United Food and Commercial Workers Union, Local 648, United Food and Commercial Workers International Union[1] (Safeway, Inc.) *and* Cynthia Schaer. Case 20–CB–11846–1

August 7, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 16, 2003, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent Union filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.

The judge found, and we agree, that the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by causing the Employer, Safeway, Inc., to discharge Charging Party Cynthia Schaer on October 11, 2002,[3] without having informed her of her rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988),[4] and without having provided her with a specific tabulation of the amount of dues and fees she owed and the method used to calculate this amount, as required under *Philadelphia Sheraton Corp*., 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3d Cir. 1963). However, we reverse the judge's further findings that the Respondent earlier independently violated Section 8(b)(1)(A) by failing to inform Schaer of her *General Motors* and *Beck* rights when the Union presented her with membership documents on April 30.[5] In our view, to find these unalleged violations, as the judge did here, would, under the circumstances of this case, raise serious due process concerns.

The judge based his finding of the Section 8(b)(1)(A) violation relating to the Respondent's April 30 conduct in large part on the undisputed testimony of Charging Party Schaer, who started work in the bargaining unit represented by the Union at Safeway on February 22. Schaer stated that, after learning that she had to join the Union, she went to the Respondent's headquarters on April 30. There, Schaer spoke to a woman identified in the record as "Elsa," and signed a membership application. The judge found, inter alia, that

> [a]lthough Elsa did not testify, there is no disagreement that during this transaction [ ] neither Elsa nor anyone else from the Union informed Schaer that . . . she could whittle [her membership obligations] down to a "financial core" [as described in *General Motors*, supra] or told her that she was entitled [under *Beck*, supra] to know what the non-representational portion of the dues and fees were, so she could decline to pay them.

The judge found that the Respondent's "active effort to conceal from Schaer her right to *General Motors* and *Beck* information" tolled the limitations period, and that the Respondent's failure to inform Schaer of information concerning reduced dues and fees under *General Motors*, supra, and *Beck*, supra, violated Section 8(b)(1)(A).

As noted above, we reverse the judge. In our view, the General Counsel made a deliberate choice not to place the lawfulness of the April conduct at issue in this proceeding. The General Counsel did not allege in the complaint that the Union's April 30 conduct was unlawful, nor did he amend the complaint at the hearing to make such an allegation or argue in his brief to

[1] We have amended the caption to reflect the disaffiliation of the United Food & Commercial Workers International Union from the AFL–CIO, effective July 29, 2005.

[2] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All subsequent dates are in 2002.

[4] See *NLRB v. General Motors Corp*., supra, 373 U.S. 734 (employees who work under a union-security agreement have the right to become or remain nonmembers, subject only to the duty to pay initiation fees and periodic dues); *Communications Workers v. Beck*, supra, 487 U.S. 735, 745 (Sec. 8(a)(3) does not permit a union, over the objections of dues-paying nonmember employees, to expend funds collected under a union-security agreement on activities unrelated to "representational activities," i.e., collective bargaining, contract administration, and grievance adjustment); *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1988), reversed on other grounds sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), judgment vacated and remanded sub nom. *Paperworkers v. Buzenius*, 525 U.S. 878 (1988) (unit employees, both union members and nonmembers, must receive notice of their *General Motors* rights if they did not receive such notice when they entered the bargaining unit).

[5] For the separate reasons set forth in his concurring opinion, Member Walsh agrees with his colleagues' reversal of the judge's independent 8(b)(1)(A) finding, but finds it unnecessary to pass on their rationale for doing so.

the judge that such a violation should be found. It is only in his brief to the Board that the General Counsel argues that the judge correctly found this 8(b)(1)(A) violation.

In light of the above, we find that the judge erred in passing on and finding that the April 30 encounter between Schaer and Elsa violated the Act. For whatever reason, the General Counsel decided not to pursue the issue of whether the Respondent's conduct on that date was unlawful. Indeed, his failure to do so may explain why the Respondent did not call Elsa or other witnesses to testify about the encounter. In sum, the General Counsel's presentation of the case in the complaint, at the hearing, and in his brief to the judge failed to place the Respondent on notice that the lawfulness of its conduct on April 30 would be the basis for a separate finding of a violation. To find an unfair labor practice in these circumstances raises serious due process concerns. Instead, in disagreement with the judge, we decline to find an unfair labor practice based on the Respondent's April 30 conduct.[6]

