Laborers' International Union of North America, Local No. 16, AFL–CIO *and* Delores Ornelas. Case 28–CA–092331

April 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On October 30, 2013, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed an exception, a supporting brief, and a reply brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge, for the reasons he states, that the complaint allegation that the Respondent violated Section 8(a)(1) and (3) of the Act by requiring Charging Party Delores Ornelas to become a member of the Union as a condition of her employment must be dismissed as time-barred. As the judge explained, *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416–417 (1960), governs the use of time-barred events in situations where, as here, "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice." In that circumstance, the Court held,

> use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 417.

Applying this principle, the judge correctly found that because the conduct that occurred within the 6-month limitations period could be found unlawful only by relying on a defunct unfair labor practice, the complaint allegation was time-barred. As the judge noted, when Ornelas was hired in 2007, and on other occasions preceding the 6-month limitations period, the Respondent told her that she had to join the Union and pay dues. As the judge found, however, the General Counsel failed to present any evidence that the Respondent maintained or imposed such a requirement within the 10(b) period. Thus, as the judge concluded, a current violation could be made out only by relying on anterior events that predate the 10(b) period, a practice that *Bryan Mfg.* forbids. The judge therefore dismissed as time-barred the complaint allegation that the Respondent violated the Act by requiring Ornelas to become a union member and pay dues.[2]

Unlike our dissenting colleague, we agree with the judge that the record fails to establish that the Respondent maintained a policy requiring union membership during the 10(b) period. The fact that Ornelas continued to pay dues during that time does not show she was required to do so. Nor does her continued union membership establish a violation, as employees are free to join and maintain membership in a labor organization that does not represent them. Further, given the General Counsel's failure to present any evidence that the Respondent maintained a policy of requiring union membership within the limitations period, we would not rely on the Respondent's failure to tell Ornelas that her membership was voluntary as establishing its existence during the 10(b) period. Doing so would improperly shift the burden of proving a current unfair labor practice from the General Counsel to the Respondent.

Finally, the cases relied upon by the General Counsel and our dissenting colleague are legally and factually distinguishable, and do not solve the problem created by the complete absence of evidence that the Respondent maintained a policy requiring union membership during the 10(b) period. In *Communications Workers Local 4309 (AT&T Midwest)*, 359 NLRB No. 131, slip op. at 6 (2013), the parties stipulated that the respondent maintained the rule in question during the limitations period; in *Control Services*, 305 NLRB 435, 442 (1991), the respondent conceded that the rule continued in effect;

[1] There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by maintaining and enforcing an overly broad and discriminatory rule prohibiting employees from contacting other employees and the International Union about their terms and conditions of employment, and by discharging employee Delores Ornelas for engaging in protected concerted activity.

[2] As our dissenting colleague notes, *Bryan Mfg.* also recognized that if "occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices[,]" then "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events." Id. at 416. As the judge found, however, there were no events within the 10(b) period that would, standing alone, establish a violation. For this reason, it cannot be said here that time-barred events would merely elucidate a current unfair labor practice.

and in *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985), the record showed that the policies at issue were maintained and enforced during the 6-month period. Here, by contrast, there is no such evidence. Accordingly, for the reasons stated by the judge, we uphold his dismissal of the complaint allegation.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C., April 30, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HIROZAWA, dissenting.

Contrary to my colleagues, I would find that the 6-month limitation period imposed by Section 10(b) does not bar the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by requiring employee Ornelas to pay union dues to the Respondent as a condition of her employment. As my colleagues observe, Section 10(b) bars a complaint based upon earlier events where "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice." *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416–417 (1960). However, where a timely allegation is before the Board, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose [Section] 10(b) ordinarily does not bar such evidentiary use of anterior events." Id. at 416.

The General Counsel alleges that, within the limitations period, Ornelas was required to be a member of the Union and pay dues. It is undisputed that Ornelas was not at any time an employee in any collective-bargaining unit represented by the Respondent or covered by an agreement lawfully requiring membership. If, therefore, the Respondent maintained a policy requiring her membership, that policy was facially unlawful. It is well established that the maintenance of a facially unlawful policy within the 10(b) period is an independent violation of the Act. See, e.g., *Communications Workers Local 4309 (AT&T Midwest)*, 359 NLRB No. 131, slip op. at 6 (2013); *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991); *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985).[1] The General Counsel's allegation is therefore timely, because finding it meritorious does not depend upon finding that any conduct of the Respondent outside of the limitations period constituted an earlier unfair labor practice.

