UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITE HERE LOCAL 1
(STEFANI'S PIER FRONT, INC. d/b/a
CRYSTAL GARDEN)

and **Case 13-CB-96888**

EILEEN CHAPA, An Individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Eileen Chapa was a 17-year employee of Crystal Garden (Employer) and an active dues paying member at the time the Respondent Union caused her termination. On December 27, 2012, her Employer notified her that it was terminating her employment for non-payment of her union dues.[1] Chapa learned of her delinquency from her Employer as the Respondent never informed her at any point before her discharge that it was actively seeking her termination due to her recent default. The Administrative Law Judge held that Chapa was a free rider and that the Respondent's actions in causing her termination were lawful.[2] The Judge's conclusion erroneously relied on evidence preceding the parties' six-month payment plan to reach this conclusion.

Contrary to the Judge's ruling, the Respondent failed to satisfy its fiduciary duty owed to Chapa as it did not follow the parties' agreed upon notice procedures for default, and it did not provide Chapa with the benefit of their agreed upon 10-day grace period to cure her default.

[1] All dates occurred in 2012, unless otherwise noted.
[2] In this Brief, the Administrative Law Judge is referred to as "the ALJ"; UNITE HERE LOCAL 1 is referred to as "Respondent"; and the National Labor Relations Board is referred to as "the Board". Citations to the ALJ's Decision are referred to as "ALJD" followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript are designated as "Tr." followed by the page number. Exhibits for the Acting General Counsel and the Respondent are respectively designated as "GC" and "R" followed by the exhibit number.

Chapa had made substantial progress towards paying off her past dues at the time the Respondent peremptorily caused her termination. Unfortunately, she encountered unforeseen personal issues that impacted her ability to make one payment under the parties' six-month payment plan. That one of her checks bounced did not make her to be a free rider. She accepted her financial obligations by entering into the six-month payment plan, completed a dues check-off form which she did not previously have on file with her Employer, and was paying her dues through this check-off provision when the Respondent requested her termination. Further, the Board has made it clear that termination of an employee is a serious matter and that a union should be strictly held to the standards of *Philadelphia Sheraton* including the notice requirements. Chapa was making every honest effort to pay her dues, and the Judge simply ignored these efforts in his decision by holding her accountable to events that occurred before she entered into her six-month payment plan to decide that the Respondent did not violate Section 8(b)(2) of the Act.

Therefore, pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel through his attorney Christina Hill, files this Brief in Support of Exceptions to the July 12, 2013 ALJ's decision. The Acting General Counsel respectfully requests that the Board reject the Judge's proposed order and instead finds that the Respondent unlawfully caused the discharge of Eileen Chapa in violation of Section 8(b)(2).

I. Background Facts

Chapa was aggressively paying her dues obligations at the time of her termination. On September 27 she made a payment of $1,002.37 pursuant to the parties' three-month payment plan;[3] on October 5 she executed a dues check-off authorization form, effective October12; and,

[3]The Respondent sent Chapa three delinquency notices – September 6, 13 and 20 - before she entered into the September 27 three-month payment plan. (G.C. Exs. 2 and 3; R. Ex. 3) As discussed in more detail below, the

on November 12 and November 30 she made two additional payments totaling $678.24 per the parties' revised six-month payment plan.[4] (ALJD pgs. 3-4) It is this latter plan – the November plan- and the events that occurred *after* Chapa made her November 30 payment that are the gravamen of the General Counsel's complaint. (G.C. 7)

Chapa candidly discussed her financial troubles in-person with Membership Coordinator Matthew Johnson when she made her November 30 payment. (Tr. 41-42) She told him that she did not have the money in her account at that moment and asked that the Respondent cash her check the following Monday, December 3 in order to give her additional time to make the necessary deposit. (*Id*.) On December 3 the Respondent deposited the check. About two weeks later, the bank returned the check for insufficient funds. (Tr. 152)

