

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:)
)
United Nurses and Allied Professionals,)
(Kent Hospital),)
) Case 01-CB-011135
and)
)
Jeanette Geary.)
)

**OPERATING ENGINEERS LOCAL 150
BRIEF IN SUPPORT OF NLRB PROPOSED
PRESUMPTIONS OF CHARGEABILITY**

INTRODUCTION

On December 14, 2012, the National Labor Relations Board (“NLRB” or “the Board”) issued its Decision in this case addressing “several novel issues arising from the Supreme Court’s decision in *Communication Workers v. Beck*.” *United Nurses and Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (slip op. at 1) (2012). There, the Board held that (slip op. at 8):

(1) lobbying expenses may be charged to objectors, but only if they are germane to the union’s role in collective bargaining, contract administration or grievance adjustment, and (2) extra-unit lobbying expenses may be charged only if they were incurred for services that are otherwise chargeable and that may ultimately inure to the benefit of employees in the objector’s bargaining unit because of the union’s participation in an expense-pooling arrangement.

The Board further observed, however, that in so holding, it left open the question of “whether particular lobbying expenses satisfy the germaneness test.” *Id.* at 9. The Board then proposed the use of “rebuttable presumptions of germaneness,” and solicited briefs from stakeholders on how to define “the germaneness standard in the context of lobbying activities;” and “the appropriateness of presumptions concerning germaneness.” *Id.* Local 150 of the International

Union of Operating Engineers, AFL-CIO (“Local 150” or “the Union”) submits this Brief in response to the Board’s invitation and its support of its proposed presumptions.

STATEMENT OF FACTS

A. Local 150 and the Employees It Represents.

Local 150 represents construction workers and employees in other industries including those employed in the construction material production, testing and heavy equipment rental and repair industries in northwest Indiana, northern Illinois and eastern Iowa (Certification of James M. Sweeney dated February 19, 2013 (hereinafter Sweeney Cert. ¶ __)) at ¶ 2, attached hereto as Attachment A). James M. Sweeney is the elected President-Business Manager of Local 150, a position he has held since 2008 (Sweeney Cert. ¶ 1). The Union’s geographic jurisdiction is divided into eight districts, each of which has its own Union hall (Sweeney Cert. ¶ 3).

Local 150 negotiates its major construction contracts with various multi-employer bargaining associations based upon this District structure (Sweeney Cert. ¶ 4). Most Local 150 members work under one or more of the Heavy and Highway and Underground agreements, which cover mass earth excavation, roadwork, and underground utility work (*id.*). In Illinois, there are essentially eight separate construction bargaining units: four covering heavy, highway and underground work, and four covering building work (*id.*). Building construction work is similarly covered by separate agreements with each of those four groups (*id.*). In Indiana, the Union negotiates three different heavy and highway agreements and two separate building agreements covering its Districts 6 and 7 (*id.*). Local 150 also negotiates construction contracts with multi-employer associations and other employers in the landscape, railroad, and marine construction industries (*id.*).

Local 150 also negotiates collective bargaining agreements with a variety of other non-construction industry employers and employer associations (Sweeney Cert. ¶ 5). Such contracts include multi-employer agreements covering individuals working in the aggregate construction materials industry, working in the various limestone quarries, and sand and gravel pits throughout the Union's jurisdiction (*id.*). The Union also represents the mechanics and other employees engaged in the heavy equipment and aerial lift rental and repair industry; as well as heavy equipment operators working in landfills, and handling materials and slag recycling in the Indiana steel mills (*id.*).

Each of Local 150's district offices administers an exclusive hiring hall created under the collective bargaining agreements with construction industry employers (Sweeney Cert. ¶ 7). Union members and non-members register for referrals to employers, based primarily upon their experience and qualifications for employment, their length of service with any given employer as well as in the industry, and experience in any particular geographic area (*id.*).

Local 150 is party to various collective bargaining agreements which create Taft-Hartley Trust Funds designed to provide benefits to individual employees (Sweeney Cert. ¶ 8). Under those collective bargaining agreements negotiated with construction industry and other employers, employers are required to contribute negotiated dollar amounts for every hour work by covered employees (*id.*). The Union is able to monitor work levels of its members by payments of fringe benefit contributions remitted to the Trust Funds based upon hours worked (*id.*). Employers also contribute to an Industry Advancement Fund established pursuant to the Labor Management Cooperative Committee provisions of Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(9) (*id.*).

