

**Nos. 19-1490 & 19-1602**

---

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**UNITED NURSES AND ALLIED PROFESSIONALS**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**JEANETTE GEARY**

**Intervenor**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**JULIE BROCK BROIDO**

*Supervisory Attorney*

**MILAKSHMI V. RAJAPAKSE**

*Attorney*

*National Labor Relations Board*

**1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2996  
(202) 273-2914**

**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Associate General Counsel*

**DAVID HABENSTREIT**

*Acting Deputy Associate General Counsel*

**National Labor Relations Board**

---

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Jurisdictional statement .....	1
Issue statement .....	2
Statement of the case .....	3
I. Procedural history .....	3
II. The Board’s findings of fact.....	5
A. The Union’s structure, operations and lobbying activity.....	5
B. Employees in the Kent Hospital local decline union membership and object to any assessment of fees for nonrepresentational activities; the Union discloses its major categories of expense, saying an accountant has verified them, and treats some of its lobbying costs as chargeable to objectors .....	7
III. The Board’s conclusions and Order .....	9
Standard of review .....	10
Argument summary.....	12
Argument.....	16
I. Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by charging nonmember objectors for the Union’s lobbying activities .....	16
A. The Act authorizes unions to charge nonmembers only for those costs necessary to perform the functions of an exclusive collective- bargaining representative in dealing with the employer on labor- management issues .....	16

B.	Based on Supreme Court precedent, the Board reasonably found that objectors cannot be charged for lobbying because that activity is beyond the union’s representative function .....	19
C.	The Union violated its statutory duty of fair representation by charging objecting nonmembers for its lobbying activities .....	28
II.	Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by failing to provide an audit-verification letter to nonmember objectors.....	30
A.	Under settled law establishing procedures unions must follow as a matter of basic fairness, an independent auditor must confirm the union’s account of its expenditures .....	30
B.	The Board reasonably interpreted <i>Hudson</i> and its progeny to require disclosure of the auditor’s letter confirming that the required audit was conducted .....	32
C.	The Union violated its statutory duty of fair representation by failing to give nonmember objectors the audit-verification letter.....	35
D.	The Court lacks jurisdiction to consider the Union’s meritless challenge to the Board’s “Retroactive” application of its rule requiring an audit-verification letter in the instant case .....	36
	Conclusion .....	44

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Air Line Pilots v. O’Neill</i> , 499 U.S. 65 (1999).....	28
<i>American Federation of Television and Recording Artists, Portland Local (KGW Radio)</i> , 327 NLRB 474 (1999) .....	27, 32
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978).....	10
<i>Bradley v. School Board of Richmond</i> , 416 U.S. 696 (1974).....	41
<i>Breining v. Sheet Metal Workers</i> , 493 U.S. 67 (1989).....	11
<i>California Saw &amp; Knife Works</i> , 320 NLRB 224 (1995) .....	11, 18, 28, 29, 30, 31, 32, 42
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97 (1971).....	41
<i>Chicago Teachers Union Local 1 v. Hudson</i> , 475 U.S. 292 (1986).....	18, 30, 31, 35
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988).....	3, 8, 10, 11, 17, 18, 19, 21, 22, 29
<i>Cummings v. Connell</i> , 316 F.3d 886 (9th Cir. 2003) .....	33, 34
<i>Electrical Workers v. Foust</i> , 442 U.S. 42 (1979).....	29
<i>Electronic Workers IUE (Paramax Systems) v. NLRB</i> , 41 F.3d 1532 (D.C. Cir. 1994).....	42

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks</i> , 466 U.S 435 (1984).....	19, 22, 23, 29
<i>Ferriso v. NLRB</i> , 125 F.3d 865 (D.C. Cir. 1997) .....	32, 34
<i>Fox Painting Co. v. NLRB</i> , 919 F.2d 53 (6th Cir. 1990) .....	40
<i>HealthBridge Mgmt., LLC v. NLRB</i> , 798 F.3d 1059 (D.C. Cir. 2015).....	39
<i>HTH Corp. v. NLRB</i> , 823 F.3d 668 (D.C. Cir. 2016) .....	39
<i>Int’l Ass’n of Machinists &amp; Aerospace Workers v. NLRB</i> , 133 F.3d 1012 (7th Cir. 1998) .....	11
<i>Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.</i> , 420 U.S. 276 (1975).....	38
<i>Int’l Longshoreman’s Ass’n, Local 1575</i> , 332 NLRB 1336 (2000) .....	28
<i>Janus v. Am. Federation of State, County, and Municipal Employees, Council 31</i> , 128 S. Ct. 2448 (2018).....	25
<i>Lehnert v. Ferris Faculty Association</i> , 500 U.S. 507 (1991).....	25
<i>Litton Fin. Printing Div. v. NLRB</i> , 501 U.S. 190 (1991).....	11
<i>Lone Mountain Processing, Inc. v. Sec’y of Labor</i> , 709 F.3d 1161 (3d Cir. 2013).....	27

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Machinists v. Street</i> , 367 U.S. 740 (1961).....	18, 20, 21
<i>Miller v. Air Line Pilots Association</i> , 108 F.3d 1415 (1997).....	24
<i>Miranda Fuel Co.</i> , 140 NLRB 181 (1962), <i>enforcement denied</i> , 326 F.2d 172 (2d Cir. 1963).....	28
<i>N. Wind, Inc. v. Daley</i> , 200 F.3d 13 (1st Cir.1999).....	37
<i>NLRB v. Affiliated Midwest Hosp., Inc.</i> , 789 F.2d 524 (7th Cir. 1986) .....	40
<i>NLRB v. Bufco Corp.</i> , 899 F.2d 608 (7th Cir. 1990) .....	42
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990).....	10
<i>NLRB v. Gaylord Chem. Co.</i> , 824 F.3d 1318 (11th Cir. 2016) .....	27
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963).....	17
<i>NLRB v. Harding Glass Co.</i> , 500 F.3d 1 (1st Cir. 2007).....	38
<i>NLRB v. Hotel Employees &amp; Restaurant Employees Int’l Union Local 26</i> , 446 F.3d 200 (1st Cir. 2006).....	12
<i>NLRB v. Int’l B’hood of Elec. Workers, Local Union 16</i> , 425 F.3d 1035 (7th Cir. 2005) .....	28

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>NLRB v. New Columbus Nursing Home, Inc.</i> , 720 F.2d 726 (1st Cir. 1983).....	41
<i>NLRB v. Noel Canning</i> , 573 U.S. 513.....	4
<i>NLRB v. Pier Sixty, LLC</i> , 855 F.3d 115 (2d Cir. 2017).....	27
<i>NLRB v. Saint-Gobain Abrasives, Inc.</i> , 426 F.3d 455 (1st Cir. 2005).....	37
<i>NLRB v. Sw. Reg’l Council of Carpenters</i> , 826 F.3d 460 (D.C. Cir. 2016).....	26, 27
<i>NLRB v. United States Postal Service</i> , 660 F.3d 65 (1st Cir. 2011).....	11
<i>Oil Workers v. Mobil Oil Corp.</i> , 426 U.S. 407 (1976).....	17
<i>Price v. Auto Workers UAW</i> , 927 F.2d 88 (2d Cir. 1991).....	32
<i>Quality Health Servs. of P.R., Inc. v. NLRB</i> , 873 F.3d 375 (1st Cir. 2017).....	11, 39
<i>Radio Officers v. NLRB</i> , 347 U.S. 17 (1954).....	17
<i>Railway Clerks v. Allen</i> , 373 U.S. 113 (1963).....	23, 24
<i>Retail, Wholesale &amp; Dept. Store Union v. NLRB</i> , 466 F.2d 380 (D.C. Cir. 1972).....	40, 42