As a remedial matter, the judge required that the Respondent Union provide Schaer with a breakdown of dues and fees, i.e., delineating representational versus nonrepresentational expenses. We disagree. Although Board law requires that employees be told of their *General Motors* and *Beck* rights at the time when they are told of their union-security obligations, current Board law does not require that the above-mentioned kind of breakdown be given at that juncture. *Teamsters Local 166* (*Dyncorp Support Services)*, 327 NLRB 950, 952 (1999), revd. in relevant part *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). No party seeks to reverse that Board law, and the General Counsel does not allege a violation in this regard. Accordingly, in order to tailor the remedy to the violation, we will not impose that remedy.[7]

ORDER

The National Labor Relations Board orders that the Respondent, United Food and Commercial Workers Union, Local 648, United Food and Commercial Workers International Union, San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause and causing Safeway, Inc. to terminate the employment of Cynthia Schaer, or any other employee, for failing to pay union dues and fees pursuant to a union-security clause without first notifying them of their rights to remain nonmembers under *NLRB v. General Motors Corp*., 373 U.S. 734 (1963), and, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities, with sufficient information to enable them to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections, and without advising them of the amount of the dues delinquency (showing the calculation), and affording them a reasonable opportunity to pay the amounts owed.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Make Cynthia Schaer whole for any loss of wages or other rights and benefits she may have suffered as the result of the Respondent's unlawful conduct, with interest.

(b) Notify Safeway, Inc. in writing, with a copy to Cynthia Schaer, that it has no objection to her employment, and that it requests that she be reinstated.

(c) Notify Cynthia Schaer in writing that it will not request or cause Safeway, Inc. to discharge her for nonpayment of dues without first having notified her of her rights to remain a nonmember under *NLRB v. General Motors Corp*., 373 U.S. 734 (1963), and, as a nonmember under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in dues and fees for such activities, with sufficient information to enable her to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections, and without advising her of the amount of her delinquency (showing the calculation) or affording her a reasonable opportunity to pay the sum owed.

(d) Within 14 days of the date of this Order, remove from its files, and ask Safeway, Inc. to remove from its files, any reference to the discharge of Cynthia Schaer, and within 3 days thereafter notify Cynthia Schaer in writing that it has been done and that it will not use the discharge against her in any way.

(e) Within 14 days after service by the Region, post at its business office and meeting hall copies of the

[6] Accordingly, we do not pass on the judge's conclusion that finding a violation is not barred by Sec. 10(b).

[7] Since neither party seeks to reverse Board law, Member Schaumber agrees with his colleagues not to revisit it. He does not, however, necessarily disagree with the kind of remedy the judge ordered and, in light of the D.C. Circuit's decision in *Penrod,* he would revisit Board law in the appropriate case.

attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service of the Region, deliver to the Regional Director for Region 20 signed copies of the notice in sufficient numbers to be posted by Safeway, Inc. in all places where notices to employees are customarily posted, if it is willing.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER WALSH, concurring.

I agree with my colleagues' adoption of the judge's finding that the Respondent unlawfully caused the Employer to discharge Charging Party Cynthia Schaer in violation of Section 8(b)(1)(A) and (2) of the Act. And while I also agree with my colleagues' *reversal* of the judge's finding that the Respondent earlier independently violated Section 8(b)(1)(A) by failing to inform Schaer of her *General Motors*[1] and *Beck*[2] rights (hereinafter, her rights) when she applied for union membership, I find it unnecessary to pass on their rationale for doing so. Rather, I find, fundamentally and contrary to the judge, that Section 10(b) of the Act bars any allegation that the Respondent independently violated Section 8(b)(1)(A) by failing to inform Schaer of her rights.

A.

On April 30, 2002,[3] Schaer filled out a union membership application at the Respondent's office, in compliance with the union-security provisions of the operative collective-bargaining agreement. Elsa, the Respondent's office worker who took Schaer's application, did not tell Schaer that in lieu of becoming a member of the Union, she could satisfy her obligation under the collective-bargaining agreement by becoming a dues-paying nonmember employee and paying the Union only the "financial core" amount equivalent to initiation fees and dues,[4] and that as a dues-paying nonmember she could get her dues and fees reduced in proportion to that portion of the Union's overall expenses that are attributable to its collective bargaining, contract administration, and grievance adjustment activities.[5]

On November 26, about 7 months after the Respondent failed to inform her of her rights when she joined the Union (and about a month and a half after the Respondent caused the Employer to discharge her), Schaer filed unfair labor practice charges, alleging, inter alia, that the Respondent violated Section 8(b)(1)(A) by failing to inform her of her rights. Ultimately, however, the General Counsel did not include that particular charge as an unfair labor practice allegation in the instant complaint.

B.