Furthermore, the General Counsel has presented evidence that the Respondent maintained a union-membership requirement within the 10(b) period. The General Counsel showed, my colleagues have found, and I agree, that the Respondent imposed a requirement that Ornelas become a member of the Union and pay dues. That initial imposition of the requirement occurred outside of the 10(b) period, and therefore cannot be found to constitute a violation in and of itself. However, the evidence establishing the initial imposition of the requirement may be considered under *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, above, and well-established Board precedent, see, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB No. 86, slip op. at 5 fn. 14 (2011), to elucidate subsequent events.[2]

Ornelas continued to pay dues until her discharge, the Respondent continued to accept them, and Ornelas was never told that her membership was voluntary. These facts, considered in the light shed by the undisputed fact that the Respondent had previously required Ornelas to become a member and pay dues, support an inference that the Respondent maintained its policy requiring union membership throughout the 10(b) period. Accordingly, I would reverse the judge's decision and find that the Respondent violated the Act.

Dated, Washington, D.C. April 30, 2014

Kent Y. Hirozawa, Member

NATIONAL LABOR RELATIONS BOARD

[1] As my colleagues observe, the record in each of those cases established that the policy at issue had been maintained during the 10(b) period, while the question was the lawfulness of each policy. Here, by contrast, the question is whether the Respondent's facially unlawful union-membership policy was maintained during the limitations period. This factual distinction, however, does not affect the relevance of the legal standard applied in the cited decisions.

[2] My colleagues suggest that my analysis improperly relieves the General Counsel of his burden of proof. But given the General Counsel's showing that the Respondent imposed a union-membership requirement, it would not improperly shift the burden, either of production or of persuasion, for the Board to find that the Respondent never rescinded that requirement.

Eva Shih, Esq., for the Acting General Counsel.
John L. Hollis, Esq. (John L. Hollis, PA), of Albuquerque, New Mexico, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case in Albuquerque, New Mexico, on April 23, 2013. Delores Ornelas, a former employee of the Respondent labor organization, filed the original charge on October 30, 2012.[1] Thereafter, she filed an amended charge on November 7, and a second amended charge on December 21. On December 31, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or Board) issued a complaint and notice of hearing alleging that Laborers' International Union of North America, Local 16, AFL–CIO (Respondent or Local 16), violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).[2] The complaint alleges that Respondent independently violated Section 8(a)(1) by maintaining and enforcing an overly-broad and discriminatory rule prohibiting employees from contacting other employees and the International Union about matters pertaining to their terms and conditions of employment, and by discharging Ornelas for engaging in protected concerted activities. The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by requiring Ornelas to become a member of Local 16 as a condition of her employment.

The Respondent filed a timely answer denying the substantive allegations of the complaint and alleging affirmatively that it terminated Ornelas for cause. At the hearing, Respondent further asserted that the mandatory union membership allegation contained in the complaint was time-barred by Section 10(b) of the Act.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an unincorporated association with an office and place of business in Albuquerque, New Mexico, represents employees in collective bargaining with employers.

At all material times Respondent, has been chartered by and has been an integral part of a multistate labor organization, Laborers' International Union of North America, AFL–CIO (LIUNA), that maintains its national headquarters in Washington, DC. In conducting its operations during the 12-month period ending October 30, 2012, Respondent collected and received dues and initiation fees in excess of $500,000, and remitted from its facility in Albuquerque, to LIUNA per capita taxes in excess of $50,000. Based on the foregoing, I find Respondent has been an employer at all material times engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Local 16 represents construction laborers and custodians throughout the State of New Mexico for collective bargaining purposes. In addition to its principal office located at 1030 San Pedro Avenue, N.E. in Albuquerque, Local 16 maintains satellite offices in Espanola, Farmington, and Las Cruces, New Mexico.

Juan Cordova took office as Local 16's secretary-treasurer and business manager on June 8 following his election in May 2012. In that capacity he serves as Local 16's chief executive officer. He oversees the work of Local 16's six business agents, its office manager, and its administrative assistant or secretary. During the same election, Jose (Joey) Atencio, became Local 16's president. It appears that Atencio almost simultaneously became a Local 16 business agent working from the union's Albuquerque office. The other two business agents, Louie Moya (Atencio's predecessor as the local's president) and Darrell Deaguero, also work out of the Albuquerque office. The union's business agents and administrative employees are unrepresented.

Local 16's Albuquerque office building sits in the middle of the commercial lot on San Pedro Avenue N.E. There are parking areas on all four sides of the building for use without charge by the union's employees, members, and guests. The second story of the union's office building overhangs the first floor in a manner that provides a single row of covered parking spaces immediately adjacent to the north and south side of the building.[5]

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[1] All dates refer to the 2012 calendar year, unless otherwise shown.

