

**United States of America
Before The National Labor Relations Board**

In the Matter of:	}	
	}	
United Nurses & Allied Professionals, (Kent Hospital),	}	
	}	
Respondent,	}	Case 1-CB-11135
	}	
And	}	
	}	
Jeanette Geary, An Individual,	}	
	}	
Charging Party.	}	
	}	

**BRIEF OF RESPONDENT, UNITED NURSES & ALLIED PROFESSIONALS, IN
RESPONSE TO THE BOARD’S INVITATION TO ADDRESS THE
APPROPRIATENESS OF REBUTTABLE PRESUMPTIONS OF GERMANENESS OF
LOBBYING ACTIVITIES AND PROVIDE EXAMPLES OF LOBBYING ACTIVITIES
THAT SHOULD BE SUBJECT TO SUCH PRESUMPTIONS**

Respectfully submitted,

The United Nurses & Allied Professionals

By its attorney,

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Introduction

On December 14, 2012, Chairman Pearce and Members Hayes, Griffin and Block of the National Labor Relations Board (Board) issued a decision in the above captioned case. See *United Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (2012).

Among the issues before the Board: “whether the Union unlawfully charged the Charging Party for expenses the Union incurred while lobbying for bills pending in the Rhode Island and Vermont Legislatures.” *Id.*, slip op. at 1.

The Board held that “like all other union expenses, lobbying expenses are chargeable to objectors to the extent that they are germane to collective bargaining, contract administration, or grievance adjustment.” *Id.*

The Board noted, however, that the issue of “whether particular lobbying expenses satisfy the germaneness test” remains open. *Id.*, slip op. at 9. Indeed, to address this open issue, the Board has proposed using a rebuttable presumption of germaneness as a way forward, and has solicited the views of the stakeholders to the instant litigation as well as the views of other interested parties on this proposal:

“The Board invites all interested parties to file briefs in this case regarding the question of how the Board should define and apply the germaneness standard in the context of lobbying activities. In particular, **we encourage interested parties to address the appropriateness of presumptions concerning germaneness and to provide examples of the types of lobbying activities that should or should not be subject to such presumptions.**”

Id. (emphasis supplied).

The United Nurses & Allied Professionals (Union) hereby avails itself of the Board’s gracious invitation to offer its views on the Board’s proposal.

Argument

I. Rebuttable presumptions are common in Board jurisprudence and appropriate in the instant case.

Board precedent is replete with examples of the use of rebuttable presumptions in a broad range of contexts. See e.g., *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999)(rebuttable presumption that medical technologists are professional employees under the Act); *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 344 (1999)(rebuttable presumption of majority status for a reasonable period after a successor employer’s obligation to recognize incumbent union is triggered); *O’Brien Memorial, Inc.*, 308 NLRB 553 (1992)(rebuttable presumption that single-facility units are appropriate in the health care industry); *Saint John’s Health Center*, 357 NLRB No. 170, slip op. at 1 (2011)(restrictions on wearing union insignia in immediate patient care areas subject to a rebuttable presumption of validity); *Children’s Hospital Oakland*, 351 NLRB 569, 572 (2007)(rebuttable presumption that a broad no-strike clause covers sympathy strikes); *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 548 (2002)(wage adjustments during union organizing campaign warrant rebuttable presumption of unlawful effects); *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 3 (2011)(rebuttable presumption that matters which affect terms and conditions of employment are mandatory subjects of bargaining); *Finley Hospital*, 359 NLRB No. 9, slip op. at 6 (2012)(rebuttable presumption that information requested by union relevant to union’s representational duties).

Based on the foregoing, application of rebuttable presumptions as to the germaneness of lobbying activity is also appropriate. Indeed, “[p]resumptions of germaneness would be useful to the public: they would simplify for unions the task of ensuring compliance with their Beck

obligations and for objecting employees the determination whether their union is in compliance.”

Kent Hospital, supra, slip op. at 9.

