



NLRB Requires Non-Union Member To Pay For Lobbying Fees

Insights

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Lobbying Took Place In A Neighboring State's Legislature

The National Labor Relations Board recently held that United Nurses and Allied Professionals (UNAP) did not violate the National Labor Relations Act (NLRA) by failing to provide an audit-verification letter to a non-member objector, Jeannette Geary, who opposed the UNAP charging her for lobbying expenses.

The Board further held, that the lobbying expenses made to the Vermont legislature by UNAP were chargeable to objectors such as Geary (even though she worked at Kent Hospital in Rhode Island), and that these expenses would be chargeable even if they were an “extra-unit” expense. This Board’s holding in this case is controversial for a number of reasons. *United Nurses and Allied Professionals (Kent Hospital)*.

Why It's A Hot Potato

The first and most controversial issue created by this recent decision is intertwined with the recent decision handed down by the U.S. Circuit Court of Appeals for the District of Columbia. That court held that President Obama improperly appointed three members of the NLRB. The court reasoned that the President attempted to appoint these members during Congress’ “recess” period, and that this was constitutionally impermissible. See our [Legal Alert](#) on this decision.

The D.C. Circuit’s opinion could have negative implications on the Kent Hospital case because this case – as well as about 200 cases decided by the NLRB in the prior year – is in danger of being invalidated if the Supreme Court agrees that members of the Board were improperly appointed by President Obama.

The second controversial implication of this case is that it appears to go against the Supreme Court’s holding in *Communications Workers v. Beck*. In that case, the Court held that the NLRA does not allow a union representative, over the objection of non-member employees it represents, to use funds collected from those employees on activities unrelated to collective bargaining, contract administration, and grievance adjustment.

The Board in the *UNAP* case distinguished public-sector cases examining what types of lobbying expenses may be chargeable to objectors, because public-sector cases implicate state action and therefore are subject to constitutional scrutiny. Conversely, *UNAP* involved a private-sector employer who was not a state actor, and therefore *UNAP*'s conduct was evaluated under a less stringent standard.

The Facts

UNAP entered into a collective bargaining agreement with the employer – a private acute care hospital in Warwick, Rhode Island. The agreement was effective from July 2009 to June 2011, and required all new members to join the union by their 30th day of employment, or to begin paying a fee equivalent to union dues, usually referred to as an agency fee. These fees may be imposed on all employees, but only for costs directly related to union representation, such as collective bargaining, contract administration, or grievance adjustment.

Jeannette Geary – a former union member at Kent Hospital in Rhode Island – resigned her membership in the union, along with several other unit employees. Citing the Supreme Court's decision in *Beck*, Geary objected to the assessment of fees for the *UNAP* engaging in activities she perceived to be unrelated to collective bargaining, contract administration, or grievance judgment. Specifically, Geary argued these fees being charged to her were related to lobbying activities with the Vermont legislature, and not germane to the *UNAP*'s representational duties.

The Board faced three issues in this case: 1) whether *UNAP* was required to provide Geary a copy of the audit-verification letter of the financial information regarding the expenses she was being charged with; 2) the appropriate standard for determining if lobbying expenses are germane for purposes of union activity, and thus chargeable to Geary; and 3) the circumstances under which Geary or objectors could be charged for extra-unit lobbying expenses.

The Audit-Verification Letter

The Board quickly distinguished the facts of this case from other recent union cases decided by other federal courts of appeals. The Board noted that this case was not a public-sector union case, and thus was **not** to be evaluated under the heightened First Amendment standard, but rather the less stringent "duty of fair representation" standard. The Board reasoned that a union violates its duty of fair representation only if its actions are "arbitrary, discriminatory, or in bad faith.

Following this standard, the Board held that it was not necessary for the union to provide its objectors, such as Geary, a copy of the audit-verification letter. Instead, the reasonable response of *UNAP* promptly providing Geary with its major categories of expenditures along with assurances that the figures had been independently verified, were sufficient under this standard. Accordingly, unlike in public-sector cases, *UNAP* did not need to provide an audit-verification letter, and thus did not violate the Act.

Lobbying Expenses

The next issue was whether Geary could be charged for UNAP's lobbying expenses for what Geary claimed was "nonrepresentational activity." The Board reasoned, attempting to be consistent with Beck and Board precedent, that lobbying expenses are chargeable to objectors only if they are germane to collective bargaining, contract administration, or grievance adjustment. Therefore, in this case, the Board had to determine whether the expenses related to a legislative goal were sufficiently related to the union's representational functions.

The Board held that they were sufficiently related. In reaching this conclusion the Board analyzed decisions from the Supreme Court and from the 6th Circuit Court of Appeals. In *Lehnert v Ferris Faculty Assn* the 6th Circuit held that legislative proposals by unions can involve core employee concerns such as wages, hours, and working conditions. The court concluded that the conduct was clearly related to the union's core essential functions, and thus is chargeable to objecting members.

In analyzing the *Beck* case, the Board noted that the Supreme Court did not define the term chargeability to exclude all union expenses that are political in nature. Because the Board reasoned that the lobbying expenses by UNAP were arguably closely tied to UNAP's representative duties of its members – such as wages, hours, benefits etc. – then it was permissible for the objectors to be charged for these expenses.

Extra-Unit Expenses

This final issue of "extra-unit expenses" arose after UNAP lobbied for three bills in the Vermont legislature which did not provide a direct benefit to its members of the Kent Hospital in Rhode Island. Thus the question became whether or not UNAP is permitted to charge objectors for extra-unit expenses. Again, the Board said yes. The Board reasoned that a union is permitted to charge for extra-unit expenses as long as they are "for services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization." The union only needed to make a showing that the charge was reciprocal in nature, i.e., the contributing local expects other locals to contribute resources to the parent unions for similar activities

The Board acknowledged that although the employees in the Kent Hospital in Rhode Island were unlikely to receive a direct benefit from UNAP supporting legislation in Vermont, contributions of other units to the UNAP's overall operating fund were intended to subsidize similar efforts on their behalf – and thus were "reciprocal in nature."

Said differently, UNAP made a showing that the UNAP's fund-covered lobbying efforts intended to benefit its Rhode Island members as well. Accordingly, the Board held that charging extra-unit expenses did not violate the Act, and therefore were properly chargeable to the members.

Conclusion

It will be interesting to see whether this decision will survive for two reasons. First, the holding appears to go against Supreme Court precedent in the *Beck* case that held that unions could **not** charge funds on activities unrelated to collective bargaining, contract administration, or grievance adjustment in a public-sector case over the objections of its members. And second, whether the

adjustment in a public sector case, over the objections of its members. And second, whether the Supreme Court will throw out this decision, as well as about 200 other decisions made by the Board in the past year, because members of the Board were not properly appointed by the President. In the *Kent Hospital* case the only undisputedly legitimate Board member hearing this case was Chairman Pearce.

Nevertheless, until the Supreme Court makes a final decision on this appointment issue, the Board has promised to “continue to perform [their] statutory duties and issue decisions.” This could lead to a lot more decisions potentially being discarded.

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