[2] Under Sec. 8(a)(1) it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 provides in pertinent part employees "have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right to refrain from any of these activities except as otherwise provided under the Act. It is an unfair labor practice under Sec. 8(a)(3) for an employer to discriminate against an employee "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Sec. 10 of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting commerce."

[3] The relevant portion of Sec. 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

[4] Respondent's unopposed motion to correct the transcript is granted.

[5] As the record evidence failed to describe the parking setup in a manner that would allow informed findings of fact on this important issue, I have viewed the parking configuration shown in the satellite view of Google maps at 1030 San Pedro Avenue, N.E., Albuquerque, New Mexico, which shows Local 16's office building. Pursuant to Rule 201 of the Federal Rules of Evidence, I take administrative notice of the parking configuration shown there for purposes of making my findings here about the parking setup at that site. As no party had prior

The principal issue in this case concerns the August 9 termination of Delores Ornelas, the local's sole secretary or administrative employee. The Acting General Counsel contends that Cordova terminated Ornelas for her concerted protected activities. Local 16 contends he terminated her for misconduct growing out of a confrontation she initiated with Atencio on August 8 after he asked that her car be moved to another location in the union's parking lot. Two lesser issues concern the alleged requirement that all of Local 16's staff employees become and remain members in good standing of that labor organization and an alleged in-house rule limiting the staff employees' right to engage in Section 7 activities.

B. Relevant Facts

Ornelas began working at Local 16 in October 2007. When she learned of an opening there for an administrative assistant, she submitted her resume to Jennifer Nieto, the office manager and direct supervisor of the union's secretarial staff. There is no evidence that Ornelas ever worked for a labor organization before, ever belonged to a labor organization, ever had any familiarity with the purposes or work of labor organizations, or otherwise knew about or ever heard of the arcane laws and rules governing the limitations on employers, whether labor organizations or otherwise, governing the employment of workers. On the contrary, from my observation of Ornelas at the hearing, I have concluded that she was, at the time of her hire, a young woman with clerical skills in need of work and that she almost certainly did as she was told by her potential employer.

Shortly after a personal interview, Nieto offered Ornelas a job with the local. During the hiring process Nieto faxed the typical employment documents on two or three separate occasions that Ornelas completed and returned them. One document, a letter-like form on Respondent's letterhead and addressed to Local 16 in a hand obviously different than Ornelas' writing at the bottom, authorized Local 16 to deduct from her wages $26 during the first pay period each month for her "monthly membership dues fee." It also authorized Local 16 to deduct $25 per pay check until a $100 "Initiation Fee or Readmission fee" had been paid. (GC Exh. 2) The form's final paragraph goes on to state:

> You (meaning Local 16) are directed to remit the amount deducted on the monthly Employer Reporting Form submitted to Southwest Multi-Craft Health and Welfare Fund on or before the 15th day of the calendar month following for which said deductions were made.[6]

Although characterized as "dues," the clear wording on this form and Respondent's acknowledgment in its brief shows that this exaction amounted to a requirement that the employee pay for her/his own pension and health care benefits that other documents describe as benefits provided by Local 16.

Ornelas called Nieto after receiving this form seeking an explanation for her need to complete it and pay the specified dues and initiation fee. Nieto told her she needed to become a union member and pay the dues by way of the payroll deduction in order to start work. Ornelas complied with the instruction given.

In November 2008, Ornelas signed another dues-deduction document entitled "Voluntary Dues Deduction Authorization." This authorization, also printed on a Local 16 letterhead and countersigned by the then Business Manager Eddie Archuleta, allowed her employer to deduct 4 percent from her gross wages each pay period "for working dues and my monthly dues." In addition it authorized deduction of three cents per hour for a "Build New Mexico" fund and five cents per hour for a so-called "LECET" fund. This form further authorized increased deductions to cover "any future increases." The final sentence of the form states: "This authorization is voluntarily given and may be revoked in writing by me at any time, and is not dependent upon my being a member of Laborers' Local Union #16." At the same time, Ornelas was given another so-called voluntary authorization form for the "N.M. Laborers' Political Education Fund" that she declined to sign. No evidence shows that Ornelas suffered any reprisal for refusing to authorize a payroll deduction for the political activity fund. According to Ornelas' uncontradicted testimony, she was told on several occasions over the years, particularly by Business Agent Moya, at a time when he was also Local 16's president, that she "had" to pay dues. Respondent's brief summarized the sum total of Ornelas' dues obligations as follows:

> She paid monthly membership dues of $26.00 per month. In addition to her monthly dues, working dues of 4% of her gross wages were deducted and paid to Respondent. Dues are paid into the general fund, and from that fund, contributions are made in behalf of Ornelas and other employees of Respondent for health insurance and pensions.