II. The lobbying activities in issue provide compelling examples of what should be subject to a rebuttable presumption of germaneness.

In the instant case, the Board has provided an analytical framework within which to work to determine whether or not a particular lobbying activity should be subject to a rebuttable presumption of germaneness.

Legislative proposals regarding core employee concerns such as wages, hours and working conditions are at the very heart of a union’s representative functions:

“[L]egislative proposals involving core employee concerns such as wages, hours, and working conditions all clearly raise issues that relate to a union’s most essential representative functions. And even outside the public sector, legislative action can substantially alter the context in which collective bargaining takes place.”

Id. (emphasis supplied).

The Board proposes that if the link between the legislation and the union’s representational functions is so close that the legislation directly affects these core subjects of collective bargaining (wages, hours, working conditions), a rebuttable presumption of germaneness is appropriate:

“proposed legislation may be so closely linked to the union’s representational functions that it would directly affect subjects of collective bargaining. Where the legislature has effectively pulled up a seat at the bargaining table, it is hard to see how the union’s effort to influence the legislature in such matters is not germane to collective bargaining. In those circumstances, we propose presuming that lobbying expenses are germane to union’s representative functions and thus chargeable.”

Id. (emphasis supplied).¹

¹ Put another way: “[w]e propose, however, that, as to certain kinds of lobbying expenses, **there may exist such a direct, positive relationship between the union’s representational duties and the union’s goals in pursuing legislative or other action that a rebuttable presumption of germaneness is warranted.**” *Id.* (emphasis supplied)(citations omitted).

Working within this analytical framework, there appear to be no better examples of lobbying activities that should be subject to a rebuttable presumption of germaneness than those that are in issue in the instant case. To be sure, the legislation that the Union advanced in Vermont and Rhode Island is *so closely linked to the union's representational functions that (it) would have directly affected subjects of collective bargaining, in particular, core employee concerns such as wages, hours and working conditions.*

1. The lobbying with regard to wages.

There are three (3) pieces of legislation in issue that the union lobbied in support of that involved wages: two (2) in Rhode Island, the Hospital Payments bill and the Retirement System bill, and one in Vermont, the legislation regarding mental health care funding. The legislative goal in each instance was to increase the wages of bargaining unit employees.

a. **The Hospital Payments Bill (J-12).**

The Hospital Payments bill required the State of Rhode Island to make payments to hospitals to help them cover the expenses associated with uncompensated care. J-12. Among other things, the bill required the State to make payments in the amount of \$500,000 to any acute care hospital in Washington County. J-12 at 1. There are two (2) acute care hospitals in Washington County, one of which is Westerly Hospital. (Tr. 52:22-23). The union represents hundreds of employees at Westerly Hospital. (Tr. 53:1). The Union represents 256 professional and technical employees in Local 5075, and another 326 service, skilled maintenance and business office employees in Local 5104. R-1.

The Union's legislative goal in supporting this bill was to secure funding for wage payments for bargaining unit employees at Westerly Hospital under specific provisions in their collective bargaining agreements (CBAs).

Pursuant to the CBAs in effect at the time, Westerly hospital was required to make one time wage payments to hourly employees depending upon operating budget shortfalls. As set forth explicitly in the CBAs, if the operating budget losses were less than the agreed upon benchmark, wage payments were due. The agreement between Local 5104 and Westerly hospital reads in relevant part:

“If the Hospital’s net operating loss for fiscal year 2007 goes below \$2.5 million (“the 2007 Benchmark”), **all scheduled hour employees** (excluding senior leadership) **will receive a one-time payment** equal to 50% of each dollar below the 2007 benchmark divided by the number scheduled hour employees (prorated for those working less than full-time). The 2008 benchmark will be \$1.5 million and the 2009 benchmark will be \$500,000, and the same formula as above shall apply.”

