UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED NURSES &
PROFESSIONALS,
Respondent,

and 01-CB-011135

JEANETTE GEARY,
Charging Party.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union file this brief in response to the request of the National Labor Relations Board for *amicus* briefs addressing generally "how the Board should define and apply the germaneness standard in the context of lobbying activities," and "[i]n particular, . . . the appropriateness of presumptions concerning germaneness" of various "types of lobbying activities." D&O 9.

For the reasons stated below, we submit that the Board should follow the same "case-by-case" approach to determining which lobbying activities may be charged to objecting fee payers as it does with regard to litigation. *California Saw & Knife Works*, 320 NLRB 224, 238 (1995). Thus, the Board should not adopt any presumptions concerning the germaneness of lobbying activities. And, reviewing such activities on a case-by-case basis, the Board should treat as chargeable only "representation on legislative and administrative agency matters [that is] closely related to the negotiation or

administration of contracts and working conditions." *Transport Workers Local 525*, 329 NLRB 543, 544 (1999).

The starting point must be the Supreme Court's holding in *Machinists v. Street*, 367 U.S. 740 (1961), that Railway Labor Act "§ 2, Eleventh is to be construed to deny the unions, over an employees' objection, the power to use his exacted funds to support *political* causes which he opposes." *Id*. at 768-69 (emphasis added). In *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988), the Court treated this core construction of the RLA as "controlling" with regard to the interpretation of § 8(a)(3) of the National Labor Relations Act, "for § 8(a)(3) and § 2, Eleventh are in all material respects identical." The Board has correctly observed that certain chargeability determinations under the RLA rest "principally . . . on the legislative history of the 1951 amendment that added Section 2, Eleventh to the Railway Labor Act." *Food & Commercial Workers Locals 951, 7 & 1036*, 329 NLRB 730, 736 (1999). However, there is no question that *Street*'s core holding regarding "political causes" applies under the NLRA.

The fact that "political" expenditures are *per se* nonchargeable is relevant to the question of charging objectors for "lobbying." As the *Street* opinion observes, "expenditures for lobbying purposes, [and] for the the promotion or defeat of legislation" are often closely related to expenditures "for political campaign purposes." 367 U.S. at 769 & n. 17. Indeed, the most obvious reason for unions to engage in political campaigning is to elect candidates who will be sympathetic to the interests of the union-represented and thus responsive to the unions' lobbying effort on behalf of those

employees. As Justice Frankfurter demonstrated in his *Street* dissent, the "political activity of American trade unions . . . [is] indissolubly relat[ed] to the immediate economic and social concerns that are the *raison d'etre* of unions." 367 U.S. at 800. The *Street* majority did not attempt to refute Justice Frankfurter's showing but held nevertheless that no matter how reasonably related to representing employee interests union political activities may be, objecting nonmembers had a right to withdraw their financial support from political activities.

Given the connection between lobbying and political activities recognized in the *Street* opinion, we submit that lobbying expenditures, like political expenditures, constitute a special category of chargeability determination. We do not mean to suggest a complete identity between the two, so that lobbying expenditures would be treated as *per se* nonchargeable to objectors. Lobbying activities can be targeted to support measures that are "closely related to the negotiation or administration of contracts and working conditions." *Transport Workers Local 525*, 329 NLRB at 544. Support for a political candidate can never be targeted in that manner, because once in office the candidate will inevitably address a wide range of issues and cannot be controlled in any regard by the union. That difference suggests that some lobbying expenditures can be charged to objecting nonmembers, even though no political expenditures can be so charged.

In sum, we submit that because of the relationship between union political activity and some union lobbying activity and because union political activities are *per se* nonchargeable to objectors, the Board should proceed cautiously in this regard by making

case-by-case chargeability determinations regarding lobbying activities and not by employing any categorical presumptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 19, 2013, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union as *Amici Curiae* by electronic mail, or by U.S. mail for those parties for whom electronic mail addresses are not available, on the following:

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