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

March 1, 2019

DECISION AND ORDER[1]

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

This case presents two issues arising from the Supreme Court's decision in *Communications Workers v. Beck* concerning the rights of nonmembers in a bargaining unit subject to a contractual union-security requirement.[2] The first issue is whether the Respondent Union violated the Act by failing to provide Charging Party Jeanette Geary with an audit verification letter in support of the Union's claim of expenses chargeable to a *Beck* objector. The second issue concerns whether the Union unlawfully charged the Charging Party for expenses the Union incurred while lobbying for seven bills pending in the Rhode Island and Vermont legislatures.

For many of the same reasons set forth in the dissenting opinion of former Member Hayes in the now-vacated 2012 decision, we hold that private-sector unions subject to the "basic considerations of fairness" inherent in the statutory duty of fair representation are required to provide *Beck* objectors verification that the financial information disclosed to them has been independently verified by an auditor. We also hold that the charges for the specified lobbying activities were unlawful because such activities are not so related to the Union's representational duties to employees in the objecting employees' bargaining unit as to justify the compelled financial support of those activities by *Beck* objectors.

## 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, which included a union-security provision requiring 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 had violated Section 8(b)(1)(A) of the Act by "fail[ing]

[1] 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.

On December 14, 2012, the Board issued a Decision and Order in this case, reported at 359 NLRB 469. Thereafter, on August 13, 2013, the Charging Party filed a motion to vacate the Board's decision and for consideration of exceptions ab initio, contending that at the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On July 2, 2014, the Charging Party supplemented its prior motion with citation to *Noel Canning*.

In light of *Noel Canning*, the Charging Party's motion to vacate is granted. Accordingly, the Board has considered de novo the judge's 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. Our review of the record does not include consideration of supplemental and amicus briefs filed pursuant to the Board's invitation in the vacated 2012 decision.

We shall amend the judge's conclusions of law and remedy consistent with our findings and legal conclusions herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, as set forth in full below. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[2] 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, or grievance adjustment. Id. at 745.

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." The judge found that the Union did not violate the Act. Although he acknowledged that the United States Court of Appeals for 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.

*B. Analysis*

The Acting General Counsel and Charging Party filed exceptions to the judge's dismissal. They argue that the absence of a verification letter 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. We agree and find that the Union was obligated to provide the verification letter.

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 identified three stages in the *Beck* objection process and the information a union must provide potential and actual objectors at each stage: stage 1, when an employee subject to union-security requirements must decide whether to object to paying dues for nonrepresentational activities; stage 2, when an employee who has objected to paying dues for nonrepresentational activities must decide whether to challenge the union's statement of chargeable amounts; and stage 3, when an objecting employee has decided to challenge the union's calculation of chargeable dues.

In determining what information unions must provide employees at each stage, the *California Saw* Board relied on the Supreme Court's pronouncement in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), that "basic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." Id. at 306; see also *California Saw*, 320 NLRB at 233. Although *Hudson* was a case involving public employees and thus also involved First Amendment considerations not applicable in the National Labor Relations Act (NLRA) context, the Board agreed with the United States Court of Appeals for the District of Columbia Circuit's decision in *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995), which stated, "Although in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in '[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake.'" Id. at 1379 fn. 7 (quoting *Hudson*, 475 U.S. at 306); see also *California Saw*, 320 NLRB at 233.[4]

Following the Board's decision in *California Saw*, the D.C. Circuit has repeatedly granted review in cases where the Board has not faithfully followed *Hudson*'s "basic considerations of fairness" standard. See *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000), and *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997). Thereafter, the Board majority in *Teamsters Local 579 (Chambers & Owen)*, 350 NLRB 1166 (2007), rejected the dissent's arguments for a more lenient standard and reemphasized the significance of *Hudson* in determining what information the statutory duty of fair representation requires unions to provide employees under *Beck*:

> The reason for requiring adequate disclosure to *Beck* objectors is so that they can decide whether to challenge the union's fee calculations. As the Supreme Court observed, and contrary to the dissent, that purpose would be thwarted by keeping objectors in the dark and requiring them to challenge the union's figures. Although, as the dissent notes, unions generally enjoy a wide range of reasonableness under the duty of fair representation standard, that range does not extend to conduct that contravenes *Hudson* and denies to nonmember objectors information essential to the exercise of their *Beck* and statutory rights.

Id. at 1170. As we must, we consider whether basic considerations of fairness required that the Union provide *Beck* objectors with an audit verification letter.

The *California Saw* Board held that at stage 2, a union must inform an objector of the percentage of dues reduction, the basis for the calculation, and the right to challenge the union's figures. Id. at 233.[5] 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 (quoting *Price v. Auto Workers UAW,* 927 F.2d 88, 93 (2d Cir.

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

[4] Recently, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, ___ U.S. ___, 138 S.Ct. 2448 (2018), the Supreme Court held that public-sector agency fees are unconstitutional. Although *Hudson* involved public-sector agency fees, *Hudson* still defines what information must be provided to potential objectors in other settings.

[5] The *California Saw* Board held that a union is not required to give this information to bargaining unit employees at the preobjection stage 1. We need not address that precedent in this case, but we would consider whether to adhere to it if the issue is raised in a future proceeding.

1991)). The Board further explained its verification requirement in *Television Artists AFTRA (KGW Radio),* 327 NLRB 474 (1999). There, 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 means "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.[6] Id. at 477.

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 requirement 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,* 125 F.3d at 869–870 ("[N]onmembers 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."). Similarly, in *Food & Commercial Workers Local 4 (Safeway, Inc.)*,[7] the Board found that expenditure information the union provided a nonmember objector fell short of its duty of fair representation because the independent accounting firm's review of that information relied solely on representations by the union's officials and not the firm's independent verification. Id., slip op. at 3.

In *Cummings v. Connell*, the Ninth Circuit 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, as here, the union's report provided to objectors broke down the union's annual expenditures into chargeable and nonchargeable categories, and the union informed objectors that its figures were taken from an independent audit that had been prepared by a certified public accounting firm. 316 F.3d at 886. 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. The court did not require the union to provide objectors with a full copy of the underlying audit, but 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*."[8] Id. at 892 (emphasis added).

