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International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO (Intercontinental Hotels Group d/b/a Mark Hopkins Intercontinental Hotel) and Kenneth J. Peterson.
Case 20-CB-13834

December 15, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On August 19, 2011, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel also filed cross-exceptions and a supporting brief.

The National Labor Relations 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,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO, San Francisco, California, its

¹ The judge cited *Oklahoma Fixture Co.*, 308 NLRB 335 (1992), in support of his finding that the Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by causing the Employer to discharge the Charging Party for failing to pay his union dues without providing him sufficient notice of the delinquency and a reasonable opportunity to cure it. In *Oklahoma Fixture*, however, there were no exceptions to the judge's finding that the union violated the Act by causing the discharge of an employee for failing to pay his union dues. Therefore, the issue was not before the Board. Accordingly, while we agree with the judge's reasoning and adopt his finding of a violation, we do not rely on *Oklahoma Fixture*.

The Acting General Counsel argues that the judge's recommended Order should direct the Respondent to cease and desist from similarly causing or attempting to cause the Employer to discriminate against any other unit employee, not just the Charging Party. We find merit in that argument and we shall modify the Order accordingly. See, e.g., *Teamsters Local 122 (August A. Busch & Co.)*, 203 NLRB 1041, 1043, 1053 (1973), enfd. mem. 502 F.2d 1160 (1st Cir. 1974). By contrast, we reject the Acting General Counsel's request to expand the Order to all other employers with employees represented by the Respondent. Board precedent does not suggest a practice of expanding the cease-and-desist order in that manner, and we find no facts here to support such a measure.

² Member Hayes would not, under the circumstances presented, require the notice mailing remedy ordered by the judge.

officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Causing or attempting to cause the Mark Hopkins Intercontinental Hotel to discriminate against Kenneth J. Peterson or any other employee for nonpayment of dues without adequately and sufficiently advising him of his obligations.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 15, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 on your behalf with your employer.
- Act together with other employees for your benefit and protection.
- Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause the Mark Hopkins Intercontinental Hotel to discriminate against Kenneth J. Peterson or any other employee for nonpayment of dues without adequately and sufficiently advising him of his obligations.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL make Kenneth J. Peterson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, from the date of

his discharge until the date he is reinstated by the Mark Hopkins Intercontinental Hotel or obtains substantially equivalent employment elsewhere.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS, LOCAL
39, AFL–CIO

Sarah McBride Esq. and *Cecily Vix, Esq.*, for the General Counsel.

Kristina Hillman, Esq. (Weinberg, Roger & Rosenfeld), of Alameda, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on June 21, 2011. On March 4, 2011, Kenneth J. Peterson (Peterson) filed the original charge alleging that International Union of Operating Engineers, Stationary Engineers, Local 39, AFL–CIO (Respondent or the Union), committed certain violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On April 28, 2011, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act by requesting the Mark Hopkins Intercontinental Hotel (the hotel) to discharge Peterson without giving Peterson proper notice of his union dues obligations. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Hotel, a Delaware corporation, with a facility in San Francisco, California has been engaged in providing food and lodging to its guests. During the 12 months prior to issuance of the complaint, the Hotel, in the course and conduct of its business, received gross revenues in excess of \$500,000 and directly received goods and services valued in excess of \$5,000 from outside the State of California. Accordingly, Respondent admits and I find that the Hotel is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent and the Hotel are parties to a collective-bargaining agreement, effective by its terms from July 16, 2010, to July 15, 2013. The agreement covers a bargaining unit of the Hotel's engineers. The agreement includes a union-security clause requiring unit employees, after a lawful grace period, to become and remain members of the Union.

Peterson was employed by the Hotel from December 2009, through March 1, 2011. Peterson joined the Union after he became employed by the Hotel. Beginning with his first payment of dues and initiation fees, Peterson paid his dues obligations in a lump sum of \$1000. He waited for his balance and then made another lump sum payment approximately 6 months later.

In June 2010, Peterson's lump sum payment ran out. He received a phone call from his supervisor notifying him that he had to pay his union dues. Peterson immediately made a lump sum payment. This payment covered the dues owing plus several months in advance.