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	40
<i>SNE Enters.</i> , 344 NLRB 673 (2005) .....	41
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967).....	40
<i>Teamsters Local 75 (Schreiber Foods)</i> , 329 NLRB 28 (1999) .....	33
<i>Transport Workers of America, Local 525 (Johnson Controls World Services)</i> , 329 NLRB 543 (1999) .....	26
<i>Truck Drivers &amp; Helpers Union, Local No. 170 v. NLRB</i> , 993 F.2d 990 (1st Cir. 1993).....	42
<i>UFCW Local 1036 v. NLRB</i> , 249 F.3d 1115 (9th Cir. 2001) .....	11
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	37
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	28
<i>Wessel v. City of Albuquerque</i> , 299 F.3d 1186 (10th Cir. 2002) .....	34
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	37, 38

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Yesterday's Children, Inc. v. NLRB</i> , 115 F.3d 36 (1st Cir. 1997).....	12

<b>Statutes</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151-69)	
Section 7 (29 U.S.C. § 157) .....	9, 16
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	16, 17, 18, 21
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) .....	2,3,4,5,9,13,15,16,29,30,35,36
Section 8(d) (29 U.S.C. § 158(d)).....	19
Section 9(a) (29 U.S.C. § 159(a)) .....	16
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	12, 15, 37, 38, 39
Section 10(f) (29 U.S.C. § 160(f)) .....	2

Railway Labor Act, as amended (45 U.S.C. §§ 151-65)	
Section 2, Eleventh (29 U.S.C. § 152, Eleventh).....	9, 16

Internal Revenue Code of 1954 .....	20
-------------------------------------	----

<b>Rules &amp; Regulations</b>	<b>Page(s)</b>
29 C.F.R. §§ 102.46(a).....	38
29 C.F.R. §§ 102.48(c).....	38

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**Nos. 19-1490 & 19-1602**

---

**UNITED NURSES AND ALLIED PROFESSIONALS**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**JEANETTE GEARY**

**Intervenor**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of United Nurses and Allied Professionals (“the Union”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Decision and Order

against the Union issued on March 1, 2019, and reported at 367 NLRB No. 94. (JA 399-418.)<sup>1</sup>

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act” or “NLRA”), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), and venue is proper under that provision because the unfair labor practices occurred in Rhode Island.

The Union filed its petition for review on May 15, 2019. The Board filed its cross-application for enforcement on June 12, 2019. Because the Act establishes no deadline for such filings, both were timely. Jeanette Geary, the charging party before the Board, has intervened in this proceeding on the side of the Board.

### **ISSUE STATEMENT**

1. Whether substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by charging a portion of its lobbying costs to nonmembers who had objected to the assessment of dues and fees for activities unrelated to collective bargaining, contract administration, and grievance adjustment.

---

<sup>1</sup> Record references are to the Joint Appendix (“JA”) and Supplemental Appendix (“SA”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Union’s opening brief.

2. Whether substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by failing to furnish nonmember objectors with a letter from an auditor confirming that the Union’s major categories of expense, which are used to calculate the fees owed by nonmember objectors, have been independently audited as required by law.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

This case originated with a charge filed by employee Jeanette Geary, alleging that the Union violated Section 8(b)(1)(A) of the Act in its treatment of nonmembers, such as herself, who had exercised their right under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), to refrain from supporting the Union’s activities unrelated to collective bargaining, contract administration, and grievance adjustment. The General Counsel issued a complaint against the Union based on Geary’s charge.

Following a hearing, an administrative law judge issued a decision and recommended order, finding that the Union violated Section 8(b)(1)(A) of the Act by charging nonmembers who had objected to the use of their funds for nonrepresentational purposes (“*Beck* objectors”) an agency fee for purportedly representational services that included charges for legislative lobbying unrelated to collective bargaining. The judge dismissed a separate allegation that the Union

also violated Section 8(b)(1)(A) of the Act by failing to provide *Beck* objectors with a verification letter from the auditor retained by the Union, confirming that the financial information disclosed to them had been audited. Each of the parties filed exceptions to the judge’s findings.

On December 14, 2012, the Board (Chairman Pearce and Members Griffin and Block; Member Hayes dissenting) issued a Decision and Order severing and retaining the complaint allegations relating to the Union’s lobbying expenses for further consideration. 359 NLRB 469. The Board sought additional briefing on the standards that it should apply in evaluating which union lobbying expenses are chargeable as “germane” to collective bargaining. *Id.* at 477. The Board otherwise affirmed the judge’s findings. *Id.* at 469-71.

Geary moved to vacate the Board’s Decision and Order, challenging the recess appointments of Board members Griffin and Block. On June 26, 2014, while Geary’s motion was pending, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 573 U.S. 513, which held that three recess appointments to the Board in January 2012 were invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block. Geary supplemented her motion to reflect this development.

On March 1, 2019, a properly constituted Board panel (Chairman Ring and Members Kaplan and Emanuel; Member McFerran dissenting) vacated the 2012

Decision and Order in light of *Noel Canning* and considered the judge’s decision and the parties’ exceptions anew.<sup>2</sup> (JA 399-418.) The Board found that the Union breached its duty of fair representation, and therefore violated Section 8(b)(1)(A) of the Act, by: (1) charging *Beck* objectors for the costs of lobbying—a political activity that is nonchargeable under Supreme Court precedent; and (2) failing to give *Beck* objectors a letter from an auditor verifying that the expenses reported to them as the basis for the Union’s agency fees have been audited as required by law. (JA 399-405.)

## **II. THE BOARD’S FINDINGS OF FACT**

### **A. The Union’s Structure, Operations, and Lobbying Activity**

The Union represents groups of employees for purposes of collective bargaining with their respective employers in Connecticut, Rhode Island, and Vermont. (JA 402; JA 27, 183.) The Union organizes the represented employees into “local” unions based on their work location and employer. (JA 402; JA 38, 183.) There are 15 local unions in total, with the locals ranging in size from 2,269 employees at Rhode Island Hospital to 5 employees at the Putnam Board of Education in Connecticut. (JA 402; JA 38-39, 183.)

---

<sup>2</sup> The Board did not consider the various briefs filed in response to the invitation for briefing issued by the improperly constituted Board in the 2012 Decision and Order. (JA 399 n.1.)

Members of each local pay monthly dues, a portion of which goes into the Union's general operating fund. (JA 402; JA 41-43, 45, 47, 184-85.) The general operating fund supports an array of services that the Union provides to all locals, including contract negotiation, grievance processing, and arbitrations. (JA 402; JA 41, 47-51.) The Union also uses some of its general operating fund to lobby for various legislative measures in which the Union is interested at the state level. (JA 402; JA 47, 70, 326.)

In 2009, for example, the Union lobbied for four bills in Rhode Island:

- The Hospital Merger and Accountability Bill, which would have empowered a state government council to monitor and regulate hospitals that own more than 50 percent of hospital beds in the state;
- The Public Officers and Employees Retirement Bill, which would have raised the cap on postretirement earnings that former state-employed registered nurses could earn without reducing their retirement benefits;
- The Hospital Payments Bill, which would have provided all hospitals in Kent County, including one where the Union represents a bargaining unit, with \$800,000 in funding; and
- The Center for Health Professionals Bill, which would have created a center tasked with developing a sufficient, diverse, and well-trained healthcare work force in the state.

(JA 402; JA 51-65, 331-39, 354-60.)