We find persuasive the Ninth Circuit's rationale in *Cummings*, which applied *Hudson* to conclude unions must provide audit verification to adequately assure the reliability of the financial information provided to objectors. The Board in *KGW Radio* and *Safeway* has already made clear that the financial information provided to *Beck* objectors must be independently verified by an audit. It inevitably follows from this precedent that we should explicitly hold that unions must take the modest additional step of supplying verification from the auditor that the provided financial information has been independently verified. Just as requiring objectors to simply accept the union's financial figures without an audit is unfair, so too would be requiring objectors to accept the union's bare representations that the figures were appropriately audited. Independent verification by an auditor is essential information objectors need to decide whether to challenge the propriety of the union's fee.

Accordingly, we find that the Union violated Section 8(b)(1)(A) by failing to furnish Charging Party Geary and other *Beck* objectors with verification from the auditor that the financial information disclosed to them had been audited.[9]

[6] 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. We express no opinion here as to whether the use of "local presumption" can ever be an appropriate alternative means of allocating chargeable expenses.

[7] 363 NLRB No. 127 (2016), as modified by a March 8, 2016 unpublished order, motion for reconsideration denied in relevant part 365 NLRB No. 32 (2017).

[8] The court cited other circuits' decisions that also require that the notice to objectors include verification or certification by the auditor. Id. at 891; 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 adequate accounting, certified by an independent auditor and setting forth the major categories of the union's budgeted expenses.").

[9] Although our dissenting colleague agrees that the statutory duty of fair representation requires unions to provide verification from the auditor, she believes the Board should apply the requirement only prospectively. The Board's usual practice is to apply new policies and

## III. CHARGEABILITY OF LOBBYING EXPENSES

### *A. Facts*

UNAP comprises 15 local unions in Rhode Island, Vermont, and Connecticut. The locals range in size from 2,269 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 bill (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 postretirement 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 work force 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.

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 bill (4), the Safe Patient Handling bill (5), and the Mandatory Overtime bill (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 bill (1), the Hospital Payments bill (3), and the Mental Health Care Funding bill (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 employ-

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standards retroactively to all pending cases in whatever stage. See, e.g., *SNE Enterprises*, 344 NLRB 673, 673 (2005). We do not agree that finding this violation and providing a remedy for it would constitute "manifest injustice" warranting an exception from the usual practice of retroactive application. The Union here may have withheld the verification letter because it believed it was not legally required to provide it, but it did not act in reliance on any well-established precedent. We and our colleague agree that the Board had never directly addressed the issue presented and has therefore never stated that verification is not required. Making the requirement explicit here is only a minor extension of what was already implicit in precedent. Moreover, the remedy we provide for this violation—requiring the Union to provide nonmember objectors the verification letter already in its possession and to post a notice recognizing the right of nonmember objectors to receive such verification—effectuates the purposes of the Act while imposing only a small affirmative burden that will not entail any undue hardship.

ees. Accordingly, he found that the Union lawfully charged objectors for those expenses. The Acting General Counsel and Charging Party filed exceptions to these findings.

*B. Analysis*

We believe that relevant Supreme Court and lower court precedent compels holding lobbying costs are not 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. In particular, the Supreme Court upheld agency-shop agreements under the RLA in *Machinists v. Street*, 367 U.S. 740 (1961), but only insofar as employees who objected to the expenditure of their funds on nonrepresentational activities were shielded from the compulsion to support them.[10] In *Street*, the Court recognized that Congress sought "to protect freedom of dissent" and "made inroads on it for the limited purpose of eliminating problems created by the 'free rider.'" Id. at 767. The Court specifically held that unions do not have the power, "over an employee's objection, . . . to use his exacted funds to support political causes which he opposes" because it "is not a use which helps defray the expenses of negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." Id. at 768–769.[11]

In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), another RLA case, 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 performance of its statutory duties, which necessarily accrue to the nonmembers in the unit. "We remain convinced," the Court stated, "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. 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).

In *Communications Workers v. Beck,* 487 U.S. 735 (1988), the Court extended its reasoning and holdings in those cases to the NLRA, concluding that Congress intended that Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA function as statutory equivalents, thereby making the law developed in the Supreme Court's RLA 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 [that 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," 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) (internal citations omitted). The Court accordingly concluded that "§ 8(a)(3), like its statutory equivalent, § 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 (emphasis added) (quoting *Ellis*, 466 U.S. at 448).

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,* 487 U.S. at 762, otherwise described as the cost of performing the union's "statutory func-

[10] The Supreme Court also upheld agency-shop agreements in the public sector in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), but that decision was recently overruled in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, supra, for reasons particular to the public sector. Public-sector cases are still instructive insofar as their holdings were based in reasons beyond the First Amendment.

[11] Accord: *Knox v. Service Employees International Union Local 1000*, 567 U.S. 298, 320 (2012) ("[A]s long ago as *Street,* we noted the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmembers' money 'to support candidates for public office' or 'to support political causes which [they] oppos[e].'").

tions," *Ellis,* 466 U.S. at 447. This is limiting language fundamentally restricting unions' use of exacted funds to direct representative functions.

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.[12] Moreover, lobbying expenses are in the realm of the political activities that the Court found nonchargeable in *Street*. 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 that 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).[13]

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. In *Miller*, 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.*

Id. at 1422–1423 (emphasis added) (citing *Lehnert*, 500 U.S. at 516; *Ellis*, 466 U.S. at 447–448; *Street*, 367 U.S. at 768).[14]

Consistent with these cases, we conclude that lobbying expenses are not chargeable to *Beck* objectors under the NLRA. We accordingly find that the Union violated its duty of fair representation by charging nonmember objectors for expenses incurred as to any of the lobbying activities at issue.

### AMENDED CONCLUSIONS OF LAW

Replace Conclusion of Law 3 in the judge's decision with the following paragraphs.

"3. The Respondent Union violated Section 8(b)(1)(A) of the Act by failing to provide nonmember objectors with verification from the auditor that the financial information disclosed to them has been audited.

4. The Respondent Union violated Section 8(b)(1)(A) by charging nonmember objectors for lobbying activities."

### AMENDED REMEDY

Having found that the Respondent Union engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(b)(1)(A) of the Act by failing to provide nonmember objectors with verification from the auditor that the financial infor-

[12] Our dissenting colleague urges a broader view of chargeable expenses than only funds for direct representative functions, which is a position we view to be contrary to precedent. The examples she offers of chargeable lobbying expenses—including, hypothetically, resisting shifts in applicable law that would directly cause changes to provisions in the collective-bargaining agreement, existing terms and conditions of employment, or legal avenues of enforcing the agreement and, from this case, lobbying for more public funding for the employer when it could help achieve ongoing bargaining goals—would only indirectly serve a union's representative functions.