At the time of her termination in August 2012, Ornelas earned $14.40 per hour. During the spring of 2012, Ornelas learned from Moya, still the union's president at the time, that the pay freeze in effect for all Local 16 employees for the previous 3 years would continue for yet another year. Ornelas protested to Moya saying that she did not see why she was paying dues while her pay had remained static for such a long time. Then, as on other occasions, Moya told Ornelas that she "had to pay dues." Later, presumably after the union election

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notice of my intention to administratively notice this adjudicative fact, and as the Board's Rules provide for the contemporaneous transfer of jurisdiction over this case from me to the Board upon the issuance of this decision, the parties may exercise their right to be heard on this question of official notice as provided in FRE Rule 201(e) by filing a specific exception with the Board.

[6] The Southwest Multi-Craft Health and Welfare Fund is a trust fund that administers the pension, and the health and welfare benefit program established under Local 16's collective-bargaining agreements with area contractors and other employers who employ the workers the union represents. The employers make monthly payments into this trust to cover the benefits provided to the workers they employ. The employers also withhold and remit to Local 16's general fund separate amounts to cover their employees' membership dues and fees. Purportedly, some unexplained special arrangement exists that permit the union's own employees to also participate in this benefit trust established by the collective-bargaining agreement but the cost for that participation apparently comes from the "dues" deducted from the union's employees pay that are then transmitted to the trust fund.

that spring, Ornelas spoke to Nieto about a pay increase and Nieto advised her to hold off until after Cordova took office.

In about mid-July Ornelas spoke to Cordova about a pay raise. He told her he would look into it and get back to her. On another occasion she pressed him about the pay matter but he told her that he had not yet had an opportunity to look into it.

On August 7 Ornelas and her supervisor, Nieto, met with Cordova to discuss her wage increase request. Cordova told Ornelas that he would grant her a 4 percent increase (effectively to $15 per hour) and then take another look at her pay in 6 months or a year to see if he could give her an additional 4 percent. Apparently not satisfied, Ornelas presented a document to Cordova that she obtained from an internet site showing workers in her category earning $18 to $19 per hour. Seemingly the meeting ended in a stalemate. In a handwritten summary she made of this meeting and other events that followed, Ornelas acknowledged that she "was turned down about the raise I was asking for" but had been offered an increase to $15 per hour. At the end of the meeting, Cordova told Ornelas to "think about it."

Ornelas' pay matter largely became moot when Cordova terminated her 2 days later for a conflict she had on August 8 with Jose Atencio, the union's president. That issue began when she parked her car that morning in a covered parking space on the north side of the union's building because of the heat.[7] Although she had parked there before, there appears to have been an understanding in the office that the covered spaces on that side of the building were reserved for the business agents while the administrative personnel, namely, Nieto and Ornelas, were relegated to parking in uncovered spaces to the north or any of the spaces to the south.

After Ornelas returned from lunch that day, she overheard Atencio, tell Nieto "You need to have your girl move her car. She cannot park down there," apparently meaning that Ornelas could not park where she had parked that day. Nieto promptly went to Ornelas' cubicle to tell her of Atencio's request, commenting, according to Ornelas, "Wow, he is pissed." The two commiserated briefly about Atencio's disrespectful "girl" reference but after Nieto returned to her office, Ornelas continued on with her regular work.

A few minutes later, Darrell Deaguero, another business agent Ornelas characterized as a "buddy" of Atencio's, approached Ornelas directly and requested that she move her car. After finishing what she was doing and making a phone call, Ornelas finally went to move her car.

On her way back to the office after moving her car, Ornelas came upon Atencio standing in front of the building talking with a contractor on his cell phone while smoking a cigarette. Ornelas admitted that she spoke to Atencio but the two provided dramatically different accounts of the words and the tone used. Ornelas claimed that she said "I moved my car. You don't have to cry" as she passed Atencio. She said Atencio asked her to repeat what she had just said and she then told him, "I moved my car. You don't need to have a cry; you could have just come to me." Atencio claimed that Ornelas approached within 2 or 3 feet of him and began yelling at him, "There, I moved my f—king car. You can stop your f—king crying. If you have got something to say to me, you come to me. Don't be going to Jennifer." Based on other record evidence showing that Ornelas harbored animosity toward Atencio before this incident and Atencio's immediate complaint to Cordova over the matter, I credit Atencio's account indicating that Ornelas became irate and aggressive over the parking issue. At the hearing, Ornelas conveyed the impression that she loathed Atencio.

Atencio ended his call and returned to the Local 16 office area. He promptly reported the incident to Cordova, saying that he had just been "verbally assaulted" by Ornelas yelling profanities at him while he had been minding his own business out in front of the building.

With Atencio still present in his office, Cordova immediately summoned Ornelas to speak with her about the incident reported by Atencio.

