

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.

SERVICE EMPLOYEES INTERNATIONAL UNION,  
UNITED HEALTHCARE WORKERS-WEST  
(Lakewood Regional Medical Center)

and

Case 21-CB-15007

NATIONAL UNION OF HEALTHCARE  
WORKERS

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO  
EXCEPTIONS OF SERVICE EMPLOYEES INTERNATIONAL UNION,  
UNITED HEALTHCARE WORKERS-WEST TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Irma Hernández  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 21  
888 South Figueroa Street, Ninth Floor  
Los Angeles, CA 90017  
(213) 894-5236

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## I. INTRODUCTION

On June 29, 2011, Administrative Law Judge Clifford H. Anderson (“ALJ”) issued his decision in this case, making findings of fact and conclusions of law that Service Employees International Union, United Healthcare Workers-West (“Respondent” or “the Union”) violated Section 8(b)(1)(A) and (2) of the Act by seeking and causing the termination of employee Terrence L. Carter (“Carter”) for failure to tender to the Union dues or initiation fees without providing him with an accurate and unambiguous statement of the precise amount of dues owed and of the method used to compute this amount.

On July 26, 2011, Respondent filed 16 exceptions to the ALJ’s decision, and a brief in support, challenging essentially all of the ALJ’s findings of fact, credibility resolutions, and legal conclusions. However, the record and relevant Board precedent establish that the ALJ’s decision is well-founded. Respondent’s exceptions are without merit and should be rejected.

## II. ISSUE PRESENTED

Whether the ALJ was correct in finding that Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing Carter’s termination without providing proper notice of his dues delinquency.

## III. STATEMENT OF FACTS

### A. Background

Respondent and Lakewood Regional Medical Center (“the Employer”) are parties to a collective-bargaining agreement (CBA), effective January 1, 2007, through March 31, 2011. (GCX 18).<sup>1</sup> Article 23 of the CBA contains a union-security clause requiring unit employees to

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<sup>1</sup> Throughout this brief, citations to the ALJ’s Decision will be referred to as ALJD followed by the appropriate page and line number. References to the hearing transcript will be referred to as “Tr.” followed by the page number. References to the exhibits presented at trial will be cited as “GCX” for the Acting General Counsel’s exhibits.

pay initiation fees and periodic dues to the Respondent following the thirty-first day of their employment at “the Employer.” (GCX 18). The union-security provision also provides that:

The Union shall notify the Employer and the affected employee in writing of an employee’s failure to comply with the provisions of [Article 23] and shall afford each such employee fifteen (15) work days, after the employee has been mailed such notice at his/her last known address, in which to comply.

If said employee does not comply with the provisions of [Article 23] within the ten (10) day period following actual notice, the employee shall be promptly terminated upon written notice of such fact from the Union to the Employer. (GCX 18).

Carter was hired as part-time electroencephalogram technician on February 27, 2006, at which time he became a member of the Union and signed a dues check-off authorization.

(Tr. 37, 39). Carter served as the highest-ranking shop steward representing employees of the Employer from 2006 to 2009, when he was removed from that position by the Union.

(Tr. 38).

**B. From August 2009, to July 2010, Carter routinely tendered payments towards his dues obligation directly to the Respondent.**

On about March 6, 2009, Carter and Shop Steward Alan Valle delivered about 100 signed dues check-off revocation forms, including one from Carter, to the Employer’s Director of Human Resources, Mary Okuhara-Yip. (GCX 2, GCX 3; Tr. 39-40).<sup>2</sup> Carter then began to remit dues payments by personal check directly to the Union. At the hearing, the Union

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<sup>2</sup> On cross-examination, Carter testified that he filled out the revocation form and did not want dues to be deducted automatically because he was dissatisfied with the representation by the Respondent. (Tr. 71-74). Carter further expressed that he felt that if he did not have a voice in his union then he was going to slow down the payment. (Tr. 73). Carter also admitted that he told a Board Agent in an affidavit that because the Respondent was not doing its job and failed to assist Carter in three grievances, Carter was unwilling to re-execute a dues check-off form or otherwise catch up with his dues payments. (Tr. 75-75).

stipulated that it received the following payments from Carter on about the following dates:

August 2009	\$30	Check #1161 (GCX 5; Tr. 22-24)
November 10, 2009	\$35	Check #104 (GCX 10; Tr. 28)
December 18, 2009	\$30	Check #111 (GCX 11; Tr. 29-30)
January 20, 2010	\$30	Check #115 (GCX 12; Tr. 30)
February 18, 2010	\$29	Check #121 (GCX 13; Tr. 31)
March 16, 2010	\$30	Check #123 (GCX 14; Tr. 31-32)
April 27, 2010	\$29	Check # 128 (GCX 16; Tr. 32)
June 8, 2010	\$30	Check #102 (GCX 16; Tr. 32)
July 1, 2010	\$29	Check #176 (GCX 16; Tr. 32)