Section 10(b) of the Act provides in pertinent part that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. Here, the April 30 alleged unfair labor practice in question—failing to inform Schaer of her rights—occurred more than 6 months prior to Schaer's November 26 filing of charges with the Board. It is, however, well settled that the 10(b) period of limitations does not begin to run on an alleged unfair labor practice until the person adversely affected by it is put on actual or constructive notice of the act constituting the unfair labor practice.[6] Here, the act constituting the asserted unfair labor practice was Elsa's April 30 failure to inform Schaer of her rights. Schaer was a witness to Elsa's act and was thus put on actual notice of it at the time Elsa committed it.

In nevertheless determining that Section 10(b) does not preclude a finding that the Respondent's failure to inform Schaer of her rights violated Section 8(b)(1)(A), the judge appears to conflate (1) the asserted unfair labor practice *itself* (failure to inform Schaer of her rights), with (2) an asserted attempt by the Respondent to *conceal the commission* of this asserted unfair labor practice. In other words, the judge seems to mix up (1) the Respondent's arguably unlawful failure to inform Schaer of her rights, with (2) an asserted attempt by the Respondent, *through that same*

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

[2] *Communication Workers v. Beck*, 487 U.S. 735 (1988).

[3] All dates are 2002 unless otherwise stated.

[4] *NLRB v. General Motors Corp.*, supra.

[5] *Communication Workers v. Beck*, supra.

[6] See, e.g., *Fiber Products*, 314 NLRB 1169 fn. 2 (1994), enfd. sub nom. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935 (4th Cir. 1995); *Desks, Inc.*, 295 NLRB 1, 11 (1989); *Truck & Dock Services*, 272 NLRB 592, 593 (1984).

failure to inform Schaer, to conceal *the fact* that it failed to so inform her. In this regard, the judge found that the Respondent defrauded and deceived Schaer by making an active effort to conceal her rights from her when she applied for union membership on April 30. Intent, however, is not an element of this alleged unfair labor practice: a failure to inform an employee of her rights, without more, completes the violation.

In any event, there is no evidence that Elsa herself or the Respondent defrauded or deceived Schaer, or actively sought to conceal her rights from her. For all that the record in this case shows, Elsa's failure to inform Schaer of her rights on April 30 was no more than negligence. Negligence would, of course, still be enough to establish the violation, but it would not be enough to establish the intentional deceit and concealment that the judge attributes to the Respondent so as to toll the running of the 10(b) period of limitations.[7]

In support of his finding that the Respondent's conduct on April 30 tolled the running of the 10(b) period of limitations and thus legitimized the otherwise untimely November 26 unfair labor practice charge, the judge cites *Burgess Construction*[8] and *Frontier Hotel & Casino*.[9] These cases are inapposite.

In *Burgess Construction*, the Board found that the 10(b) period was tolled because the employer fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the union by assuring the union on two occasions that it would no longer employ carpenters. The record in the instant case, by contrast, does not show any such lies or fraudulent concealment.[10]

In *Frontier Hotel & Casino*, the Board found that the 10(b) period was tolled because the employer surreptitiously implemented unlawful changes in terms and conditions of employment. The record in the instant case, by contrast, does not establish any such surreptitious conduct.

The Respondent has established its 10(b) defense, and reversal of the judge's 8(b)(1)(A) finding on this issue is fully warranted on that basis.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT request or cause Safeway, Inc. to discharge Cynthia Schaer, or any other employee, because of their failure to pay union dues, without first having notified them of their rights to remain nonmembers under *NLRB v. General Motors Corp*., 373 U.S. 734 (1963), and, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), 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 activities, with sufficient information to enable them to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections, and without advising them of the amount of the delinquency (showing the calculation) or affording them a reasonable opportunity to pay the amount owed.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Cynthia Schaer for any loss of wages or other rights and benefits as a result of having caused her discharge, with interest.

WE WILL notify Safeway, Inc. in writing, with a copy to Cynthia Schaer, that we have no objection to the employment of Cynthia Schaer and WE WILL request that Safeway, Inc. reinstate her.

WE WILL notify Cynthia Schaer that we will not request or cause Safeway, Inc. to discharge her for nonpayment of dues without first having notified her of rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain a nonmember, and as a

[7] It is worth noting that the record establishes that at some point (but not exactly *when*) the Respondent revised its membership application form to include a statement of *Beck* rights on the reverse side. But that was not the version of the application form that was given to Schaer on April 30.

[8] 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

[9] 318 NLRB 857, 861, 876–877 (1995), enfd. in part sub nom. *Unbelievable, Inc. v. NLRB,* 118 F.3d 795 (D.C. Cir. 1997).