B. The Union's Political and Lobbying Activity.

Local 150 has long adhered to the political philosophy attributed to the first president of the American Federal of Labor, Samuel Gompers, that labor should “reward its friends and punish its enemies,”¹ regardless of political party affiliation (Sweeney Cert. ¶ 10).² Hence, Local 150 routinely supports political candidates affiliated with the major political parties, as well as independents running in local municipal elections (*id.*). The Union's partisan political activities are generally supported financially through federal and state political action committees in which it participates (*id.*).

The Union also engages in a variety of lobbying activities supported by the Union's general revenues (Sweeney Cert. ¶¶ 6, 11). The Union's principal lobbying activities are most often directed at securing legislative appropriations for public works construction (Sweeney Cert. ¶ 9). Union representatives and others in related entities routinely also promote prevailing wage laws, employee training, licensing and certification, and the protection of state unemployment insurance and most recently to promote a collectively bargained workers compensation program (Sweeney Cert. ¶ 11).

C. The Great Recession of 2008 and the Collapse of the U.S. Housing Market.

Beginning in 2008, it became clear to the Union's leadership that the U.S. economy was weakening generally, and that in particular, the housing “bubble” was about to burst (Sweeney Cert. ¶ 17). Based on general media accounts, and conversations with government and industry

¹ While this is probably not an exact quote from Gompers, under his leadership the AFL adopted such a policy in 1906. *See* Bernard Mandel, *Samuel Gompers*, at 287 (Antioch Press, 1963).

² The Union's bi-partisan political strategy reflects generally the sentiments of its membership. By its most recent estimates, 72% of the Union's members are registered to vote. Of that number, 49% consider themselves Republicans while the other 51% are Democrats (Sweeney Cert. ¶ 10).

leaders, Local 150 believed that construction work was going to be reduced dramatically especially in the residential housing industry (*id.*).³

Residential housing construction has provided jobs for Operating Engineers in the Chicago metropolitan area for decades (Sweeney Cert. ¶¶ 16-17). The process of converting farm fields into housing developments includes mass excavation of earth; “cutting in” roads; digging basements; laying underground lines for water, sewer and other utilities; then paving roads and landscaping home sites, all of which involve the operation of heavy equipment in a market still dominated by Union labor (Sweeney Cert. ¶ 16). Commercial construction of strip malls, gas stations and fast food restaurants attendant to housing developments also create work opportunities for Operating Engineers and other construction workers (*id.*). Local 150 believes that between 2000 and the housing market collapse in 2008, between 40 and 45% of its membership was employed in this work (*id.*).

The onset of the “Great Recession” in 2008 quickly brought unemployment to millions of Americans (Sweeney Cert. ¶ 8). The U.S. construction industry was particularly hard hit; employees represented by Local 150 were no exception. Hours worked by Local 150’s membership reached all time highs of over 25 million man hours in 2006, and peaked at 25.3 million in 2007 (*id.*). Hours worked in 2008 fell by over 1 million to 24.1 million. Employees represented by Local 150 lost another 5 million hours in 2009, dropping to just over 19 million. The recession bottomed out for Local 150 members and non-members in 2010 and 2011, when hours worked fell to 17 million in each of those years (*id.*).

³ For an analysis of the effect of the “Great Recession” on the U.S. housing industry, *see, generally*, Andrew Ross Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System – and Themselves* (Viking Adult, 2009).

D. The Illinois Capital Bill 2009.

Over the past several decades, both the states of Illinois and Indiana have financed public improvements programs through major pieces of capital spending legislation (Sweeney Cert. ¶ 18). In Illinois, the last such bill was called “Illinois First,” which generated \$13 billion of construction work between 1998 and 2003. In Indiana, the “Major Moves” program financed by the sale of the Indiana Tollway in 2004 funded construction projects statewide for the past ten years (*id.*). Because the Major Moves program was still generating substantial roadwork in Indiana and there were major industrial expansion projects underway there, we turned our political attention to the state of Illinois in 2008 (*id.*).

After the November 2008 elections, Local 150 began a comprehensive effort to lobby Illinois state officials to pass a new capital bill (Sweeney Cert. ¶ 19). Along with Chicago Federation of Labor President Dennis J. Gannon, Local 150 met with Illinois Governor Pat Quinn and members of his staff, as well as the Democratic and Republican leadership in the Illinois Senate and House to encourage support for such a capital infrastructure spending program (*id.*). When the Illinois legislature convened in January 2009, Local 150 assigned two registered lobbyists to work full-time in the state capitol of Springfield, Illinois, to generate support for the capital bill (*id.*). Travel and lodging expenses and the salary and expenses of the full time lobbyists came from the Union’s general revenues (*id.*). Between January and May 2009, Local 150, the Chicago District Council of the Laborers International Union and various contractor groups also worked to generate public support for a capital bill (*id.*). Using PAC money, the Union helped fund a television ad campaign sponsored by the “Safe Roads Alliance,” which highlighted the generally poor condition of Illinois highways (*id.*).