R-4 at 48 (emphasis supplied).² The same exact language appears in the CBA between Local 5075 and Westerly Hospital. R-5 at 53.³

Wages are, by definition, among the subjects over which employers and unions must bargain in good faith:

“**to bargain collectively is the performance of the mutual obligation** of the employer and the representative of the employees **to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder ().**”

29 U.S.C. §158(d) (emphasis supplied).

Similar statutory language appears in §159(a) of the Act:

“[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit **for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment**”).

29 U.S.C. §159(a) (emphasis supplied).

² The term of that agreement is July 13, 2006 – November 5, 2009. R-4.

³ The term of that agreement is November 5, 2006 – November 5, 2009. R-5.

The link here between the Union's support of the Hospital Payments bill and its representational functions is remarkably close. The bill, had it passed, would have resulted in a \$500,000 payment to Westerly hospital, which would have reduced operating budget losses (if there were any). This, in turn, would have triggered the contractual mandate to make one time wage payments to bargaining unit employees, provided the contractual benchmark was hit.

That passage of this bill could have directly affected a mandatory subject of bargaining (wages) makes it a compelling example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

b. The Retirement System Bill (Jt. Ex. 7).

The Retirement System bill permits the State of Rhode Island to employ/reemploy nurses who have otherwise retired from State service at double the earnings without a reduction in retirement benefits. Jt. Ex. 7.⁴

The Union's legislative goal in supporting this bill was to increase the pay nurses could make, post retirement, without corresponding reductions in retirement benefits. In particular, this lobbying activity was undertaken on behalf of current state employed nurses, represented by Local 5019. (Tr. 50:17-21).⁵

The bill reads in relevant part:

“(a)ny retired member who retired from service as a registered nurse may be employed or reemployed, on a per diem basis, for the purpose of providing professional nursing care and/or services at a state operated facility in Rhode Island (). In no event shall “part time” mean gross pay of more than twenty-four thousand dollars (\$24,000) in any one calendar year. Any retired nurse who provides such care and/or services shall do so without forfeiture or reduction of any retirement benefit or allowance the retired nurse is receiving as a retired nurse ().”

⁴ Had the bill passed, such nurses would have been permitted to make \$24,000 in any one calendar year as opposed to just \$12,000. Jt. Ex. 7 at 3.

⁵ There are approximately 150 nurses in that bargaining unit. R-1.

Jt. Ex. 7 at 3 (emphasis added).⁶

The link here between the Union's support of the Retirement System bill and its representational functions is, again, remarkably close. The bill, had it passed, would have doubled the earnings current bargaining unit employees could make post retirement without a corresponding reduction in their retirement benefits.

That passage of this bill would have directly affected mandatory subjects of bargaining (wages, retirement benefits) makes it a compelling example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

c. **Mental Health Care Funding.**

The union also lobbied in support of increased mental health care funding in Vermont on behalf of several local affiliates, among them, Local 5051 at Healthcare and Rehab Services of Southeastern Vermont (HCRS). (Tr. 99:24-25, 100:1-20).

The Union's legislative goal here was to secure State funding for HCRS, which, under the CBA in effect at the time, was to be used to address pay inequities among bargaining unit employees. Indeed, Local 5051 and HCRS negotiated two (2) provisions into their July 1, 2006 – June 30, 2009 CBA that called for joint labor management lobbying for state funding, and a mechanism to distribute those funds to address pay inequities among bargaining unit employees.

One such provision reads in relevant part: “**(d)uring this agreement, both parties agree to cooperate with each other in achieving favorable legislation and regulation to enhance the funding available to the Agency** which is currently subject to flat funding.” J-15 at 45 and 47

(emphasis supplied). A companion provision reads as follows:

⁶ It is settled Board law that bargaining on behalf of current bargaining unit employees over future retirement benefits is mandatory. See e.g. *Midwest Power Systems, Inc.*, 323 NLRB 404, 406 (1997)(citing *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971) and *Timmus Optical Co., Inc.*, 205 NLRB 974, 981 (1973)). There, the employer was found to have violated Sections 8(a)(5) and (1) of the Act when it implemented unilateral “changes to the future retirement medical and life insurance benefits of current bargaining unit employees.” *Id.* Here, the Union was also representing current bargaining unit employees with regard to future benefits. (Tr. 50:17-25, 51:1-5).