During this meeting, Cordova told Ornelas that he thought she had been very unprofessional and that he did not like the way she had "confronted" Atencio and told her "You know, we need to carry ourselves professionally here . . . we need to be a team. We need to have respect for each other here." Cordova said Ornelas admitted that she had "verbally assaulted" Atencio and apologized for acting unprofessionally. However, Ornelas then charged that Atencio was a sexist and complained that the business agents generally received preferential treatment.[8] Cordova said he concluded the meeting by telling Ornelas that he would get back to her because he wanted some time to think about the "assault" matter after first dealing with the immediate conflict.

According to Ornelas, the whole parking issue was resolved and Cordova told her that "if ever anything happened in the future . . . with any other employees" she should follow the "chain of command" and come to him for any issues she had with another employee. After that, Ornelas said her pay issue came up again and the discussion of this topic concluded with Cordova offering to increase her pay to $15 per hour. During a 611(c) examination, Atencio answered affirmatively to the counsel for the Acting General Counsel's leading question during her 611(c) examination asking whether "wages" were discussed during the meeting but that issue was never pursued further with him by either side. Cordova denied discussing Ornelas' wage issue with her at that time. In fact, Ornelas' own written note concerning the chronology of the pay matter which acknowledged that the $15-per-hour pay adjustment offer had been made on August 7 states that on August 8 she brought up the pay issue by asking "if he could increase (it) just to a little bit more." In view of her prior written account of the pay issue chronology, I do not credit Ornelas' effort during her hearing

[7] Ornelas had parked in the covered area before and denied knowing, as Respondent's witnesses assert, that the covered parking area on the north side of the building was reserved for business agents. In my judgment, whether the covered parking was reserved or not is not relevant to what ultimately occurred.

[8] Ornelas claimed that Atencio then "jumped into" the exchange saying that he had nothing personal against Ornelas but the practice at the local had always been that the business agents parked on the north side of the building and the clerical staff parked on the south side.

testimony to imply that the unfortunate exchange with Atencio on August 8 was fully resolved at the meeting with Cordova and that everyone then moved on to other matters, including her pay increase.

Later on the afternoon of August 8 Ornelas returned to her car in the parking lot and attempted to call International Representative Feher in Arizona to speak with him about her pay issue and her coverage under the collective-bargaining agreement between Local 16 and area contractors covering a unit of construction laborers.[9] She had never called Feher before. Ornelas claims that she left a message asking that he call her but she did not receive a return call from him that day. Feher denied that he received a telephone voice message from Ornelas on August 8 and his telephone record for that period does not reflect a call to or from Ornelas' cell phone or any other number in the 505 area code that day.[10] Ornelas' phone record shows that she, in fact, called Feher's work number twice and that the first of the calls lasted approximately 1 minute and 26 seconds, suggesting that a brief message may have been left.

Ornelas asserted that she almost immediately began fearing for her job after she placed the two calls to Feher and that she told Nieto about what she had done when she returned to the office. Nieto denied that she knew of any attempt by Ornelas to speak with Feher until the following day after Ornelas had been discharged. Cordova also denied that he knew of any attempt by Ornelas to contact Feher before he terminated her the following day. Cordova said any effort by Ornelas to speak with Feher did not come to his attention until 3 or 4 weeks after her termination. Cordova also denied Ornelas' claims that Local 16 prohibits employees from speaking to union officials at the regional or international level. To the contrary, he asserted that both the local and the international maintain an open door policy to encourage employees to speak to the union's officials about any matters of concern.

At the start of the workday on August 9, Cordova summoned Ornelas, Office Manager Nieto, and Business Agent Moya to his office. At that time, he summarily discharged Ornelas for "workplace violence and insubordination." He rebuffed Ornelas' attempt to discuss the matter and directed Nieto to assist her in clearing out her personal property from her desk and to then escort her out of the building.

C. Analysis and Conclusions

1. The restrictive rules allegation

Complaint paragraph 4(b) alleges that Respondent has maintained and enforced an overly-broad and discriminatory rule prohibiting employees from contacting other employees and the International Union about their terms and conditions of employment.

To support this allegation, the Acting General Counsel relies on Ornelas' claim that Moya and Deaguero told her on several occasions in the past that the local always found a pretext to fire secretaries who contacted the international union coupled with Cordova's statement to her at the August 8 meeting that she should come to him if she ever had a problem with another employee of the local. The Acting General Counsel argues that these combined prohibitions amounted to a rule designed to chill the employees exercise of Section 7 rights.

Workplace rules that chill employee Section 7 activities violate Section 8)(a)(1). *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Under the analytical framework in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), rules that explicitly restrict Section 7 activities may be found unlawful on their face. But where a rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. In assessing the lawfulness of a rule, fact finders must give the disputed rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights. Id. at 646.

