No. 97-1832

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALAN STRANG, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that the union did not breach its duty of fair representation under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by calculating the reduced agency fee charged to objecting nonmember employees on a union-wide rather than a unit-by-unit basis.

2. Whether the Board reasonably concluded that the union did not breach its duty of fair representation by charging objecting nonmember employees for litigation expenses that are related to the union's basic representational functions but were incurred outside the employees' bargaining unit.

3. Whether the Board reasonably concluded that the union did not breach its duty of fair representation by using its in-house auditing staff, rather than an independent certified public accounting firm, to verify the expenditures of its affiliated district and local lodges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 133 F.3d 1012. The decision and order of the National Labor Relations Board (Pet. App. 13a-142a) and the decision of the administrative law judge (Pet. App. 143a-328a) are reported at 320 N.L.R.B. 224. The Board's supplemental decision (App., *infra*, 1a-6a) is reported at 321 N.L.R.B. 731.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1998. On March 19, 1998, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May

14, 1998. The petition for a writ of certiorari was filed on May 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. 158(b)(1)(A). Section 7 of the NLRA affords employees the right to engage, or "to refrain from" engaging, in activities in support of collective bargaining. 29 U.S.C. 157. Under Section 8(a)(3) of the NLRA, however, an employer and a union may contract to require as a condition of continued employment that bargaining-unit employees maintain "membership" in the union, provided that membership is available to all and that it requires only "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3); see *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963) (" 'Membership' as a condition of employment is whittled down to its financial core."). The NLRA also permits an "agency shop" arrangement under which employees are not required to maintain "membership" in the union but are required, as a condition of continued employment, to pay to the union sums equal to the initiation fees and periodic dues paid by union members. *Id.* at 743-744.

As construed in this Court's decisions, the NLRA does not "permit[] a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers* v. *Beck*, 487 U.S.

735, 738 (1988). When it receives such objections from nonmember fee payers, the union must calculate "what proportion of [union] expenditures went to activities that could be charged to dissenters" and then make an appropriate reduction in the fees required of objecting nonmembers. *Ellis* v. *Railway Clerks*, 466 U.S. 435, 457 n.15 (1984).

2. The International Association of Machinists and Aerospace Workers (IAM or Union) represents approximately 800,000 employees in 6500 bargaining units in a variety of industries in the United States and Canada. Within the United States, IAM represents primarily employees in the private sector in accordance with the NLRA and the Railway Labor Act. Approximately 12,000 of the employees represented by IAM are nonmembers of the Union. Pet. App. 32a, 158a-159a, 221a.

IAM, also known as the Grand Lodge, is organized into six geographic territories and approximately 1400 affiliated District Lodges and Local Lodges. Some Local Lodges (IAM's smallest organizational unit) represent employees in a single industry, and other Local Lodges represent employees in various industries. The District Lodges, which are comprised of two or more Local Lodges, employ business representatives, who are responsible for assisting the constituent Local Lodges. IAM reimburses the District Lodges for 50% of the cost of the business representatives' salaries and benefits. IAM also employs a staff of individuals who advise and assist the District and Local Lodges. Pet. App. 32a-33a, 158a-159a; see also App., *infra*, 2a.

Many IAM collective bargaining agreements include union security clauses, which require employees to join and maintain "membership" in IAM

after an initial period of employment. Pet. App. 32a, 159a.[1] However, in each December issue of its monthly magazine, The Machinist, IAM notifies employees that "[i]ndividuals [may] elect to be non-member agency fee payors," and that nonmembers "meet their monthly obligation by the payment of" an agency fee equal to "monthly union dues." *Id.* at 32a, 160a & n.8; App., *infra*, 7a. IAM's notification also informs employees that "nonmember agency fee payors may object to expenditures nongermane to the collective-bargaining process and support only chargeable activities," and that the Union deems the category of chargeable expenditures to include "litigation related to * * * representational activities." *Id.* at 8a; see also Pet. App. 32a, 41a & n.53, 51a, 160a, 206a.

Union members and nonmember agency fee payers pay dues and initiation fees to their Local Lodge, which in turn remits a portion of the dues and fees to the District Lodge with which it is affiliated. The Local Lodges also pay a per capita tax to IAM. Pet. App. 32a-33a, 159a.