“(i)n the event, the State provides HCRS with new money earmarked for personnel costs over and above that which is already covered by the current state budget, either party may ask to reopen the agreement solely on the issue of utilizing the portion of such funds apportioned to the bargaining unit to help address internal pay equity issues among and between bargaining unit employees in the same bargaining unit job classification. Upon such limited reopener, both sides agree to meet at least twice a month to discuss whether and to what extent such funds may be used to rectify such issues.”

J-15 at 39 (emphasis supplied).

The link here between the Union’s lobbying in support of increased mental health care funding and its representational functions is, yet again, remarkably close. Had the measure passed, it could have resulted in an infusion of funding to cover personnel costs at HCRS. This, in turn, would have triggered the contractual mandate to address internal pay inequities among and between bargaining unit employees.

That passage of this measure could have directly affected a mandatory subject of bargaining (wages) makes it yet another compelling example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

2. The lobbying with regard to hours of employment.

There is one piece of legislation in issue that the union lobbied in support of in the State of Vermont that involved the hours of work of bargaining unit employees: the Mandatory Overtime bill. The Union’s legislative goal there was to prohibit hospitals from forcing bargaining unit employees to work in excess of their scheduled hours.

a. **The Mandatory Overtime Bill (Jt. Ex. 14).**

As noted above, the Mandatory Overtime bill was written to prohibit hospitals from requiring health care workers to work mandatory overtime.⁷ The bill reads in relevant part: **“(n)o**

⁷ Mandatory overtime occurs when an employer requires an employee to work beyond their regular hours. (Tr. 98:19-20).

hospital shall require any employee to work in excess of eight hours per day, in excess of 40 hours per week, or in excess of scheduled hours.” Jt. Ex. 14 at 3 (emphasis supplied).

The bill, had it passed, would have been applicable to Copley Hospital and Retreat Healthcare. (Tr. 98:9-17). The Union represents 105 registered nurses at Copley Hospital, Local 5109, and, as noted above, 429 professional and non-professional employees at Retreat Healthcare, Local 5086. R-1.

Mandating these employees to work overtime is particularly onerous:

“one of the most onerous aspects of working conditions for our members in health care is the exercise of mandatory overtime. And that is, for instance, **most typically an employer requires an employee to work a double shift**. 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 from 7a to 11p, that’s very onerous both physically from a work point of view and how it adversely affects family life or personal life. And so for our members at Retreat Healthcare and Copley Hospital, the right of an employer to impose mandatory overtime, as they do frequently, is really onerous.”

(Tr. 98:23-24, 99:1-9) (emphasis supplied).

It is settled Board law that overtime is a mandatory subject of bargaining. See e.g., *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001). Indeed, hours of work are, by definition, among the subjects over which employers and unions must bargain in good faith:

“**to bargain collectively is the performance of the mutual obligation** of the employer and the representative of the employees **to meet at reasonable times and confer in good faith with respect to wages, hours,** and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder ().”

29 U.S.C. §158(d) (emphasis supplied).

Similar statutory language appears in §159(a) of the Act:

“[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit **for the purposes of collective**

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

29 U.S.C. §159(a) (emphasis supplied).

The link here between the Union’s support of the Mandatory Overtime bill and its representational functions could not be closer. Had the bill passed, Copley Hospital and Retreat Healthcare would have been prohibited from forcing bargaining unit employees from working in excess of their scheduled hours.