[10] As indicated, the Board in *Burgess Construction* applied the equitable doctrine of fraudulent concealment. The Board has held that three critical elements must be present in order to toll the 10(b) limitations period under the doctrine of fraudulent concealment: (1) deliberate concealment has occurred; (2) material facts were the object of concealment; and (3) the injured party was ignorant of those facts. E.g., *Benfield Electric Co.*, 331 NLRB 590, 591 (2000). The critical first element has not been established here, because there is no showing that the Respondent deliberately concealed anything.

nonmember under *Communications Workers v. Beck*, 487 U.S. 735 (1988), 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 activities, with sufficient information to enable her to decide intelligently whether to object, as well as a description of any internal union procedures for filing objections, and without advising her of the amount of the delinquency or affording her a reasonable opportunity to pay the amount owed.

WE WILL, within 14 days from the date of this Order, expunge from our files, and ask Safeway, Inc. to expunge from its files, any reference to the discharge of Cynthia Schaer, and WE WILL within 3 days thereafter, notify her in writing that we have done so and that we will not use the discharge against her in any way.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 648, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Donald R. Rendall, for the General Counsel.
David A. Rosenfeld (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in San Francisco, California, on June 3, 2003, upon a complaint issued by the Regional Director for Region 20 of the National Labor Relations Board on March 20, 2003. It is based upon an unfair labor practice charge originally filed on November 26, 2002[1] (amended on January 23, 2003) by Cynthia Schaer (Schaer), an individual. The complaint alleges that United Food & Commercial Workers Union, Local 648, United Food and Commercial Workers International Union, AFL–CIO (Respondent, the Union, or Local 648) has engaged in certain violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).

Issues

The principal issue is whether Respondent properly notified Schaer, an employee of Safeway, Inc., of her rights as recognized under the Supreme Court's decisions in *NLRB v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and whether, if it failed to do so, it was privileged to demand her discharge under the union shop clause of the collective-bargaining contract for failing to pay the initiation fee and dues. If it was not so privileged, a subsidiary issue is what remedy or remedies should be applied.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by both the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits Safeway, Inc., is a corporation operating in San Francisco, California where it runs a chain of retail supermarkets, including one located at 220 Market Street in that city. It admits Safeway's annual gross volume of sales exceeds $500,000 and that it annually purchases goods valued in excess of $5000 from sources originating outside California. Accordingly, Respondent admits and I find that Safeway is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent and Safeway are bound to a multiemployer collective-bargaining contract which was in effect at the time of the transactions described here. That collective-bargaining contract contains a union shop clause which requires employees to become union members on or after the 30th day of their employment.

Schaer was hired on February 22 as a trainee but only worked part-time. Her first assignment was as a personal shopper for the "dot-com" portion of the Market Street store. Later, perhaps still in March, she occasionally worked in the deli section of the store. She was actually transferred to the deli in May and continued to work part-time until her discharge. For her, part-time amounted to 24 hours per week or so. The record does not clearly show what her hourly wage rate was at the deli, although it seems to have been in $8–9 range, given her level of experience.[2]

Having learned from some source that she had to join the Union, on April 30, Schaer, went to its office and filled out an application for membership. There she spoke to a person identified in the record only as "Elsa." Elsa is one of the women who worked at the office and handled membership applications. Schaer says Elsa told her the initiation fee was $300. During the process, Schaer told Elsa that she was having financial difficulties and asked for some easy way of paying the initiation fee and the dues. She testified that Elsa told her a payment schedule could be worked out, and one was. It is in evidence as General Counsel Exhibit 6. Although Elsa did not testify, there is no disagreement that during this transaction that neither Elsa nor anyone else from the Union informed Schaer that she could pay a lesser

[1] All dates are 2002 unless otherwise indicated.

[2] At the time Schaer was hired she was 47 years old. She is well educated and has a law degree from the Cardozo School of Law in New York City. She has been admitted to practice in New York, but not California. Before obtaining employment with Safeway, she had been working as a security guard for 3 years. She says she has not been actively practicing law for a number of years. She gave some peculiar testimony regarding her right to appear in the Northern California Federal district courts despite lacking a California license, but it is not germane to the issues presented here. Her life as a lawyer seems to be far behind her.

amount of dues and fees than what the Union required under its constitution and by-laws. No one told her she could whittle the amount owed down to a "financial core" (as described in *General Motors*, supra) or told her that she was entitled (under *Beck,* supra) to know what the nonrepresentational portion of the dues and fees were, so she could decline to pay them. Nor is there any written reference to those rights set forth in the membership application.[3]

Not aware of any legal right to a reduced initiation fee or dues, Schaer signed the payment schedule proffered by Elsa. The schedule required the payment of $326 over a period of 3 months. It required $50 payments on May 9 and 23, June 6 and 20, and July 5 and 18. A last payment of $26 was due on July 25.