Each year, the Union calculates a single nationwide agency fee reduction for all objectors based on the ratio of chargeable to non-chargeable expenditures of the Grand Lodge, the District Lodges, and

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[1] The validity of IAM's union-security clauses was not an issue before the Board (see Pet. App. 32a n.39, 159a) and is not an issue before this Court. The question whether a union breaches its duty of fair representation by negotiating and maintaining a contractual provision requiring an employee to be "a member of the Union in good standing" is, however, presented in *Marquez* v. *Screen Actors Guild, Inc.*, cert. granted, No. 97-1056 (Mar. 23, 1998). See also *United Paperworkers Int'l Union* v. *Buzenius*, petition for cert. pending, No. 97-945.

the Local Lodges. The fee reduction is uniform and does not take into account the particular bargaining unit in which the objector is employed. Pet. App. 32a-33a, 160a-161a.

The portion of the fee reduction attributable to the expenditures of the Grand Lodge is calculated based on a report issued by an independent firm of certified public accountants. Pet. App. 33a, 161a, 220a n.29. The portion of the fee reduction attributable to the expenditures of the District and Local Lodges is calculated on the basis of an audit of those entities conducted by the Grand Lodge's in-house auditing staff. Although the in-house auditors are not certified public accountants, they are specially trained to perform the auditing task. Moreover, the Grand Lodge has taken steps to insure their objectivity by forbidding the assignment of an auditor to perform an audit for a District or Local for which he or she worked or of which he or she was a member. *Id.* at 33a, 62a-63a, 161a, 220a.

On receipt of a timely objection, IAM reduces the objector's agency fee in accordance with the above calculations. IAM also provides the objector summaries of the expenditures of the Grand Lodge, District Lodges, and Local Lodges, with an explanation of how the respective fee reductions were calculated. Pet. App. 32a-33a.

3. Petitioners are objecting nonmember employees in various IAM bargaining units in the United States. Acting on charges filed by petitioners, the General Counsel of the National Labor Relations Board (Board) issued a complaint against the Union alleging that it had breached its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by, among other things, charging non-

member objectors for expenses "not attributable to [the Union's] representation of the objecting non-member's bargaining unit" and using its in-house auditing staff, rather than an "independent auditor," to verify the expenditures of the District and Local Lodges. Pet. App. 59a, 144a, 164a, 203a.

The Board, affirming in part the decision of the administrative law judge, concluded that the Union had not breached its duty of fair representation in either respect. Pet. App. 49a-55a, 58a-63a, 203a-207a, 219a-227a. First, noting that "the Supreme Court and the lower courts that have addressed this issue in the public sector and [Railway Labor Act] context have not required unit-by-unit accounting," the Board held that "the duty of fair representation does not require the IAM to calculate its *Beck* dues reductions on a unit-by-unit basis." *Id.* at 50a & n.66 (citing *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991)); see also Pet. App. 203a-205a.

The Board also held that "the duty of fair representation does not require unions to segregate litigation costs on a unit-by-unit basis, as long as the categories of litigation charged to objecting employees are related to the union's basic representational functions" and are not "political" in nature. Pet. App. 54a. Based on its "experience deciding cases that turn on language in collective-bargaining agreements" and its "familiarity with the body of arbitral law construing labor agreements," the Board concluded that "union litigation of issues arising in connection with collective-bargaining agreements may confer benefits on employees beyond those units immediately affected." *Id.* at 53a-54a. The Board cautioned, however, that only litigation "on behalf of one bargaining unit which is likely to benefit other

bargaining units" is chargeable. *Id.* at 55a. And the Board stressed that unions do not have "carte blanche to charge an objecting employee for litigation having only a remote or theoretical benefit to the objector's bargaining unit." *Ibid.*[2]

The Board further held that "IAM did not breach its duty of fair representation by using in-house auditors to verify the expenditures of the District and Local Lodges." Pet. App. 61a. The Board rejected the contention that the auditors lacked the necessary skills and independence. *Id.* at 61a-62a. In particular, the Board found that "IAM takes significant steps to assure objectivity in the performance of the audits of District and Local Lodges." *Ibid.* The Board also rejected the contention that this Court's decision in *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986), requires IAM to hire an independent certified public accounting firm to perform the audits of the District and Local Lodges. Pet. App. 60a-61a nn. 83 & 85.