[13] *Lehnert* involved public-sector employees, and constitutional concerns were "[perhaps] most important" to the Court's rationale, but 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.

[14] We also note that in *California Saw*, the Board appeared to take the nonchargeability of lobbying expenses for granted. While holding that some extra-unit litigation expenses may be chargeable to objectors, the Board stated: "The 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.'" 320 NLRB at 238 (quoting *Lehnert*, 500 U.S. at 528).

mation disclosed to them has been audited, we shall order the Respondent to provide such verification to Charging Party Jeanette Geary and all other similarly situated nonmember objectors. Further, having found that the Respondent violated Section 8(b)(1)(A) by charging nonmember objectors for lobbying activities, we shall order the Respondent to reimburse Geary and all other similarly situated nonmember objectors the amount of the dues collected from them that were spent on lobbying activities, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[15]

ORDER

The National Labor Relations Board orders that the Respondent, United Nurses and Allied Professionals, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to provide nonmember objectors with verification from the auditor that the financial information disclosed to them has been audited.

(b) Charging nonmember objectors for lobbying activities.

(c) 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) Provide Jeanette Geary and all other similarly situated nonmember objectors with verification from the auditor that the financial information disclosed to them had been audited.

(b) Reimburse Geary and all other similarly situated nonmember objectors for the amount of the dues collected from them that were spent on lobbying activities, in the manner set forth in the amended remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 1 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursements due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its union offices in Rhode Island, Vermont, and Connecticut, and mail to all of its objecting nonmembers, copies of the attached notice marked "Appendix."[16] 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, sign and return to the Regional Director for Region 1 sufficient copies of the notice for posting by Kent Hospital, if willing, at all places where its notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

Dated, Washington, D.C. March 1, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Today the majority decides two questions of first impression under the National Labor Relations Act, both of them adversely to the union respondent here. First, the majority holds that Union violated the Act by failing to

[15] In the absence of exceptions, we leave in place here the judge's remedy requiring the Respondent to mail the notice to each nonmember objector.

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

provide a *Beck*-objecting[1] employee with an audit verification letter that she had never requested and that no prior Board decision has ever required unions to provide automatically, despite the existence of a comprehensive framework of required disclosures. Under the test established by current Board law, *prospectively* requiring disclosure of the audit verification letter to *Beck* objectors is reasonable. But it is unjust to penalize the Union here by applying that new requirement retroactively. Second, the majority holds that a union may not charge objecting nonmembers for any of its lobbying expenditures, because such expenditures are never (and never can be) "incurred during the union's performance of statutory duties as the objectors' exclusive bargaining agent." Contrary to the majority, this result—while perhaps administratively easier—is not compelled by Supreme Court precedent. The Court's cases do not suggest such a categorical answer. Instead, they support the view that lobbying expenditures may be chargeable if the union can demonstrate that they were "germane to collective bargaining, contract administration, [or] grievance adjustment" and thus "'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.'"[2] It is not hard to conceive of some lobbying expenditures that would meet this standard (as do some, but not all, of the Union's expenditures at issue in this case). Nor is it difficult to see why the Act's goal of promoting collective bargaining is served by preserving the possibility that employees who will benefit from a union's representational activities (including certain lobbying) may be required to pay their fair share of the costs.

## I. THE AUDIT VERIFICATION LETTER

Applying existing Board law, I agree with the majority that when a union receives a *Beck* objection the union should be required, under "basic considerations of fairness," to include a copy of the cover verification letter it received from the independent auditor who reviewed the dues-related financial material the union sends to the objector. Such a requirement is an appropriate extension of current law because objectors, at the time they must decide whether to challenge the union's fee calculations, should have some independent assurance that the figures provided to them are accurate.[3] But, as I will explain, under well-established Board doctrine, the majority errs in applying this new requirement retroactively to the Union here.

As my colleagues acknowledge, the Board has never before required a union to provide such a verification letter to *Beck* objectors. Nor, before today, has the Board even suggested that such a requirement might be necessary. In these circumstances, Board law makes clear the majority's error in finding the Union retroactively liable for not having complied with a requirement that did not exist.

The Board does not apply a new rule retroactively where retroactive application would work a "manifest injustice" to any party.[4] In determining whether retroactive application will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purpose of the Act; and (3) any particular injustice arising from retroactive application.[5] Here, all three factors point against retroactive application.

First, regarding the Union's reliance on existing law, as the Union's representative testified at the hearing, at the time the Charging Party and other unit employees asserted their *Beck* objections, the Union had no reason to believe it was legally required to provide them with its auditor's verification letter. My colleagues concede that the Board had not established any such requirement at the time. Nor had the Board given any indication that it might require *Beck* objectors to be provided with such verification at any stage in the objection process, let alone immediately after an employee first files an objection.[6] The Union, in short, was on solid legal ground

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[1] See generally *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

[2] Id., 487 U.S. at 745, 752 (brackets in original), quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 447–448 (1984).

[3] I believe that this result follows from the divided full-Board decision in *Teamsters Local 579 (Chambers & Owen),* 350 NLRB 1166 (2007), precedent that no party here has challenged. In that case, the Board majority applied the "basic considerations of fairness" standard, derived from the Supreme Court's public-employee decision in *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986), to hold that unions must provide *Beck* objectors with information related to union-affiliate expenditures even before a challenge to the union's fee calculations is made. The *Chambers & Owen* majority rejected the view of dissenting Members Liebman and Walsh that under the duty-of-fair representation framework adopted 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 was required to balance the competing interests of Beck objectors and the union (as the representative of the bargaining unit as a whole) and that such a balance tipped against the new requirement.

[4] E.g., *Graymont Pennsylvania, Inc.,* 364 NLRB No. 37, slip op. at 8 (2016); *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993).

[5] Id.

[6] The decision that first required the union's audit to be independently verified had previously reaffirmed that

> although a union must give objectors sufficient information to make a reasoned judgment whether to challenge the dues-reduction calculations, a union need not at the pre-challenge stage, establish that its calculations are justified. *That burden is created only if and after the objector files a challenge to the union's figures*.

when it did not automatically provide the audit verification letter to *Beck* objectors.