Furthermore, it set August 15 as the date of Schaer's initiation into the Union. In addition, as a condition of acceptance of the payment schedule, Schaer was obligated by its terms to "abide by the by-laws and working rules of the Union." Finally, it concluded with an acceleration clause stating that failure to pay per the schedule would result in the entire unpaid amount becoming due immediately, that the employer would be informed and that the failure to pay dues and initiation could result in the termination of her employment.

It is unclear from the evidence what the payments were for. Specifically, union officials have written on her application some things regarding the schedule, though Schaer never saw the writing. The handwritten material and a connected printout suggest that the initiation is $210 rather than the $300 described by Elsa to Schaer. The Union's business agent, Gilberto Mendoza[4] said the initiation fee depends on the employee's job classification. Uncertain, he opined that it was $300 for food clerks. In addition, the handwriting on the application also refers to dues as being $29 rather than $26, which the last proposed payment suggests. Mendoza said the lowest level of dues he knew of was $27.50 for a courtesy clerk. What were the amounts for a part-time personal shopper or a junior deli clerk? That cannot be determined from the testimony or the documentary evidence.

Moreover, it is not clear to what month(s) the dues portion was being allocated. Section 8(a)(3) of the Act bars Respondent from collecting dues for the first 30 days of employment. Yet, the payment schedule does not show what the monthly dues allocation was. Respondent did not offer any evidence about that, although it easily could have called Elsa or provided a dues ledger card or printouts regarding Schaer. Apparently it was not interested in demonstrating that it honored the statutory grace period. It is certainly not clear that the payment schedule was solely aimed at prospective dues from April 30 forward. And, the printout it did provide is almost incomprehensible, except for the dates Schaer made payments. It shows that on May 16 she paid $45, on May 31, $42 and $13 ($55), on July 5, $50, and on July 11, $50, for a total of $200. She made no other payments.

Mendoza became aware of her supposed delinquency sometime in August or September. He says he tried to reach her by telephone on as many as five occasions, leaving a message on her answer machine asking her to return his call. He says she never did.

About that time, Schaer had come to believe that Safeway was not providing her with the minimum number of hours per week required by the collective-bargaining contract for a part-time employee. The accuracy of her belief is not of concern here (and was not litigated). She says Mendoza telephoned her and advised her that she needed to pay the entire amount in full, since she had not met the requirements of the payment plan. She says she responded with her complaint about insufficient hours and the connected inability to pay. She also testified that Mendoza told her he would not help her with her short-hours complaint until she paid the money owed to the Union.

Mendoza testified that the short hour's discussion occurred earlier, perhaps in July or August. He says he told her he would look into it, and denies saying that he would only look into that issue once she was paid in full. His testimony suggests that delinquent dues and fees were not a part of that discussion.

According to Mendoza when, in September or early October, Schaer had failed to respond to his telephone calls, he assigned the Union's service agent, Alan Lawson, to serve her with a 7-day warning letter at the store. Lawson did so on Friday, October 4. The letter warned that in the event she did not pay within 7 days the outstanding amount in full, which the Union said was $188,[5] it would demand that Safeway discharge her. Although testimony was presented regarding Lawson's two visits to the store on that day, it is clear that the letter was delivered. Schaer never paid the money, nor did she go to the Union's office before the deadline to deal with the issue, although she had told Lawson she would. Seven days later, on October 12, Safeway discharged her at the Union's request.

Approximately 3 weeks after the discharge, Schaer had an additional conversation with a union official, this time Local 648's President Mary Chambers. There is some disagreement regarding what was said regarding dues amounts and reduced rates and plans, but it is unnecessary to resolve it. It occurred well after the discharge and is irrelevant to any issue raised by the complaint.

[3] The application does contain an obscure reference (in a minuscule, barely readable, font) to some litigation over the subject of initiation fees and dues, offering to answer questions about the suit if the applicant had any. At the time the Union presented Schaer with this application there was no active litigation in progress (save for, according to Respondent's counsel, a 1988 case long stalled in the Court of Appeals for the Ninth Circuit). Whatever the facts are concerning any supposed litigation then pending, this obscure paragraph did not provide an applicant with any breakout of fees and dues allocations, nor did it even acknowledge that any dues and fee reductions were available.

[4] Mendoza was a newly-appointed business agent, having been hired on June 17. There is no record evidence about his prior experience or knowledge.

[5] The $188 calculation is not explained. Schaer had paid $200 of the plan's $326 and the difference is only $126, not $188. A possible explanation is that additional month's dues were now being included. However, there is no record evidence on the point. The October 4 letter contains no explanation whatsoever.