In the same time period, the Union also lobbied for three bills in Vermont:

- The Safe Patient Handling Bill, which would have required hospitals in the state to establish a safe patient handling program that included rules to protect nurses and provision of new equipment to improve patient-handling procedures;
- The Mandatory Overtime Bill, which would have prohibited hospitals from requiring any employee to work more than 40 hours a week; and
- The Mental Health Care Funding Bill, which would have provided additional funding for mental healthcare services at three facilities where the Union has bargaining units.

(JA 402; JA 28-30, 100, 102-10, 361-71.)

**B. Employees in the Kent Hospital Local Decline Union Membership and Object to Any Assessment of Fees for Nonrepresentational Activities; the Union Discloses Its Major Categories of Expense, Saying an Accountant Has Verified Them, and Treats Some of Its Lobbying Costs as Chargeable to Objectors**

At Kent Hospital in Kent County, Rhode Island, the Union represents about 600 registered nurses. (JA 399; JA 53, 183, 296, 299.) The Board certified the Union as the exclusive collective-bargaining representative of the Kent Hospital registered nurses in November 2008, and the Union and Employer executed a collective-bargaining agreement in July 2009. (JA 399; JA 296, 299.) That initial

agreement, effective through June 30, 2011, contained the following provision on

“Union Security and Dues Deduction”:

It shall be a condition of employment that every employee who is a member of the Union in good standing as of the effective date of this Agreement shall remain a member in good standing. Every employee covered by this Agreement employed by the Hospital who is not a member shall become a member of the Union on the thirtieth day following the beginning of the employee’s employment or the effective date of this Agreement, whichever is later . . . . It is understood that these requirements may be enforced only to the extent of requiring payment of an amount equal to dues and not actual Union membership.

(JA 399; JA 299.)

In September 2009, several employees in the Kent Hospital local (Local 5008) resigned their membership in the Union and, citing their rights under *Communications Workers of America v. Beck*, objected to the Union’s assessment of dues and fees for activities unrelated to collective bargaining, contract administration, or grievance adjustment on behalf of their local. (JA 399; JA 27-28, 328-30.) The Union responded by informing the objectors of the reduced fees they would owe for representational activities only. (JA 399; JA 324.) In support of its reduced-fee calculations, the Union provided objectors with several charts setting forth the major categories of the Union’s expenses overall and for Local 5008 in particular. (JA 399; JA 325-27.) The Union asserted that “[t]he major categories of expense have been verified” by an independent auditor (specifically,

a CPA), but did not provide any statement from the CPA. (JA 399; JA 35, 87, 126-27, 324.)

For purposes of calculating the reduced fees, the Union included the costs of lobbying activities that it considered relevant to its collective-bargaining efforts on behalf of the Kent Hospital bargaining unit. (JA 402; JA 28-30, 34-36, 325-26.)

Among other things, the Union considered chargeable about \$21,970 of its \$22,650 total expenditures on lobbying before the Vermont legislature. (JA 402; JA 28-29, 326.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran dissenting) found that the Union violated Section 8(B)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by charging nonmember objectors for expenses incurred as to any lobbying activities, and by failing to furnish Jeanette Geary and other *Beck* objectors with verification from the auditor retained by the Union that the financial information disclosed to them had been audited. (JA 401, 404.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found and from, in any like or related manner, restraining or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 405.) Affirmatively, the Order requires the Union to provide

Jeanette Geary and all other similarly situated nonmember objectors with verification from the Union's auditor that the financial information previously disclosed to them had been audited, reimburse them for the amount of dues collected from them for lobbying activities, and post a remedial notice. (JA 405.)

### **STANDARD OF REVIEW**

As the Supreme Court has recognized, "it is to the Board that Congress entrusted the task of applying the Act's general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978) (internal quotation marks and citation omitted). Accordingly, the Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). And if the Board is to fulfill its congressional charge, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-01.

This is particularly true where, as here, the Board seeks to give content to the union's statutory duty towards nonmembers who assert their rights under *Communications Workers of America v. Beck*, 487 U.S. 735, 749-50 (1988). It is for the Board, in the first instance, to strike "a careful balance" between the competing "individual, collective, and public policy interests" at stake in this area.

*California Saw & Knife Works*, 320 NLRB 224, 230 (1995); *see also Breininger v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989) (“Most fair representation cases require great sensitivity to the tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals.”). Indeed, “[i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules” to translate “the generalities of the *Beck* decision” into a fair and “workable system for determining and collecting agency fees” from nonmembers. *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998).

Consistent with these principles, “if the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (internal quotation marks and citation omitted); *accord Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 384 (1st Cir. 2017). The Board, however, “does not have a free hand to interpret [the] statute when the Supreme Court has already” done so. *UFCW Local 1036 v. NLRB*, 249 F.3d 1115, 1119 (9th Cir. 2001). Likewise, courts need not defer to the Board’s interpretation of Supreme Court precedent. *NLRB v. United States Postal Service*, 660 F.3d 65, 68-69 (1st Cir. 2011) (citing cases).

The Board’s factual findings are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *NLRB v. Hotel Employees & Restaurant Employees Int’l Union Local 26*, 446 F.3d 200, 206 (1st Cir. 2006) (internal quotation marks and citation omitted). Accordingly, this Court will “not substitute [its] judgment for the Board’s when the choice is ‘between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.’” *Yesterday’s Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997) (quoting *Universal Camera*, 340 U.S. at 488).

### **ARGUMENT SUMMARY**

1. The Act, as interpreted by the Supreme Court in *Beck*, authorizes unions to charge nonmembers only for costs incurred for the purpose of performing the statutory function of an exclusive collective-bargaining representative in dealing with the nonmembers’ employer on labor-management issues. Under the Supreme Court’s holding in *Machinists v. Street*, political activity—including lobbying—is not part of a union’s statutory representational function under the Railway Labor Act. In *Beck*, the Supreme Court made this holding fully applicable to private-sector unions operating under the equivalent provisions of the NLRA.

Applying the teachings of *Street* and *Beck*, the Board here reasonably found that union lobbying activity is never chargeable to nonmembers, regardless of its possible relationship to collective-bargaining subjects. Contrary to the Union's claims, the Board did not disregard relevant Supreme Court precedent in so finding. Rather, the Board fully acknowledged relevant precedent, including controlling Supreme Court decisions, and explained why that precedent compels a finding that lobbying activity is not chargeable to nonmembers. Thus, it is immaterial that the Board did not specifically address a prior Board case cited by the Union, in which an administrative law judge opined that lobbying costs are not per se nonchargeable.

As the Board also found, the Union has a statutory duty to deal fairly with all bargaining-unit employees, including those who exercise their statutory right to refrain from full union membership. And it plainly breaches that duty by attempting to charge nonmembers for activities that are not part of the Union's recognized representative functions on behalf of employees in dealing with their employer. Here, the undisputed evidence shows that the Union sought to charge nonmember objectors for expenses incurred in lobbying for proposed legislation in Rhode Island and Vermont. Accordingly, substantial evidence supports the Board's finding that the Union breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act.

2. The Supreme Court's decision in *Chicago Teachers Union v. Hudson* establishes that, as a basic matter of fairness, the Union owes nonmembers timely and sufficient information, so that they can make informed decisions about whether to challenge the Union's calculated agency fees. As *Hudson* makes clear, although the Union need not furnish an exhaustive list of its expenditures, it must at minimum provide its major categories of expense, as well as verification of those expenses by an independent auditor.

In the present case, the Board clarified that verification by an auditor encompasses not only the independent audit itself, but also a letter from the auditor confirming for the benefit of nonmember objectors that the Union's expense figures have been independently verified and are accurate. As the Board explained, the letter serves to remove any uncertainty for the objectors as to whether the Union's claimed expenses were actually incurred, and allows them to make a reliable decision about whether to contest the Union's agency-fee calculations.

