

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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Submitted by
Sarah McBride
Cecily Vix
Counsel for the Acting General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103

I. INTRODUCTION¹

A. The ALJ's Findings

In his decision dated August 19, 2011, Administrative Law Judge Jay R. Pollack correctly found Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing the Mark Hopkins Intercontinental Hotel (herein the Employer or Hotel) to discharge employee Kenneth Peterson in violation of Section 8(a)(3) of the Act. (ALJD 5:9-11). The judge correctly found Respondent caused Peterson's discharge without providing him proper notice of his dues obligation under the *Philadelphia Sheraton* line of cases.² (ALJD 4:26-27; 4:43-46). The record evidence and long-standing Board law necessitate this finding.

Kenneth Peterson was employed as a stationary engineer by the Hotel from December, 2009, through March 1, 2011.³ (ALJD 2:16). During that time he was a member of the International Union of Operating Engineers, Stationary Engineers, Local 39 (herein Respondent or the Union). (ALJD 2:17). Peterson remained an employee of the Hotel until he was terminated on March 1 at Respondent's request for non-payment of dues. Peterson did not receive his dues notice until the day he was terminated. (ALJD 4:26; Tr. 35). Respondent knew Peterson had not received notice prior to March 1

¹ The Administrative Law Judge is referred to herein as "ALJ or judge." References to the ALJ's decision are noted as "ALJD" followed by the line and page number(s). References to the transcript are noted by "Tr." followed by the page number(s). References to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number. References to Respondent's Exhibits are noted as "R Exh." followed by the exhibit number.

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

³ All dates herein refer to 2011 unless otherwise noted.

because the Union did not mail Peterson's dues statement to his correct address until February 28, the day before it was received. (Tr. 35; GC Exh. 5). In addition, the dues statement failed to provide a due date for payment, failed to disclose how the amount owed was calculated, and failed to advise Peterson that he risked termination if he did not make a payment. (GC Exh. 7). As such, the judge correctly found the statement itself to be insufficient. (AJLD 4:43-44).

The judge's decision is supported almost entirely by un-challenged documents and un-disputed facts. Peterson's February 2011 dues statement was mailed to the wrong address and returned to Respondent on February 18,⁴ then sent it to his new address on February 28,⁵ and Respondent requested his termination on March 1.⁶ While the judge's decision could stand entirely on the documents, smaller details that support the judge's reasoning are based on testimony from General Counsel's witness, Kenneth Peterson. While the ALJD contains no specific credibility section, the judge made his credibility determinations clear by excluding several of Respondent's assertions in his statements of fact and instead relying on Peterson's version of events.

B. Statement of Facts

The judge included a brief and accurate statement of facts in his decision. The facts are all supported by testimony and documentary evidence. General Counsel fully supports the judge's statement of facts. Respondent, however, has restated the flawed version of facts it first presented to the judge, which the judge correctly refused to adopt in his findings. Many of the facts Respondent includes in its Brief in Support of

⁴ GC Exh. 6.

⁵ GC Exh. 5.

⁶ GC Exh. 4.

Exceptions do not correspond with a single exception filed. In those situations the Board should deem such exceptions waived under Rule 102.46(b)(2). Where Respondent excepted to specific findings of fact they will be addressed fully in the Argument section, *infra*. On the whole, however, the Board should uphold the judge's findings of fact in entirety because they are based on credited testimony and un-challenged documentary evidence. Respondent's statement of facts relies on discredited testimony of Joe Klein⁷ and evidence that was accepted only for limited use.⁸

II. ARGUMENT

A. Kenneth Peterson Was Not a Free Rider¹¹

The essence of Respondent's argument is that Respondent did not have an obligation to provide Peterson notice of his dues obligation as set forth in *Philadelphia*

⁷ Respondent asserts Klein called Peterson in February 2011 to let him know his payment was due. The judge credited Peterson's version that no such call took place. The finding is supported by the adverse inference that can be drawn from Respondent's failure to produce documentary evidence in its control to corroborate Klein's assertion. Specifically, despite presenting a call log of important calls Klein had with members in June 2010, [R. Exh. 2], Respondent failed to produce a call log to support Klein's testimony that he left a message for Peterson in February 2011. Respondent also failed to produce phone records to show Klein placed a call to Peterson in February.