4. The United States Court of Appeals for the Seventh Circuit affirmed the Board's decision. Pet. App. 1a-12a. The court held that the Board reasonably concluded that the Union did not breach its duty of fair representation by "pool[ing] all its expenditures (including litigation expenditures, treated separately by the parties but analytically identical, as far as we can see) relating to collective bargaining, and in

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[2] The Board also noted that "general litigation expenses unconnected to collective-bargaining or other core representational functions * * * are expressly excluded from the amounts deemed chargeable to objectors" by IAM. Pet. App. 52a n.69. Board Member Cohen dissented on the litigation-expense issue. See *id.* at 55a n.78.

effect divid[ing] the pool by the number of workers that the union represents, to compute the basic agency fee." *Id.* at 4a.

The court explained that petitioners' argument that they should be charged only for "the expenses incurred by the union in representing their units * * * overlooks the economic interdependence of bargaining units." Pet. App. 5a. Because "quantification of the benefits to the workers in one bargaining unit from a worker-favorable collective bargaining agreement in another would be impossible as a practical matter," the court determined that "aggregation is the only feasible alternative to ignoring interdependence altogether." *Ibid.* The court therefore concluded that, "[f]aced with such a choice, a classic case of having to choose the lesser of two evils on insufficient information, the Board's decision cannot be deemed unreasonable." *Ibid.*

The court stressed that, before both the Board and the court, petitioners had raised only a facial challenge to the Union's method of calculating the agency fee reduction. Pet. App. 5a-6a. The court thus preserved petitioners' ability to challenge in the future the application of the Union's calculus, if petitioners could demonstrate that "the actual interdependence of units of machinists is so slight as to make the pooling of the expenses of all the different ones unreasonable." *Ibid.*

The court of appeals also held that the Board was reasonable in concluding that the Union did not violate its duty of fair representation by using its in-house auditing staff, rather than an independent certified public accounting firm, to verify the expenditures of the District and Local Lodges. See Pet. App. 6a-8a. The court noted that petitioners' challenge

was not based on any evidence that the in-house auditors were biased or unskilled but on an objection in principle to the decision not to use outside auditors. Stating that "[t]his is another area where the difference between abstract and concrete judicial review bites," the court did not foreclose an action by petitioners if they could show that the Union's in-house auditors are "so biased or so unskilled that they make many mistakes." *Id.* at 6a. But the court of appeals refused to overturn the Board's decision based on "speculat[ion] on the likelihood and direction of error under the informal system the Board has approved." *Ibid.*

The court of appeals noted that "CPAs are costly, so much so that Congress in passing the Landrum-Griffin Act rejected a proposal to require that the reports of union financial activities that the Act requires be made to union members and regulatory bodies be audited by independent CPAs." Pet. App. 6a. Although it did "not put much weight on this history" (*ibid.*), the court concluded that "[i]t is within the Board's discretion to decide whether, all things considered, the system adopted by the machinists' union is an acceptable alternative to a system in which the local would hire an independent accounting firm to audit its books." *Id.* at 8a.

ARGUMENT

1. The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

Accordingly, as the court of appeals explained, "the Board has broad latitude in interpreting nondirective statutory language." Pet. App. 3a (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). See also *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990) (Board entitled to "considerable deference" in formulating rules "to fill the interstices of the [Act's] broad statutory provisions," so long as "rational and consistent with the Act"); accord *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 118 S.Ct. 818, 822 (1998); *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996).

Because the NLRA provides little explicit direction on the questions posed by this case, deference to the Board's determination is particularly appropriate. In addition, as the court of appeals noted, "[t]he posture of this case * * * makes judicial review necessarily abstract, and as a result limited in depth." Pet. App. 4a. "The Board evaluated [the Union's] procedures not in terms of their actual operation, evidence of which was not placed before the Board, but in terms of their conformity to the general norm of reasonableness that is implicit in the concept of 'fair' representation." *Ibid.*

The court below correctly concluded that the Board acted within its discretion in holding that the Union did not necessarily breach its duty of fair representation under the NLRA either by calculating the reduced agency fee charged to objecting nonmembers on a union-wide rather than unit-by-unit basis or by using in-house auditing staff to verify the expenditures of the District and Local Lodges. Pet. App. 4a-8a. As the court of appeals recognized, that conclusion does not prevent petitioners from raising a fair repre-

sentation claim in the future based on specific evidence showing that the Union's behavior in practice is arbitrary or otherwise unreasonable. See *id.* at 5a, 6a; see also *Finerty* v. *NLRB*, 113 F.3d 1288, 1292 (D.C. Cir.), cert. denied, 118 S. Ct. 558 (1997). Review by this Court of petitioners' abstract claims is not warranted.