The Board's clarification that an audit-verification letter is required follows directly from settled precedent. Just as requiring objectors to simply accept a union's financial figures without an audit would be unfair under existing law, so too would be requiring objectors to accept the union's bare representations that the figures were appropriately audited. Accordingly, by failing to provide an audit-

verification letter to nonmember objectors, the Union breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act.

Before this Court, the Union contests the application of the letter requirement and corresponding remedy, claiming that such “retroactive” application of a new rule works a manifest injustice. But because the Union failed to raise that argument before the Board, Section 10(e) of the Act bars substantive consideration of it here. In any event, the Board correctly found it appropriate to apply the letter requirement to the Union in this case. Application of a new rule is most defensible where, as here, the parties litigated the merits of the rule.

Moreover, the Union did not detrimentally rely on any prior contrary rule in withholding the audit-verification letter from the nonmember objectors here; its provision at this point will effectuate the purposes of the Act by eliminating a condition that the Board has reasonably found unlawful; and the Union will assume only the smallest of burdens in now providing a letter that is already in its possession.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY CHARGING NONMEMBER OBJECTORS FOR THE UNION’S LOBBYING ACTIVITIES**

#### **A. The Act Authorizes Unions To Charge Nonmembers Only for Those Costs Necessary To Perform the Functions of an Exclusive Collective-Bargaining Representative in Dealing with The Employer on Labor-Management Issues**

Section 7 of the Act guarantees to employees the right to “form, join, or assist labor organizations,” and the right to “refrain from” all such activity, with the caveat that the right to “refrain” from joining a union “may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 8(a)(3)” of the Act. 29 U.S.C. §§ 157, 158(a)(3). Section 8(a)(3) specifically allows an employer to enter into an agreement with a union that has been duly designated as the exclusive representative of employees in an appropriate bargaining unit, to “require as a condition of employment” that all employees in the unit acquire “membership” in the union within 30 days of their employment or the effective date of the agreement. 29 U.S.C. § 158(a)(3); *see also* 29 U.S.C. § 159(a) (providing for exclusive-representative status). Section 8(a)(3), thus, qualifies the general rule that employers may not “discriminat[e] in regard to hire or tenure of employment

or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).

As the Supreme Court explained in *Communications Workers of America v. Beck*, 487 U.S. 735, 749-50 (1988), the Act allows for such “union security” or “union shop” agreements between employers and unions for a limited purpose, and the “membership” that may be required under the statute is correspondingly limited in scope. In enacting Section 8(a)(3), as well as the “nearly identical” union-shop provision in Section 2, Eleventh of the Railway Labor Act (“RLA”), Congress sought to “authorize[] compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost.” *Beck*, 487 U.S. at 746; *see also id.* at 749 (citing *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976) (authorization of union-security agreements grew out of concern over “employees who are getting the benefits of union representation without paying for them”), and *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954) (“Congress recognized the validity of unions’ concerns about ‘free riders[]’ . . . who receive the benefits of union representation but are unwilling to contribute their fair share of financial support,” and it tailored a solution “to meet that problem”)). Accordingly, the “membership” that may be required pursuant these provisions is “whittled down to its financial core,” *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), and is aimed at “eliminating ‘free riders’” rather than achieving

ideological conformity or support for all the union’s endeavors, *Beck*, 487 U.S. 745-54, 762.

Consistent with this statutory purpose, an employee satisfies the condition of “membership” contemplated in Section 8(a)(3) of the Act and Section 2, Eleventh of the RLA by paying a proportionate share of the union’s “costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.” *Beck*, 487 U.S. at 751 (quoting *Machinists v. Street*, 367 U.S. 740, 764 (1961), a case involving Section 2, Eleventh of the RLA).

Bargaining-unit employees can make these “financial core” payments, moreover, while declining formal membership in the union and maintaining the status of nonmembers. *Beck*, 487 U.S. at 738, 745 (noting that certain basic payments are obligatory under a union-security agreement, “whether or not the employees otherwise wish to become union members”).

As a corollary, nonmembers have a right to object to a union’s use of funds collected from them for activities other than collective bargaining, contract administration, and grievance adjustment. *See California Saw & Knife Works*, 320 NLRB 224, 232-33 (1995) (adopting objection procedures based on *Beck* and *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986)); *see also* pp. 30-32 below (detailing the procedures established in *California Saw*). In addressing such objections, the Board bears in mind the *Beck* Court’s holding that

“‘Congress’ essential justification for authorizing the union shop’ limits the expenditures that may properly be charged to nonmembers” to those “‘necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.’” *Beck*, 487 U.S. at 752, 762-63 (quoting *Ellis v. Railway Clerks*, 466 U.S.435, 447-48 (1984)).

**B. Based on Supreme Court Precedent, the Board Reasonably Found that Objectors Cannot Be Charged for Lobbying Because that Activity Is Beyond the Union’s Representative Function**

Applying the settled principles discussed above, the Board reasonably found that “lobbying activity is not part of the union’s statutory collective-bargaining obligation and, therefore, is nonchargeable” to objectors. (JA 403-04.) Under Section 8(d) of the Act, the union’s obligation as exclusive representative of the employees is to “meet [with the employer] at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder.” 29 U.S.C. § 158(d). Accordingly, the union’s statutory function—for which all employees in the bargaining unit must share the cost pursuant to *Beck*—involves “‘dealing *with the employer* on labor-management issues.’” *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448) (emphasis added). As the Board recognized in this case, it

does not encompass lobbying a third party in the government, or other forms of political activity outside the bargaining relationship. (JA 403-04.)

As the Board emphasized, its position is “compel[led]” by Supreme Court precedent, which has long treated lobbying as a form of political activity that is not chargeable to nonmember objectors in the private sector. (JA 403-04.) Thus, in *Machinists v. Street*, 367 U.S. 740 (1961), the Court specifically addressed nonmember objections to a union’s use of their compelled payments not only “to support the political campaigns” of candidates for public office that the objectors opposed, but also “to promote legislative programs” that they opposed. *Id.* at 744 n.2 (summarizing “the pertinent findings of the trial court” on the objected-to charges). Regarding the contested charges, the Supreme Court held that Section 2, Eleventh of the RLA did not authorize the union to use a nonmember’s funds, over his objection, “to support political causes which he opposes.” *Id.* at 768-69.

In so holding, the Court noted that a similar “distinction between the use of union funds for political purposes and their expenditure for nonpolitical purposes is implicit in other congressional enactments.” *Id.* at 769 n.17. In particular, the Court noted that regulations interpreting the Internal Revenue Code of 1954 denominate as “political” union efforts to “support . . . or oppos[e] . . . candidate[s] for public office,” and union “lobbying . . . for the promotion or defeat of legislation.” *Id.* (union dues are not fully tax-deductible if “a substantial part” of

the union’s activities consist of political activities described in the regulations). The particular issue of lobbying for legislation, thus, was well within the Court’s contemplation in *Street*, and it was part of the political activity that the Court held nonchargeable to objectors under Section 2, Eleventh of the RLA. Accordingly, the Union is mistaken that *Street*—a seminal Supreme Court case on which the Board appropriately relied (JA 403)—reached only the chargeability of union efforts to “support political candidates[] and advance political programs,” and somehow left the chargeability of lobbying for specific legislation untouched. (Br. 28.)

