

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

In the Matter of:

United Nurses & Allied Professionals,
(Kent Hospital),

Respondent,

And

Jeanette Geary, An Individual,

Charging Party.

Case 1-CB-11135

**RESPONSIVE BRIEF OF RESPONDENT, UNITED NURSES & ALLIED
PROFESSIONALS, REGARDING THE APPLICATION OF REBUTTABLE
PRESUMPTIONS OF GERMANENESS TO LOBBYING ACTIVITIES THAT ARE
DIRECTLY AND POSITIVELY RELATED TO THE UNION'S REPRESENTATIONAL
DUTIES**

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 rebuttable presumptions 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.

Initial briefs were due on or before February 18, 2013. Responsive briefs are due on or before March 4, 2013. *Id.*

The United Nurses & Allied Professionals (Union) hereby files the instant responsive brief.

Argument

- I. The argument that the application of rebuttable presumptions of germaneness to a narrow scope of lobbying activities represents an abandonment of the case-by-case analytical framework set forth in *California Saw* is misplaced and should, therefore, be rejected.

In its Brief, the National Association of Manufacturers (NAM) observes that determinations as to the chargeability of union expenses should be made on a case-by-case basis. The NAM argues, therefore, that “[t]he determination of whether union [lobbying] expenses are chargeable is unsuitable for an evidentiary presumption” and that “[n]o presumption can apply.” Brief of *Amicus Curiae*, National Association of Manufacturers at 12.

For the same reason, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Service Employees International Union (SEIU) argue in their brief that “the Board should not adopt any presumptions concerning the germaneness of lobbying activities.” Brief of American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union as *Amicus Curiae* at 1.

In this regard, the NAM relies on the Board’s holding in *California Saw & Knife Works*, 320 NLRB 224 (1995). Brief of *Amicus Curiae*, National Association of Manufacturers at 13. So does the AFL-CIO and the SEIU. Brief of American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union as *Amicus Curiae* at 1.¹

The argument that the Board should continue to apply the case-by-case analytical framework set forth in *California Saw* rather than apply rebuttable presumptions of germaneness

¹ The Charging Party refused to address this issue notwithstanding the Board’s invitation to do so. Charging Party Jeanette Geary’s Response to the Board’s Request for Briefing on its Proposed Germaneness Standard in the Context of Lobbying at 2.

is off the mark. It is based upon the false premise that the Board has decided to substitute one for the other.

In the instant case, the Board has reaffirmed its commitment to its holding in *California Saw* that the ultimate burden is on the union to justify its expenditures and the percentage of which are chargeable and nonchargeable:

“To begin, we adhere to the rule that, as in other chargeability contexts, a union has the ultimate burden to justify all of its claimed expenditures and the percentages of each that are chargeable and nonchargeable.”

United Nurses and Allied Professionals (Kent Hospital), 359 NLRB No. 42, slip op. at 9 (citing *California Saw* approvingly).

Moreover, notwithstanding the proposed application of rebuttable presumptions of germaneness to the narrow scope of lobbying activities that have a direct and positive relationship to the union’s representational duties, the Board has reaffirmed its commitment to the case-by-case analytical framework set forth in *California Saw*:

“[a]s with any general rule, however, there may arise an exceptional case that demands an exception to even the most reasonable presumption. It would therefore be advisable for any such presumptions to be rebuttable **based on the specific circumstances of a particular case**. Thus, for those expenses that are presumptively germane, the General Counsel or a charging party might rebut the presumption by showing, for example, that the relationship of expenses to the union’s representative functions is too attenuated.”

Id. (emphasis supplied).

What the NAM, AFL-CIO and SEIU fail to understand is that the Board has not decided here to substitute rebuttable presumptions of germaneness for the case-by-case analytical framework set forth in *California Saw*. The use of rebuttable presumptions of germaneness does not preclude a case-by-case analysis. Indeed, the two are not mutually exclusive.

Conclusion

For the reasons set forth in the Union's initial brief, and this responsive brief, the Board should proceed with the analytical framework set forth in its Decision and Order in *United Nurses & Allied Professionals (Kent Hospital)*, which does not disturb its holdings in *California Saw*.

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 March 4, 2013.

/s/ Elizabeth Wheeler

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