2. Petitioners contend (Pet. 21-22) that, in permitting the Union to calculate the reduced agency fee charged to objecting nonmember employees on a union-wide, rather than a unit-by-unit, basis, the Board has forced nonmembers covered by the NLRA to subsidize union activities under the Railway Labor Act, public sector labor laws, and Canadian labor laws. There is no merit to that contention.[3]

a. In *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991), the plaintiffs contended that a public sector union "may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." *Id.* at 519. This Court rejected that argument. The Court stated that, although it had consistently examined whether non-ideological expenses were "germane to collective bargaining," it had "never interpreted that test to require a direct * * * tangible benefit to the dissenters' bargaining unit." *Id.* at 522. To require such a direct relationship, the Court explained, would be "to ignore the unified-membership structure" of many unions, under which "membership in the local union constitutes

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[3] This Court recently denied a petition for certiorari raising the same issue. See *Finerty* v. *NLRB*, 118 S. Ct. 558 (1997).

membership in the state and national parent organizations." *Id.* at 523. The Court continued:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Ibid. Accordingly, the Court concluded that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 524.

b. In holding that the NLRA does not require unit-by-unit fee calculations (see Pet. App. 49a-51a), the Board has concluded—consistent with *Lehnert*—that a union may create a pool of resources that will be available, as needed, to each affiliated bargaining unit and may require each unit to help finance that pool by contributing on a fixed periodic schedule whether or not a particular unit actually draws upon those resources in any given period. That rationale applies with equal force whether the contributing units are in the same industry in the same State, in different industries in Canada and the United States, or in

different States with different collective bargaining laws within the United States.[4]

Contrary to petitioners' contention (Pet. 24), the Board's decision is fully consistent with "the existence of discrete and clearly defined bargaining units" contemplated by the NLRA. Although the NLRA presupposes the existence of discrete bargaining units, nothing in the statute requires unions to formulate their bargaining strategies on a unit-by-unit basis. Thus, "a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 n.2 (1965). And a union may engage in coordinated bargaining along with other unions representing other bargaining units. *General Electric Co.* v. *NLRB*, 412 F.2d 512, 516-520 (2d Cir. 1969). A union enjoys the same latitude in determining how best to "provide bargaining expertise or financial support" in representing the various units that have chosen it as their bargaining agent. *NLRB* v. *Financial Institution Employees, Local 1182*, 475 U.S. 192, 199 n.5 (1986). IAM's cost-pooling method of financing collective bargaining activities is well within the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it

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[4] There is therefore no merit to petitioners' contention (Pet. 23) that IAM's union-wide dues allocation formula gives the NLRA an impermissible extraterritorial effect. Although IAM has locals in Canada, the dues paid to IAM by employees in petitioners' domestic bargaining units are assessed for the purpose of protecting those bargaining units, not for the purpose of "representing Canadian bargaining units" (*ibid*.).

represents." *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 75 (1991) (quoting *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953)).

c. The court of appeals therefore correctly concluded that the Union did not breach its duty of fair representation by "pool[ing] all its expenditures (including litigation expenditures [which are] analytically identical, as far as we can see) relating to collective bargaining, and in effect divid[ing] the pool by the number of workers that the union represents, to compute the basic agency fee." Pet. App 4a. That conclusion is in accord with the decisions of other courts of appeals, which have also held that a union does not breach its duty of fair representation "by calculating the reduced agency fees charged to objecting nonmember employees on a union-wide, rather than unit-by-unit, basis." *Finerty* v. *NLRB*, 113 F.3d 1288, 1291 (D. C. Cir.), cert. denied, 118 S. Ct. 558 (1997); see also *Pilots Against Illegal Dues* v. *Air Line Pilots Ass'n*, 938 F.2d 1123, 1127-1129 (10th Cir. 1991) (holding the same for a union under the Railway Labor Act).