Second, failure to apply today's new requirement retroactively would in no way undermine the purposes of the Act. Indeed, events have overtaken this litigation to the point that remedying the violation serves little purpose. After the Charging Party filed her initial objection, she proceeded to file a challenge to the Union's dues figures (to which the Union has responded). Although the Union had not provided the verification letter before the challenge, the Union undisputedly had complied with the audit-verification requirement itself, as mandated by *KGW Radio*, supra, and the Charging Party is now well aware that an audit has been performed. It is therefore unnecessary to apply the new rule retroactively to accomplish any purpose of the Act.

Finally, in this case it would be particularly unjust to find the Union retroactively liable because the violation at issue involves the Union's duty of fair representation, and the Supreme Court has affirmatively held that a union's actions are arbitrary and thus violate its duty "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."[7] Under this standard the behavior of the Union here—acting in reliance on a correct understanding of current law at the time—was clearly *not* "so far outside a wide range of reasonableness as to be irrational."

In short, all of the relevant factors under Board precedent demonstrate that holding the Union retroactively liable is manifestly unjust.[8] Accordingly, I dissent from the majority's finding that the Union violated its duty of fair representation by failing to provide the audit-verification letter.

## II. THE CHARGEABILITY OF LOBBYING EXPENSES

As the Supreme Court has explained, "Congress' decision to allow union-security agreements . . . reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them."[9] The Court has never adopted the categorical rule announced by the majority today: that under the National Labor Relations Act, a union may never charge objecting non-members for a lobbying-related expenditure, no matter what the expenditure was for. In its *Beck* decision—the sole decided case involving the chargeability of union expenditures under the NLRA—the Court adopted, as a matter of statutory interpretation, the general standard it had earlier announced in *Ellis*, a Railway Labor Act (RLA) case: Nonmembers many be charged for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."[10] And this includes, as the Court has made clear, "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."[11] While the Court has identified certain types of political activity as nonchargeable, the Court has never held that performing the duties of an exclusive bargaining representative under the Act cannot include lobbying a legislative or administrative body, no matter the subject or the context. The lesson for the Board, then, is that it must consider each challenged lobbying expenditure individually and ask whether, in the particular circumstances, the union has established that the lobbying was "germane to collective bargaining, contract administration, [or] grievance adjustment," the three core duties of a bargaining representative as identified by the Court.[12] The majority has declined to do that here, mistakenly.[13]

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*KGW Radio*, 327 NLRB 474, 478 (1999) (emphasis added), petition for review dismissed 1999 WL 325508 (D.C. Cir. 1999). See also *Teamsters (Dale E. Peterson)*, 324 NLRB 633, 634–635 (1997) (same). *KGW*, then, made clear that a union was not required to justify its dues-reduction calculations until *after* a challenge was filed. Inasmuch as an audit-verification letter is part of such a justification, *KGW* fully justified the Union's view that the audit-verification letter need not be provided to *Beck* objectors unless and until they challenge the Union's calculations.

[7] *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991) (internal citation omitted) (emphasis added); *National Association of Letter Carriers Branch 1227 (Postal Service)*, 347 NLRB 289 (2006). See also *International Union of Electrical Workers v. NLRB*, 41 F.3d 1532, 1534 (D.C. Cir. 1994); *American Federation of Government Employees Local* 888, 323 NLRB 717, 721–722 (1997).

[8] See *Loomis Armored US, Inc.*, 364 NLRB No. 23, slip op. at 7 (2016) (Board would not retroactively apply new rule barring withdrawal of recognition from a unit of guards unless the union is shown to have lost majority support, since employers had relied for years on pre-existing law permitting such withdrawal); *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1663 (2015) (new rule that dues-checkoff requirement would not terminate with expiration of collective-bargaining agreement not applied retroactively, since employers had relied on preexisting law); *Babcock & Wilcox Construction*, 361 NLRB 1127 (2014) (new standard of deferral to arbitration not applied retroactively, since unions and employers had relied on previous rule in negotiating contracts), review denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017).

[9] *Beck*, supra, 487 U.S. at 750, quoting *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

[10] *Beck*, supra, 487 U.S. at 752 (brackets in original), quoting *Ellis*, supra, 466 U.S. at 447–448.

[11] *Ellis*, supra, 466 U.S. at 448.

[12] *Beck*, supra, 487 U.S. at 745.

[13] The Board's interpretation of Supreme Court precedent, of course, is entitled to no judicial deference, as the Court itself has pointed out.

*A.*

There is little actual support in Supreme Court precedent for the majority's categorical approach. In *Beck*, the Court adopted the RLA standard announced in *Ellis*, but did not itself address any particular union expenditures. The Court affirmed a judgment issued en banc by the U.S. Court of Appeals for the Fourth Circuit,[14] which in turn had affirmed a panel decision finding that certain "labor legislation" expenditures were *not* chargeable.[15] The Fourth Circuit panel agreed with the finding of a special master that "in large part these expenditures covered costs of 'lobbing efforts' by [the union] 'far remote . . . from collective bargaining, contact negotiation and grievance adjustment,' for instance 'lobbying efforts on behalf of the Panama Canal Treaty, and the Equal Rights Amendment.'"[16] With respect to the remainder of the expenditures, the Fourth Circuit panel endorsed the view of the special master "that there might have been some areas such as 'the Telecommunications Act or Occupational Safety and Health Regulations,' where 'lobbying would have some relevance, . . . but [the union] had made no effort to identify *such permissible 'lobbying activities'* or to offer any evidence in support."[17] At a minimum, then, the Supreme Court's decision in *Beck* left open the possibility that a union's lobbying expenditure could be chargeable to objecting nonmembers—if it were shown to be germane to collective bargaining, contract administration, or grievance adjustment.

The majority relies not on *Beck*, but rather on the Supreme Court's 1961 decision in *Street*,[18] an RLA case, asserting that "lobbying expenses are in the realm of political activities that the Court found nonchargeable." But even assuming (contrary to our own precedent) that the Board should look to that decision under a different statute,[19] a careful reading of *Street* shows a more limited holding. The focus of the Court's decision was union expenditures for "political causes which [an employee] opposes."[20] The Georgia trial court had found that objecting employees' dues had been used "to support the political campaigns of candidates" for public office and "to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by" the employees.[21] The Supreme Court, in turn, held that the RLA denied unions the "power to use [an employee's] exacted funds to support political causes which he opposes," observing that the use of such funds "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes."[22] Had the *Street* Court held generally that "lobbying expenses" were never chargeable—whatever the subject matter—then presumably the Fourth Circuit panel in *Beck* would not have examined the purpose of the specific union lobbying expenditures at issue there, but would instead have found them categorically nonchargeable. In fact, the correct reading of *Street*'s holding is that under the RLA, unions may not charge objecting nonmembers for expenditures that "support candidates for public office" or that "advance political programs."