Contrary to the Union’s further suggestion, the Supreme Court did not depart from *Street* in its later *Beck* decision or find that lobbying activity is chargeable in cases involving union-security agreements authorized by Section 8(a)(3) of the NLRA. (Br. 31.) Instead, as the Board noted (JA 403), the *Beck* Court made clear that the rationale and holding of *Street* are fully applicable to cases arising under the Act. As the *Beck* Court explained, *Street*’s holding “that [Section] 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes” is not merely “instructive” as to the rights of nonmember objectors under the Act. *Beck*, 487 U.S. at 745. It is “controlling” on that issue, because Section 8(a)(3)’s authorization of compelled union “membership” is “nearly identical” in its

language to the authorization of compelled union “membership” in Section 2, Eleventh of the RLA, and “Congress intended the same language to have the same meaning in both statutes.” *Id.* at 746-47. There is accordingly no basis for the Union’s claim that *Beck* “left undisturbed . . . observations” of the lower courts, before the Supreme Court’s *Beck* ruling, that lobbying expenses “might be relevant to collective bargaining, contract negotiation and grievance adjustment.” (Br. 31.)

There is likewise no merit to the Union’s argument that, notwithstanding the Supreme Court’s holdings in *Street* and *Beck*, its intervening decision in *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435 (1984), allows unions to potentially defend the chargeability of specific lobbying expenses. (Br. 29-30.) To the contrary, the Supreme Court in *Ellis* reaffirmed the holding of *Street*, that an objector “could not be burdened with any part of the union’s expenditures in support of political or ideological causes.” *Id.* at 447. Nevertheless, the *Ellis* Court acknowledged that in *Street* it had “expressed no view on *other union expenses* not directly involved in negotiating and administering the contract and in settling grievances.” *Id.* (emphasis added). Accordingly, the *Ellis* Court set out to address the gray area left by *Street*, between the clearly chargeable expenses of performing statutory collective-bargaining functions and the clearly nonchargeable “expenditures to support union political activities.” *Id.* at 453; *see also id.* at 438-39 (noting that the Court in *Street* “did

not express a view as to expenditures for activities in the area between the costs which led directly to the complaint as to free riders, and the expenditures to support union political activities” (internal quotation marks and citation omitted)).

As to this gray area, the *Ellis* Court held that “objecting employees may be compelled to pay their fair share of not only the direct costs” of performing statutory representational functions such as “negotiating and administering a collective-bargaining contract and . . . settling grievances and disputes,” but also “the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.” *Id.* at 448. But in so holding, the *Ellis* Court did not, as the Union claims (Br. 29-30), invite a parsing of union *political* activities to determine which ones might be “germane” to collective bargaining. *See id.* at 447-48 (citing *Railway Clerks v. Allen*, 373 U.S. 113 (1963)). Rather, the *Ellis* Court was addressing a range of *nonpolitical* activities—not touched upon in *Street*—that do not qualify as “negotiating and administering a collective-bargaining contract” or “settling grievances and disputes,” but may nevertheless be “germane” to such traditional collective-bargaining activities and chargeable for that reason. *Id.* at 447-55. Thus, the *Ellis* Court specifically held that a union may use funds from nonmember objectors for conventions, social activities, informational publications not dealing with political causes, litigation concerning

the bargaining unit, and employee death benefits—all expenditures that are germane to collective bargaining but most emphatically do not constitute political activity. *Id.*

Despite the clear import of the Supreme Court cases above, the Union insists that its legislative lobbying efforts were “germane” to collective bargaining, and chargeable to nonmember objectors, because they involved topics that were or could be addressed in collective-bargaining, such as wages. (Br. 32-35.) But as the Board explained, lobbying activity does not shed its political character and become “a representational function simply because the proposed legislation involves a matter than may also be the subject of collective bargaining.” (JA 404.) Indeed, the D.C. Circuit “explicitly rejected” a similar claim in *Miller v. Air Line Pilots Association*, 108 F.3d 1415 (1997). (JA 404.) There, as here, the union argued that its lobbying efforts touched on areas of concern to represented employees and would complement the union’s efforts on their behalf at the bargaining table. *Id.* at 1422-23. The court, however, refused to consider the union’s lobbying efforts as “somehow nonpolitical” because of their relationship to bargaining. *Id.* at 1422. Applying Supreme Court precedent, the court held that “[i]f there is any union expense that . . . must be considered furthest removed from ‘germane’ activities, it is that involving a union’s political actions,” of which lobbying efforts are undoubtedly a part. *Id.* at 1422-23 (noting that under *Ellis* and

*Street* “expenses are not germane to collective bargaining at least in the private sector if they involve political or ideological activities”).

Contrary to the Union’s suggestion (Br. 31-32), *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), does not undercut *Miller*’s assessment that for private-sector unions, lobbying is fundamentally a political activity—not a representational function. *Lehnert* involved legislative lobbying by a union representing government employees, where the bargaining relationship was directly with the government and “union efforts to acquire appropriations for approved collective bargaining agreements often serve as an indispensable prerequisite to their implementation.” 500 U.S. at 520. In that admittedly different context, the Supreme Court held that a union could charge objectors for lobbying, but severely limited the type of lobbying that would be chargeable, as the Board noted here. (JA 404, citing 500 U.S. at 520.) Thus, under *Lehnert*, a union could only charge objectors for lobbying it had to undertake for “ratification or implementation of [the objector’s] collective-bargaining agreement.” *Id.*<sup>3</sup>

---

<sup>3</sup> In any event, the Supreme Court has recently invalidated *any* compelled charges to nonmember objectors in the public sector, based on state-action considerations not present here (i.e., the government’s direct involvement in compelling public-sector employees to pay dues under a union-security agreement with a government entity) and the unique First Amendment interests of those employees in that special circumstance. See *Janus v. Am. Federation of State, County, and Municipal Employees, Council 31*, 128 S. Ct. 2448, 2478-80 (2018) (noting “the difference

The Union gains no more ground by faulting the Board for not specifically addressing *Transport Workers of America, Local 525 (Johnson Controls World Services)*, 329 NLRB 543 (1999), a distinguishable case where the union represented employees of several government contractors. (Br. 37-38.) In that dissimilar context, the Board held that the union’s “expenses incurred . . . in contacting and appearing before [] governmental officials and agencies” were “representational in nature” because the government had “a unique role in setting” the represented employees’ terms and conditions of employment through contracts with their private-sector employers. 329 NLRB at 544, 559. Contrary to the Union’s claim, the *Johnson Controls* Board did not embrace the administrative law judge’s observations, in dicta, that the union’s expenses on communications with the government “might be characterized as lobbying expenses” and that “lobbying is not per se nonchargeable.” *Id.* at 543-45, 560.

Accordingly, because the Board in *Johnson Controls* did not decide whether the union’s communications with the government constituted lobbying, the Union errs in suggesting that the case is controlling precedent on the issue of lobbying expenses. (Br. 37-38.) The Board therefore did not need to discuss, let alone reverse, that distinguishable ruling as the Union claims (Br. 38). *See NLRB v. Sw.*

---

between the effects of agency fees in public- and private-sector collective bargaining”).

*Reg'l Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016) (“the Board need not address ‘every conceivably relevant line of precedent in [its] archives,’” so long as it discusses “‘precedent directly on point.’” (quoting *Lone Mountain Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161, 1164 (3d Cir. 2013)).<sup>4</sup>

Instead, the Board appropriately based its decision here on controlling court precedent that is directly on point. As the Board reasonably found, and as explained above, the “relevant Supreme Court and lower court precedent compels holding lobbying costs are not chargeable as incurred during the union’s performance of statutory duties as the objectors’ exclusive bargaining agent.” (JA 403.)