III. ANALYSIS AND CONCLUSIONS

After the Supreme Court decided *Beck*, the Board issued two decisions dealing with the manner in which labor unions were to manage the requirements imposed by *Beck* as well as its interconnection to *General Motors*. The cases were *California Saw & Knife Works*, 320 NLRB 224 (1995),[6] and *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1988).[7] Together, dealing not only with union members and nonmembers, but with new hires, the two cases require labor unions under the doctrine of fair representation to inform all of those employees whom they represent about two matters: First, the fact that employees may satisfy their union security obligation by paying only financial core membership levels (under *General Motors*) and avoiding full membership as defined by the union's constitution. Second, that represented employees (whether members or not) could object and decline to pay (under *Beck*) for expenses unrelated to the union's representational obligations, e.g., expenditures for political purposes and the like. In addition, the Board said, for the employee to have sufficient information to intelligently make a *Beck*-rights decision, the union had to provide allocation breakdowns so an objector could knowledgeably challenge the figures provided by the Union.[8] The latter issue is not directly presented in this case, but is part of the overall scheme which a union must follow to provide its represented employees information about their legal rights under a compulsory membership system in order to satisfy its duty of fair representation.

In addition, the Board has long held that a labor union has a fiduciary responsibility to the employees it represents in the sense that it must accurately[9] advise them of the amount of the dues delinquency, that his/her job is in jeopardy and give the employee a reasonable amount of time to pay before demanding and effecting the discharge. *NLRB v. Hotel, Motel and Club Employees' Union Local 568 (Philadelphia Sheraton Corp.)*, 320 F.2d 254, 258 (3d Cir. 1963), enfg. 136 NLRB 888 (1962); *Conductron Corp.*, 183 NLRB 419, 426 (1970); *Rocket and Guided Missiles Lodge 946, IAM (Aerojet-General Corp.)*, 186 NLRB 561 (1971); *Ironworkers Local 378 (Judson Steel),* 192 NLRB 1069 (1971); and *Boilermakers Local 732 (Triple A Machine Shop)*, 239 NLRB 504 (1978), and many others.

With respect to the facts presented here, it is clear that at no time did Respondent ever advise Schaer of her right to pay anything less than what Elsa told her she would have to pay. There was no presentation of a *General Motors* financial core option or of a reduced rate under *Beck*. Elsa only presented Schaer with a single option, payment in full (albeit under a time payment plan) leading to constitutional membership. Indeed, her initiation date was even placed on the payment plan. Clearly Respondent had no interest in providing her with any information consistent with *California Saw* or *Weyerhaeuser*. It wanted Schaer to be a constitutional member and did not want to tell her she had any other options. This, itself, violated its duty of fair representation and Section 8(b)(1)(A). Specifically, see, *L. D. Kichler Co. (Electrical Workers Local 1377)*, 335 NLRB 1427 (2001) ("[W]e agree with the judge that the Union violated Section 8(b)(1)(A) when it solicited Joynt's membership in the Union without providing notice of her rights under *General Motors* and *Beck*.") 335 NLRB 1429.

And, the Board has held that demanding and causing an employee's discharge under such a fact pattern is a clear violation of Section 8(b)(1)(A) and (2). See *Production Workers, Local 707 (Mavo Leasing)*, 322 NLRB 35 (1996), enfd. 161 F.3d 1047 (7th Cir. 1998). The reasoning of that case is very simple. If a union operating under a union security clause fails to provide its represented employees with *Beck* information, and the employee fails to pay his/her dues and fees, the union may nevertheless not cause the employee's discharge. If it does so, it violates Section 8(b)(1)(A) and (2). That is exactly what happened here. See also, *Teamsters Local 251 (Ryder Student Transportation)*, 333 NLRB 1009 fn. 3 (2001). Citing *Mavo Leasing*, the Board said there: "A union ordinarily may not lawfully seek to have an employee discharged for failing to pay dues under a union-security clause when it has not informed the employee of his or her *Beck* rights."

When Schaer failed to pay, Local 648 continued to fail to treat her in accordance with its duty of fair representation. It did give her a figure stating the amount due and owing, but that figure is not clearly explained. It does not show what amount had been allocated to dues and what had been allocated to initiation. Indeed, if her initiation fee was actually only $210 (as shown in the handwritten notation and the printout) rather than the $300 Elsa required, it was not treating her in a uniform manner and was affirmatively misleading her from the very beginning. She was entitled, under that theory, to a $90 credit. Moreover, there is no showing that the Union did not seek to collect dues from Schaer's first 30 days of employment. No evidence was offered concerning

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[6] Enfd. 133 F.3d 1012 (7th Cir. 1998), cert. den., sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[7] Revd. on other grounds sub nom. *Buzenius v NLRB*, 124 F.3d 788 (6th Cir. 1997), judgment below vacated and remanded sub nom. *Paperworkers v. Buzenius*, 525 U.S. 979 (1998).