⁸ Respondent asserts in its Statement of Facts that the Union sent out, and Peterson received, monthly dues statements. In doing so they rely on a stack of dues statements that were accepted as business records, but not as evidence that Peterson received them. Peterson credibly testified that he did not receive a dues statement after October 2010, until he received the February statement after he was terminated on March 1. Respondent had access to witnesses who are responsible for the regular mailing of monthly dues statements but did not present one. Respondent's failure to produce a material witness to corroborate their version of events that Peterson received monthly dues statements therefore supports an inference that the statements were not delivered. The judge correctly made this adverse inference.

¹¹ In answer to Respondent's Exceptions 1, 9, and 14.

Sheraton because he was a free rider. This argument has no basis in the facts of this case and is a missapplication of the law.

In order to establish that an individual is a free rider, a union must demonstrate that an employee's failure to pay dues is a result of the employee's own recalcitrance, and not ignorance or inadvertence. *IBI Security*, 292 NLRB 648 (1989). A free rider is content to receive the benefits of union representation while willfully and deliberately seeking to avoid dues obligations. *R.H. Macy & Co.*, 266 NLRB 858, n. 11 (1983).¹² Peterson never attempted to avoid his dues obligations. Instead, he paid in large lump sums in order to reduce the risk of missing a monthly payment. (Tr. 30). As soon as he was notified that the lump sum had run out, he immediately made another payment. (Tr. 32, 55). As the judge found, "Peterson paid his dues on a lump sum payment and made every effort to pay his dues as quickly as possible when he became aware of any delinquencies." (ALJD 4:23-24). Those are not the actions of an employee avoiding his dues obligation.

Respondent misstates the facts in several important areas to paint a false picture of Peterson avoiding his dues obligation. Respondent states Peterson waited until the last day before facing termination in June 2010 to pay his dues. This statement is incorrect for two reasons. First, Peterson was never advised by the union he was a day away from being terminated for non-payment of dues. Peterson was informed by his supervisor, not the Union, that a failure to pay dues could result in termination. (Tr. 54). Second,

¹² In *R.H. Macy & Co.*, supra, the Board overturned the ALJ's decision and found an employee who failed to pay dues for over a year while admittedly being worried that his failure to pay would cause him to be fired was not a free rider. The Board found that the union violated Section 8(b)(2) and 8(b)(1)(A) by causing the employee's termination without proper notice and ordered the union to make the employee whole for any lost wages.

Peterson did not wait until the last day possible to pay his dues in June 2010. The truth is that Peterson made a \$1,000.00 payment with his debit card as soon as his supervisor informed him that his dues had run out. (Tr. 32). There was absolutely no delay.

Respondent goes on to make a tangential argument about Peterson not properly updating his address with the Union in an attempt to bolster its unsubstantiated free rider argument. (Exceptions 4 and 5). Regardless of what the Union's By-Laws say about a member's obligation to update their address, the Union's fiduciary duty to notify its members of their dues obligation prior to seeking termination includes obtaining a correct address to properly notify the employee. That is especially true where the Union is aware it has an incorrect address and the correct information is easily attainable. *Oklahoma Fixture Co.*, 308 NLRB 335 (1992).

Respondent also takes exception to the judge's finding that Peterson updated his address with the Union. (Exception 2, 3 and 4). The judge correctly found based on Peterson's credited testimony and the record evidence that Peterson "telephoned the Union's main office in Sacramento, California to update his address." (ALJD 2:26-27). There is nothing in the record to support Respondent's exception to this finding. It is undisputed in the record evidence that Peterson phoned the Union's Sacramento office to update his address and add his son to his healthcare plan. Whether Peterson's call was transferred to the Union's Health & Welfare Trust Fund without his knowledge is immaterial. Any duty Peterson might have had to notify the Union of his change of address was satisfied when he made that call to the Union and changed his address. Respondent's argument that Peterson bears responsibility for its failure to mail dues statements to his correct address is not founded in fact or law.

