

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the matter of:

United Nurses & Allied Professionals,
(Kent Hospital),

Respondent,

and

Jeanette Geary, an Individual,

Charging Party.

Case No. 1-CB-11135

**CHARGING PARTY JEANETTE GEARY'S
RESPONSE BRIEF**

The following is Charging Party Jeanette Geary's response to briefs filed pursuant to the Board's solicitation of comment on its proposed "presumption of germaneness" standard in determining the chargeability of lobbying to nonmember objectors.¹

Charging Party Geary incorporates into her response the arguments from her first brief (filed February 19, 2013). As explained there, the Board's proposed standard is invalid, and Charging Party refrains from comment on how best to "define and apply" it.² Nevertheless, Charging Party takes this opportunity to respond to amici and United

¹On February 11, 2013, Geary filed a Petition for a Writ of Mandamus or Prohibition to prevent this Board from taking further action in this case until a constitutionally legitimate Board is capable of acting. *In re Jeanette Geary*, Case No. 13-1029 (D.C. Cir., Feb. 11, 2013). On February 22, 2013, the court issued an order to the NLRB to respond to the Petition.

²*See generally*, dissenting opinion of Member Hayes, *Geary* slip op. at 12-14.

Nurses & Allied Professionals (“UNAP” or the “union”). More specifically, Charging Party notes with irony that UNAP and the International Union of Operating Engineers, Local 150’s (“IUOE”) attempts to defend the Geary standard are the strongest arguments in favor of overturning the *Geary* decision altogether. Local 150 gives the world a preview as to exactly how the “presumption of germaneness” standard will be implemented: all union lobbying and politics will be chargeable unless an individual employee with no resources and no legal help attempts to challenge the union. This unjust state of affairs is precisely what Justice Black warned against in his dissent in *International Ass’n of Mach. v. Street*, 367 U.S. 740, 795 (1961).

It seems to me, however, that while the Court’s remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.

Employees’ will lose any protection of their statutory and constitutional rights to be free from workplace coercion and forced political speech.

I. Introduction

UNAP and amicus IUOE, Local 150 raise no new legal issues in their response briefs. Unsurprisingly, both briefs enthusiastically support the Board’s proposed germaneness standard and both are replete with examples of how union lobbying on many different issues at all levels of government will be chargeable under the new germaneness standard. Indeed, by laying out their vision of “presumptive germaneness” under the new standard, the unions unintentionally make a powerful argument in favor of abandoning

Geary altogether and imposing strict constitutional scrutiny on any union charging employees for political speech. The unions' briefs show how under *Geary*, all lobbying will be chargeable – unless an employee can afford specialized legal counsel for complex litigation. As a practical matter, employees under the NLRA will have no protection from coercion and forced political speech, unlike their counterparts in the public sector and under the Railway Labor Act.

II. Argument

A. *Geary's* Rebuttable Presumption Standard is Unworkable and Unfair.

In its brief Respondent UNAP contends that “rebuttable presumptions” are common in Board jurisprudence, and provides examples. UNAP at 3.

Rebuttable presumptions may be appropriate where a legal or evidentiary question has been decided and where re-opening the issue would lead to inefficient administration of justice. *Blacks Law Dictionary* defines rebuttable presumption as: “An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.” *Blacks Law Dictionary* 965 (Abridged 7th ed. 2000).

UNAP and IUOE do not explain how the “rebuttable presumption” of charging objecting nonmembers for politics is appropriate where the First Amendment and Section 7 rights of *Beck* Objectors are at stake. If a presumption is to be used, surely it should favor the employees' rights, not the unions' power to charge objecting employees for the unions' politics. Applying *Black's Law Dictionary* definition, what are the “certain facts”

from which the “inference” may be drawn that the union’s political expenses relate to the employee’s representation? In short, there are no facts; there is only a blanket judgment that various lobbying goals are related to representation. The rebuttable presumption is more akin to an *irrebuttable assumption* that whatever the union does is good for employees and they should be made to pay for it. This standard might be lawful for voluntary union members regarding issues other than forced political speech. When it comes to objecting nonmembers, however, and protecting their First Amendment rights, the “irrebuttable assumption” will not do.

