

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,
AFL-CIO (INTERCONTINENTAL HOTELS GROUP
d/b/a MARK HOPKINS INTERCONTINENTAL HOTEL)

Case 20-CB-13834

and

KENNETH J. PETERSON, An Individual

**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND
RECOMMENDED ORDER**

Submitted by
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Region 20
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I. INTRODUCTION¹

The judge issued a recommended Decision and Order in this case finding that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by causing the Hotel to terminate Kenneth Peterson. In sum, the judge found a *Philadelphia-Sheraton* violation. Counsel for the Acting General Counsel's exceptions to the Administrative Law Judge's findings are limited to the narrow language in the judge's proposed order and notice posting. The order calls for Respondent to cease and desist from "causing or attempting to cause the Mark Hopkins Intercontinental Hotel to discriminate against Kenneth J. Peterson in violation of Section 8(a)(3) of the Act." (ALJD 5:44-45). The judge did not order Respondent to cease and desist from causing the Hotel to discriminate against other similarly situated employees. Likewise, the notice posting is too limited in breadth. (ALJD Appendix).

The Complaint and Notice of Hearing alleged that Respondent requested the Hotel discharge Peterson for nonpayment of dues without first giving Peterson notice of the precise amount of dues owed, the months for which dues were owed, or the method of calculation; a deadline by which payment must be made; notice that failure to pay would result in termination; and without giving him a reasonable amount of time to pay. The Complaint and Notice of Hearing alleged that Respondent violated Section 8(b)(1)(A) and (2) of the Act. Counsel for the Acting General Counsel amended the Complaint and

¹ The Administrative Law Judge is referred to as the ALJ or the Judge. All references to the transcript are noted by "Tr." followed by the page number(s). All references to the Acting General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to Respondent's exhibits are noted as "R. Exh." followed by the exhibit number(s). All references to the Administrative Law Judge's Decision are noted by "ALJD" followed by the page and line and/or footnote number(s). The Mark Hopkins Intercontinental Hotel is referred to as the Hotel.

Notice of Hearing to seek a remedial order directing Respondent to change the form of its dues statements in order to comply with the notice requirements set forth in *Philadelphia-Sheraton. NLRB v. Hotel, Motel and Club Emp. Union, Local 568, AFL-CIO*, 320 F.2d 254, 258 (3rd Cir. 1963), enf'g 136 NLRB 888 (1962).

The judge found Respondent violated Section 8(b)(1)(A) and (2) by requesting the Hotel discharge Peterson without first providing him proper notice of his dues obligation. (AJLD 4:48-49). The judge also noted that had Peterson received the dues statement in a timely fashion with a reasonable amount of time to make a payment, the dues statement itself was “insufficient” notice. (ALJD 4:43-46). Despite the General Counsel’s amended requested remedy and the judge’s determination that the Union’s regular dues statement is insufficient, the judge failed to grant a remedy applicable to employees other than Peterson. Acting General Counsel does not take exception to the remedy as it applies to Peterson, but to the judge’s failure to grant the traditional remedy which extends to all employees. The judge erred in not granting a remedy preventing Respondent from causing or seeking to cause an employer from discharging other employees in the same manner.

II. FACTS

Respondent and the Hotel are parties to a collective-bargaining agreement which contains a valid union-security clause. (GC Exh. 3). Peterson was employed by the Hotel from December 2009 through March 1, 2011. Throughout that time, Peterson was a member of the Union. Peterson always paid his dues in a lump sum of approximately \$1,000.00, from the time he made his first dues and initiation fee payment. (Tr. 30).

Dues check-off is not an option for employees at the Hotel. (Tr. 30). Respondent never informed Peterson that his lump sum practice was problematic.

In June 2010 Peterson's first lump sum payment ran out. Peterson's supervisor informed him that he needed to make a dues payment or risk termination. (Tr. 31). Immediately upon ending the phone conversation with his supervisor, Peterson called Respondent's Sacramento office and made another lump sum payment with his debit card to cover his dues and fees. (Tr. 32, 55).