The question addressed in *Street*—whether it is permissible for unions in the rail and airline industries to charge nonmembers for expenses related to the support of candidates or ideological political causes—is separate and distinct from the question we face today: whether, under the NLRA, union expenses incurred when attempting to influence government actors or government policy can ever be "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."

The majority's reliance on the Supreme Court's *Lehnert* decision[23] also misses the mark. There, in a fractured decision, the Court held that state employees could not be required to pay for a union's legislative lobbying that did not involve legislative ratification of the collective-bargaining agreement or fiscal appropriations for the agreement. *Lehnert*, however, does not support the majority's categorical approach here. First, as the majority properly acknowledges, *Lehnert* involved not private-sector unions, but a public-sector union. In that setting, of course, First Amendment considerations govern: the government is the employer, and compelled speech is the issue. The Court recently reemphasized the importance of this distinction in *Janus*, where it held (reversing precedent) that a state may not extract agency fees from non-

*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–144 (2002).

[14] *Beck v. Communications Workers of America*, 800 F.2d 1280 (4th Cir. 1985) (en banc).

[15] *Beck v. Communications Workers of America*, 776 F.2d 811 (1985) (panel decision).

[16] Id. at 1210–1211.

[17] Id. at 1211 (emphasis added).

[18] *International Assn. of Machinists v. Street*, 367 U.S. 740 (1961).

[19] In the seminal *California Saw & Knife* decision, supra, the Board explained that "union-security clauses negotiated between a private union and a private employer pursuant to Section 8(a)(3) of the Act do not bear the imprimatur of the state, and . . . public sector and RLA precedents premised on constitutional principles are not controlling in the context of the NLRA." 320 NLRB at 226 (footnote omitted).

[20] Id. at 749, 750, 764, 768, 769.

[21] Id. at 744 fn. 2.

[22] Id. at 768–769.

[23] *Lehnert v. Ferris Faculty*, 500 U.S. 507 (1991). The majority quotes the plurality opinion.

consenting public-sector employees.[24] The *Janus* Court relied heavily on the public sector setting, noting that "collective bargaining with a government employer, unlike collective bargaining in the private sector, involves 'inherently "political"' speech."[25] Indeed, even when it "[a]ssum[ed] for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements," the *Janus* Court nonetheless drew a meaningful distinction, explaining that:

> the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."

138 S.Ct. at 2480, quoting *Harris v. Quinn*, 573 U.S. ___, ___, 134 S.Ct. 2618, 2632 (2014).[26] Second, the *Lehnert* Court itself distinguished between lobbying activities that related to the union's collective-bargaining agreement (held to be chargeable) and those that did not (not chargeable). In short, even in the more restrictive public-sector context (while agency-fee arrangements were lawful), the Supreme Court did not take a categorical approach.

Finally, the majority invokes a decision not by the Supreme Court, but by the U.S. Court of Appeals for the District of Columbia Circuit,[27] to argue that "lobbying activity is not a representational function simply because the proposed legislation involves a matter that may also be the subject of collective bargaining." But knocking down this strawman does not compel taking the majority's restrictive approach. Even conceding that a lobbying expense would not necessarily become chargeable simply because it involves a matter that may also be the subject of collective bargaining does not mean that such expenses will never satisfy the germaneness test adopted in *Beck*. It is not at all inconsistent with the District of Columbia Circuit's position to conclude that a lobbying expenditure is properly chargeable under *Beck* if, in fact, it is shown to be germane to the union's actual performance of its representational function through collective bargaining, contract administration, or grievance adjustment.

*B.*

There is no proper substitute, then, for an approach that examines each union lobbying expenditure individually and asks whether, in the particular circumstances, the union has established that the lobbying was germane to collective bargaining, contract administration, or grievance adjustment. Before turning to the various lobbying expenditures at issue in this case, it is worth considering hypothetical expenditures that would seem clearly to meet the *Beck* test—but which the majority necessarily would find non-chargeable under its categorical approach.

First, assume a collective-bargaining agreement that obligates the employer, as a matter of contract, to comply with the existing state statutory standard addressing certain terms and conditions of employment, and that authorizes the union to enforce the statutory standard against the employer. The standard might involve overtime pay, occupational safety and health, or anti-discrimination guarantees, for example. Legislation is introduced in the state legislature, or a rule is proposed by a state administrative agency, that would lower or even eliminate the state standard incorporated in the collective-bargaining agreement. If the legislation is enacted, employees represented by the union and covered by the contract would, as a direct result, lose protections guaranteed by the collective-bargaining agreement. The employer would no longer be required, as a contractual matter, to comply with the prior, higher standard. Surely the union's lobbying expenditures, intended to preserve guarantees incorporated in a collective-bargaining agreement, would be (in the words of the *Beck* Court) "necessarily or reasonably incurred for the purpose of

[24] *Janus v. AFSCME, Council 31*, ___ U.S. ___, 138 S.Ct. 2448 (2018).

[25] Id. at 2480.

[26] The *Janus* Court elsewhere described as highly "questionable" the proposition that the First Amendment applies to private-sector agency-fee cases because the Congressional enactment authorizing agency-fee arrangements "was sufficient to establish governmental action." 138 S.Ct. at 2479 fn. 24. The Board itself has rejected that proposition. See *California Saw & Knife*, supra, 320 NLRB at 226.

[27] *Miller v. Air Line Pilots Assn.*, 108 F.3d 1415 (D.C. Cir. 1997). In *Miller*, a 1997 RLA decision, the District of Columbia Circuit held non-chargeable those union expenditures involving the union's "contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety – which even include[d] intervention with the President and members of the Senate concerning appointments to the National Transportation Safety Board." Id. at 1422. All of these expenditures, the union contended, 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. The court rejected that argument, asserting that "if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining." Id. In short, the union in *Miller* made what amounted to an "all or nothing" argument related to its lobbying expenditures, and the District of Columbia Circuit, perhaps not surprisingly, answered "nothing."