---

<sup>4</sup> Likewise, contrary to the Union’s suggestion (Br. 37), the Board was not obligated to address the administrative law judge’s speculation in *American Federation of Television and Recording Artists, Portland Local (KGW Radio)*, 327 NLRB 474, 484 (1999), that lobbying efforts “could have” a relationship to collective bargaining. Nor did the Board have to address a similarly conjectural statement in an internal advice memorandum issued by the General Counsel over 15 years ago, that union expenditures on lobbying “may be chargeable” in some circumstances. (Br. 37, citing *Carpenters Local 751 (Largo Construction, Inc.)*, Advice Memorandum, Case 32-CB-5560-1 (2003).) See *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123 n.36 (2d Cir. 2017) (“advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the Board”); *NLRB v. Gaylord Chem. Co.*, 824 F.3d 1318, 1332 n.42 (11th Cir. 2016) (“[s]uch memoranda are intended to serve as internal instruction for use by the Office of the General Counsel, and have no precedential value or authoritative weight” (internal quotation marks and citation omitted)).

**C. The Union Violated Its Statutory Duty of Fair Representation by Charging Objecting Nonmembers for Its Lobbying Activities**

The Board has long interpreted Section 7 of the Act as giving employees “the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment.” *Int’l Longshoreman’s Ass’n, Local 1575*, 332 NLRB 1336, 1336 (2000) (quoting *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963)); *see NLRB v. Int’l B’hood of Elec. Workers, Local Union 16*, 425 F.3d 1035, 1039-40 (7th Cir. 2005) (noting that “the [Board] has read [Section 7’s] right of representation to include” the right specified in *Miranda Fuel*).

Accordingly, a union’s status as an exclusive bargaining representative gives rise to “a statutory obligation to serve the interests of all members [of the bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *accord California Saw*, 320 NLRB 224, 229-30 (1995).

This obligation “applies to all union activity” and, at bottom, requires a union to “represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements.” *California Saw*, 320 NLRB at 229 (citing *Air Line Pilots v. O’Neill*, 499 U.S. 65,

67 (1999), and *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979)) (internal quotation marks omitted).

In *California Saw*, the Board expressly made this longstanding “duty of fair representation” applicable to situations where a union seeks to exact payments from nonmembers pursuant to a collectively bargained union-security agreement. 320 NLRB at 230. In particular, *California Saw*, *id.* at 233, 244, requires a union to deal fairly with nonmembers in giving them timely and sufficient information to understand their rights under *Beck*, and in charging them only for those costs “necessary to ‘performing the duties of an exclusive representative . . . in dealing with the employer on labor-management issues,’” *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448). If a union fails to comply with these specific obligations to nonmembers, it violates Section 8(b)(1)(A) of the Act, which makes it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [Section 7 of the Act].” 29 U.S.C. § 158(b)(1)(A).

Here, the undisputed evidence shows that the Union lobbied for several proposed pieces of legislation in the Rhode Island and Vermont legislatures and then sought to pass on a proportionate share of its lobbying costs to nonmember objectors. The record, therefore, amply supports the Board’s finding that the Union violated its duty of fair representation, implemented by Section 8(b)(1)(A)

of the Act, “by charging nonmember objectors for expenses incurred as to . . . lobbying activities,” which are outside the scope of the Union’s statutory representational function. (JA 404.) *Accord California Saw*, 320 NLRB at 244 (finding that the union violated Section 8(b)(1)(A) by charging nonmember objectors for “legislative expenses” that were admittedly non-chargeable).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY FAILING TO PROVIDE AN AUDIT-VERIFICATION LETTER TO NONMEMBER OBJECTORS**

### **A. Under Settled Law Establishing Procedures Unions Must Follow as a Matter of Basic Fairness, an Independent Auditor Must Confirm the Union’s Account of Its Expenditures**

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986), the Supreme Court held that “basic considerations of fairness . . . dictate that . . . potential objectors be given sufficient information to gauge the propriety of the union’s fee” for representational activity. It is accordingly fundamental to the law on the procedural rights of nonmembers that they do not have to blindly accept the union’s representations relevant to their agency fees.

Building on *Hudson* and the Supreme Court’s later decision in *Beck*, the Board in *California Saw* interpreted the statutory duty of fair representation to impose several specific obligations on unions where union-security agreements are concerned. To begin, “when or before a union seeks to obligate an employee to

pay fees and dues under a union-security clause,” the union must “inform the employee that he has the right to be or remain a nonmember.” 320 NLRB 224, 233 (1995). The union must also inform the employee that nonmembers have the right: “to object to paying for union activities not germane to the union’s duties as bargaining agent and to obtain a reduction in fees for such [non-germane] activities”; to receive “sufficient information to enable” an intelligent decision as to whether to object; and to receive information on applicable internal union procedures for filing objections. *Id.* Moreover, if an employee chooses to object, “he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.” *Id.*

Thus, the duty of fair representation requires that a union provide timely and sufficient information to employees, particularly once they have asserted their right to object. Although a union does not owe objectors an “exhaustive and detailed list of all [the union’s] expenditures,” as the Supreme Court emphasized in *Hudson* “adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.” *Hudson*, 475 U.S. at 292 n.18; accord *California Saw*, 320 NLRB 224, 241 n.83 (1995) (relying on *Hudson*).

As the Board explained in *California Saw*, “[t]he fundamental purpose [of] requiring an audit of union expenditures is to provide objecting nonmembers with a reliable basis for calculating the fees they must pay.” 320 NLRB at 242.

“[W]ithout trustworthy information about the basis of the union’s fee calculations,” nonmembers “cannot make a reliable decision as to whether to contest” the calculated fees. *Ferriso v. NLRB*, 125 F.3d 865, 869-70 (D.C. Cir. 1997). Thus, “an independent audit is the minimal guarantee of trustworthiness.” *Id.* at 870.

A satisfactory audit must conform to “the generally accepted meaning of the term” in that “the auditor independently verifies that the expenditures claimed [by the union] were in fact made.” *American Federation of Television and Recording Artists, Portland Local (KGW Radio)*, 327 NLRB 474, 477 (1999); *see also California Saw*, 320 NLRB at 241 (noting that the duty of fair representation requires “that [the] usual function of an auditor be performed, i.e., to determine that the expenses claimed were in fact made” (quoting *Price v. Auto Workers UAW*, 927 F.2d 88, 93 (2d Cir. 1991))). A union does not satisfy its duty of fair representation if its auditor fails to independently verify the union’s major categories of expenses and merely relies on the union’s representations. *KGW Radio*, 327 NLRB at 477.

**B. The Board Reasonably Interpreted *Hudson* and Its Progeny To Require Disclosure of the Auditor’s Letter Confirming that the Required Audit Was Conducted**

As the Board reasonably found, “[i]t inevitably follows” from the precedent discussed above that “unions must take the modest additional step of supplying verification from the auditor” to nonmember objectors “that the provided financial

information has been independently verified.” (JA 401, citing *Cummings v. Connell*, 316 F.3d 886, 891-92 (9th Cir. 2003) (requiring union to provide nonmembers with certification from independent auditor “that the summarized figures have indeed been audited and have been correctly reproduced from the audited report”).) As the Board explained, “[j]ust as requiring objectors to simply accept the union’s financial figures without an audit is unfair, so too would be requiring objectors to accept the union’s bare representations that the figures were appropriately audited.” (JA 401.)