In August 2010 Peterson moved to a new address. (Tr. 38). Soon after, he called Respondent's Sacramento office to update his address and add his son to his healthcare plan. (Tr. 39). Peterson later received a health insurance card for his son at his new address. Respondent also mailed its monthly newsletter to Peterson's new address after he made the phone call to update his address. (Tr. 40). Even though Peterson received mail from Respondent at his new address, Peterson never received a dues statement after October 2010.

On March 1, 2011, Peterson was terminated for non-payment of dues. The first time Peterson heard that he was behind in his Union dues payments was when his employer informed him of his termination at approximately 5:00 p.m. (Tr. 34). Earlier that morning, Union representative Joe Klien called the Hotel's human resources director, Jimmie Lopez, and requested Peterson be discharged for non-payment of dues. (Tr. 16-17). Lopez complied under the union-security provision of the collective-bargaining agreement. The paperwork was processed and Peterson was discharged by the time Lopez spoke with Peterson that afternoon. (Tr. 34).

After speaking with Lopez and being informed of his termination, Peterson checked that day's mail and found an envelope from Respondent. (Tr. 35). The envelope was post-marked February 28. (GC Exh. 5) Inside the envelope was another envelope from Respondent stamped "Recieved February 18" with the words "Not at this address" written in pencil across it. (GC Exh. 6) Inside the second envelope was a dues statement dated February 3. (GC Exh. 7). The dues statement showed Peterson was 31-60 days past due in the amount of \$164.30. The statement did not state when the amount needed to be paid, how the amount was calculated or what the amount covered. Nor did the statement warn Peterson that he risked termination for non-payment.

The following morning Peterson went to Respondent's San Francisco office to pay his union dues. (Tr. 41-42). Peterson made a large payment covering the amount owed, a re-initiation fee and his dues for March. (GC Exh. 9). This payment was complete by 9:00 a.m. on March 2. (Tr. 43). Peterson took his receipt and drove directly to the Hotel where he showed it to Lopez and asked for his job back. (Tr. 42-43). Lopez said the Hotel would not be reposting the position. (Tr. 27, 43).

III. ARGUMENT – EXCEPTIONS 1 AND 2

Where a union maintains a valid union-security provision, the union has a duty to notify members of their dues obligation prior to seeking the member's discharge. *Philadelphia Sheraton*, 136 NLRB 888 (1962). The Board has reasoned that allowing a union to seek the termination of an employee without first providing such notice "would be greatly inequitable and contrary to the spirit of the Act." *Id.*, 896. The severe consequences of failing to pay dues under a union-security provision requires the union

to take every precaution to ensure a reasonable employee is aware of his obligation. *Conduction Corp.*, 183 NLRB 419, 426 (1970).

To that end, the Board has enumerated the requirements of a proper dues notice. A union meets the minimum obligation to provide sufficient notice to employees “by giving reasonable notice of the delinquency, including a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount.” *Teamsters Local 112 (August A. Busch & Co.)*, 202 NLRB 1041, 1042 (1973). The union must also notify the employee whose discharge it wishes to seek that failure to pay the amount owed will lead to termination. *Machinist Rochet and Guided Missile Lodge 946 (Aerojet-General Corp.)*, 186 NLRB 561, 562 (1970). The dues statement Respondent sends to members does not meet these basic notice requirements.

As the judge correctly found, “the monthly dues statements do not show the methods for calculating the total amounts owed, do not warn members that they risk discharge for failure to make payments and do not give members a date by which payment is due.” (ALJD 3:17-20). The judge stated “I would find that the statement was insufficient.” (ALJD 4:43-44). Unfortunately, the judge passed on clearly finding the statement received by Peterson, which is in the same format of every dues statement Respondent sends out, is insufficient. Read in context of the judge’s previous findings, this presumably was because the judge had already found Respondent in violation of the Act by failing to give Peterson timely notice of his dues obligation before causing his termination.

