses in order to address the nursing shortage. He testified that the nursing shortage was impacting the Union's members by requiring them, at times, to handle more patients than they can safely care for and to float from one unit to another. He testified:

> So, by supporting this legislation to create incentives to educate, recruit and retain registered nurses, we were doing our part to address the nursing shortage and reduce the impact that the nursing shortage has on our members' working conditions.

Three additional bills before the Rhode Island General Assembly in 2009 (Jt. Ex. 8, 9, and 10) related to health and safety. One related to the need for new health care equipment and another related to the licensing of health care facilities in the state. Brooks testified that the Union spent about an hour lobbying for each of these three bills. Admittedly, the lobbying expense for these bills should not have been charged to the nonmember objectors.

The remaining bills were in the State of Vermont. In 2009 the Union spent $22,600 for lobbying costs in the State of Vermont, and its objectors were charged for 97 percent of this amount. The Union represents approximately 500 employees in Vermont and they lobbied for a bill that would have required certain hospitals to adopt and acquire equipment and mechanical means in order to ameliorate the stress and injuries caused when health care employees have to lift or carry patients. The bill would have required that a committee be formed in each unit and shift at health care facilities. The Union also lobbied for a bill that would have prohibited mandatory overtime for certain health care employees except when there is an emergency. Callaci testified that mandatory overtime is one of the most onerous aspects of working conditions in the health care industry:

> And, as you can imagine, if you were working on a day shift for example, you come to work, you expect to work 7:00, 8:00 to 3:30 and you have to work for 7A to 11P, that's very onerous both physically from a work point of view and how it adversely affects family life and personal life. And so, for our members at Retreat Healthcare and Copley Hospital, the right of an employer to impose mandatory overtime, as they frequently do, is really onerous.

Finally, the Union paid for some lobbying activities related to a bill in the Vermont legislature with regard to mental health care funding. Retreat Healthcare, some of whose employees the Union represents, would have received some of these funds. The contract covering these employees provides that if the state provides the employer "with new money earmarked for personnel costs over and above that which is already covered by the current state budget," either party can reopen the agreement to negotiate about the distribution of those additional funds.

IV. ANALYSIS

The initial allegation is that the Respondent violated the Act by not providing the *Beck* objectors with an accompanying letter from its auditor confirming the reliability of the audit. Admittedly, the Board has never found that to be a violation, although *Cummings v. Connell,* 316 F.3d 886 (9th Cir. 2003), did make such a finding in a case involving employees of the State of California, stating:

> We find that the Union's 1999 notice did not satisfy the dictates of *Hudson*. Although it informed nonmembers that the figures in the notice were derived from an audited statement, it did not include any "independent verification" of this fact.

Because the Board has not yet ruled on this issue, and because *Cummings* involved public sector employees, I recommend that this allegation be dismissed and leave it to the Board to decide.

The principal issue is the chargeability of the Union's lobbying expenses in Rhode Island and Vermont. What is not in dispute is that the Union improperly charged the nonmember objectors for approximately 3 hours that Brooks spent lobbying for three bills before the Rhode Island General Assembly in 2009: An Act Relating to Health and Safety- Department of Health, introduced on February 26, 2009 (Jt. Ex. 8); An Act Relating to Health and Safety—Determination of Need for New

Health Care Equipment and New Institutional Health Services, introduced February 4, 2009 (Jt. Ex. 9); and An Act Relating to Health and Safety- Licensing of Health Care Facilities, introduced March 10, 2009 (Jt. Ex. 10). As the Respondent admits that these charges were improper, I find that they violated Section 8(b)(1)(A) of the Act.

The remaining allegations relate to the charges for lobbying the remaining bills in both Rhode Island and Vermont. The difficulty in establishing a dividing line between chargeable and nonchargeable derives from the broad language in the decisions. *Beck* states that objectors' financial obligations to the union may not include support for activities "beyond those germane to collective bargaining, contract administration and grievance adjustment," while *Abrams v. Communications Workers of America*, 59 F.3d 1373 at fn. 8, states:

> We disagree with the employees' contention that CWA must demonstrate that chargeable expenses provide an "actual benefit" to nonmembers. As the district court declared, "plaintiffs want CWA to have to prove that all charged expenses, no matter how squarely those expenses fall with the Supreme Court's definition of chargeable ones, actually benefit them. There is no basis for such a requirement in Supreme Court precedent or in CWA's statutory duty of fair representation." 818 F. Supp. at 404.

The three most relevant cases herein are *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), *Locke v. Karass*, 555 U.S. 207 (2009), and *Fell v. Independent Assn. of Continental Pilots*, 26 F. Supp.2d 1272 (1998). In *Lehnert*, a public sector case, the Court stated, inter alia:

> The Court of Appeals determined that unions constitutionally may subsidize lobbying and other political activities with dissenters' fees so long as those activities are "pertinent to the duties of the union as a bargaining representative." In reaching this conclusion, the court relied upon the inherently political nature of salary and other workplace decisions in public employment. "To represent their members effectively," the court concluded, "public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other 'political' arenas."
>
> This observation is clearly correct.