Insofar as *Miller* might be read broadly, as the majority does, to stand for the proposition that union lobbying expenditures are never chargeable, the court's decision reaches much farther than warranted by the Supreme Court's own decisions, before and after *Miller*. In particular, the Circuit's reliance on the supposed "First Amendment-type interests" of objecting employees is questionable now in the wake of the Supreme Court's *Janus* decision, which (as explained) emphasized the different considerations involved in the private and the public sectors.

performing the duties of an exclusive bargaining representative." [28] Add to the hypothetical the fact that the *employer* was, directly or through an association, lobbying *in favor of* reducing state-law protections, and the case for chargeability becomes even clearer.

Second, assume that an employer announces to the union that it will make a detrimental change to bargaining-unit employees' existing substantive terms and conditions of employment—without bargaining with the union—because such a change is mandated by State or Federal law.[29] The union lobbies a state or federal administrative agency, seeking a definitive interpretation of the law that negates the employer's claim of a mandate for its unilateral change. Or the union lobbies the relevant legislative body to the same effect, seeking an amendment to the law itself. Here, too, the union acts in a direct way to preserve represented employees' existing terms and conditions of employment, as well as its role as their bargaining representative. That lobbying activity is closely connected to collective bargaining, in the circumstances of the case.

Third, assume that a state legislature was considering legislation that would directly and adversely affect a union's procedural ability to enforce an existing collective-bargaining agreement by, for example, stripping state courts of jurisdiction to hear claims for breach of labor contracts, or shortening the statute of limitations for bringing such claims, or imposing an attorney's fees-shifting requirement that would penalize the union for bringing an unsuccessful claim. Lobbying against such legislation would surely be germane to the union's administration of the collective-bargaining agreement.

Fourth, consider situations in which a union represents the employees of a government contractor. The government agency controls or directly affects certain terms and conditions of employment; the private contractor, others. The union intercedes with agency officials with respect to agency rules that contravene the union's collective-bargaining agreement with the private contractor and with respect to contract changes that will alter employees' terms and conditions of employment. Only the private contractor, of course, is subject to the NLRA. And the union's intercession with agency officials is fairly characterizable as lobbying the government. But the union's expenditures are clearly germane to collective bargaining and contract administration—*and the Board has held them to be chargeable to objecting nonmembers*.[30] In this respect, today's decision—which seemingly would preclude that holding—is not only based on a misreading of Supreme Court precedent, it is inconsistent with Board precedent, as well.

These hypothetical examples of lobbying expenses that are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative" are not meant to be exhaustive or to mark the outer limits of what might properly be found chargeable.[31] They illustrate, rather, why the majority's categorical position here is demonstrably wrong. Rather than take the administratively easy way out, the Board should follow a case-by-case, expenditure-by-expenditure approach. Accordingly, I consider next the specific expenditures at issue in this case.

*C.*

The Union comprises 15 local unions in Rhode Island, Vermont, and Connecticut. Along with one of those local unions, the Union represents the Charging Party's bargaining unit at Kent Hospital, a private acute care hospital in Rhode Island. The Union is responsible for dues collection, collective bargaining, grievance pro-

[28] *Beck*, supra, 487 U.S. at 752.

[29] For examples of cases in which employers have contended that unilateral changes were required by law, see *San Miguel Hospital Corp.*, 355 NLRB 265, 271–272 (2010) (employer required employees to take a fitness test, citing Occupational Safety and Health Administration regulations), appeal dismissed 2010 WL 4340459 (D.C. Cir. 2010); *SGS Control Services*, 334 NLRB 858, 861 (2001) (employer reduced overtime pay, citing state wage and hour law); *Trojan Yacht*, 319 NLRB 741, 743 (1995) (employer froze employees' pension benefit accruals, citing Internal Revenue Service requirements); *Holmes & Narver*, 309 NLRB 146, 151–152 (1992) (employer reduced contributions to employees' pension plans, citing Department of Labor regulations); *Keystone Steel & Wire*, 309 NLRB 294, 296–298 (1002) (employer reduced pension eligibility, citing ERISA), reversed on other grounds 41 F.3d 746 (D.C. Cir. 1994); *King Radio Corp.*, 172 NLRB 1051, 1056, 1062 (1968) (employer changed wages, citing Fair Labor Standards Act), enfd. 416 F.2d 569 (10th Cir. 1969), cert. denied 397 U.S. 1007 (1970).

[30] *Transport Workers Local 525 (Johnson Controls World Services)*, 329 NLRB 543, 544–545 (1999).

[31] As Board and court cases not involving *Beck* issues illustrate, unions have engaged in lobbying that would seem directly related and narrowly tailored to the protection of the terms and conditions of employment for represented employees, including the continued existence of the bargaining unit. *Sawyer of Napa*, 321 NLRB 1120, 1123–1124 (1996) (employer's business was threatened by environmental regulatory requirements, and the union offered to lobby with the employer for modifying legislation); *Pittston Coal Group v. UMW*, 894 F.Supp. 275, fn.3 (W.D.Va. 1995) (miners' union lobbied for legislation to protect employees' retiree health plans, in part by requiring mine employers with whom the union had contracts to make back payments to those plans); *ChurchHomes*, 343 NLRB 1301, 1318 (2004) (union lobbied with assisted-living and nursing home employers for a larger state appropriation for Medicaid payments specifically earmarked for wage and benefit increases for those facilities' represented health-care employees), vacated on other grounds 448 F.3d 189 (2d Cir. 2006). Expenditures for such lobbying efforts—which hardly seem ideological—are clearly not the same as those found nonchargeable in *Street*, supra, and thus would merit careful consideration by the Board.

cessing, and lobbying the three state governments on behalf of all of its locals. At issue in this case is the chargeability of seven specific lobbying efforts undertaken by the Union in 2009. As explained, the majority finds none chargeable, based on its view that a union's lobbying expenses are, categorically, nonchargeable to objectors. That view is untenable, for reasons I have shown. Applying the *Beck* germaneness standard here, I would find that two of the Union's lobbying efforts were germane to its representation of all bargaining-unit employees (members and objectors alike), and so the Union lawfully could charge employees for the costs of those efforts. I consider those two activities first, before turning to the remainder of the Union's challenged expenses.