In the real world of a Beck Objector, the rebuttable presumption will work unfairly. First, an employee who has *already objected* under *Beck* to paying for the union’s non-representational expenses, must accept that all the union’s political spending is representational. If the employee does not accept that “fact,” and wants to protect himself from forced political speech, he will have to litigate every instance of union political spending that he can discover, year after year.

Until *Geary*, the most significant non-representational union expense objected to by nonmembers was political activity, including lobbying. *Geary*’s rebuttable presumption essentially takes that expense category off the table. Must the employee who wishes to not subsidize the union’s political activity hire a law firm and a CPA firm to get to the bottom of the union’s declared and undisclosed political expenses? How else would the employee rebut the presumption? Should he pore over state and federal campaign

finance lobbying records to glean information on his union's registered lobbyists, and what they lobbied on? Should the employee sift through the union's financial and other disclosures to the Department of Labor, and review the federal lobbying carried out by the union, on behalf of the union, paid for by the union? How shall the employee "overcome [the inference] by introduction of contrary evidence" in order to rebut the presumption? In a word, such a task is beyond the capability of the average employee. No employee should be put to such an absurdly weighty burden to protect his or her fundamental constitutional rights.

More absurd still is *Geary's* holding that the employee would have to do all that merely to *rebut* the presumption of germaneness. The employee's battle to avoid compelled political speech would not yet be won. The employee would still have to demonstrate how the union's lobbying was unrelated to representation, a task made nearly impossible by the Board's all-inclusive approach to "germaneness" discussed in the following section.

B. *Geary's* "Germaneness" Standard Makes All UNAP's Lobbying Chargeable.

In its brief UNAP refers to *Geary's* "analytical framework within which to work to determine whether or not a particular lobbying activity should be subject to a rebuttable presumption of germaneness." UNAP at 4.

What is that framework? If the lobbying concerns any of the following it is chargeable to nonmember *Beck* Objectors: 1) "core employee concerns such as wages,

hours, and working conditions”; *Geary*, slip op. at 9; 2) matters directly affecting subjects of collective bargaining, *Id.*; and 3) instances where 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. *Id.*

Lo and behold! All UNAP and IUOE lobbying fits perfectly into that “analytical framework.” UNAP at 5; IUOE at 9-12. Indeed, under the *Geary* standard it would be difficult to find lobbying that was not chargeable!

UNAP exposes the complete futility of *Geary*’s germaneness standard with a final argument contained in a footnote to the last sentence of its brief: “To be sure the lobbying activity in the instant case is germane given the industry (health care) and the employee group (health care workers).” UNAP at 19, fn. 14. In other words, under *Geary*’s presumption of germaneness virtually any lobbying is germane simply because the union performs it. And what if *somehow* the presumption of germaneness were rebutted? The lobbying expense at issue “may still be shown to be chargeable if the particulars of the legislation, industry, or employee group, make it germane...” *Geary* slip op. at 9.

For UNAP the chargeability determination boils down to a foolproof two-step “analytical framework”: 1) all lobbying is presumptively germane to representation and chargeable to *Beck* objectors; and 2) if the presumption is rebutted, all lobbying carried out by the health care union is *ipso facto* germane to representation of all health care workers, and therefore chargeable to *Beck* objectors.

C. *Geary* Germaneness Makes All IUOE Local 150's Lobbying Chargeable.

In support of *Geary* “germaneness,” amicus IUOE Local 150 contends that all its lobbying should be presumptively chargeable, including lobbying on state workers’ compensation system (IUOE at 9), state minimum wage legislation (IUOE at 10), public work projects and infrastructure spending (IUOE at 11), improving roads (IUOE at 6), among other examples. As with UNAP’s lobbying, IUOE reasons that all its legislative efforts are presumptively chargeable because they relate to employees generally and “offer numerous examples of a direct, positive relationship to the Union’s representational duties.” IUOE at 9.