The Court then went on to say, however:

> Where as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

The Court concluded that because none of the charged activities were shown "to be oriented toward the ratification or implementation" of the collective-bargaining agreement, they could not be supported by the funds of objecting employees.

In *Locke*, also a public sector case, the local union charged nonmembers at the local union a service fee that reflects an affiliation fee that it pays to its national organization. The nonmembers challenged these service fees on the ground that they did not *directly* benefit the local union. The Court, citing *Lehnert*, found the service charge valid, stating, inter alia:

> We focus upon one portion of that fee, a portion that the national union uses to pay for litigation expenses incurred in large part on behalf of *other* local units . . . we conclude that under our precedent the Constitution permits including this element in the local's charge to nonmembers as long as (1) the subject matter of the (extra-local) litigation is of a kind that would be chargeable if the litigation were local, *e.g.*, litigation appropriately related to collective bargaining rather than political activities, and (2) the litigation charge is reciprocal in nature, *i.e.*, the contributing local reasonably expects other locals to contribute similarly to the national's resources used for costs of similar litigation on behalf of the contributing local if and when it takes places.

In *Fell*, the court had to determine whether the union's charges for its merger with ALPA were "germane" and properly chargeable expenses. The union was concerned that Continental Airlines, whose pilots it represented, would merge with another airline, possibly one whose pilots were represented by ALPA. As this might have resulted in the union's members losing seniority status, the union attempted to preempt the situation by affiliating with ALPA and charged its nonmembers for this expense. The court found the expenditures for the merger should be considered "germane" and chargeable:

> Clearly, protecting pilots' seniority, which Plaintiff himself considers to be one of the most important aspects of his employment, is an undertaking "reasonably employed" to effectuate the union's duties as exclusive bargaining representative.

The legality of the Union's charges for lobbying these bills in Rhode Island and Vermont must be determined on the basis of *Lehnert, Locke,* and *Fell*. I find that the subject matter of the Hospital Merger Accountability Act (Jt. Ex. 6) and the Hospital Payments Act (Jt. Ex. 12) were germane to the Union's duty as the collective-bargaining representative of certain employees in the state, and are therefore properly chargeable to the objecting nonmembers. The Hospital Merger Act would have given the Union some say in whether hospitals in the State could merge their operations, which would have an effect on the bargaining strength and position of the parties. Clearly, the Hospital Payments Act, which if passed would have given an additional $1,300,00 to two hospitals whose employees the Union represents and would have loosened those employers' purse strings to the benefit of the employees. On the other hand, I find that the Rhode Island Retirement Pension Act (Jt. Ex. 7) and the Center for Health Professional Act (Jt. Ex. 11), while well intentioned, were not germane to the Union's collective-bargaining obligations and were therefore not chargeable to the objecting nonmembers. Of the three Vermont bills that the Union lobbied for, I find that only the bill that would have provided for mental health care funding was germane and charge-

able. The contract for Retreat Healthcare, whose employees the Union represented, provides for a reopener if the state provided the employer with "new money." That would clearly be germane to the Union and the employees. The other two bills, which were lobbied for the health and safety of the represented employees, and is to be commended for that reason, however was not germane to collective bargaining and therefore is not chargeable to the objecting nonmembers.

CONCLUSIONS OF LAW

1. The Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Union violated Section 8(b)(1)(A) of the Act by charging objecting nonmembers of the Union for lobbying activities involving the following bills before the States of Rhode Island and Vermont:

(a) Bill Relating to Public Officers and Employees- Retirement System- Contributions and Benefits (Jt. Ex. 7).
(b) Bill Relating to Health and Safety- Center for Health Professionals Act (Jt. Ex. 11).
(c) The three bills before the Rhode Island General Assembly related to health and safety that the Union admits should not have been charged to the objecting nonmembers (Jt. Ex. 8, 9 and 10).
(d) The bills before the Vermont legislature that would have required certain hospitals to purchase equipment to assist employees in lifting and moving patients, and to prohibit certain mandatory overtime work for certain health care employees.

THE REMEDY

Having found that the Respondent has unlawfully charged its nonmember objectors for certain lobbying costs incurred in the States of Rhode Island and Vermont, I recommend that it be ordered to reimburse those individuals for those charges and post a notice to that effect at each of its local offices, as well as mailing a copy of the notice to each of its nonmember objectors.

On these findings of acts and conclusions of law, and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, United Nurses and Allied Professionals, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Charging objecting nonmembers for expenses that it incurred for lobbying costs that were not germane to the Union's position as the collective-bargaining representative of certain employees in the states of Rhode Island, Vermont, and Connecticut.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse all objecting nonmembers employed by the Employer for the improper lobbying expenses that it charged them for the year 2009.

(b) Within 14 days after service by the Region, post at each of its union office in Rhode Island, Vermont, and Connecticut, and mail to all of its objecting nonmembers, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., March 30, 2011

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT charge employees who are employed at facilities whose employees we represent, but who are not members of our union, for certain lobbying expenses that we incurred

[1] 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.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that were not germane to our position as the collective-bargaining representative of the employees at these facilities and WE WILL reimburse those individuals for those improper charges for the year 2009.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED NURSES AND ALLIED PROFESSIONALS