3. Petitioners contend (Pet. 16-17) that *Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984), nonetheless establishes that a union cannot charge nonmember objectors for litigation expenditures "incurred outside their bargaining unit." That contention, however, rests on a misinterpretation of *Ellis*.

In *Ellis*, the Court addressed "the legality of burdening objecting employees" with union expenditures for "litigation not involving the negotiation of agreements or settlement of grievances." 466 U.S. at 440. The Court held that, unless the "bargaining unit is directly concerned, objecting employees need not share the costs" of litigation unrelated to collective

bargaining activities. *Id.* at 453. The Court observed, however, that "expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit" would be "clearly chargeable" to an objector in that unit. *Ibid.*

The Court in *Ellis* did not have occasion to consider, and therefore did not foreclose, the possibility that litigation *related to collective bargaining* that arises outside the objector's bargaining unit may be chargeable to that objector if there is a connection between the litigation and the objector's unit. See *Lehnert*, 500 U.S. at 564 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("*Ellis* * * * contains no discussion of whether a local bargaining unit might choose to fund litigation which is 'a normal incident of the duties of the exclusive representative' through a cost sharing arrangement under the auspices of the affiliate.") (citation omitted).

That is the issue that the Board addressed here. And the standard enunciated by the Board for resolving the chargeability of out-of-unit litigation expenses is consistent with the general principle that this Court prescribed in *Ellis* for determining whether expenses are chargeable to dissenters. See *Ellis*, 466 U.S. at 448 ("the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative"). The Board's test permits the union to charge an objector for the expenses of litigation arising outside the objector's bargaining unit if and only if the litigation is "related to the union's basic representational functions" and is of more than "a remote or theoretical benefit to the

objector's bargaining unit." Pet. App. 54a-55a. As the Board explained, under the NLRA, representational litigation arising out of a dispute in one bargaining unit may have a direct impact on employees in another unit. See *id.* at 53a-54a & nn.75 & 76 (noting, for example, that "[l]itigation involving the meaning of provisions in other contracts that might be applied to a unit through a most favored nations clause * * * clearly can affect that unit"). When there is no connection between the litigation at issue and the objector's unit, as was the case in *Ellis*, the expenses of that litigation cannot be charged to the objector under the standard articulated by the Board. See *id.* at 55a.

Contrary to petitioners' suggestion (Pet. 17), the Board's approach is also consistent with this Court's decision in *Lehnert*.[5] Nor is there any conflict between the standard for chargeability adopted by the Board and the other court decisions cited by petitioners.[6]

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[5] There was no majority holding in *Lehnert* on the correct standard to determine the chargeability of litigation expenditures. A plurality of the Court concluded that "extraunit litigation [is] more akin to lobbying in both kind and effect," and that "[w]hen unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative" and are thus not chargeable to objecting employees. See 500 U.S. at 528 (opinion of Blackmun, J., joined by Rehnquist, C.J., and White and Stevens, JJ.). The Board's test is consistent with that standard. Under the Board's standard, neither litigation that has no connection to the objector's bargaining unit nor "the type of political extra-unit litigation that concerned the Court in *Lehnert*" is chargeable to the objector. Pet. App. 53a-55a.

[6] The cases cited by petitioners (Pet. 17) stand only for a proposition consistent with the Board's ruling—that litigation

Finally, petitioners err in suggesting (Pet. 19) that the Board "implicitly upheld" as chargeable "more than $3.3 million of [IAM's] extra-unit litigation." In this case, the Board did no more than establish the basic standard by which the chargeability of litigation expenditures to objectors should be determined. Neither the Board nor the court of appeals passed on the chargeability of any specific litigation expenditure by the Union. See Pet. App. 5a-6a. Any claim that specific expenditures by the Union are improper should therefore wait for another day.