Like the Respondent, Chapa learned of the insufficient funds directly from the bank about the second week in December. (Tr. 92-93) Unfortunately, her estranged husband withdrew all the money from their joint account causing her check to the Respondent and to other creditors to bounce. (Tr. 100) Chapa did not write her dues check with the intentions of it bouncing, and the ALJ did not discredit Chapa's testimony on this critical fact. (ALJD pg 8, note 12; Tr. 100-101) Also, Chapa's acknowledgement that she did not contact the Respondent upon learning of the bounced check was due to the fact that she was attempting to balance other immediate financial commitments impacted by her insufficient funds such as her car insurance and utility bills and should not be construed merely as an effort to avoid her obligation to the Union. (Tr. 100-101)

Judge incorrectly relied upon these notices in his analysis to conclude the Respondent satisfied its fiduciary obligation after Chapa executed her six-month plan.

[4] The Respondent's initial offer to revise the payment plan included six monthly payments of $334.12. (G.C. Ex. 7) When Chapa went to accept the offer, she learned she had to make six payments over five months. (Tr. 35) The Respondent said that two payments were due in November because Chapa defaulted on their earlier agreement and she made the additional payment to cure that default. (Tr. 130)

Johnson testified that after the bank returned the check, he attempted to call Chapa twice to discuss her delinquent status. (ALJD pg. 5, lines 15-23) None of these calls, however, were recorded in the Respondent's Call Log or its TIMSS Log, and Chapa denied knowing of Johnson's attempts to speak with her. (ALJD pgs. 20-23; Tr. 148-149)

The parties' November payment plan had express measures to redress Chapa's failure to make a payment. The plan's acceleration clause required the Respondent to give Chapa notice of her delinquency and allowed her 10 days to pay the full balance after she received notice. (G.C. Ex. 7) But, the Respondent never implemented these measures before it sought her termination. On December 27 Chapa's supervisor called and said the Respondent instructed him to terminate her employment for failure to pay her union dues. (ALJD pg. 5, lines 38-41) The Respondent never communicated to Chapa that it was actively seeking her termination at any time prior to December 27 as result of her recent default. (Tr. 163) She learned of her termination from the Employer. (Tr. 44)

Two days after the termination, Chapa received a letter in the mail from the Respondent dated December 17 that said her check was returned for insufficient funds. (G.C. EX. 9) In accordance with the plan's acceleration clause, the letter said Chapa was required to pay her full balance by Thursday, December 27 to avoid termination. (*Id*.) Although Johnson testified that the Respondent sent this December letter using the same process in which the Respondent had sent Chapa's previous mailings, the ALJ held that the Respondent failed to carry its legal burden of proving that Chapa actually received this December letter or was aware of Johnson's alleged efforts to speak with her before the Respondent requested her termination. (ALJD pg. 7, lines 33-44; Tr. 163)

Despite this evidentiary ruling, the ALJ held that the Respondent's failure to establish Chapa's receipt of the December 17 letter before her termination was not dispositive to his ultimate disposition of the complaint because the Respondent had repeatedly informed Chapa of her delinquent status, including the total amount owed, a monthly breakdown for how the debt was calculated, and that the Respondent would seek her termination for her failure to adhere to the union-security provision. (ALJD pg. 7, lines 35-50) The ALJ also held that by Chapa's agreeing to the payment plan, she enabled the Respondent to seek her termination for failure to meet her financial obligations. (ALJD pg. 8) Lastly, the ALJ held that even assuming the notice was defective, Chapa willfully and deliberately sought to evade her dues obligations by failing to take any affirmative action to pay her dues after the bank informed her of the bounced check.[5] *(Id.)*

II. The Judge Erred When He Held that the Respondent's Failure to Establish Notice of the Bounced Check was not Dispositive, and When He Relied Upon Respondent's Notices Sent Before the November Payment Plan Was Executed As Evidence of the Respondent's Providing Sufficient *Philadelphia Sheraton* Notice to Chapa Prior to Her Termination. Exceptions 2 and 3.