Here, Cordova denied that the local maintained any rule prohibiting employees from contacting the international union about their employment issues. I credit his assertion. Ornelas' claims that she has been led to believe over the years that the local fired secretaries for contacting the international officials is only supported by her own highly self-serving testimony. I have concluded this testimony amounts to an invention on her part designed primarily to support her allegation that she was unlawfully discharged. She even made a nearly identical assertion in an effort to explain away an incidental acknowledgment that she never attended a meeting of the union to which she belonged for several years even though her own job description includes a responsibility for preparing a draft of the minutes of such meetings. I find her claims unworthy of belief, particularly where, as here, she admitted that she had voted in the union's elections without any known recrimination. Simply put, there is no evidence of any type that lends a scintilla of support for her claims about secretaries being summarily dispatched to the unemployment line for protected activities of this type. Given the gravamen of this allegation, one could reasonably anticipate a name or two of one of these unfortunate, former Local 16 secretaries would have come to her attention over the years but none were produced at this hearing. Other than Ornelas, the Acting General Counsel advanced not a single name of another person who might have suffered the kind of recrimination suggested by Ornelas' testimony. Hence, I do not credit her claim that Local 16 routinely discharges its employees because they seek assistance from the international union officials about workplace issues or because they attend membership meetings.

But to support this allegation otherwise lacking any credible support whatsoever, the Acting General Counsel advances the missing witness (adverse inference) rule in an effort to buttress Ornelas' self-serving assertions that Local 16 dismissed members of its secretarial staff on a trumped up basis because they discussed workplace issues with a staff member of the international union or dared to attend a union meeting even though

[9] According to Ornelas, she asserted during the August 8 meeting with Cordova and Atencio that she argued that she should be paid the contractual pay rate for jobsite construction laborers which was $16.02 per hour at that time.

[10] The 505 area code encompasses the entire State of New Mexico.

their job description might require that they do so. The Acting General Counsel asserts that I should infer support for Ornelas' claims from Respondent's failure to call Moya and Deaguero to deny her claims that Local 16 routinely dismissed secretaries because they complained to international officials or attended union meetings, or ever said as much.

I decline the Acting General Counsel's invitation to draw such an inference. In my judgment, it would be inappropriate to do so in this situation. In the past decade or so some courts have cautioned against these types of irrational applications of the missing witness rule. Based on my decades of trial work, I find these criticisms have a degree of validity that should not be routinely ignored. The Seventh Circuit in particular has declined to approve the use of the adverse inference rule to fill the "gaps in the record" when used to help prove a matter for which the party seeking the inference has the burden of proof. See *NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d. 432, 446 (7th Cir. 1999). See also *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363 (7th Cir. 2001); *Vulcan Basement Waterproofing v. NLRB*, 219 F.3d 677 (7th Cir. 2000); and *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358 (7th Cir. 1998).

In my judgment, using an adverse inference based on Local 16's failure to call Moya and Deaguero to deny the statements Ornelas attributed to them over the years would not serve the interest of justice. It is known that Atencio displaced Moya as the union's president in the last election but no other detail is known. The record does suggest Ornelas' affinity for Moya and her strong distaste for Atencio. For all that is known, Moya could well have been an adversary of Atencio's in the election and harbored some substantial animosity toward him for having lost his union office to him. In those circumstances, it could well be that Moya would be predisposed to do what he could to get even with Atencio and the current union hierarchy even if it meant being untruthful about the union's past practices of ridding itself of clerical employees who spoke to international officials about their working conditions. That being the case, any inference about his absence would be entirely unwarranted.

Moreover, there is no evidence that Deaguero was ever anything other than a nonsupervisory business agent at the local union. In that circumstance, Local 16 would have no obligation to produce him in a case such as this.

In short, I have concluded that there is no credible evidence to support a finding that the local maintained a policy or practice of terminating its secretaries for contacting international officials about their working conditions. Additionally, I find that Cordova's request on August 8 that Ornelas speak to him if she ever had a problem with another employee was little more than a reaction to the explosive exchange that occurred that particular afternoon over the parking spaces. Regardless, I find that it does not explicitly restrict Section 7 activity nor does it run afoul of the alternative tests the Board articulated in *Lutheran Heritage Village* case in those instances where a workplace rule does not explicitly restrict Section 7 activity. For these reasons, I recommend dismissal of this allegation.

2. The mandatory union membership requirement allegation

Complaint paragraph 5(a) and (b), as amended, alleges that Respondent violated Section 8(a)(1) and (3) by requiring Ornelas to become a member of Local 16, in its capacity as a labor organization, as a condition of her employment with Respondent. The evidence clearly proves that to be the case. The evidence showing that Nieto said as much to Ornelas during this employee's preemployment paperwork process is worthy of credit.