4. a. Petitioners' final contention—that this Court should review the ruling by the court of appeals that the Union's auditors are sufficiently independent—is also unpersuasive. First, petitioners mistakenly

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that is unrelated to a bargaining unit and does not benefit the unit may not be charged to unit dissenters. In *Pilots Against Illegal Dues* v. *Air Line Pilots Association*, 938 F.2d 1123 (10th Cir. 1991), for example, the court concluded that litigation in connection with the bankruptcy of Continental Airlines was not chargeable to objectors at United Airlines because "[the union] failed to show * * * that this litigation benefitted the United bargaining unit in any significant way." *Id.* at 1129. In *Albro* v. *Indianapolis Education Association*, 585 N.E.2d 666 (Ct. App.), adopted, 594 N.E.2d 781 (Ind. 1992), the court held that "extra-unit litigation expenses are *not* chargeable fair share fee expenses," but the court defined "extra-unit litigation," using the *Lehnert* standard, as "unrelated to an objecting employee's unit." See 585 N.E.2d at 673. See also *Browne* v. *Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992) (litigation expenses chargeable if "directly related to the objecting employee's bargaining unit"); *Reese* v. *City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995) (pooled litigation expenses chargeable to objectors because they were not "unrelated to" the objectors' unit, which "benefitted from the pooling arrangement for litigation services"), cert. denied, 117 S.Ct. 386 (1996).

argue (Pet. 13-14) that the ruling is inconsistent with *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986), because the Board did not require "independent audits by certified public accountants." *Hudson* does not require that unions secure independent audits by CPAs.

In *Hudson*, the Court held that "the constitutional requirements for the [u]nion's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310; see also *Air Line Pilots Ass'n* v. *Miller*, 118 S. Ct. 1761, 1766 (1998) (explaining holding of *Hudson*). The *Hudson* Court found, among other things, that the union had "provided nonmembers with inadequate information about the basis for the proportionate share." 475 U.S. at 306-307. The Court added that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18.

As the court of appeals correctly concluded, *Hudson* "does not say that the auditor must be a CPA or have no affiliation with the audited union" to qualify as independent. Pet. App. 7a; see also *id.* at 60a-61a nn.83 & 85. Petitioners nonetheless assert (Pet. 14) that an "independent auditor" must be a "certified public accountant" because "*Hudson* itself used the term 'verification by an independent auditor' interchangeably with the term 'certified public accountant.'" That assertion is, however, mistaken. The *Hudson* Court's single reference to a "certified public

accountant" occurred in a passage giving an example of a situation in which a union would not be required to escrow 100% of the nonmembers' fees pending resolution of their challenges. See 475 U.S. at 310.[7] In offering that example, the Court did not purport to establish a general rule mandating that unions hire CPAs to audit the financial information that they are required to disclose to nonmembers.[8] See *Ferriso* v. *NLRB*, 125 F.3d 865, 872 (D.C. Cir. 1997) (rejecting contention that "*Hudson* should be read to require that all audits be performed by CPAs").[9]

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[7] The Court stated: "If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories." 475 U.S. at 310.

[8] *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984) (cited at Pet. 14), does not support the contention that *Hudson* requires unions to hire CPAs to audit their financial disclosures to nonmembers. *Hudson* nowhere refers to *Arthur Young & Co.*, which dealt with an unrelated issue. See 465 U.S. at 807 (certiorari granted "to consider whether tax accrual workpapers prepared by a corporation's independent certified public accountant in the course of regular financial audits are protected from disclosure in response to an Internal Revenue Service summons issued under § 7602 of the Internal Revenue Code").

[9] Petitioners are also incorrect in contending (Pet. 12) that "the vast majority of lower courts have interpreted *Hudson*'s 'verification by an independent auditor' requirement" to mean an audit conducted by "an independent certified public accountant." In most of the cases upon which petitioners rely (Pet. 12), the court had no occasion to reach the issue because the union in fact employed a CPA to audit its expenditures. See *Hohe* v. *Casey*, 727 F. Supp. 163, 165-166 (M.D. Pa. 1989) (CPA did not sufficiently audit union's breakdown of charge-

b. Petitioners also contend (Pet. 9, 10, 15-16) that the court of appeals' ruling on the independent auditor issue conflicts with the decision of the D.C. Circuit in *Ferriso* v. *NLRB*, 125 F.3d 865 (1997). Although petitioners are correct that the two decisions are in conflict on this point, resolution of that relatively narrow conflict by this Court is not warranted at the present time.