After the Respondent learned of Chapa's bounced check, the Respondent was obligated to inform Chapa of her potential default and that she had 10 days to make her payment before seeking her termination. The Respondent failed to carry its legal burden by failing to prove that it gave Chapa notice of her delinquency and a reasonable opportunity to meet her obligations. *See Boilermakers, Local 732*, 239 NLRB 504, 505 n. 8 (1978) (the union may establish actual notice by providing credible evidence of personal knowledge or, although not required of the union, by offering documentary evidence such as a return receipt from registered or certified

[5] Your Honor stated that Chapa knew of her bounced check as early as December 10; however, the record does not support this conclusion. Chapa could not identify a date as to when she learned of her bounced check. She testified that she became aware of the bounced check about the second week in December. (Tr. 92-93) She did not testify as to a specific date in which she received notice from the bank.

mail.) The Respondent's attempts at notifying Chapa of the default by its December letter or by its unsuccessful telephone calls are simply not sufficient. *See Machinists (Borg-Warner Corp.),* 237 NLRB 1278, 1278 (1978) (attempting to notify an employee by letter is not sufficient where the union sends the delinquency notice by regular mail without any regard as to whether it was received; the union must ensure receipt); *United Metaltronics Local 955,* 254 NLRB 601, 606 (1981) (notice of the delinquency is ineffective where an employee credibly testifies that he was not informed of the delinquency prior to termination). The Respondent failed to carry its unwavering burden of proving that it informed Chapa she was in default of the November plan, and it cannot hide behind Chapa's conduct (i.e. the fact she did not immediately call the Respondent after she received notice from her bank) or the actions of a third-party (i.e. the bank's notice to Chapa of the bounced check) to carry its legal burden. *See e.g. Helmsley-Spear, Inc.*, 275 NLRB 262, 263 (Board held member's negligence or inattention to union matters does not establish a willful attempt to evade union obligations.); *see also International Brotherhood of Boilermakers,* 239 NLRB at 504-505 (citing for the proposition that constructive notice is not sufficient as the union cannot rely upon happenstance to ensure the employee was made aware of his dues delinquency.)

The Acting General Counsel's position that the Respondent was required to give Chapa notice of default after the execution of the November payment plan conforms to the Board's general treatment of payment plans and how it has limited a union's ability to seek an employee's termination after the union has received partial payment from an employee. *See, e.g., Palmer House,* 353 NLRB No. 90, *2 (2009) (Board held that the union waived its right to pursue discharge because it agreed to a dues payment plan and accepted payment before the actual discharge); *Colgate-Palmolive Company*, 138 NLRB 1037 (1962) (Board held that once a

union accepts a payment for dues delinquency but before the employee is actually discharged, it waives all rights to continue to assert delinquency as a ground for discharge); *Teamsters Local 200 (State Sand & Gravel)*, 155 NLRB 273, 277-278 (1965) (Board held union could not seek the discharge of an employee where it has agreed to a payment plan with the employee for his arrearages and has accepted one payment before the actual discharge). Additionally, the Acting General Counsel's interpretation of the impact that the payment plan had on the Respondent's notice obligation is also in tandem with the Act's inherent principles of fundamental fairness and the requirement that a union provide actual notice of default before peremptorily causing an employee's termination. "Causing or attempting to cause an employee to be fired is a serious act, and a union that seeks to do so should accept its responsibility." *Service Employees International Union*, 289 NLRB 632, 632 (1988).