Respondent lists seven actions the Union purportedly took in order to support its argument that it was not required to strictly comply with the *Philadelphia Sheraton* requirements. Respondent asserts the Union “acted more than fairly” and therefore did not owe Peterson notice of his dues obligation. The case law is very clear that simply “acting fairly” is insufficient when a union seeks the discharge of an employee for non-payment of dues. The Board has long held that when a union maintains a lawful union-security clause, it has a duty to notify the employee of his or her membership obligations. *Philadelphia Sheraton*, supra, 136 NLRB 888 (1962), enf’d *NLRB v. Hotel, Motel and Club Emp. Union, Local 568, AFL-CIO*, 320 F.2d 254, 258 (3rd Cir. 1963). Where the union seeks to cause an employee’s termination, the union “has a fiduciary duty to deal fairly with that employee.” *Western Publishing Co.*, 236 NLRB 1110, 1111 (1982). To allow a union to seek the termination of an employee under a union-security provision without first providing notice of his or her dues obligations “would be grossly inequitable and contrary to the spirit of the Act.” *Philadelphia Sheraton*, supra, 896. The extreme penalty of failing to fulfill dues obligations under a union-security clause requires the union take every necessary step to ensure that a reasonable employee is apprised of his dues obligations. *Conductron Corp.*, 183 NLRB 419, 426 (1970). The steps outlined in Respondent’s exceptions do not meet this standard.

The first point Respondent raises is that the Union notified Peterson of his dues obligation in June 2010 when his initial payment was late (although this is not the delinquency that resulted in Peterson’s termination). This is counter to the judge’s findings of fact. The judge found it was Peterson’s supervisor who notified him of his dues obligation at that time. (ALJD 2:22-23). Respondent did not take exception to the

finding that his supervisor, and not the Union, notified Peterson. Even if the judge had found the Union had notified Peterson in June 2010, it does not absolve Respondent of its duty to notify him of his current dues obligation prior to seeking his termination on March 1, 2011.

The second point Respondent makes is that the Union made efforts to ensure Peterson understood his obligation and assisted him in correcting his dues delinquency. Again, no exceptions were filed on this point. It is unclear from the record what efforts, if any, the Union made in June 2010. The only assistance Peterson received was from the Union employee who accepted his \$1,000 payment over the phone. Respondent's acceptance of a lump sum dues payment does not amount to "assistance" in correcting a dues delinquency, and it surely does not relieve a union of its fiduciary duty under *Philadelphia Sheraton*.

Next, Respondent asserts in points three and four that it phoned Peterson in February to notify him of his dues obligation. As discussed in detail above, there is no evidence to support a finding that this call was placed. The judge was correct in not finding that this phone call was made. Furthermore, Respondent did not take exception to the judge's failure to find Klein phoned Peterson in February and this argument should be waived.

Respondent goes on to say in points five and six that it made an effort to obtain Peterson's correct address from his employer and then mailed the dues statement. While there is some support for this in the transcript, and the envelope post-marked February 28 does have Peterson's correct address, a single, belated attempt to obtain Peterson's address does not meet the Board's notice requirements. (Tr. 97; ALJD 4:40-41). By

contacting Peterson's employer to obtain his address, Respondent was only taking the first step in what is expected of a union to meet the minimum notice requirements. *Oklahoma Fixture Co.*, 308 NLRB 335 (1992). Even though Respondent ultimately obtained Peterson's correct address and mailed him the February dues statement, as the judge noted "Peterson was clearly not given a reasonable amount of time to correct the delinquency." (ALJD 4:26-27).

Finally, Respondent notes that Joe Klein went to the employer once Peterson was reinstated as a member and Klein requested that the Employer return Peterson to work. The judge found Klein had in fact requested Peterson be reinstated at the Hotel and the Hotel had decided not to fill the position. (ALJD 3:7-9). The judge has already considered Respondent's arguments that it did all that was required to notify Peterson of his dues obligation and remedy his termination. In weighing the record evidence and the ample case law on point, the judge correctly determined that Respondent simply did not meet its fiduciary duty to notify Peterson of his dues obligation prior to causing his termination.

B. Respondent Failed to Notify Peterson of His Dues Obligation¹³

The judge made several findings, grounded in substantial record evidence, that Respondent failed to give Peterson notice of his dues obligation and a reasonable amount of time to correct his dues delinquency. Respondent takes exception to all of those findings. Whether Respondent gave Peterson sufficient notice of his dues obligation is a straightforward matter of law applied to a clear cut set of facts.

¹³ In answer to Respondent's Exceptions 10 – 15.