Respondent advances two defenses for this allegation. First, Respondent argues that Ornelas' voluntarily undertook her membership obligations, if not in 2007, then clearly in 2008. Second, Respondent asserts that the 6-month limitations period in the Act bars this allegation. Although I would find that the first defense lacks merit, I find it unnecessary to address that issue because I find Respondent's 10(b) defense has merit.

In Respondent's opening statement at the hearing and in its brief, Respondent asserted that this allegation was barred by Section 10(b) based on the rationale in *Local Lodge 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960) (hereafter *Bryan Mfg*. case). At the hearing, the Acting General Counsel conceded that this situation arose outside the 10(b) period but asserted, in effect, that it amounted to a "continuing violation" described by Justice Harlan writing for the majority in the *Bryan Mfg.* case. I disagree with the Acting General Counsel's position. In my judgment, his position can only be sustained by turning the Act on its head and finding that it is unlawful on its face for an employee to join a union, maintain membership in a union, and pay the organization's ordinary dues and fees.

In my view, the Acting General Counsel argument fails to recognize critical distinctions made by the Supreme Court in *Bryan Mfg*. The parties in that case entered into a collective-bargaining agreement that required the employer to recognize the union as the exclusive bargaining agent (the exclusive recognition provision) and further required all unit employees to become and remain members of the union within 45 days after the execution of the agreement or, in the case of new hires, their date of hire (the union security provision). The union did not represent a majority of the unit employees when the agreement became effective.

A year later, an individual employee charged that both the employer and the union engaged in unfair labor practices based on existing Board law by enforcing an agreement containing the exclusive recognition provision and the union security provision at a time when the union did not represent a majority of the unit employees. Throughout the proceeding, the employer and the union argued that the unfair labor practice allegations should be dismissed based on the Act's 10(b) limitations period. Both the Board and the court of appeals rejected the 10(b) defense and found the employer and the union violated the Act by enforcing both provisions during the current 10(b) period because their agreement was unlawful from the outset.

The Supreme Court granted certiorari and reversed. Justice Harlan's opinion articulated the following rationale applicable to cases such as this where a party invokes Section 10(b) as a defense to ongoing conduct that began outside the 6-month

period:

> It is doubtless true that §10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

362 U.S. 416–417.

Here, a violation can be made out only by reliance on "anterior events" (meaning those outside the 10(b) period) to come up with the evidence that Nieto told Ornelas that she had to join the union and, in effect, pay certain fees and dues in order to start work at Local 16. Without that stale evidence, the fact that Ornelas maintained membership in Local 16 and paid dues during a 10(b) period is, to paraphrase Justice Harlan, not sufficient in and of itself to "constitute, as a substantive matter, (an) unfair labor practice." For this reason, I recommend dismissal of complaint paragraphs 5(a) and (b).

3. Ornelas' termination

Together, the Acting General Counsel's complaint and brief advances the theory that Ornelas engaged in protected concerted activity on August 8 when she attempted to reach International Representative Feher—in violation of Respondent's overly broad and discriminatory rule prohibiting employees from contacting other employees and the International Union about issues they had with Respondent's terms and conditions of employment—in order to speak to him about her efforts to obtain a wage increase and her coverage under the construction laborers collective-bargaining agreement. The complaint and the Acting General Counsel's brief also charges that Respondent violated Section 8(a)(1) on August 9 by discharging Ornelas for violating that unlawful rule. Respondent contends that it discharged Ornelas for cause, namely, her angry verbal attack on Local 16's president on August 8 over the parking issue.

When an employer proffers a facially legitimate reason for taking adverse action against an employee but the motive is disputed, the Board employs a causation test it first announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). That test applies here.

Wright Line requires the Acting General Counsel to meet an initial burden of persuading the tribunal that the employee's protected activity constituted a substantial or motivating factor for the employer's adverse action against the employee. If the Acting General Counsel meets that burden, then the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

To sustain his initial *Wright Line* burden, the Acting General Counsel must show by either direct or circumstantial evidence, or a combination thereof that: (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), citing *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994).

I have concluded that the Acting General Counsel failed to sustain his initial burden in Ornelas' case and, hence, the burden of persuasion never shifted to Respondent. As structured, the complaint invokes the principle found in cases such as *Williamette Industries, Inc.*, 306 NLRB 1010, fn 2 (1992), that an employer violates the Act by taking adverse action against an employee for violating an unlawful rule. That theory fails here because of my conclusion above that Respondent does not maintain such an overly broad and discriminatory rule that prohibits its employees from contacting other employees and the International Union about issues they have with Respondent's terms and conditions of employment. With that conclusion, the Acting General Counsel's burden in this case was reduced to proving the traditional elements of an unlawful adverse action. As noted, the Acting General Counsel failed to meet that burden.