Thus, the ALJ's reliance on those wholly irrelevant events occurring *before* Chapa's entry into that second payment plan was misplaced; rather, the ALJ should have focused his analysis only those notices the Respondent provided *after* Chapa entered into and defaulted on her November payment plan.[6] The Respondent waived whatever rights it may have had to seek enforcement of the security clause when it agreed to the payment plans and received Chapa's money. *See Palmer House*, 353 NLRB at *2. Each payment plan stood alone. The Respondent's September 2012 warning letters was followed by a payment plan executed on September 27, and Chapa immediately paid one-third of the debt as the three-month plan required. (ALJD pg. 3, lines 34-39) When Chapa failed to make her October payment, the Respondent, again, waived whatever right it may have had up to that point regarding the enforcement of the union-security

[6] The Respondent's attempts at securing dues payments between 2010 and September 2012, although not alleged in the complaint, were unlawful because the Union had not informed Chapa of her *General Motors* and/or *Beck* rights. (R. Ex. 1) In *International Brotherhood of Teamsters, Local No. 251*, 333 NLRB 1009 (2001), the Board upheld the ALJ's determination that a union violates Section 8(b)(1)(A) of the Act when it attempts to collect union dues pursuant to a union-security clause without notifying the employee of his *General Motors* and *Beck* rights.

clause when it entered into a second payment plan for the remaining balance. (ALJD pg. 4) This latter plan expressly overruled the parties' prior agreement, and Chapa made additional payments under the more recent plan further reducing her debt. (G.C. Ex. 7; ALJD pg. 4)

The Respondent, therefore, owed Chapa actual notice of the outstanding amount that was due post the November 12 payment plan before seeking her termination, particularly because Chapa made payments during this period. *See Local 32B-32J, Service Employees International Union, AFL-CIO*, 289 NLRB 632, 632 (1988) (citing for the proposition that a union must provide its members with clear and accurate notice of what the member owes). Because the ALJ failed to limit his notice analysis to only those events occurring after Chapa entered into and defaulted on her November plan, the ALJ erroneously concluded that the Respondent met its burden of proving it gave Chapa actual notice of the default before it requested her termination.

Furthermore, the ALJ's interpretation that the payment plan somehow enabled the Respondent to terminate Chapa for failure to meet her financial obligations isolates only one paragraph in the November payment plan to read more favorable for the Respondent. But, when the plan is read in its entirety, Chapa was no more obligated to the November payment plan than the Respondent. Like Chapa had a duty to pay her union dues by November 30 the Respondent, by the express terms of the payment plan, was obligated to notify Chapa that she was in default and giver her 10 days to make a payment to avoid termination. The Respondent breached that fiduciary duty owed to Chapa and violated Section 8(b)(2) of the Act when it failed to provide Chapa with the opportunity to cure her default as the parties mutually agreed.[7]

[7]Moreover, by the Union's agreeing to a 10-day grace period to cure any default, it also obligated itself to a heightened standard than that owed under the *Philadelphia Sheraton* analysis and therefore by its not carrying out the plan's terms, it, again breached its fiduciary obligation.

III. The Record Evidence Fails to Substantiate the Judge's Conclusion that Eileen Chapa Was a Free Rider, and the Judge Erred When He Relied Upon Respondent's Notices Sent Before the November Payment Plan Was Executed as Evidence of Chapa's Free Rider Status. Exceptions 1 and 3.

The Judge erred when he relied heavily upon Chapa's conduct preceding the November plan and her conduct immediately after she learned of the bounced check as a basis to relieve the Respondent of all its fiduciary obligations as discussed above in Section II. What must not be forgotten is that at the time the Respondent requested her termination, Chapa was *actively* paying her dues. At no point after her entering either payment plan did Chapa ever disavow her dues obligations. Chapa's actions, including paying a substantial portion of her past dues and making sure that she was keeping up with her current dues, are distinguishable from those that would be expected from a free rider. *See e.g., Ralph's Grocery Comp.*, 209 NLRB 117, 225 (1974) (member avoided paying union obligations under the *pre-text* that he was unaware of the existence of a union-security clause and his financial obligations there under); *Big Rivers*, 260 NLRB 329, 329 (1982) (member failed to make *any* effort to meet dues obligations for eight months after the union made repeated warnings that it would enforce its union-security clause); *I.B.I Security, Inc.*, 292 NLRB 648, 649 (1989) (member made a conscious effort to evade his obligations and failed to tender payment for his union dues until *after* the union sought his discharge); and *Professional Services Unlimited*, 317 NLRB 352, 355 (1995) (for seven months the member *refused to pay any dues* noting that she was not obligated because other unit employees were not paying their dues).