The issue remains, however, that the format of Respondent's dues statement does not provide employees with sufficient notice of their dues obligation. In cases where the minimum notice requirements are not met, the Board's traditional cease and desist order extends to all employees. Such an order is required even more so in this case where the judge found that the dues statement Respondent sends to employees is their only notification of a dues delinquency. (ALJD 3:13-16). The judge delineated the many ways in which the dues statement used by Respondent fails to meet the Board's notice requirements. (ALJD 3:17-20). A cease and desist order applicable to all employees is therefore appropriate.

The Board has affirmed notice postings that apply to all employees, not just the discriminatees, in similar cases. In *Teamsters Local 122 (August A. Busch & Co. of Mass. Inc.)* the judge ordered, and the Board upheld, a notice posting which read:

We will not restrain or coerce employees William J. McGoniagle, Daniel O'Brien, Harold MacWhinnie, or any employee of August A. Busch & Co. of Mass., Inc., similarly situated, in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

We will not demand, cause, or attempt to cause the above-named employer, August A. Busch & Co. of Mass., Inc., to discharge or deny employment for invalid and illegal reasons to the above-named three employees or to other employees similarly situated.

Teamsters Local 122 (August A. Busch & Co. of Mass. Inc.), 203 NLRB 1014 (1973)
(emphasis added).

The Board also upheld a notice posting applicable to all employees in a case similar to the one at hand, where the union failed to provide timely notice and the notice itself was insufficient. *Int'l Broth. of Teamsters Local 776 (Carolina Freight Carriers Corp.)*, 324 NLRB 1154, 1160 (1997). That posting read, in pertinent part:

We will not threaten to cause the discharge of employees for failing to meet their alleged union membership obligations in an unreasonably short period of time and without providing them with the information required under *NLRB v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988).

This type of broad notice posting, aimed at remedying a violation which effects all employees subject to notice requirements, has been an appropriate remedy since the Board first articulated the notice requirements in *Philadelphia-Sheraton* over forty years ago. In that seminal case, the Board upheld the judge's order which read, in pertinent part:

B. Respondent Hotel, Motel and Club Employees' Union, Local 568, AFL-CIO, Philadelphia, Pennsylvania, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Respondent Employer to discriminate against Miguel de Jesus Sanchez, Anibal Vazquez, and Elliott McIlwain, or any other of its employees in violation of Section 8(a)(3) of the Act, as amended.

NLRB v. Hotel, Motel and Club Emp. Union, Local 568, AFL-CIO, 320 F.2d 254, 258 (3rd Cir. 1963), enf'g 136 NLRB 888, 899 (1962) (emphasis added).

There is ample support in the record to find Respondent's notification system, as a whole, fails to meet the Board's notice requirements. The dues statements are the only notification of dues obligations sent to employees. (AJLD 3:14) The statements do not contain sufficient information to notify an employee of their dues obligation. (AJLD 3:17-20). An order requiring Respondent to cease and desist from causing or attempting to cause any employer to discriminate against Peterson, or any other employee, in violation of Section 8(a)(3) of the Act is therefore appropriate. For the same reasons, a

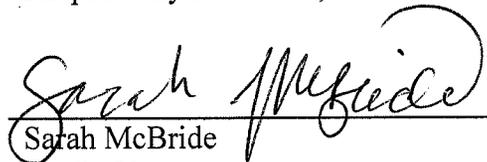
notice posting stating Respondent will not cause any employer to discriminate against Peterson, or any employee is appropriate.

IV. CONCLUSION

For the reasons set forth and discussed in detail above, the Board should find Respondent violated Section 8(b)(1)(A) and 8(b)(2) and an appropriate remedy should be ordered.

DATED AT San Francisco, California, this 26th day of September 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sarah McBride", is written over a horizontal line.

Sarah McBride

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