The Board has made the minimum notice requirements quite clear through forty years of decisions since *Philadelphia Sheraton*. A union meets the minimum obligation under *Philadelphia Sheraton* “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 122 (August A. Busch & Co. of Mass. Inc.)*, 203 NLRB 1041, 1042 (1973). The union must provide a reasonable amount of time for the delinquent member to make a payment. *Id.*; *Int’l Broth. of Teamsters Local 776 (Carolina Freight Carriers Corp.)*, 324 NLRB 1154 (1997); *Local Union 99, Int’l Broth. of Electrical Workers (Electrical Maintenance and Control, Inc.)*, 312 NLRB 613 (1993). The union is further obligated to inform the employee whose discharge it seeks that failure to make the required dues payment will lead to termination. *Machinists Rocket and Guided Missile Lodge 946 (Aerojet-General Corp.)*, 186 NLRB 561, 562 (1970); *Forsyth Hardwood Co.*, 243 NLRB 1039, 1044-1045 (1979). In essence, this minimum obligation of the union simply “requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure.” *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).

Here, Respondent’s dues statement fails to meet these requirements on its face, and it was delivered to Peterson with less than twenty four hours to cure his dues deficiency. (ALJD 4:43-44; 4:25-27). Taken in chronological order, Respondent’s first exception regarding notice is to the judge’s finding that Peterson received mail from the Union at his correct address prior to his termination. (Exception 12). The judge’s

finding is accurate and supported by the record. Peterson credibly testified to receiving the Union newsletter at his correct address, in addition to mail from the Union's Trust Funds. (Tr. 40). Respondent asserts in its exception to this finding that Peterson had a mail forwarding order with the post office. While this is true, Respondent failed to establish that the Union newsletter Peterson received was marked with a forwarding service label by the post office. (Tr. 75).

Next, Respondent takes exception to the finding that the Union had Peterson's correct address ten days prior to mailing the February dues statement. (Exception 13). The record is unclear as to when exactly Respondent obtained Peterson's correct address. Respondent received Peterson's February dues statement marked "not at this address" on February 18. (ALJD 2:41-42). Joe Klein called the Employer and obtained Peterson's correct address sometime between February 18 and February 28. (Tr. 97). It is undeniable that Respondent sat on the dues statement for ten days despite having access to Peterson's phone number and address before mailing the statement. (GC Exh. 5; GC Exh. 6).

Even if Respondent is correct that the Union did not have Peterson's correct address for the full ten days, that fact would have no bearing on the outcome of the case. The evidence makes it clear that Respondent mailed Peterson his February dues statement on February 28 and caused his termination on March 1. It is the unreasonably short period of time from when the dues statement was sent to Peterson's correct address until Respondent sought his termination, less than twenty four hours at most, on which the finding of insufficient notice is based. (ALJD 4:26-27). Respondent does not deny that the Union mailed the February dues statement to Peterson on February 28 or that the Union

caused Peterson's termination on March 1. Nonetheless, Respondent takes exception to the finding that Peterson was not given a reasonable amount of time to correct his dues delinquency. (Exception 10). While a strict definition of a "reasonable" amount of time to make a payment does not exist, it is clear that Respondent failed to give Peterson any opportunity to make a payment prior to seeking his termination because Peterson received his February dues statement after he was terminated.¹⁴ (ALJD 2;36-41; Tr. 34).

The judge's conclusion that Respondent did not provide Peterson a reasonable amount of time to become current in his dues is well supported by case law. The Board has held that with regard to a reasonable opportunity to cure a dues delinquency, even one full day is insufficient. Where a union caused an employee's termination only two days after providing notice, the Board found such notice to be insufficient due to timeliness. *Int'l Broth. of Electrical Workers Local 3 (Mulvhill Electric Contracting Corp.)*, 266 NLRB 224 (1962). In *Local Union 99, Int'l Broth. of Electrical Workers (Electrical Maintenance and Control, Inc.)*, 312 NLRB 613 (1993), the Board affirmed the ALJ's finding that five days is not "ample or reasonable notice." *Id.*, 618. The Board found that was especially true where the union had a history of calling or otherwise reminding the employee his payment was past due. Here, Respondent had previously contacted Peterson's supervisor Mike Nichols who then informed Peterson that his dues payment had run out and he needed to make another payment. (Tr. 31). Going a step