Further, Chapa did not write the dues check that was returned for insufficient funds with the intention of evading her financial obligations to the union, and the Judge did not discredit her testimony on this important fact. In *Fischbach and Moore*, 309 NLRB 856, 856 (1992), the employee wrote a check for his delinquent dues on March 26 and asked that the union not cash

the check until March 30. The union cashed the check before March 30, the check bounced, and the union requested the employee's termination without notifying the employee that the check bounced. *Id*. The ALJ found a violation of the Act, and the union filed exceptions on the basis that it was prohibited from admitting evidence that would have established that the employee had insufficient funds in his account on March 30. *Id*. The Board, in examining the employee's intentions at the time he gave his check to the union, found a violation because the evidence did not establish that the delinquent employee willfully and deliberately sought to evade his union-security obligations. The Board held that the judge did not improperly exclude evidence because even if the employee's funds were deficient on March 30, said deficiency would not have established that the employee lacked the intentions to deposit the requisite funding when he paid his dues.[8] *Id*.

While General Counsel concedes that the Respondent waited to deposit Chapa's check as she requested, the Board in *Fischbach and Moore* looked at the employee's intentions at the time he wrote the check in determining whether the employee was attempting to avoid his union obligations. Chapa's good-faith intentions, like the employee in *Fischbach and* Moore, is evidenced by her honesty when she went to the Union Hall to pay her debt in-person and openly discussed her financial problems. (Tr. 41-42) She wrote that check with the full intentions of the money being there, and that her funds were insufficient when the Respondent cashed her check in no way establishes a nefarious plot to willfully and deliberately evade her union obligations. More importantly, and contrary to the ALJ's conclusion, Chapa was not obligated to

[8]In its footnote, the Board said that had the union simply waited until March 30 to cash the check and it nonetheless bounced, then a different result *might* have been warranted. *Fischbach*, *supra* 309 at fn. 1. Although this discussion intimates a different conclusion may have been reached if different facts were before the Board, the Board's holding clearly examines the employee's intentions at the time the check is written, and it cannot be overly stressed that Chapa wrote her check with the good-faith intentions of paying her dues.

contact the Respondent after the bank notified her of the bounced check because the payment plan spelled out specific actions that were to be carried out in the event of a missed payment.

The ALJ also ignored critical facts that undermined the Respondent's free rider defense such as the Respondent's poor record keeping that contributed to Chapa's arrearages, and the fact that after Respondent asked Chapa to pay over half a decade of debt in no less than three months to avoid termination, she very quickly paid almost half her debt. S*ee R. H. Macy Co.*, 266 NLRB 858, 860 (1983) (member's failure to remain current on his dues was induced in large part by the union's inattention, rather than by the employee's conscious effort to evade his obligations); and *Ransome Lift*, 303 NLRB 1001, 1004 (1991) (union's failure to demonstrate ordinary diligence in monitoring arrearages contributed to the employee's delinquency). Respondent's apparent poor record keeping exacerbated an issue that should have been well resolved before her dues were six years in arrears. Although its auditing practices are not the issue in this proceeding, they cannot be ignored when making a just and fair decision. Chapa's failure to remain current on her dues resulted more from the Respondent's own inattention rather than her deliberate effort to avoid paying her dues.[9] Chapa was not a recalcitrant member. Chapa made every immediate, good faith, and on-going effort to pay her dues. Consequently, because Chapa is not a free-rider, the Respondent's failure to give Chapa notice of her default is unexcused.