1. Chargeable expenses

First, the Union lobbied for a bill in the Rhode Island legislature that would have provided Kent Hospital with $800,000 in state funding to compensate it for "the high ratio of unqualified uncompensated care expenses to qualified uncompensated care expenses"—i.e., healthcare delivered but not paid for.[32] At the time of this lobbying activity, the Union and the hospital were bargaining over economic issues for a first contract. The hospital had resisted the Union's wage/benefit proposals, contending that limitations in its budget made those proposals unaffordable. The Union believed the additional funding provided by this legislation would enable the hospital to respond more favorably to its bargaining proposals.

This lobbying expense was chargeable because, in the particular circumstances, it was directly germane to the Union's collective bargaining. This is not to say that any union lobbying for public funding that would benefit an employer will always be chargeable. In this instance, however, the Union was specifically motivated to engage in lobbying by the adverse position the hospital took in ongoing contract negotiations. The hospital, in the course of those negotiations, gave the Union reason to believe that the lobbying at issue would facilitate achieving its bargaining goals. Even on the conservative assumption that the payment the hospital would receive from the state if the legislation was enacted would be allocated by management to non-labor costs, the likely direct benefit to bargaining-unit employees is clear. Money is fungible: the hospital would clearly have been $800,000 better able to at least partly accede to the Union's contract proposals. The Union, moreover, could reasonably expect—especially if it was instrumental in obtaining that payment for the hospital – that at least some of that amount would be used to fund its eventual collective-bargaining agreement, to the benefit of all the unit members at Kent Hospital, including *Beck* objectors. This lobbying activity was therefore chargeable to those objectors.

Second, the Union lobbied the Vermont legislature for state funding for mental healthcare services at three, Union-represented Vermont facilities. The Union's collective-bargaining agreement with one of those facilities specifically required both parties to lobby in cooperation for such funding, and provided that if their lobbying effort was successful, the contract would be reopened to correct existing pay inequities through targeted wage increases. This lobbying expense, too, was germane to the Union's collective bargaining.

The parties' agreement to lobby in cooperation for state funding, at least in part for the specific purpose of increasing unit pay, was an explicit issue in their bargaining and was directly correlated to their bargained terms of employment. This joint commitment to lobby together was embodied in the parties' collective-bargaining agreements and would potentially have benefited all the members of the three bargaining units, including *Beck* objectors. Certainly, it merits notice that the Kent Hospital was in Rhode Island rather than Vermont. However, it is well established that where there is a reasonable expectation of reciprocal support between union affiliates in different localities, an activity by one affiliate may be chargeable to employees represented by the other affiliate even though those employees do not directly benefit from that particular activity. See *Locke v. Karass*, 555 U.S. 207 (2009).[33] As the Supreme Court has explained, when examining whether expenses are germane to collective bargaining, the Court has " never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," because "to require so close a connection would be to ignore the unified-membership structure under which many unions . . . operate." *Lehnert*, supra, 500 U.S. 507, 522–523.[34] Here, the employees in Rhode

[32] The legislation provided the payment to "any acute care hospital in Kent County" (along with other Rhode Island hospitals), but Kent Hospital was the only acute care hospital in that county.

[33] In *Locke,* the Supreme Court found that–even under First Amendment criteria—litigation expenses incurred outside an objector's unit were sufficiently germane to that unit's collective bargaining to be chargeable to the objector. Critical to this conclusion was the Court's dual findings that "the subject matter of the national litigation bears an appropriate relation to collective bargaining" and 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 place." Both factors are similarly present in this case.

[34] The Board has also repeatedly affirmed this reciprocity principle. See, e.g., *Transport Workers Local 525 (Johnson Controls World Services)*, 329 NLRB 543 (1999); *Teamsters Local 75 (Schreiber Foods*), 329 NLRB 28, 31 (1999); *Communications Workers of America Local*

Island and Vermont, though in different locals and bargaining units, were all represented by the Union, which was responsible for each local's bargaining with employers and for all the state and local lobbying activity in its three-state jurisdiction. There was therefore complete reciprocity of support between all those employees. I would therefore also find this lobbying activity chargeable to *Beck* objectors.

2. Nonchargeable expenses

As to the remaining lobbying activities at issue, I would find that the Union has failed to prove that these activities, given their particular circumstances, were sufficiently related to "collective bargaining, contract administration, or grievance adjustment" to fall within the *Beck* standard.[35]

In one instance, the Union initiated and lobbied for a bill in the Rhode Island legislature to require any entity acquiring ownership of 50 percent of hospital beds in the state to expand its board of trustees to include five public members, one of them to be appointed by the union representing the largest number of the entity's employees—i.e., the Union. The bill would also have created an independent government council to monitor and regulate any such entity, with the power to review (with public input, including the Union's) the impact of the merged entity's actions on the continuation of essential services at other, unaffiliated hospitals, and to approve or deny any business plan of the entity, including relocation, expansion, contraction, addition or closure of hospitals. The Union initiated this legislation in response to the merger of the two largest private hospital systems in the state, both of which contained hospitals represented by the Union, including Kent Hospital. From past experience, the Union foresaw that the merger and resulting consolidation might well result in closures and/or the loss of jobs and reduced staffing levels at the hospitals it represented.

In supporting this legislation, the Union was clearly attempting to ensure the job security of the Rhode Island hospital employees it represented, including the Kent Hospital objectors, a legitimate representational aim. However, although obtaining a seat on the merged entity's governing body might strengthen the Union's position in collective bargaining, this possibility was speculative. The prospective new government council similarly could not bear directly on the Union's contract negotiations, even considering the Union's anticipated participation in the council's oversight of the merged entity.[36] In short, the Union failed to prove that either the lobbying itself or the subject of the legislation was a subject of the Union's negotiations with an employer or that the legislation directly implicated any of the Union's bargaining units' terms of employment. This lobbying activity was therefore not chargeable to objectors.

The Union also supported a bill to raise the cap on postretirement pay that nurses who retired from employment at Rhode Island state hospitals could earn without reducing their retirement benefits, if they returned to work at state hospitals. The Union's goal was to increase the number of working hospital nurses in the state, including at Kent Hospital. The legislation, however, was confined to the public sector and directly affected only state retirees and their employment at public hospitals operated by the state. The Union did not prove that the bill was germane to its collective-bargaining, contract administration, or grievance adjustment at any private-sector bargaining unit like Kent Hospital. The Union's lobbying for it was therefore not chargeable to Kent Hospital's *Beck* objectors.