¹⁴ Respondent also excepts to the judge's finding that Peterson received his dues statement after being notified of his termination. (Exception 11). Peterson testified clearly and credibly that he first checked his mail and saw the February dues statement after Lopez called to notify him of his termination around 5:00 p.m. on March 1. (Tr 34). If the judge's finding that Peterson received the statement after being terminated is not affirmed, the record only provides the possibility of a few hours between Peterson receiving the dues statement and being notified of his termination.

further, the Board has found that up to seven days notice is an unreasonable amount of notice to employees to pay dues and become a member in good standing in order to avoid termination. *Int'l Broth. of Teamsters Local 776 (Carolina Freight Carriers Corp.)*, 324 NLRB 1154 (1997). Even two weeks to make a payment on an overdue statement has been deemed an unreasonable amount of time. *L.D. Kicher Co.*, 335 NLRB 1427 (2001). Therefore, the judge correctly found Respondent failed to give Peterson a reasonable amount of time to bring his dues current and avoid termination. (ALJD 4:26-27).

Finally, Respondent puts forth a baseless argument that by mailing Peterson dues statements more than three months prior to his termination, and providing him the Union's By-Laws upon first becoming a member, it somehow met its duty to provide notice.¹⁵ Respondent is essentially seeking a new standard by which an employee would be required to keep their own ledger of dues payments, calculate any late fees or additional fees on their own, and make payments in a timely manner without being apprised of specific due dates. Respondent provides no basis for this significant change in the law. Allowing an employee to be terminated because they failed to keep personal records of dues and fee payments to the union over the course of several months runs counter to the spirit of the Act. *Philadelphia Sheraton*, supra, 896. All of Respondent's exceptions relating to the notice Respondent provided Peterson should be dismissed outright.

¹⁵ See Respondent's Exceptions 14, 15 and 17.

B. Respondent's Dues Statement Is Insufficient¹⁶

The judge concluded that Respondent violated the Act primarily because Respondent failed to give Peterson a reasonable amount of time to correct his dues delinquency. (ALJD 4:23-41). Having already found a violation, the judge also discussed the numerous ways in which the Union's dues statement fails to meet the minimum notice requirements. (ALJD 4:43-46). Respondent takes exception to this finding. (Exception 16). A quick comparison of the Union's dues statement to the clearly articulated minimum notice requirements shows the judge reached the correct conclusion.

The Board in *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989) explained:

This [fiduciary duty] requires that before a union may seek the discharge of an employee for the failure to tender owed dues and fees, it must at a minimum give the employee reasonable notice of the delinquency, including a statement of the precise amount and months for which dues are owed and of the method used to compute this amount, tell the employee when to make the required payments, and explain to the employee that failure to pay will result in discharge.

First, the dues statement received by Peterson on March 1 did not specify the months for which Peterson owed dues. (GC. 7) While the statement shows a total amount due of \$164.30, there is no line item on the statement, or any other indication, of which dues or fees are included in the total owed. Second, the dues statement does not demonstrate the method used to compute the total. The statement lists an amount for "current" and an amount for "past due" which adds up to the total amount due, but gives no indication as to how the union computed the "current" and "past due" amounts. It is

¹⁶ In answer to Respondent's Exceptions 6, 7, 8, and 16.

unclear from the statement if those amounts only cover uniform periodic dues, if other fees are included, if assessments are included, if that amount includes a late penalty, or anything else in addition to dues.

Third, Respondent's dues statement form fails to notify the employee of when to make the required payment. (ALJD 4:45-46). There is absolutely no indication on the dues statement of when payment must be received. (GC. Exh. 7). Finally, the dues statement fails to notify the employee that failure to pay will result in discharge. There is no warning on the monthly dues statement that informs members of the risk of discharge if they fail to pay the amount owed. As of January 1, Respondent ceased its practice of mailing delinquency notices to members whose accounts were 45 days past due and were therefore in danger of having their membership status suspended in a matter of days. (ALJD 3:11-14; Tr. 82). The dues statements were not amended to make up for this change in notification.

The standard monthly dues statement Respondent sends to its members fails to meet the minimum notice requirements set by the Board in *Philadelphia Sheraton*, supra, and clarified in *Communications Workers Local 9509*, supra. This is especially true given Respondent's elimination of the delinquency notice previously sent to members at risk of losing their membership status. The sample dues statement in the Union newsletter has a circle around the "past due" column with explanatory text stating, "In the future this will serve as the members ONLY notice of an impending suspension." (GC Exh. 10). No such warning appears on the actual dues statement sent to members. Should a member have missed the Fall 2010 newsletters, or chosen not to read the Union's newsletter from September through December 2010, they would be completely

without notice that delinquency letters would no longer be sent out and that any “past due” amount means impending suspension.