In *Ferriso*, the Board, relying on its decision in the present case, dismissed an allegation that a union and its local violated the NLRA "because the information

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able and nonchargeable expenses), aff'd in relevant part, 956 F.2d 399 (3d Cir. 1992); *Hudson* v. *Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1315 (7th Cir.) (union's financial disclosure to objectors included an "audit report prepared by its independent certified public accountant"), cert. denied, 501 U.S. 1230 (1991); *Tierney* v. *City of Toledo*, 917 F.2d 927, 935 (6th Cir. 1990) (rejecting contention that CPA "was not independent" of the union); *Dashiell* v. *Montgomery County*, 925 F.2d 750, 757 (4th Cir. 1991) (union submitted "its financial records to an outside accounting firm"). In *Tierney* v. *City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987), the court stated that *Hudson* requires that "detailed financial information concerning all major categories of union expenses * * * be audited by a certified public accountant independent of the union and provided to all non-members before any fees may be collected from them." The reference to an audit by a certified public accountant was dictum, however. The court found a failure to comply with *Hudson* not because the union provided information that was audited by someone other than a CPA but because the union did not provide any detailed financial information at all. *Tierney*, 824 F.2d at 1506; see also *id.* at 1501, 1509-1510. Cf. *Gwirtz* v. *Ohio Educ. Ass'n*, 887 F.2d 678, 682 (6th Cir. 1989) ("*Hudson* does not mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees."), cert. denied, 494 U.S. 1080 (1990).

they were required to provide Ferriso [the non-member objector] was not verified by an independent auditor." See *Electronic Workers (Paramax Systems Corp.)*, 322 N.L.R.B. 1, 2 (1996), petition for review granted *sub nom. Ferriso* v. *NLRB*, 125 F.3d 865 (D.C. Cir. 1997). The D.C. Circuit reversed, directing the Board on remand to "order that the Unions provide Ferriso with an independent audit of their financial data, and that the independence and qualifications of the auditors conform to prevailing norms for audits of comparable entities." 125 F.3d at 873. The *Ferriso* court stated that "it is unlikely that an arrangement like that at issue in [the present case] would be consistent with the ordinary norms for the independence of an audit." *Id.* at 872. And, although it rejected the contention that *Hudson* requires "all audits be performed by CPAs," the court suggested that the audits should generally be performed either by certified public accountants or licensed public accountants. See *ibid.*

The court of appeals in the present case disagreed with the D.C. Circuit on this point. The court concluded instead that it is "within the Board's discretion to decide whether, all things considered, the system adopted by the machinists' union is an acceptable alternative to a system in which the local would hire an independent accounting firm." Pet. App. 8a.[10]

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[10] The court observed that "[t]he auditors in the present case have an indirect affiliation with the audited local but are not employed by the local, and it could be argued that an independent auditor hired by the local would actually feel a greater sense of obligation to the local as the entity paying its bills." Pet. App. 7a-8a.

Resolution of the narrow conflict between the two courts of appeals is not warranted at this time, however, because the Board currently is reconsidering its position in light of the conflicting decisions. See *Teamsters Local 443 (Connecticut Limousine Service, Inc.)*, 324 N.L.R.B. No. 105 (Oct. 2, 1997); *Laborers' Local Union No. 1168 (Work Services Corp.)*, No. 16-CB-4316 (unpublished order dated Apr. 20, 1998, reproduced at App., *infra*, 10a-11a).[11] The Board's reconsideration of its position may well lead to resolution of the conflict in the courts of appeals. If the Board adopts the view of the D.C. Circuit, the Seventh Circuit would likely defer to the Board's change in position. See Pet. App. 8a (resolution of the issue is "within the Board's discretion"). Even if the Board reaffirms its current position, the opportunity for further consideration would allow it to respond fully to the issues raised by the *Ferriso* court and thereby aid subsequent judicial review of the issue.

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[11] In *Teamsters Local 443 (Connecticut Limousine Service, Inc.)*, the Board remanded the case to the administrative law judge "to adduce additional evidence concerning the type of audit performed for the [union] and the verification procedures that were used, and to make the necessary supplemental findings of fact for the Board to resolve the legal issues raised in the D.C. Circuit's decision [in *Ferriso*]." Slip op. 4. In *Laborers' Local Union No. 1168 (Work Services Corp.)*, the Board remanded the case to the administrative law judge "for development of a full factual record on which to consider the respective views of the Seventh and District of Columbia Circuit Courts of Appeal," including the issue "whether the LM-3 report on which Comptroller Adams relied in preparing the [union's] statement of expenditures was prepared pursuant to the type of audit required by the court in *Ferriso*." See App., *infra*, 11a.

Review by this Court at this time would therefore be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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