Another bill supported by the Union would have created a Rhode Island "Center for Health Professionals" to develop a "sufficient, diverse, and well-trained healthcare workforce" in the state. The center would "coordinate" statewide efforts to meet supply and demand needs in healthcare; "ensure" that the state's education and training systems have the resources to adequately support workforce demand; and research creative retention initiatives. The Union's interest in this legislation derived from a nursing shortage that may have been responsible for represented nurses being assigned more patients than they could safely care for, being assigned to varying shifts, and being assigned to positions in which they were not experienced. Here also the Union's ultimate goal was to defend its bargaining units' working conditions. But the prospective center's potential impact on bargaining or on terms of employment was entirely speculative, considering its apparent lack of actual regulatory authority. This lobbying expense therefore was not chargeable.

*9403 (Pacific Bell),* 322 NLRB 142, 143–144 (1996), review denied 113 F.3d 1288, (D.C. Cir. 1997), cert. denied 522 U.S. 995 (1997); and *California Saw,* supra, 320 NLRB at 237.

[35] Where a *Beck* objector disputes the chargeability of a particular union expense, the union has the burden of establishing that the expense is chargeable. *Teamsters Local 75 (Schreiber Foods)*, 365 NLRB No. 48, slip op. at 2 (2017); *KGW*, supra, 327 NLRB at 477 fn. 15; *Communications Workers of America (Pacific Bell)*, 322 NLRB 142, 144–145 (1996), enfd. sub nom. *Finnerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997), cert. denied 552 U.S. 995 (1997); *California Saw & Knife Works*, supra, 320 NLRB at 242.

[36] As with the other four lobbying activities that I would find nonchargeable to the *Beck* objectors here, if this legislation or lobbying in its favor had become an issue in the parties' contract bargaining, my view might be different.

The Union also lobbied the Vermont legislature for a bill to require hospitals to establish a safe-patient-handling program that would include rules, training, protocols, workplace committees (including employee members chosen by the Union), and equipment assessment. The legislation's purpose was to protect healthcare employees from injuries incurred in moving patients. Weighing in favor of chargeability, there was testimony that such injuries were common among bargaining-unit employees, so naturally this was an issue of general concern to the Union. It is understandable then that the Union supported the proposed legislation. But there is no evidence in the record demonstrating that the proposed legislation was related to any matter under negotiation between the Union and the Employer, that the legislation would have aided the Union in seeking to address patient-moving related injuries in collective bargaining with the Employer, that the proposed legislation would have augmented (or shielded from attack by the Employer) any existing protections in the parties' collective-bargaining agreement, or that the legislation would have enhanced the Union's prospects for success in any pending or potential grievance. Absent such evidence, I would find that this lobbying activity was not chargeable.

Finally, the Union lobbied the Vermont legislature for a bill to prohibit hospitals from requiring an employee to work more than 40 hours a week. Here, too, the Union's interest was understandable. The Union wished to protect bargaining-unit employees from excessive mandatory overtime, including mandatory double shifts, which the Employer did require employees to work at times. But, as with the safe-patient handling legislation discussed above, there is no evidence in the record demonstrating that the proposed legislation was related to any matter under negotiation between the Union and the Employer, that the proposed legislation would have enhanced any existing protections in the parties' collective-bargaining agreement (whether substantively or simply by giving existing protections the additional force of law), or that the legislation would have benefitted the Union's position in any pending or potential grievance. On this record, then, I would be constrained to find that this expense, too, could not be charged to *Beck* objectors.

### IV. CONCLUSION

The majority's decision today is unfair and unsound. It begins by adopting a reasonable rule with respect to unions' duty to provide audit-verification letters, but errs in applying that rule retroactively, a manifest injustice under the circumstances. It then takes a categorical approach to union lobbying expenditures that is not compelled by—or, indeed, consistent with—Supreme Court precedent. This approach reflects an artificially narrow view of a labor union's proper role as the bargaining representative of employees, and it exacerbates the "free rider" problem that Congress intended to address in permitting union-security agreements under the National Labor Relations Act. This approach also arbitrarily undermines a union's ability to use what might be the best available tool in its arsenal—attempts to influence government actors or government policy—to perform its core representational functions. In circumstances like those hypothesized above—where an employer is actively lobbying to undermine a hard-fought contractual protection—or circumstances like those found in this case—where additional resources are available from public sources that will directly factor into the employer's calculations of what to offer at the bargaining table—it hardly seems conducive to labor peace to artificially constrain a union's ability to perform its representational functions to the best of its ability. Accordingly, I dissent.

Dated, Washington, D.C. March 1, 2019

Lauren McFerran, Member

## NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES AND MEMBERS
### POSTED AND MAILED 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, mail, 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 fail to provide nonmember objectors with verification from the auditor that the financial information disclosed to them has been audited.

WE WILL NOT charge nonmember objectors for lobbying activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL provide Jeanette Geary and all other similarly situated nonmember objectors with verification from the auditor that the financial information disclosed to them had been audited.

WE WILL reimburse Geary and all other similarly situated nonmember objectors for the amount of the dues collected from them that were spent on lobbying activities, with interest.

UNITED NURSES AND ALLIED PROFESSIONALS

The Board's decision can be found at www.nlrb.gov/case/01-CB-011135 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*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 upon 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, herein called 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 2,269 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. Exh. 6) was introduced in the Rhode Island General Assembly on March 5, 2009. The Findings state that ". . . any entity that owns more than 50 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 2,200 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 five 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. Exh. 7). The Union supported and lobbied for this law because it would have increased the cap on postretirement 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. Exh. 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. Exh. 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. Exhs. 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. Exh. 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. Exh. 9); and An Act Relating to Health and Safety—Licensing of Health Care Facilities, introduced March 10, 2009 (Jt. Exh. 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 Association 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:

> Whereas 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. Exh. 6) and the Hospital Payments Act (Jt. Exh. 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. Exh. 7) and the Center for Health Professional Act (Jt. Exh. 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 chargeable. 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. Exh. 7).

(b) Bill Relating to Health and Safety- Center for Health Professionals Act (Jt. Exh. 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. Exh. 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 based upon the entire record herein, I hereby 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 at-

[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.

tached 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 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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CB-011135 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[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."