The dues statement Peterson received on March 1 was in the same format as all monthly dues statements prepared by Respondent and illustrated in the Union newsletter. (GC Exh. 7; R Exh. 1; GC Exh. 10). Therefore, the judge correctly found that even if Peterson had received the dues statement in a timely fashion, the statement was insufficient. (ALJD 4:43-44). Respondent’s system of notifying members of their dues obligation prior to causing their termination therefore fails, as a whole, to meet the obligations enunciated in *Philadelphia Sheraton*. This is true with regard to Respondent’s actions toward Peterson and the standard content of Respondent’s monthly dues statement. Accordingly, Respondent’s exception relating to the content of Peterson’s February dues statement and the sufficiency of Respondent’s dues statements in general should be dismissed.

C. The Award of Backpay Is an Appropriate Remedy¹⁷

The judge correctly awarded Peterson back pay from the date of his discharge until he is reinstated or he obtains substantially equivalent employment. (ALJD 6:6-9). Where a union causes the termination of an employee, the union is required to make the employee whole for losses of wages and benefits until the employee is reinstated by employer or obtains substantially equivalent employment elsewhere. *Sheet Metal Workers Union Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981), *enfd.* in relevant part 716 F.2d 1249 (9th Cir. 1983). The union’s backpay liability does not toll

¹⁷ Exceptions 22 and 23.

simply by requesting the reinstatement of the discharged employee, rather it continues until the employee finds substantially equivalent employment. *Id.*, 774.

The continuing liability set forth in *Zinsco* has been routinely applied since the 1981 decision issued. *Freight Drivers Local 287 (Container Corporation of America)*, 257 NLRB 1255, 1260 (1981); *Int'l Union of Operating Engineers, AFL-CIO, Local Union 450*, 267 NLRB 776, n. 4 (1983); *Local Union 99, Int'l Broth. of Electrical Workers*, 312 NLRB 613 (1993). Post-*Zinsco*, when a judge has granted backpay limited to five days from when the union sought reinstatement of the employee, the Board has expressly modified the remedy to require that the union pay continuing backpay until the employee is reinstated or finds substantially equivalent employment. *Teamsters Local 331 w/a Int'l Broth. of Teamsters, AFL-CIO (Statewide)*, 315 NLRB 10, n. 3 (1994). In a similar case where the remedy provided by the judge was silent as to the continuing nature of the backpay award, the Board made clear backpay did not toll until the employee was reinstated or obtained substantially equivalent employment. *Nat'l Indep. Coopers Union, Inc. (Blue Grass Cooperage Co., Inc.)*, 299 NLRB 720 (1990). The continuing backpay clause from *Zinsco* was most recently applied by the Board in *Food and Commercial Workers Local 648 (Safeway, Inc.)*, 347 NLRB 868 (2006). In that case the union was ordered to make the employee whole for any loss of wages and benefits suffered as a result of the union's conduct until she was either reinstated or until she obtained substantially equivalent employment elsewhere. There was no mention of tolling backpay to the time the union sought the employee's reinstatement or of limiting the union's liability for backpay in any way.

Therefore, the judge correctly applied the law to the facts of this case in ordering Respondent make Peterson whole from the time of his discharge until he is reinstated or gains substantially equivalent employment. Respondent's exceptions to the remedy should be dismissed.

III. CONCLUSION

It is respectfully submitted that the judge's credibility rulings were correctly based on witness demeanor and should not be disturbed, and that the judge's findings of facts and conclusions of law were fully supported by the record evidence. For the reasons discussed above Respondent's exceptions to the judge's findings of fact and conclusions of law should be dismissed.¹⁸ To this extent, accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT San Francisco, California, this 7th day of October 2011.

Respectfully submitted,



Sarah McBride
Cecily Vix
Counsel for the Acting General Counsel
National Labor Relations Board
Region 20
901 Market St., Suite 400
San Francisco, CA 94103

¹⁸ Respondent's exceptions 18-21 and 24-26 all relate to the judge's ultimate findings of fact, conclusions of law and Recommended Order and they should be overruled for the reasons discussed above.