Local 150 also organized support from its members to make telephone calls to their state legislators and to send postcards to them supporting the Capital Bill (Sweeney Cert. ¶ 20). The Union mailed approximately 16,000 solicitations to all its Illinois members paid for from the general revenue fund which enclosed postcards to be mailed to state legislators (*id.*). Local 150 generated an overwhelming response from its members of nearly 50% (*id.*). For several months during the spring of 2009, legislators confirmed receiving hundreds of postcards from Local 150 members (*id.*); and hundreds more telephone calls from Local 150 members in support of the capital bill (*id.*).

In May 2009, the Legislature passed the Capital Bill, signed by the Governor two months later (Sweeney Cert. ¶ 21). The effect of the Illinois capital bill was substantial (Sweeney Cert. ¶ 22). In January 2010, the Illinois Department of Transportation (“IDOT”) conducted its largest project letting in state history (*id.*). Hundreds of millions of dollars were devoted to 279 separate projects statewide (*id.*). Two of the biggest projects included a \$100 million reconstruction of the Eisenhower expressway from Chicago to its western suburbs, and a \$350 million reconstruction of lower Wacker Drive in the City of Chicago, both of which occurred in Local 150’s jurisdiction.

Government studies suggest that every billion dollars spent on infrastructure generates between 25,000 and 35,000 jobs; the Illinois Capital Bill had an immediate effect on employment of Local 150 members (Sweeney Cert. ¶ 23). While housing construction in Illinois remains stagnant, hours worked steadily stabilized after 2010 and increased by over 1 million to over 18 million in 2012 in large measure due to the Illinois Capital Bill (Sweeney Cert. ¶¶ 8, 23).

In 2011, Local 150 helped coordinate the attendance of several hundred of its members at public hearings conducted by the Illinois State Toll Highway Authority over plans to fund a

major capital construction program through increased tolls (Sweeney Cert. ¶ 24). Individuals members and other union representatives made presentations at these hearings in support of such increases which were eventually adopted by the Tollway Authority (*id.*). Those increases funded almost \$1 billion worth of construction work exclusively within Local 150's geographic jurisdiction in Illinois in 2012 and another \$1.3 billion of work scheduled for 2013 (*id.*). The largest tollway project this year is the addition of one lane in each direction on I-90 from the Chicago suburb of Schaumburg to Rockford, Illinois – a distance of over 30 miles (*id.*).

The Indiana “Major Moves” program is expected to exhaust its last revenue during this work season in 2013 (Sweeney Cert. ¶¶ 9, 18). Local 150 has already begun lobbying Indiana state officials to replace that program with another designed to fund road work and other infrastructure improvements in Indiana (Sweeney Cert. ¶¶ 9, 18).

ARGUMENT

As the Board noted in *United Nurses*, the rights protected by Section 7 of the Act are not limited to collective bargaining with an employer, but extend to other activities for mutual aid and protection. 359 NLRB No. 42, slip op. at 7, fn. 46-47. Relying on *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978), the Board observed that, “legislative proposals involving core employee concerns such as wages, hours and working conditions all clearly raise issues that relate to a Union’s most essential representative function.” *Id.* Under *Eastex*, employee distribution of flyers is protected activity, as is the appearance of employee representatives before legislative committees. *United Nurses*, 359 NLRB No. 42, n. 46 *relying on Bethlehem Shipbuilding Corp. Ltd. v. NLRB*, 114 F.2d 930 (1st. Cir. 1940). Hence, as the Board observed, the Supreme Court’s formulation of the appropriate standard in *Beck* requires that chargeable expenses be “germane to collective bargaining, contract administration, and grievance adjustment;” and “places the focus

squarely on a union's representative duties rather than other secondary concerns." *United Nurses*, 359 NLRB No. 42, slip op. at 7.

A. Lobbying Expenses in Support of Legislation Related to Collective Bargaining Should Be Presumptively Chargeable to Objectors.

