

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL NO. 16, AFL-CIO**

and

Case 28-CA-092331

DOLORES ORNELAS, an Individual

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

I. INTRODUCTION

When Dolores Ornelas was offered a job in 2007, as an administrative assistant with the Laborers' International Union of North America, Local No. 16, AFL-CIO (Respondent or the Union), she was a young woman with clerical skills – and no understanding of labor organizations – in need of work. Respondent exploited Ornelas's naiveté, requiring her to join Respondent – in its capacity as a labor organization – as a condition of her employment, and requiring her to maintain her membership by paying Union dues for the next five years, until it terminated her employment on August 8, 2012.

Counsel for the General Counsel (General Counsel) files this brief in support of its limited exception to the decision of Administrative Law Judge William L. Schmidt (the ALJ), [JD(SF)-50-13] (October 30, 2013) (the ALJD). The ALJ, supported by the record evidence, correctly found that Respondent required Ornelas to join the Union – and maintain membership in the Union – as a condition of her employment. The ALJ, however, erred in finding that the violation, which was established by clear record evidence, is barred by Section 10(b) of the Act. The General Counsel's exceptions are limited to the ALJ's failure to find that Respondent's requirement that Ornelas join and maintain her membership in the

Union as a condition of her employment until the time of her discharge in August 2012, constitutes a rule or condition of employment whose maintenance during the 10(b) period violates Section 8(a)(1) and (3) of the Act.

II. PROCEDURAL HISTORY

The hearing on the Complaint alleging that Respondent violated Section 8(a)(1) and (3) of the Act was conducted before the ALJ on April 23, 2013. (ALJD at 1).¹ On October 30, 2013, the ALJ issued his Decision in the matter and properly found that there was clear evidence to establish that Ornelas was required to become a member of the Union as a condition of her employment with Respondent. (ALJD at 10). The ALJ further found, however, that such a requirement, while violative of the Act, was time-barred by Section 10(b) of the Act. (ALJD at 10). The ALJ recommended dismissal of all of the Complaint allegations, including the allegations that Respondent promulgated and maintained an overly-broad and discriminatory rule prohibiting employees from contacting the International Union and that Respondent discharged Ornelas for violating such a rule and for engaging in protected concerted activities. The General Counsel excepts only to the ALJ's dismissal of the allegation that Respondent's requirement of Union membership violates Section 8(a)(1) and (3) of the Act on the grounds that it was time-barred.

III. FACTUAL BACKGROUND

A. Respondent's Business and Organizational Structure

Respondent is an unincorporated association representing employees – primarily construction workers and custodians – in collective bargaining with employers. (ALJD at 2;

¹ References to the ALJD are designated as "ALJD" followed by the applicable page number. References to General Counsel and Respondent exhibits are designated as "GC" and "R" respectively, followed by the applicable exhibit number. References to the transcript of the proceedings are designated as "Tr." followed by the appropriate page citations.

GC 1(g), 1(l); Tr. 26). Julian Cordova (Cordova) is Respondent's Business Manager and Treasurer and, as such, is responsible for managing a staff of approximately six business agents, an office manager, and an administrative assistant. (ALJD at 3; Tr. 25-27). Cordova serves as Respondent's chief executive officer; he is both an employee and member of the Union. (ALJD at 3; Tr. 26). Jose Atencio, Respondent's President and a Business Agent, is similarly both an employee and member of the Union. (Tr. 49-50). Jennifer Nieto is Respondent's Office Manager and was Ornelas's direct supervisor. (Tr. 73, 150). Nieto is also an employee and member of the Union. (Tr. 26-27, 149-50).

