JD(NY)–11-11
Providence, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITED NURSES AND ALLIED PROFESSIONALS
(Kent Hospital)

and **Case No. 1-CB-11135**

JEANETTE GEARY, An Individual

Don Firenze, Esq., Counsel for the General Counsel.
Christopher Callaci, Esq., Counsel 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 non-members 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 non-members, as a condition of their employment at Kent Hospital, herein called 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 non-member 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 fifteen 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. Ex. 6) was introduced in the Rhode Island General Assembly on March 5, 2009. The Findings state that "…any entity that owns more than fifty 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 twenty five and thirty 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 ten 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. Ex. 7). The Union supported and lobbied for this law because it would have increased the cap on post retirement earnings that the former state employees could earn from $12,000 to $24,000 a year.

Brooks also spent two to three hours in 2009 lobbying in favor of a Hospital Payments Act (Jt. Ex. 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 $1,200 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 one 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. Ex. 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. Ex. 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% of this amount. The Union represents approximately five hundred 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 three 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. Ex. 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. Ex. 9); and An Act Relating to Health and Safety- Licensing of Health Care Facilities, introduced March 10, 2009 (Jt. Ex. 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 Association*, 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:

> Where as 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. Ex. 6) and the Hospital Payments Act (Jt. Ex. 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. Ex. 7) and the Center for Health Professional Act (Jt. Ex. 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. Ex. 7).

(b) Bill Relating to Health and Safety- Center for Health Professionals Act (Jt. Ex. 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. Ex. 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

[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.

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 attached 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

Joel P. Biblowitz
Administrative Law Judge

[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."

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

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601
Boston, Massachusetts 02222–1072
Hours of Operation: 8:30 a.m. to 5 p.m.
617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.

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