That this bill, had it passed, would have directly affected a mandatory subject of bargaining (overtime), makes it another compelling example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

2. The lobbying with regard to other terms and conditions of employment.

There are three (3) pieces of legislation in issue that the union lobbied in support of that involved other terms and conditions of employment: one bill in the State of Vermont: the Safe Patient Handling bill, and two (2) bills in the State of Rhode Island: the Hospital Merger Accountability Act and the Nursing Shortage bill.

a. **The Safe Patient Handling Bill (Jt. Ex. 13).**

The Safe Patient handling bill acknowledges the need for safe patient handling measures in order to reduce the risk to health care workers of suffering musculoskeletal injuries while handling patients at work: **“(w)ithout adequate resources such as special equipment and specially trained staff, lifting patients, whether the patients are overweight or not, increases the risk of injury to () health care providers when the patient is being moved, being repositioned, or receiving other care;”** **“(h)ealth care workers lead the nation in work-related musculoskeletal disorders;”** **“(s)afe patient handling reduces injuries.”** Jt. Ex. 13 at 2-3 (emphasis supplied). The bill, in turn, calls for hospitals to establish a safe patient handling

program pursuant to which hospitals would purchase the equipment and aids necessary to safely handle patients. Jt. Ex. 13 at 5.

In addition, the bill calls for hospitals to provide training to health care workers, provided during paid work time, to train them on how to effectively use such equipment and aids to safely handle patients and reduce the risk of injury. Jt. Ex. 13 at 5.

The Union's legislative goal in supporting this bill was to secure safe patient handling measures in hospitals where bargaining unit employees worked to as to minimize the risk of physical injury, corresponding wage loss, and corresponding abbreviations in employee careers.

The bill, had it passed, would have been applicable to Copley Hospital and Retreat Healthcare. (Tr. 94:3-21).⁸ Those bargaining unit employees do a lot of patient handling, including lifting, transferring and moving of patients as part of their job. (Tr. 95:6-8). As a result, they suffer large numbers of work related injuries. (Tr. 95:11-12). When this occurs, they suffer a loss in wages:

Q. In the event that somebody is injured on the job and takes a Workers' Comp leave, would that result in a loss of wages or would it not?

A. It does, because **Workers' Comp does not have a dollar for dollar replacement cost for the employees.** And there are also the roll ups like vacation accruals, pension contributions, things of that nature.

(Tr. 96:18-24) (emphasis supplied).

Moreover, the careers of these employees are shortened by the cumulative effect of unsafe patient handling:

“And then there's the cumulative effect of nurses, or certified nursing assistants or mental health care workers lifting, pulling and transferring patients day in and day out over time. **And over time that, especially in the work areas like the medical floors, the surgical floors, where the lifting is heaviest, it shortens careers because they simply can't meet the physical demands of the job.**”

⁸ As noted above, the Union represents 105 registered nurses at Copley Hospital and 429 professional and non-professional employees at Retreat Healthcare. R-1.

(Tr. 97:12-18) (emphasis supplied).

It is long settled law that safety practices in the workplace are mandatory subjects of bargaining. See e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 221-222 (1964).

Moreover, there are several Board decisions that strongly support the argument that safe patient handling and safety equipment used for the purpose of handling patients are mandatory subjects of bargaining. See e.g., *Maple View Manor*, 320 NLRB1149 (1996).

There, the union requested information for bargaining with respect to “facility procedures concerning lifting of patients (), and a listing of any and all mechanical apparatuses used to assist in lifting.” *Id.*, at 1150. The Board held that this information was “presumptively relevant for collective bargaining and must be furnished on request.” *Id.* at 1151. See also, *Parr Lance Ambulance Service*, 262 NLRB 1284 (1982). There, ambulance service employees refused to take out an ambulance because it lacked the proper safety equipment. *Id.*, at 1285. The Board held that that was protected activity because of the relationship between the employees’ complaint of the lack of safety equipment and their “working conditions.” *Id.* at 1286.