UNAP and IUOE demonstrate the unworkability and injustice to nonmember *Beck* Objectors of the Board’s “presumptive germaneness” standard. All lobbying expenses will end up as chargeable when measured against the union’s “representational function,” the very vaguest and broadest of measurements.

D. The Presumptive Germaneness Standard Contradicts All Precedents Concerning the Chargeability of Lobbying.

As stated in Charging Party *Geary*’s first brief, and by amicus National Association of Manufacturers (NAM), the “presumptively germane” standard expands germaneness to the point of meaninglessness, contradicting abundant authority.

NAM’s brief notes, following *Miller v. Airline Pilots Ass’n.*, 108 F.3d 1415 (D.C. Cir 1997) that “a subject is not made germane simply because it is a subject of collective bargaining (NAM at 13). *Miller* was more specific about what ought not to be considered

germane

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; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world.

Id. at 1422.

In direct contradiction of that precedent, UNAP and IUOE argue that under *Geary* lobbying on minimum wage (IUOE at 10), improving state pension plans (UNAP at 7), and employee safety (IUOE at 9, UNAP at 11) are presumptively chargeable. What *Miller* unequivocally considered *not germane* becomes *presumptively* so under *Geary*.

In contrast to the Unions' ultra-permissive standard – all lobbying is chargeable, either presumptively or as somehow related to representation– federal courts have been strict to the point of intolerance, generally holding that no lobbying is chargeable.

Beckett v. Air Line Pilots Ass'n, 59 F.3d 1276, 1280 (D.C. Cir. 1995) followed *Lehnert* and judged all “union lobbying expenses....nonchargeable because of their substantial burden on dissenters' free speech rights.”

Thomas v. NLRB., 213 F.3d 651, 54 (D.C. Cir. 2000) in *dicta* described a union's spending in general terms: “Both the locals and the International spend funds to defray costs of collective bargaining and contract administration and also to support *nonrepresentational activities such as lobbying and political campaigning.*” (Emphasis

added).

E. Employee Support For Union Political Activity Should Be Voluntary or “Opt In” Rather Than Geary’s Regime of Compelled Political Speech.

Amicus National Association of Manufacturers (NAM) correctly argues that the Supreme Court in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. ____ (2012), applies fully to the private sector employees and forecloses on the entire *Geary* scheme, both procedurally and substantively. *Knox* applies fully to the NLRA. Charging Party Geary supports, endorses and adopts the arguments and reasoning set forth in NAM’s brief, concerning *Knox*.

On the substantive issue that all employees’ have First Amendment rights to be protected, NAM argues that: “[T]he Board’s test, declaring lobbying expenses *per se* related to collective bargaining, completely ignores the the fundamental free speech disparity of the agency shop relationship.” NAM at 10.

On the procedural issue of whether the Board’s proposed *Beck* regime adequately protects those rights, NAM correctly argues that *Knox* mandates an “opt in” rather than an “opt out” method of obtaining employee support for the union’s political program. Further, these protections should apply to *any* employee, and not just a *Beck* Objector. NAM at 11. NAM is correct and Geary adopts that view here, specifically.

III. Conclusion

For the foregoing reasons, and those argued in her first responsive brief, Charging Party Geary urges the Board to overturn its proposed standard of “presumptive

germaneness” with respect to the chargeability of lobbying to employees.

Dated this ____ day of March, 2013.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2013, a copy of this Response was electronically filed to the Lester Heltzer, National Labor Relations Board, Executive Secretary. In addition, a copy was sent via U.S. mail, first-class postage pre-paid, as well as email, to the following:

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/s/

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