IV. CONCLUSION, REMEDY SOUGHT AND PROPOSED ORDER

Counsel for the Acting General Counsel respectfully requests that the Board finds merit to the Exceptions to the Decision of the Administrative Law Judge and concludes the

[9] Johnson testified that Respondent was unaware of Chapa's employment at Crystal Gardens until sometime in 2010, and at which point it learned that she had been employed there since 2006. (Tr. 113) However, Chapa has worked for Crystal Gardens since 1995; therefore, Respondent is conceding essentially that it did not exercise due diligence in monitoring her dues payments while employed by Crystal Gardens.

Respondent violated Section 8(b)(2) of the Act by summarily causing Eileen Chapa's discharge before providing her actual notice of default on her November 30, 2012 payment. Accordingly, a make-whole remedy is appropriate, with interest in accordance with the holding in *In re Latino Express, Inc.*, 359 NLRB No. 44 (2012). The Respondent should post at its Union Hall the proposed Board notice.

Dated at Chicago, IL August 15, 2013.

Respectfully submitted,

/s/ Christina B. Hill

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PROPOSED ORDER

The Respondent, UNITE HERE LOCAL 1, shall:

1. Cease and desist from

(a) Causing or attempting to cause Crystal Garden to discharge or otherwise discriminate against Eileen Chapa or any other employee to whom membership has been denied or terminated on some ground other than his or her failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(b) Violating our fiduciary duty to deal fairly with members by failing to provide them reasonable notice of our intent to notify their employer that we are seeking their termination for failing to meet their obligation to pay dues pursuant to the union security clause in our collective-bargaining agreement.

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

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

(a) Provide reasonable notice of delinquency, including a statement of the precise amounts and months for which dues are owed and of the method used to compute the amount, tell the member when to make the required payments, and explain to the employee that failure to pay will result in discharge before seeking the discharge of a member.

(b) Provide employees and members a reasonable opportunity to pay dues that are in arrears and give them reasonable notice before requesting their employer to discharge them.

(c) Notify the Employer and employee member Chapa, in writing, that it withdraws and rescinds its request to discharge said employee member; that it has no objection to her reinstatement without loss of seniority or other rights and privileges previously enjoyed by her; and that it requests that the Employer reinstate employee member Chapa.

(d) Make employee member Chapa whole for all losses of wages and benefits suffered by her as a result of the Union's discrimination, with interest, as provided in *In re Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(e) Post at its business office and meeting hall copies of the attached Proposed Notice. Copies of the notice, on forms provided by the Regional Director for Region 13, 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) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 13 for posting by the Employer if the Employer is willing to do so.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

PROPOSED NOTICE TO 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 have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer 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 Crystal Garden to discharge or otherwise discriminate against Eileen Chapa or any other employee to whom membership has been denied or terminated on some ground other than his or her failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

WE WILL NOT violate our fiduciary duty to deal fairly with members by failing to provide them reasonable notice of our intent to notify their employer that we are seeking their termination for failing to meet their obligation to pay dues pursuant to the union security clause in our collective bargaining agreement.

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 provide reasonable notice of delinquency, including a statement of the precise amounts and months for which dues are owed and of the method used to compute the amount, tell the member when to make the required payments, and explain to the employee that failure to pay will result in discharge before seeking the discharge of a member.

WE WILL provide employees and members a reasonable opportunity to pay dues that are in arrears and give them reasonable notice before requesting their employer to discharge them.

WE WILL notify the Employer and employee member Chapa, in writing, that we withdraw and rescind our request to discharge the employee member; that we have no objection to her reinstatement without loss of seniority or other rights and privileges previously enjoyed by her; and that we request that the Employer reinstate employee member Chapa.

WE WILL make employee member Chapa whole for all losses of wages and benefits suffered by her as a result of our discrimination against her, with interest, as provided in *In re Latino Express, Inc.*, 359 NLRB No. 44 (2012).