B. Respondent's Requirements for Membership

All of Respondent's employees are members of the Union, despite the fact there is no collective-bargaining agreement to which the Union is a party that covers clerical employees or administrative assistants. (Tr. 26-27, 50). Although it is undisputed that the collective-bargaining agreement did not cover administrative assistants, Ornelas testified that she did not understand that she was not covered by a collective-bargaining agreement and believed that she was. (Tr. 78, 114). The ALJ noted that there was no evidence that Ornelas ever worked for a union before she began employment with Respondent, ever belonged to a union, or ever had any familiarity with the purposes or work of unions. (ALJD at 3). The ALJ further found that, at the time of her hire, Ornelas "almost certainly did as she was told by her potential employer." (ALJD at 4). In fact, the ALJ concluded that Nieto informed Ornelas that "she needed to become a union member and pay the dues by way of the payroll deduction in order to start work" and that "Ornelas complied with the instruction given." (ALJD at 4). Ornelas also testified, without contradiction, that she was told on several occasions during the five

years of her employment that she “had” to pay dues. (ALJD at 5). Ornelas remained a dues-paying Union member through the time of her discharge in August 2012. (Tr. 69, 126-27)

IV. ANALYSIS

A. **The ALJ Erred in Finding that Respondent’s Unlawful Union Membership Requirement is Time-Barred Pursuant to Section 10(b) of the Act (Exception #1)**

The ALJ expressly concluded that Respondent violated Section 8(a)(1) and (3) by requiring Ornelas to become a member of the Union as a condition of her employment. (ALJD at 10). The ALJ further found, however, that the allegation was barred by the six-month limitations period in Section 10(b) of the Act. (ALJD at 10). That conclusion is not supported by Board law. It is well-established that unlawful work rules that are longstanding, and that are maintained within the statutory limitations period established in Section 10(b) of the Act, constitute continuing violations of the Act. *Relco Locomotives*, 359 NLRB No. 133, slip op. at 16 (2013). See also *Communications Workers of America*, 359 NLRB No. 131, (2013) (union’s maintenance of unlawful rule requiring annual renewal of *Beck* objections was not time-barred; “continued maintenance of a rule is unlawful even though the rule was enacted outside the 10(b) period if the rule is found to be unlawful on its face or is presumptively unlawful”). The violation in this case, as in *CWA*, is not based on events that occurred outside of the 10(b) period, as the ALJ contends, but rather on the fact that the rule itself is unlawful. *Id.*

There is no question that Respondent’s rule requiring Ornelas’s membership as a condition of her employment violates the Act, and Respondent does not contend otherwise. Respondent has asserted only that (1) Ornelas’s membership was voluntary, an argument that the ALJ outright rejected as being without merit; and (2) the allegation is barred by

Section 10(b). To hold that an unlawful rule maintained by an employer within the 10(b) period is nevertheless barred by 10(b), because it was promulgated outside the 10(b) period, would undermine years of Board law to the contrary. See, e.g., *Marriott International, Inc.*, 359 NLRB No. 8 (2012) (“an employer commits a continuing violation of the Act throughout the period that an unlawful rule is maintained”); *Turtle Bay Resorts*, 353 NLRB 1242, 1272 (2009) (“Section 10(b) may insulate the Respondents’ promulgation of their unlawful rules, but the maintenance of those rules within 6 months of the filing of the charges in this case renders the present action timely”).

The continued maintenance of Respondent’s unlawful membership rule through the termination of Ornelas’s employment in August 2012, is undisputed; Respondent continued to withhold and exact Union dues from Ornelas until the time of her discharge. Further, the ALJ rejected any notion that Ornelas’s continued membership was, at any time, voluntary. (ALJD at 4-5). Finally, to cure its unlawful rule, Respondent’s repudiation must have been timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. *Passavant Memorial Area Hosp.*, 237 NLRB 138, 138 (1978). There is absolutely no evidence that Respondent ever repudiated – or attempted to repudiate – its membership requirement. Rather, the evidence plainly establishes that the unlawful rule remained in effect throughout the 10(b) period. Accordingly, the ALJ erred in finding that Respondent’s rule requiring Union membership – which is plainly unlawful – is time-barred by Section 10(b) of the Act.

V. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous ruling as set forth above, find that Respondent committed a violation of Section 8(a)(1) and (3) of the Act as delineated above, and order that Ornelas be reimbursed for any and all dues unlawfully collected by Respondent, with interest and that any appropriate Notice to Employees regarding such violation be posted by Respondent, including by electronic means.

Dated at Phoenix, Arizona, this 27th day of November 2013.

Respectfully submitted,

/s/ Eva C. Shih

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 16, AFL-CIO, in Case 28-CA-092331, was served by E-Gov, E-Filing, and E-Mail on this 27th day of November 2013, on the following:

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