The Board’s decision to “explicitly hold” (JA 401) that nonmember objectors are entitled to a verification letter from the auditor does not, as the Union claims, “reverse[]” or “depart from” existing Board precedent under which a union’s duty “is met if it . . . supplies verified figures” to nonmember objectors. (Br. 44, quoting *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB 28, 30 (1999).) Rather, the Board’s holding simply clarifies what it means to provide verified figures. In the Board’s view, it is not consistent with a union’s established duty of fair representation to merely provide expense figures to nonmember objectors and state that they have been verified by an auditor. Instead, as the Board explained, to ensure the modicum of trustworthiness contemplated by existing law, a union must provide direct verification of the required audit from the party who performed it. (JA 401.)

Although the Union dismisses direct verification as an empty gesture (Br. 40, 45), the Board reasonably viewed it as a logical extension of the audit requirement itself. (JA 401-02 & n.8.) While the independent audit serves to ensure the trustworthiness of the union’s representations about its expenses, the letter from the auditor actually ensures that nonmember objectors will *know* those representations are trustworthy. That knowledge, in turn, removes any “uncertainty for the objectors as to whether the [u]nion’s claimed expenses were actually incurred” (JA 400), and allows them to “make a reliable decision as to whether to contest” the union’s agency-fee calculations, *Ferriso*, 125 F.3d at 869-70. *See Cummings*, 316 F.3d at 891 (an audit-verification letter “give[s] nonmembers assurance that the reviewed books really reflect the transactions that occurred,” which in turn promotes informed decision-making about objections); *accord Wessel v. City of Albuquerque*, 299 F.3d 1186, 1193-94 (10th Cir. 2002). Accordingly, the Union errs in asserting that a letter from the auditor “does not in any way assist objecting non-members” in determining whether to challenge a union’s fee calculations. (Br. 40.) To the contrary, as the Board emphasized, direct verification of the audit to nonmember objectors “is essential information objectors need to decide whether to challenge the propriety of the union’s fee.”<sup>5</sup> (JA 401.)

---

<sup>5</sup> There is likewise no merit to the Union’s claim that the Board conflated the

**C. The Union Violated Its Statutory Duty of Fair Representation by Failing To Give Nonmember Objectors the Audit-Verification Letter**

As the Board explained, the requirement of an audit-verification letter emanates from the same “basic considerations of fairness” that “dictate” the provision of essential information to nonmember objectors, including independently verified expense figures to support the union’s agency-fee calculations. (JA 400-01, quoting *Hudson*, 475 U.S. at 306.) It follows, therefore, that a union breaches its duty of fair representation, and violates Section 8(b)(1)(A) of the Act, by failing to comply with the basic requirement of furnishing the letter from the auditor who performed an independent audit of the union’s expenses.

Here, the record shows (JA 126-27) and the Union does not deny that it failed to provide an audit-verification letter to the nonmember objectors. Therefore, substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) by withholding the letter.

In contesting this conclusion, the Union argues that the Board “should have left the verification issue alone” because the figures it provided to nonmember objectors were in fact verified by an auditor, and a union official credibly testified

---

issues of verification and chargeability in this case. (Br. 40 n.14, 44.) As the above discussion shows, the Board appropriately recognized that verification and chargeability go hand in hand: reliable, verified figures are necessary for nonmember objectors to intelligently exercise their right to challenge the union’s chargeability determinations.

to that effect. (Br. 41 n.15, 42-43.) But the Board had every reason to address the issue presented in this case—that is, “whether basic considerations of fairness required that the Union provide *Beck* objectors with an audit verification *letter*.” (JA 400 (emphasis added).) The underlying complaint issued by the Board’s General Counsel squarely presented the issue, specifically alleging that the Union violated Section 8(b)(1)(A) of the Act by “fail[ing] to provide” nonmember objectors with “evidence beyond a mere assertion that the financial disclosure [given to them] was based on an independently verified audit.” (JA 414; JA 166.) The parties subsequently litigated the propriety of a distinct letter requirement as a possible feature of the duty of fair representation. (JA 414, 416; JA 87, SA 5, 8-12.) Thus, there is no merit to the Union’s claim (Br. 39-43, 47) that the Board exceeded the bounds of what was presented and litigated, or misunderstood the issue before it, in finding that the Union unlawfully withheld an audit-verification letter from nonmember objectors.

**D. The Court Lacks Jurisdiction To Consider the Union’s Meritless Challenge to the Board’s “Retroactive” Application of Its Rule Requiring an Audit-Verification Letter in the Instant Case**

Despite the Board’s well-supported determination that basic considerations of fairness require provision of an audit-verification letter to nonmember objectors, the Union challenges the “retroactive” application of this rule here. (Br. 47-49.) In particular, the Union takes issue with the Board’s remedial order, which requires it

to give nonmember objectors the audit-verification letter previously withheld from them. (Br. 48.) The Court, however, lacks jurisdiction to consider these claims, which in any event lack merit.

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). To comply with this stricture, a party must first raise its claims before the Board at the time appropriate under its practices, and the failure to do so bars judicial consideration of those arguments on review. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). As this Court aptly noted in *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 458-59 (1st Cir. 2005), Section 10(e) “unreservedly embraces” the “general rule” stated in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the [appropriate] time.” This rule also “preserves judicial economy, agency autonomy, and accuracy of result by requiring full development of issues in the administrative setting to obtain judicial review.” *N. Wind, Inc. v. Daley*, 200 F.3d 13, 18 (1st Cir.1999) (internal quotation marks and citations omitted)). And if a party could not reasonably have made its argument in exceptions filed with the Board to an

administrative law judge's decision, it can and must raise the claim in a motion for reconsideration of the Board's Decision and Order in order to preserve the issue for judicial review. *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *see also* 29 C.F.R. §§ 102.46(a) (exceptions), 102.48(c) (motions for reconsideration).

During the litigation below over the possible requirement of an audit-verification letter, the Union never argued that the Board should decline to apply any new requirement retroactively to this case. (SA 1-3, 7-25.) Nor did the Union move for reconsideration of the Board's Decision and Order, which affirmatively required the Union to provide an audit-verification letter to the affected nonmember objectors. Accordingly, the Union failed to fulfill its obligation under Section 10(e) of the Act to "urge[]" its relevant objections before the Board at the time appropriate under its practices. 29 U.S.C. § 160(e); *see also* *Woelke & Romero Framing*, 456 U.S. at 666 (holding that Section 10(e) "bar[red]" argument that could have been raised to the Board in a "petition for reconsideration or rehearing").

Contrary to the Union's suggestion (Br. 49), its failure to satisfy this jurisdictional requirement for judicial review is not excused by the Board's sua sponte discussion of whether to apply the new rule in the instant case. (JA 401-02 n.8, 406-07.) *See NLRB v. Harding Glass Co.*, 500 F.3d 1, 7 (1st Cir. 2007)

(applying Section 10(e) bar where party failed to move for reconsideration of the Board's sua sponte resolution of certain issues). Under settled law, "a party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself." *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016), cited with approval in *Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 382 (1st Cir. 2017) (recognizing that a party cannot "salvage a barred claim by relying on" discussion among Board members).

The Union could easily have filed a motion for reconsideration before the Board, raising the matters that it now presents for the first time in this Court, including points raised by the dissenting Board member. See *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) ("Where the Board addresses an issue not raised by the parties, the party aggrieved can preserve its claim for judicial review by seeking reconsideration by the Board."). Because the Union failed to take that essential step and presents no "extraordinary circumstances" to excuse its failure, the Court lacks jurisdiction to consider its claims. 29 U.S.C. § 160(e).