The link here between the Union’s support of the Safe Patient Handling bill and its representational functions is so close that it would have directly affected mandatory subjects of collective bargaining (safety practices). It is, therefore, a persuasive example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

b. The Hospital Merger Accountability Act (J-6).

At the time the Union was lobbying in support of the Hospital Merger Accountability Act, there were merger talks going on between the two (2) largest hospital systems in Rhode Island, Lifespan Corporation and Care New England. (Tr. 45:8-12). Lifespan is the largest hospital system in Rhode Island (Tr. 45:15-16); Care New England is the second largest. (Tr.

46:1-2). The Lifespan system is comprised of four (4) hospitals, Rhode Island Hospital, Miriam Hospital, Bradley Hospital and Newport Hospital. (Tr. 45:18-19). The Care New England system is comprised of three (3) hospitals, Kent Hospital, Women & Infants Hospital and Butler Hospital. (Tr. 46:4-5).

The bill was designed to regulate hospital mergers that result in an entity obtaining ownership or effective control of more than 50% of all licensed hospital beds in Rhode Island. J-6 at 1. In particular, the bill empowers a health services council:

“(t)o review and approve or deny any business plan (including relocation, (), contraction, () or closure of hospital services) submitted by an entity ().”

J-6 at 2 (emphasis supplied).⁹

The Union represents 2,200 nurses and technical employees at Rhode Island Hospital, which, as noted above, is part of the Lifespan system. (Tr. 45:22-23). Similarly, the Union represents 619 nurses at Kent Hospital, which, as noted above, is part of the Care New England system (CNE). (Tr. 46:15-16).

The Union’s legislative goal in supporting this bill was to protect the jobs of bargaining unit employees at Kent Hospital and Rhode Island Hospital in the event of a merger of the two (2) systems:

“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 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.”

(Tr. 47:1-10) (emphasis supplied).

⁹ The Health Services Council is part of the Rhode Island Department of Health. (Tr. 47:24-25, 48:1).

Had the bill passed, it would have enabled the Union to appear before the Health Services Council to intervene and advocate for the protection of jobs of bargaining employees at Kent and/or Rhode Island Hospital in the event of a proposed consolidation, relocation or closure of services. (Tr. 48:19-25). More specifically, passage of the bill would have enabled the Union to appear before the Health Services Council at an evidentiary hearing to oppose business plans that could result in bargaining unit job loss:

“The union would have the opportunity to appear before the Health Services Council and present evidence and testimony potentially in opposition to proposed transfers of work, consolidation of work or closure of services that would have resulted in job loss of our members.”

(Tr. 50:4-8).

There are a series of Board decisions that strongly support the argument that the effects of hospital mergers on, for example, job security, are mandatory subjects of bargaining. See e.g., *Mercy Hospital Partners*, 358 NLRB No. 69 (2012). There, two (2) hospitals, Mercy and Hackley merged. *Id.*, slip op. at 5. As a result of the merger, bargaining unit work was to be relocated from Hackley to Mercy. *Id.*, slip op. at 1. The Board held that the employer had “a duty to bargain with the union over the effects of the decision” to relocate, characterizing that subject matter as “a mandatory subject of bargaining.” *Id.*, slip op. at 2.¹⁰

The link here between the Union’s support of the Hospital Merger Accountability Act and its representational functions with regard to, among other things, effects bargaining over the potential impact of an enormous hospital merger on terms and conditions of employment is remarkably close. It is, therefore, yet another appropriate example of lobbying activity that should be subject to a rebuttable presumption of germaneness.