In August 2010, Peterson moved to a new address in San Jose, California. He telephoned the Union's main office in Sacramento, California to update his address and to add his son to his medical insurance. Peterson was unaware of the Union's requirement that the Union be notified of a change of address in writing. Peterson received a copy of the union newsletter at his new address and statements from the Union's annuity fund.

On the morning of March 1, 2011, Union Representative Joe Klein called Jimmie Lopez, the Hotel's human resources director, and requested that Peterson be discharged for the failure to pay union dues. The Hotel requested that Lopez make the demand in writing. Klein made a written request that same date. The Hotel then prepared the paperwork for Peterson's discharge. Lopez called Peterson at about 5 p.m. on March 1, after the termination paperwork had been completed. Lopez told Peterson that he had been terminated at the request of the Union for the failure to pay union dues.

After his call from Lopez, Peterson checked his mail and found an envelope from the Union. Inside the envelope was another envelope from the Union marked "not at this address"¹ which had been returned to the Union on February 18. This envelope was marked February 28, and received by Peterson on March 1. Inside the envelope was a dues statement addressed to Peterson at his old address with a date of February 3. That statement showed that Peterson was 31–60 days past due in the amount of \$164.30. The statement did not state what the amount covered, how the amount was calculated, the date upon which payment was due, nor did it state that Peterson would be discharged for failure to make payment. Peterson had last received a dues statement in October 2010.

After his termination on March 1, Peterson went to the union offices in San Francisco and paid his union dues. Peterson paid his past dues, an initiation fee, and his dues for March. Peterson was reinstated as a member of the Union. Immediately

¹ The Union had originally sent the dues statement to Peterson's old address.

after paying his dues, Peterson went to the Hotel to request his job back. Peterson informed Lopez that he had paid his union dues and showed Lopez his receipt. Lopez told Peterson that it was not possible to reinstate Peterson because the position was not going to be reposted due to budgetary reasons. Klein notified Lopez that Peterson had made his dues payments and that the Union no longer objected to Peterson's employment. Lopez answered that the job would not be reposted due to budgetary reasons.

Respondent had a practice of issuing letters to delinquent members known as "ten day" letters. The letters advised members of a dues delinquency and notified the delinquent member that they had 10 days from the issuance of the letter to pay the amount owed. On January 1, 2011, Respondent ceased issuing these delinquency letters. Respondent issued a guide on how to read monthly dues statements in place of sending out notices that members were in arrears. This guide was published in September, October, November, and December 2010, issues of the Union's newsletter. 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.

Respondent showed that monthly dues statements were mailed to Peterson but at his old address. The Union contends that Peterson was obligated to notify the Union's recording corresponding secretary in writing of any change of address.

B. Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Section 8(b)(2) makes it an unfair labor practice for a union:

To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The proviso to Section 8(a)(3) of the Act permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later. . . ."

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 obligation. *Philadelphia Sheraton*, 136 NLRB 888 (1962). 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 obligation "would be greatly inequitable and contrary to the spirit of the Act." *Id.* at 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 obligation. *Conductron Corp.*, 183 NLRB 419, 426 (1970). Due to the drastic step of seeking the termination of an employee, the onus is on the union to ensure the member's delinquency was not due to ignorance or inadvertence. *NLRB v. Teamsters Local 291*, 633 F.2d 1295, 1299 (9th Cir. 1980).

The Board has held that 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 provide a reasonable amount of time for the delinquent member to make a payment. *Teamsters Local 776 (Carolina Freight Carriers Corp.)* 324 NLRB 1154 (1997); *Electrical Workers IBEW Local 99 (Electrical Maintenance)*, 312 NLRB 613 (1993). The union is further obligated to notify the employee whose discharge it seeks that failure to make the required payment will lead to termination. *Machinist Rocket and Guided Missile Lodge 946 (Aerojet-General Corp.)*, 186 NLRB 561, 562 (1970); *Forsyth Hardwood Co.*, 243 NLRB 1039, 1044-1045 (1979).

If a termination is due to the employee's own recalcitrance, and not ignorance or inadvertence, then the union is not required to meet the notice obligations set forth above. *IBI Security*, 292 NLRB 648 (1989).