In any event, the Board did not err in applying to the Union the express requirement of an audit-verification letter that resulted from the litigation in this case. The Board is generally on the strongest footing where, as here, it seeks to

give effect to a new rule in the context of the adjudication in which it was announced. Indeed, as the Supreme Court has explained, “sound principles of decision-making” favor the announcement of rules of law in the context of concrete disputes, and disfavor advisory opinions that have no immediate application. *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“every case of first impression has a retroactive effect, whether [decided] . . . by a court or by an administrative agency”).

Consistent with these principles, it would “severely curtail the Board’s practice of declaring policy through adjudication” if the Board could not “apply policy changes in the case in which the new approach is declared.” *NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 530 (7th Cir. 1986). Moreover, “to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or challenge outworn doctrines.” *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

Accordingly, in retroactively applying a new rule to the very parties who litigated the propriety of the rule, the Board acts well within its “wide discretion to determine whether and to what extent the new rule will be applied retroactively.” *Fox Painting Co. v. NLRB*, 919 F.2d 53, 56–57 (6th Cir. 1990). To be sure, the Board’s discretion is subject to an equitable limitation: it cannot apply a new rule

retroactively if “manifest injustice” would result. *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983) (citing *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974)); accord *SNE Enters.*, 344 NLRB 673, 673 (2005).

In determining whether retroactive application of a newly adopted rule will cause manifest injustice, the Board balances three factors: “the reliance of the parties on preexisting law”; “the effect of retroactivity on accomplishment of the purposes of the Act”; and “any particular injustice arising from retroactive application.” *SNE Enters.*, 344 NLRB at 673 (citing cases); see also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (applying a similar three-factor analysis to decide whether a judicial decision should be given retroactive effect).

Here, the Board reasonably found that no manifest injustice would result from requiring the Union to provide nonmember objectors with a previously prepared audit-verification letter that it already had in hand. (JA 401-02 n.8.) With regard to the first factor in the retroactivity analysis (the parties’ reliance on preexisting law), the Board correctly reasoned that although “[t]he Union may have withheld the verification letter because it believed it was not legally required to provide it,” the Union “did not act in reliance on any well-established precedent” in doing so. (JA 402 n.8.) Indeed, at the time, there were no affirmative decisions by the Board approving the practice of withholding audit-

verification letters from nonmember objectors. *See NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990) (no manifest injustice in applying arguably new rule to case in which it is first announced if the law has not been previously settled to the contrary); *accord California Saw*, 320 NLRB at 234. Rather, Board law was silent on the specific requirement of an audit-verification letter and, if anything, relevant precedent implicitly signaled the reasonableness of such a requirement. (JA 402 n.8.) In these circumstances, the Union could hardly claim detrimental reliance on an express pre-existing rule to the contrary. *See Truck Drivers & Helpers Union, Local No. 170 v. NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) (“absence of a clear rule would negate any claim of reasonable reliance” and therefore militates in favor of retroactive application); *Retail, Wholesale & Dept. Store Union*, 466 F.2d at 391 n.26 (emphasizing “the difference between [retroactive clarification of uncertain law] and retroactive change in clear law that has been specifically relied upon” (internal quotation marks and citation omitted)); *cf. Electronic Workers IUE (Paramax Systems) v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994) (retroactive application of new rule held improper where the parties had patterned their conduct after a prior, contrary standard).

The second and third factors (the effect of retroactivity on accomplishing the Act’s purposes, and any particular injustice that may result) likewise favor retroactive application of the now-explicit rule that unions must provide an audit-

verification letter to nonmember objectors. As explained above pp. 32-36, the Board’s new rule follows from the “basic considerations of fairness” underlying the Union’s statutory duty of fair representation, and the Union plainly breached that duty by withholding an audit-verification letter from nonmember objectors here. It “effectuates the purposes of the Act”—including the purpose to protect the rights of employees who refrain from union membership—to find a violation in this context and order the Union to “provide the . . . verification letter already in its possession.” (JA 402 n.8.) As the Board further found, the order to do so “imposes only a small affirmative burden” on the Union, to produce something it already has, which “will not entail any undue hardship.” (JA 402 n.8; JA 87, 126-27.) In sum, even if the Court had jurisdiction to review the Board’s retroactive application of its new rule requiring provision of an audit-verification letter, the circumstances here fully support the Board’s finding that there is no “manifest injustice” barring retroactive application, contrary to the Union’s claim. (Br. 47-49.)

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review and enforcing the Board's Order in full.

/s/ Julie B. Broido  
JULIE B. BROIDO  
*Supervisory Attorney*

/s/ Milakshmi V. Rajapakse  
MILAKSHMI V. RAJAPAKSE  
*Attorney*

National Labor Relations Board  
1015 Half Street, SE  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-2914

PETER B. ROBB  
*General Counsel*

ALICE B. STOCK  
*Deputy General Counsel*

DAVID HABENSTREIT  
*Acting Deputy Associate General Counsel*

National Labor Relations Board

November 2019

H:/UNAP-final brief-jbmr

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

UNITED NURSES AND ALLIED PROFESSIONALS	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 19-1490
	)	19-1602
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	01-CB-011135
and	)	
	)	
JEANETTE GEARY	)	
	)	
Intervenor	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing contains 9,885 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570-0001  
(202) 273-2960

Dated at Washington, DC  
this 8th day of November 2019

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

UNITED NURSES AND ALLIED PROFESSIONALS	)	
	)	
	)	Nos. 19-1490
Petitioner/Cross-Respondent	)	19-1602
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	01-CB-011135
and	)	
	)	
JEANETTE GEARY	)	
	)	
Intervenor	)	

---

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

Dated at Washington, DC  
this 8th day of November 2019

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570-0001  
(202) 273-2960

# **ADDENDUM**

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

UNITED NURSES AND ALLIED PROFESSIONALS	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 19-1490
	)	19-1602
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	01-CB-011135
and	)	
	)	
JEANETTE GEARY	)	
	)	
Intervenor	)	
	)	

**STATUTORY ADDENDUM**

National Labor Relations Act, as amended (29 U.S.C. § 151-69)

Section 7 (29 U.S.C. § 157) .....	2
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2-3
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) .....	3
Section 8(d) (29 U.S.C. § 158(d)).....	3-4
Section 9(a) (29 U.S.C. § 159(a)) .....	5
Section 10(a) (29 U.S.C. § 160(a)) .....	5
Section 10(e) (29 U.S.C. § 160(e)) .....	5-6
Section 10(f) (29 U.S.C. § 160(f)) .....	6-7

Railway Labor Act, as amended (45 U.S.C. §§ 151-65)

Section 2, Eleventh (29 U.S.C. § 152, Eleventh).....	7-8
--	-----

NLRB Rules and Regulations, Part 102 (29 C.F.R. § 102)

Section 102.46(a) .....	9-10
Section 102.48(c) .....	10-11

**Relevant provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69**

**Sec. 7. [§ 157.]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Sec. 8. [§ 158.]** (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

\*\*\*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the

periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

\*\*\*

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

\*\*\*

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and

conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully

and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

\*\*\*

**Sec. 9 [§ 159.]** (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

\*\*\*

**Sec. 10. [§ 160.]** (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

\*\*\*

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively,

wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the

proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant provisions of the Railway Labor Act**  
**45 U.S.C. §§ 151-65**

**Section 2. [§ 152.] [General Duties]**

\*\*\*

Eleventh. [Union security agreements; check-off] Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and

payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

**Relevant Provisions of the NLRB's Rules and Regulations, Part 102**  
**29 C.F.R. § 102**

**Sec. 102.46**

(a) [Exceptions and brief in support] Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50–page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived.

Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

\*\*\*

## **Sec. 102.48**

\*\*\*

(c) [Motions for reconsideration, rehearing, or reopening the record] A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.