[8] See *Teamsters Local 166 (Dyncorp Support Services)*, 327 NLRB 950, 952 (1999), remanded enf. denied sub nom. *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). There, the court of appeals held that the breakout information should be provided to the applicant at the time she/he becomes obligated to join the union. The Board has not yet spoken regarding whether it has accepted the court of appeals' analysis.

[9] It should not need to be said that accurate dues payment records are always required. The union is a fiduciary in this regard. Accuracy is the only way to determine whether the statutory grace period has been met and the only way to determine whether an employee is actually in arrears. An example of such a failure can be seen in *Alcoa Construction Systems (Millmen's Union Local 338)*, 212 NLRB 452 (1974). The information should also be transparent and shown to the employee as part of the union's demand for payment of any dues/fees arrearage. Identification of the payments' purpose is certainly required in order to determine whether moneys are aimed to satisfy the periodic dues requirement of Sec. 8(a)(3) or whether the money is for assessments, which may not be compelled under a union security clause. *NLRB v. Food Fair Stores*, 307 F.2d 3 (3d Cir. 1962). The same is true for fines. *Thermador Div. of Norris Indus.*, 190 NLRB 479 (1971); *Electric Auto-Lite Co.*, 92 NLRB 1073 (1951), enfd. 196 F.2d 500 (6th Cir. 1952), cert. den. 344 U.S. 823 (1952).

what months' dues had been covered or that the statutory grace period had been honored.

Thus, the figure given her, the difference between what she had agreed to pay and what she had actually paid, has not been demonstrated to be an accurate assessment of even what her constitutional obligations were. The figure is subject to too many questions, entirely unanswered by the Union's record-keeping. I cannot conclude that Respondent met its *Philadelphia Sheraton* fiduciary duty to accurately provide her with the correct amount due. On that basis alone the demand to discharge her violated Section 8(b)(1)(A) and (2), even aside from the *Mavo Leasing* theory.

The harder question is whether Section 10(b) of the Act may be used to insulate the Union when it essentially defrauded Schaer at the time she tried to meet the requirements of the union shop clause. Respondent, as its second affirmative defense set forth in its answer to the complaint, has asserted that the complaint is barred by Section 10(b) of the Act because of the passage of more than 6 months. Curiously, the General Counsel has made no effort to meet that defense. Even so, the answer must be a clear "no." The defense will not lie.

In pertinent part Section 10(b) states:

> . . . no complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

Schaer applied for membership on April 30. While both the demand for her discharge and the actual discharge occurred on October 12, she did not actually file an unfair labor practice charge until November 26 about 3 weeks after the literal expiration of the 6-month limitations period as it concerned the Union's April 30 deception. At the time Schaer applied she asked Elsa if there were any "alternatives" to paying union dues and fees. Elsa never told Schaer that there were or that those that did exist included the *General Motors* and *Beck* rights. Therefore, I find that Respondent's active effort to conceal from Schaer her right to *General Motors* and *Beck* information is sufficient to toll the limitations period. *Burgess Construction*, 227 NLRB 765 (1977), enfd. 596 F.2d 378, 383 (9th Cir. 1979), cert. den. 444 U.S. 940 (1979). Also, *Frontier Hotel*, 318 NLRB 857, 876–877 (1995). This is particularly so, where the information concealed is part of the duty of fair representation. It was vital information which should have been disclosed even without Schaer's request for alternatives. Accordingly, I find that Local 648 violated Section 8(b)(1)(A) on April 30 when it failed to advise her of information concerning reduced dues and fees, information which would have satisfied the duty of fair representation under *California Saw* and *Weyerhaeuser*.

Furthermore, I find that the two violations are connected by union policy. The policy, as it applied to Schaer, was that from the outset it would not notify her that she had any option other than to pay the full amount that a constitutional member would pay (if not more, under this particular time payment plan). Then, continuing that theme, knowing that a time payment plan applicant was likely to be in financial straits, the Union would allow for a payment schedule, whose accuracy was dubious, but which contained an acceleration clause in the event of nonpayment. In the event of a default, it could simply allow the acceleration clause to operate, knowing that anyone in full arrears was unlikely to be able to pay in full, thereby triggering the discharge. This would allow the Union to start anew with the next applicant whose payment record might be better.