In the instant case 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 delinquency. The Union sent Peterson a dues statement to the wrong address. Then it resent the statement on February 28, which arrived the date of Peterson's termination. Peterson was clearly not given a reasonable amount of time to correct the delinquency. Peterson was notified of his termination prior to receipt of the union dues statement.

The Union argues that Peterson had the responsibility of notifying the Union, in writing, of his change of address. However, Peterson had received mail from the Union at his correct address for months prior to his discharge. In *Oklahoma Fixture Co.*, 308 NLRB 335 (1992), the Board found that a union had failed to fulfill its fiduciary obligation to give the employee adequate and reasonable notice that his dues were delinquent. The Board found that the union could have easily found the employee's correct address through the employer or the local telephone book. Here Respondent had Peterson's correct address before mailing out the statement on February 28. The Union had this address 10 days prior to mailing out the statement on February 28. Peterson's receipt of his October dues statement does not relieve Respondent of the obligation to notify Peterson the amount owing at the end of February, and that failure to pay would result in discharge. Nor does it relieve the Union of the obligation to give Peterson a reasonable time to make his payment.

Even if Peterson had received the dues statement in a timely fashion, I would find that the statement was insufficient. The dues statement did not indicate how dues were calculated.

More importantly, the statement did not give a date upon which payment had to be made and did not indicate that failure to pay would result in discharge.

Accordingly, I find the Union violated Section 8 (b)(1)(A) and (2) in causing Peterson's discharge from the Hotel.

CONCLUSIONS OF LAW

1. Intercontinental Hotels Group d/b/a Mark Hopkins Hotel, is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing the Mark Hopkins Intercontinental Hotel to discharge employee Kenneth J. Peterson in violation of Section 8(a)(3) of the Act.

4. Respondent's acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

After Peterson made his payments to the Union on March 2, he was reinstated as a union member. The Union sought reinstatement for Peterson. However, the Hotel did not rehire Peterson due to budgetary reasons. Respondent Union shall be required to pay backpay until Peterson is reinstated or obtains substantially equivalent employment. See *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981) enfd. in relevant part, 716 F.2d 1249 (9th Cir. 1983).

General Counsel seeks an order directing Respondent to change the form of its dues statements. I decline to do so. I view my authority to remedy actual unfair labor practices and not to anticipate unfair labor practices.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:²

ORDER

The Respondent, International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO, its officers agents, and representatives, shall

1. Cease and desist from

(a) 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.

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

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Kenneth J. Peterson whole for any and all loss of earnings and other rights, benefits and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest, from the date of his discharge until he is reinstated by the Mark Hopkins Intercontinental Hotel or he obtains substantially equivalent employment. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

(b) Within 14 days after service by the Region, post at its hiring hall, meeting rooms, and offices in San Francisco, California, copies of the attached notice marked Appendix³.³ 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and 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. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its members by such manner.

(c) Within 14 days after service by the Region, sign and return to Regional Director for Region 20 sufficient copies of the notice for posting by the Mark Hopkins Intercontinental Hotel, if willing, at all places where notices to employees are customarily posted. Further, Respondent-Union shall duplicate and mail, at its own expense, a copy of the Notice to Employees and Members, to all former bargaining unit employees employed by the Employer at any time since March 1, 2011, and to all current bargaining unit employees employed at any work-site at which the Employer is unable for any reason to post the Notice to Employees and Members.

(d) 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.

Dated, Washington, D.C., August 19, 2011

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

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.

³ 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."

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 cause or attempt to cause the Mark Hopkins Intercontinental Hotel to discriminate against Kenneth J. Peterson in violation of Section 8(a)(3) of the Act.

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

of the Act.

WE WILL make Kenneth J. Peterson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, from the date of his discharge until the date he is reinstated by the Mark Hopkins Intercontinental Hotel or obtains substantially equivalent employment elsewhere.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
STATIONARY ENGINEERS, LOCAL 39, AFL-CIO
(INTERCONTINENTAL HOTELS GROUP D/B/A MARK
HOPKINS INTERCONTINENTAL HOTEL)