At the outset, I am unable to conclude that Ornelas engaged in any concerted activity protected by the Act. For her activity to be concerted within the meaning of the Act, it must be shown that Ornelas was acting with or on the authority of other employees, and not solely on her own behalf, or that she was engaged in activity seeking to initiate, or to induce or prepare for, group action, or to bring group complaints to management. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand *Meyers Industries (Meyers II)*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). I have concluded that the Acting General Counsel failed to show that Ornelas engaged in any activity beyond the pursuit of a pay increase solely for herself. Such activity does not meet the concerted activity tests addressed in either *Meyers I or II*.

To plug this gap, the Acting General Counsel's brief seizes on Ornelas' misapprehension that Local 16 employees were covered by the New Mexico construction laborers collective-bargaining agreement. On this point, the Acting General Counsel's brief states:

> Further, there is no question that Ornelas' call to Feher, which was in part for the purpose of determining whether Respondent's collective-bargaining agreement covered secretaries, in-

> cluding herself, is protected under the Act. *Union Carbide Corp.*, 1999 WL 33454762 (1999) (employees pursuing rights under a collective bargaining agreement are engaging in conduct protected by the Act even if they are incorrect in their interpretation of the contract).

The *Union Carbide* case relies on the seminal principle from the *City Disposal* case.[11] Its use here in support of an argument that Ornelas engaged in concerted activity is misplaced.

The *Union Carbide* case[12] is factually distinguishable from the situation here. In that case, the employee had been previously employed in the unit covered by a collective-bargaining agreement. A provision in that agreement required all new hires to serve a 120-day probationary period and provided that new employees with prior service had an inchoate right to bridge their prior service with their new service. The ALJ and the Board concluded that the employer discharged the employee during his new probationary period for his vigorous assertion of rights under the bridge provision of the collective-bargaining agreement.

At best, Ornelas mistakenly assumed that she was covered under a collective-bargaining agreement and intended to seek confirmation of that fact by calling Feher. The difference between the two situations is significant as the *City Disposal* line of cases are limited to those situations where it could be said that the employee claiming to have engaged in concerted activity had been a part of the group action that produced the collective-bargaining agreement in the first place. Although Ornelas was employed by Local 16, she was never a member of the construction laborers unit or any other unit of employees represented by Local 16 and, hence, her conduct would not have been an "extension" of some earlier group activity.

In addition, I credit Nieto's assertion that she never learned that Ornelas placed a call to Feher until after she had been discharged on August 9. Consequently, I find that the Acting General Counsel failed to prove that Respondent's hierarchy knew that Ornelas had attempted to contact Feher in any fashion prior to her discharge.

But even if I credited Ornelas' testimony that she told Nieto about her effort to call Feher on August 8, I would be reluctant to conclude that this knowledge could be imputed to Cordova by the time he discharged Ornelas the following morning. Although the Board ordinarily imputes a supervisor's knowledge of an employee's protected activity to the employer, (see e.g. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983)), an inference of knowledge is not always automatic. *Kimball Tire Co., Inc*., 240 NLRB 343, 344 (1979). Where, as here, Nieto credibly testified that Cordova did not involve her at all in the decision to discharge Ornelas, I find an inference that Cordova knew about Ornelas' unsuccessful calls to Feher on August 8 would be unreasonable in the absence of evidence that he acquired such knowledge by some other means.

Finally, the only evidence that Respondent harbored any animosity toward employees who took their workplace issues to international officials comes from Ornelas herself. I do not find her self-serving assertions on this point sufficiently reliable to credit.

For these reasons, I find that the Acting General Counsel has failed to prove any of the essential elements of a discharge case. Hence, I cannot find that the Acting General Counsel has met his initial *Wright Line* burden with respect to Ornelas' discharge. Accordingly, I will recommend dismissal of this allegation.

CONCLUSION OF LAW

The Acting General Counsel failed to prove the allegations contained in the complaint issued in this matter on December 31, 2012, and amended on April 5, 2013, by a preponderance of the credible evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed in its entirety.

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[11] *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822 (1984) (holding that an individual employee's reasonable and honest pursuit of her/his own rights under a collective-bargaining agreement is concerted activity within the meaning of Section 7 because the individual's effort constitutes an extension of the concerted action that produced the agreement in the first place.

[12] The citation in the Acting General Counsel's brief is to the ALJ's bench decision which the Board affirmed. See *Union Carbide Corp.*, 331 NLRB 356 (2000).

[13] 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.