¹⁰ See also, *Children’s Hospital of San Francisco*, 312 NLRB 920, 930-931 (1993)(Board held that information sought by the union with regard to a hospital merger was relevant to bargaining over the effects of such merger); *Providence Hospital*, 320 NLRB 790, 794 (1996)(same); *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989)(same).

c. **The Nursing Shortage Bill (Jt. Ex. 11).**

The Nursing Shortage bill acknowledges the dangers associated with the nursing shortage in the State of Rhode Island. The bill reads in relevant part: “(t)here is a growing shortage of qualified nurses and healthcare professionals available to meet the needs of patients in healthcare facilities in Rhode Island” and that “**(i)t is vital () that incentives be provided to attract and retain nurses and healthcare professionals to provide service in healthcare facilities throughout the state.**” Jt. Ex. 11 at 1 (emphasis supplied). As such, the bill calls for the establishment of a center for health professions “for the purpose of developing a sufficient, diverse, and well trained healthcare workforce,” with an initial focus on the nursing shortage. Jt. Ex. 11 at 2. In particular, the bill contemplates creating “**incentives () to () retain nurses () to provide service in healthcare facilities throughout the state.**” Jt. Ex. 11 at 2 (emphasis supplied).

The Union represents thousands of nurses at hospitals throughout the state of Rhode Island. R-1. The Union’s legislative goal in supporting this bill was to address the adverse impact the nursing shortage was having on the working conditions of these nurses:

A. **The shortage of registered nurses was having a severe effect on our members’ working conditions. When we don’t have enough nurses and we have high vacancy rates, we have a number of adverse impacts on our members.** For example, nurses are sometimes asked to handle more patients than they can safely care for. **They are sometimes required to float from one unit to another.**

Q. Can you just give a little more detail about what floating is?

A. Sure. Most nurses are assigned to a particular unit, which has a specialty. They care for certain types of patients. At times when there are shortages or unfilled positions hospitals will direct nurses to float to units they don’t normally work on and for which they may not feel comfortable or prepared. It’s a source of concern to our members. And so we work to try to reduce the occasion of floating.

Q. Anything else?

A. Similarly, shift rotation. Nurses are –

Q. Can you explain what that is please?

A. **Most nurses are hired to work on a particular shift; days, evenings, nights. But at times when there are staffing vacancies and shortages this often increases the frequency in which nurses are required to work something other than their ordinary shift.** And that too is very undesirable to nurses. 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.

(Tr. 55:1-25, 56:1-3) (emphasis supplied).

It is settled Board law that floating and shift rotation are mandatory subjects of bargaining. See e.g., *St. Anthony Hospital Systems*, 319 NLRB 46 (1995). There, the Board held that the employer violated the Act when it made unilateral changes to, *inter alia*, “guidelines for floating utilization between hospital units.” *Id.*, at 50. See also, *Hospital San Cristobal*, 356 NLRB No. 95, slip op. at 5 (2011)(shift assignments are mandatory subjects of bargaining); *Indian River Memorial Hospital*, 340 NLRB 467, 468 (2003)(same).¹¹

Similarly, incentive pay for nurses is a mandatory subject of bargaining. See e.g., *Hospital San Cristobal*, Case No. 24-CA-11630, slip op. at 5, 7 (2011).

The link here between the Union's lobbying in support of this bill and its representational functions regarding terms and conditions of employment such as floating, shift rotation, staffing and incentive pay is, again, remarkably close. It is, therefore, another persuasive example of lobbying activity that should be subject to a rebuttable presumption of germaneness.¹²

¹¹ It is also settled Board law that hospital staffing is a mandatory subject of bargaining. See e.g., *Beverly Health & Rehabilitation Services*, 328 NLRB 959, 961 (1999)(hospital staffing relates directly to terms and conditions of employment); *Good Samaritan Hospital*, 335 NLRB 901, 904 (2001)(same).