In *United Nurses*, relying on *Fruit & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 NLRB 730, 734 (1999) the Board proposed 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." *United Nurses*, 359 NLRB No. 42, slip op. at 9, n. 64. Local 150's lobbying activities offer numerous examples of a direct, positive relationship to the Union's representational duties.

1. Lobbying expenses closely linked to the Union's representation function that directly affect collective bargaining should be presumptively chargeable.

In explaining its proposed presumptions, the Board observed that, "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." *United Nurses*, 359 NLRB No. 42, slip op. at 9. The Board's "concrete examples" of lobbying expenses reasonably treated as presumptively germane and therefore chargeable included, "lobbying for or against minimum wage legislation, professional licensing and certification legislation affecting employees represented by the union, and State supplements to the Worker Adjustment and Retraining Notification (WARN) Act." *Id.*

One of the best examples of Local 150's lobbying efforts directly related to subjects of collective bargaining is the successful support in 2011 for Illinois legislation authorizing a pilot program to a collectively bargained workers' compensation system. Business and other groups

frequently cite the Illinois workers' compensation system's high costs creating an unfavorable business climate. Obviously workers' compensation benefits directly affect workers represented by the Union because it is so closely related to safety concerns which are often the subject of collective bargaining, and provide life support for employees and their families unable to enjoy their contract benefits due to injury. Several states in the United States have developed collectively bargained workers' compensation systems as an alternative to state administered systems that have reduced employer workers' compensation costs, in some cases dramatically (Sweeney Cert. ¶ 15). Regardless of the success of such a system, efforts by labor and management to solve this problem through collective bargaining is a classic use of the National Labor Policy.

The minimum wage legislation example given by the Board in *United Nurses* is closely analogous to the lobbying expenses incurred by the Union in support of enforcement of prevailing wage laws. State and federal prevailing wage laws seek to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. *Universities Research Association v. Coutu*, 450 U.S. 754, 773 (1981). Such laws thus help "level the playing field" by giving local labor and contractors a fair opportunity to participate in projects. *Id.* at 774. The Illinois Indiana Iowa Foundation for Fair Contracting ("IIIFFC") a labor management group supported by a collectively bargained LMCC created under Taft-Hartley Section 302(c)(9) (Sweeney Cert. ¶ 12), has been instrumental in enacting legislation designed to enhance state prevailing wage laws⁴ as well as one of the premier efforts to address misclassification of workers.⁵

⁴ See, e.g., Kara M. Pomerantz Principe, "The Tougher, Broader Illinois Prevailing Wage Act," 101 *Illinois Bar Journal* p. 482 (January 2013).

⁵ See Marc R. Poulos, Melissa Binetti, and Robert G. Reiter Jr., "Employees or Independent Contractors? A New Test for the Construction Industry," 96 *Illinois Bar Journal* p. 206 (April 2008).

Throughout its history, Local 150 has been involved in efforts to secure licensing for crane operators. Another specific example offered by the Board in *United Nurses*, such professional licensing and certification legislation seeks to upgrade the skills of individual workers represented by the Union and promote safety for construction workers and the general public. The Union worked unsuccessfully for a state crane licensing bill in Illinois in the 1980s, but then helped establish the Chicago Crane License a few years later (Sweeney Cert. ¶ 13). In the last several years, Local 150 representatives and others affiliated with the Union have participated in administrative hearings, developing federal regulation of construction cranes (*id.*).

2. Lobbying expenses directed toward passage of infrastructure spending legislation should be presumptively chargeable.

Much of Local 150's legislative lobbying activity is devoted to convincing state officials of the need to support public works construction (Sweeney Cert. ¶¶ 9, 21). Building roads, bridges, modern sewer and water systems and other public utilities are obvious sources of employment for operating engineers and other construction workers. Unlike the lobbying related to "general economic stimulus or broad social or environmental" legislation that the Board thought might be difficult to view as presumptively germane to the Union's representative function in *United Nurses*, 359 NLRB No. 42, slip op. at 9, such legislative work is much more like the job targeting programs the support for which the Board found to be Section 7 protected activity in *J.A. Croson Co.*, 359 NLRB No. 2 (2012). There the Board explained (*id.*, slip op. at 5):

The job targeting program is effectively a union's agreement with an employer to accept a pay cut in order to avoid layoffs or expand job opportunities for represented employees--a bargain that surely lies at the heart of activity protected by Section 7 of the Act. But in the construction industry, an employer often cannot guarantee that it can comply with its end of such a bargain because it must ordinarily bid for work through a competitive process. ...The job targeting program solves that unique problem by allowing the union to hold the wages donated by employees specifically for this purpose until the employer secures the

additional work. The strategy of job targeting to preserve and expand employment opportunities for represented employees thus plainly seeks to further legitimate goals under Section 7.