Respondent has violated Section 8(b)(1)(A) and (2) as alleged.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily caused Safeway, Inc., to discharge Schaer, it will be ordered to notify Safeway, in writing, with a copy to Schaer, that it has no objection to her employment and that it affirmatively requests Schaer's reinstatement. Respondent shall also be ordered to notify Schaer of her rights under *General Motors* and *Beck* and to inform her that she is not subject to discharge or suspension for nonpayment of union dues in the absence of such notification. In addition, Respondent will be ordered to make Schaer whole for any loss of wages and benefits she may have suffered as a result of its conduct until she is either reinstated by Safeway to her former or a substantially equivalent position, or until she obtains substantially equivalent employment elsewhere, less net interim earnings. Backpay shall be in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10]

Respondent has requested that I note that the treatment given Schaer is not in accordance with the policies currently in place designed to apprise employees of their *General Motors* and *Beck* rights. In this regard it has presented Respondent Exhibit 4, said to be the current application form. The top of the front side of the document contains what might be characterized as standard information material, such as the applicant's name, address, telephone number, etc., together with a signature line for the employee. It is aimed only at constitutional membership. There is no reference to any other kind of membership. The bottom includes a box preprinted for installment payments should the applicant need time to pay. That portion is similar, if not identical, to the agreement Schaer signed. Nothing on that side of the sheet touches upon *General Motors* or *Beck* rights.

It is on the back side of the sheet that Respondent finally mentions *Beck*; it does not mention *General Motors* at all. I believe that omission alone is fatal to any contention that the current system passes muster. But more than that, the material is classic in its attempt to bury employee rights in

[10] Backpay is an appropriate remedy against a labor union which has caused a discriminatory discharge, even absent complicity of the employer. *Iron Workers Local 111 (Northern States Steel Builders)*, 298 NLRB 930 (1990), enfd. 946 F.2d 1264 (7th Cir. 1991). See also *Sheet Metal Workers Local 355 (Zinsco Electrical Products),* 254 NLRB 773, (1981), enfd. in pertinent part, remanded in part on other grounds 716 F.2d 1249 (9th Cir. 1983).

grayed-out fine print. It is set in a reader unfriendly block of gray legalese. It is clearly an effort to continue to conceal the employees' rights. It is a continuation of the policy which I cited above: Keep the employees as far from their rights as possible while giving lip service to the claim that knowledge about them is readily available; do not offer the information in a format which can easily be understood as such information can only be regarded as inimical to the Union's financial well-being.

For that reason, I find that the format as expressed in Respondent Exhibit 4 is really only an effort to continue Respondent's antithetical attitude toward complying with its obligations under *General Motors*, *Beck*, *California Saw,* and *Weyerhaeuser*. Respondent simply will not embrace its obligation to advise the employees it represents of the rights they have. This failure is the same as if a fiduciary declined to apprise its client of important information, such as a right to an inheritance or a right to medical information about oneself. A remedy would lie in those situations and one will lie here as well. Accordingly, I shall give Respondent's supposed effort no weight and I specifically reject it as an effort to meet its duty of fair representation. Respondent must do more.

Therefore, I will recommend a remedy which meets that duty, to fully inform employees of all dues-connected rights set forth in the Act. To do otherwise would make the Board complicit, by omission, in denying fundamental information to employees about their dues-connected rights established by Congress and the Supreme Court. The remedy will include an order requiring Respondent affirmatively to provide the information to new applicants prior to the applicant being given an application for full union membership. The information will, in simple English (or an appropriate foreign language), describe the various options available to the applicant which will satisfy the union security requirement of the collective-bargaining contract, including a statement of rights under Section 19 of the Act relating to employees holding certain religious convictions. The information must be in an easily read format printed on a separate document which the employee may keep; Respondent must also give the applicant the opportunity to read the document and understand it before it proffers a membership application of any kind to the applicant. The information document will also provide accurate information regarding the grace period required by Section 8(a)(3) of the Act, together with the various amounts of money required for each level of membership, showing breakdowns for initiation and for monthly dues. It shall further break those amounts down to show clearly, for purposes of the employee's intelligent comparison, the full membership amounts, financial core membership amounts, the nonrepresentational portion, and the amount which would be due when the nonrepresentational portion is subtracted from the full membership amounts. Cf. *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). The nonrepresentational amount may be shown as a total, but the document shall state that upon the employee's request, the Union will separately provide figures necessary to meet the calculation challenge right available under *Beck*. Respondent may, if it chooses, also include on that document a list of benefits available to full members but which are not available to financial core members or *Beck* members, so long as the *General Motors/Beck* rights and connected figures are not obscured in any way by the additional information. It may also accurately explain that the employees' failure to meet the financial obligation can result in the applicant's loss of employment.

Finally, the information document will describe for the applicant the internal procedures for filing objections to Local 648's calculation of the nonrepresentational amounts.

[Recommended Order omitted from publication.]