¹² The examples of lobbying activity that the Union has provided herein that should be subject to the rebuttable presumption of germaneness are at least as “concrete” as those provided by the Board, which include “lobbying for or against minimum wage legislation, professional licensing and certification legislation [], and State supplements to the Worker Adjustment and Retraining Notification (WARN) Act.” *Kent Hospital*, *supra*, at 9. Conversely, the bills the Union lobbied in support of are much more *closely linked to the union's representational functions* and likely to *affect subjects of collective bargaining* than “lobbying related to general economic stimulus or broad social

Conclusion

It is settled Board law that lobbying expenses that are germane to collective bargaining, contract administration, or grievance adjustment are chargeable. See *Kent Hospital*, supra, slip op. at 1 (2012). Therein, citing Transport Workers Local 525 (Johnson Controls World Services), 329 NLRB 543 (1999), the Board observed:

“chargeable expenses need not be incurred within the narrow confines of a union-employer relationship, and we find the case instructive on the chargeability of lobbying activities that directly advance the union’s representative role.”

Id., slip op. at 5, fn. 26 (emphasis supplied).

In *Johnson Controls*, the Board affirmed an Administrative Law Judge’s (ALJ) holding that the test to be applied when determining whether lobbying expenses are chargeable is whether they are germane to collective bargaining or . The ALJ opined:

“With respect to lobbying expenses incurred by Respondents I am persuaded by the () argument that lobbying is not per se nonchargeable, and that the test is whether they are germane to collective bargaining, (), or supports activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative.”

Johnson Controls, supra, at 560 (emphasis supplied)(citations omitted).¹³

The *Kent Hospital* Board also cited *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), wherein the United States Supreme Court held that the direct costs of collective bargaining, contract administration and grievance adjustment are chargeable; as well as expenses related to activities normally or reasonably undertaken by a union to effectuate its duties as exclusive bargaining agent:

or environmental policies,” which the Board recognizes “**might** be difficult to view as presumptively germane to a union’s representative functions.” *Id.*, slip op. at 9 (emphasis supplied).

¹³ There is also at least one published advice memo that has some instructive value on this issue. See Carpenters Local 751 (Largo Construction, Inc.), Advice Memorandum, Case 32-CB-5560-1 (2003)(“**the Board has found that certain expenditures that might reasonably be characterized as political action, such as legislative, executive, and administrative agency lobbying, may be chargeable where they concern matters that are germane to collective bargaining and representational activities.**” (emphasis supplied)(citations omitted).

“the test 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. Under this standard, **objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.**”

Id., at 448 (emphasis added).

Here, the lobbying activity undertaken by the Union on behalf of bargaining unit employees in the States of Vermont and Rhode Island while not *within the narrow confines of a union-employer relationship*, was clearly *so closely linked to*, if not inextricably intertwined with, *its representational functions that it would directly affect subjects of collective bargaining* (mandatory subjects such as wages, hours, other terms and conditions of employment). Indeed, the Union’s lobbying activities are of the type that any reasonable observer would consider to be *normally or reasonably employed to effectuate the duties of exclusive representative*.

Based on the foregoing, it is entirely appropriate for the Board to apply rebuttable presumptions of germaneness to the lobbying activities at bar and to such activity in the future.¹⁴

¹⁴ Assuming, *arguendo*, that the presumptions of germaneness here are rebutted, the lobbying activity in issue is still likely chargeable: “a lobbying expense that is not presumptively germane may still be shown to be chargeable if the particulars of the legislation, industry, or employee group, for example, make it germane to collective bargaining, contract administration, or grievance adjustment.” *Kent Hospital*, *supra*, slip op. at 9. To be sure, the lobbying activity in the instant case is germane given the industry (health care) and the employee group (health care workers).

CERTIFICATION OF SERVICE

I hereby certify that a copy of this brief was filed electronically at <https://mynlrb.nlr.gov/efile>, and sent by certified mail to Mr. Donald Firenze at Region 1 of the National Labor Relations Board, 10 Causeway Street, 6th floor, Boston, MA 02222-1072, and by certified mail to Mr. Mathew Muggeridge of the National Right to Work Defense Foundation at 8001 Braddock Road, Suite 600, Springfield, VA 22160, on February 12, 2013.

/s/ Elizabeth Wheeler

Elizabeth Wheeler, UNAP Office Manager