The best example of lobbying activity designed to enhance the employment opportunities of Local 150 represented employees was in the passage of the Illinois Capital Bill in 2009. The erosion of the housing market culminating in the financial crisis in late 2008 made it clear that the jobs held almost 45% of the Union's membership engaged in residential housing construction were at risk (Sweeney Cert. ¶¶ 16-17). At the beginning of 2009 Local 150's Officers and full-time registered lobbyists worked almost exclusively on the passage of a capital bill in Illinois (Sweeney Cert. ¶¶ 18-19). The passage of that bill in May 2009 led almost immediately to thousands of construction jobs throughout Illinois by 2010, stemming the tide of job loss and helping to turn around the Union's loss of work (Sweeney Cert. ¶¶ 20-22).

Preserving jobs and creating work opportunities for members is plainly Section 7 protected activity. *J.A. Croson Co.*, 359 NLRB No. 2 (2012). It is hard imagine a more "direct, positive relationship" between lobbying activity and the Union's representational objectives.

B. Local 150 Properly Distributes Its Lobbying Expenses Across the Many Bargaining Units it Represents.

In *United Nurses*, the Board held that "a union may charge objectors for extra-unit lobbying expenses as long as they are 'for services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization'" 359 NLRB No. 42, slip op. at 8. As the Board explained, this formulation "best accounts" for the unified-membership structure under which many unions operate, pooling resources with other locals into larger organization, and entering into an agreement that is "akin to insurance." *Id.* "When the contributing local partially subsidizes a chargeable activity that more immediately benefits another local, it does so with the assurance that its own costs of the same type will be

similarly subsidized by the other locals.” *Id.* Although not pooling resources with other locals, Local 150’s size and geographic scope requires it to pool resources across numerous bargaining units in an analogous way.

Local 150’s lobbying expenses are shared by all its members working in a variety of bargaining units and inure to their benefit in several ways. First, Local 150 represented employees enjoy significant mobility in their work. Hiring hall rules and the portability of fringe benefits enable individuals who may ordinarily reside and work in one particular district to seek and obtain work in another district covered by a separate collective bargaining agreement (Sweeney Cert. ¶ 7). The multi-billion dollar expansion of the BP Amoco Oil Refinery in Whiting, Indiana is a prime example of this. In 2007 and 2008, Local 150 lobbied federal and state officials to assist BP Amoco in obtaining the necessary operating permits it needed from the U.S. Environmental Protection Agency regulating air emissions (Sweeney Cert. ¶ 25). At its peak, the project employed 14,000 tradesmen, including over 700 Local 150 Operating Engineers, most of whom were crane operators (*id.*). The supply of crane operators working out of the Union’s Indiana districts was quickly exhausted, and several hundred more travelled from Illinois to meet the demand (*id.*).

While the impact of certain lobbying activity may be more direct on some members, other members can expect to benefit indirectly. One obvious example is in the Union’s effort to promote government spending on infrastructure. While members employed by road building contractors may secure long term employment directly on any given road project, members employed in the mining and processing of aggregate construction materials will benefit from increased demand for those materials. Similarly, Local 150’s mechanic members will benefit by the increased demand for the rental and repair of heavy equipment.

Members also benefit from sharing of lobbying expenses because such resources are “akin to insurance” in *United Nurses*, 359 NLRB No. 42, slip op. at 8, and used where the need is most immediate. Hence, lobbying to protect unemployment insurance benefits in Indiana may provide no benefit to members in Illinois, but lobbying for a collectively bargained workers’ compensation system may. Both of those activities occurred in 2011. Similarly, securing funding for the Illinois Capital Bill in 2009 may benefit more Illinois members than those working in Indiana, but when Indiana’s “Major Moves” infrastructure funding is exhausted, the Union will lobby to secure a new program there (Sweeney Cert. ¶ 9).

CONCLUSION

For all the foregoing reasons, Local 150 respectfully supports the Board’s proposal to consider lobbying expenses for representational functions that affect subjects of collective bargaining as presumptively chargeable to objectors, and to extend that presumption to lobbying activity by construction unions in support of infrastructure spending.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he filed the foregoing via the NLRB’s electronic filing system on February 19, 2013.

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