Carter prepared a second check dated June 8, 2010, which is check #164 for \$30. (GCX 17). Carter testified that he prepared and mailed this check to the Respondent on about June 8, 2010. (Tr. 52-58). Carter identified the check in GCX 17 as a check from his account with First Financial Credit Union Bank, and the other check dated June 8, 2010, in GCX 16 as a check from his account with Chase Bank. (Tr. 57-58). Although Carter had no independent recollection of having sent two checks on the same date (June 8, 2010), he explained that he was probably not paying attention and did not realize that he had prepared two different checks from separate accounts. (Tr. 58).

As noted above, Carter's payments ranged from \$29 to \$35 per month. These amounts met the minimum amount of dues set forth in Section 6(a) of the Respondent's constitution and bylaws, which states that the minimum dues shall be \$29 per month for members who have annual earnings of \$16,000 or more, and \$24 per month for members with annual earnings between \$5,500 and \$16,000. (GCX 22, p. 28).

Respondent never contacted Carter to inform him that the above-mentioned checks were not acceptable. (Tr. 59-60). And Respondent never explained to Carter how those payments were being applied to his debt. (Tr. 59-60).

**C. Carter received three “final notices” from the Respondent, but none of them explained how Carter’s interim payments were being applied to his dues.**

Carter received three documents titled “Final Notice” from the Respondent. The first one is dated August 17, 2009. (GCX 4; Tr. 21). The notice, among other things, informed Carter that he owed \$163.13 in delinquent dues for the period March 29, 2009, through July 4, 2009. It further explained that his dues are calculated at 2% of actual gross straight-time earnings, which the Employer reported as totaling \$8,156.59 for the above period. The letter also set a deadline of September 7, 2009, for Carter to pay or else the Respondent “will demand that [the Employer] begin proceedings to remove you from employment due to your failure to comply with Article 23 [of the contract].” (GCX 4). However, the Respondent took no such action on September 7, 2009.

Carter then mailed a typed letter to the Respondent addressing the “final notice.” (GCX 5; Tr. 22-24). The letter is dated August 2009, and it reads in part:

How dare you send a letter asking for our hard earned money. SEIU has done nothing to deserve our dues. Since SEIU took over our union last January we have had no union representation from SEIU. You systematically dismantled the steward structure that worked so effectively to deal with our issues, and destroyed all democratic processes in our union. . . .

With regard to the letter that you sent, I have some concerns regarding the amount you are charging and believe that it may not be accurate.

The letter states that it is a “final notice” yet this is the first letter that has ever been sent to me stating an amount owed by me to the union. . . .

However, as an act of good faith on my part I have enclosed the amount of \$\_\_\_\_\_ <sup>3</sup> to address the alleged arrearages. . . . (GCX 5).

In that same letter, Carter requested that “the Union provide me with a full accounting of how my dues amount was calculated” and “[t]hat I be placed on a quarterly billing cycle and that the dues cycle billing include a full accounting of how my dues are being calculated.” (GCX 5). However, Carter never received a response to these requests. (Tr. 44).

It is undisputed that on January 20, 2010,<sup>4</sup> Carter again wrote to the Respondent, and included check #115 for \$30 in that letter. (Tr. 27-28). The letter states:

For several months, I requested an itemized bill from SEIU, and as yet I have not received anything. The notices that you are passing out, is (sic) not an itemized bill, (sic) The members are waiting for it too. Also I've requested any and all information on the Beck objectors, (sic) I have not received that either. So I'm requesting both items again, the Beck objectors and the itemized bill to pay our dues. People I asked were Cory Cordova, Rosana Mendez, and Henry Fernandez. (GCX 15).

Carter did not receive an itemized bill as requested. Nevertheless, Carter continued to remit dues payments by personal check to the Respondent. As noted above, checks were sent in February, March, April, June, and July.

The next “final notice” received by Carter is dated March 15. (GCX 6; Tr. 25). The notice states that Carter owed \$213 for the pay period ending November 7, 2009, to February 27. (GCX 6). The letter also explained that dues are calculated at 2% of actual gross straight-time earnings, which the Employer reported as totaling \$10,651.71 for the above pay period.

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<sup>3</sup> Although Carter did not write a dollar amount in this section, the Respondent admitted that it received a \$30 check from Carter included with this letter. (Tr. 24). The Respondent further stipulated that an employee of the Respondent made the hand-written notation at the top of the first page of this letter that reads: “Received . . . 09/08/09 chk #1161 \$30 included.” (GCX 5; Tr. 23-24).

<sup>4</sup> Unless otherwise noted, all dates that follow are in 2010.

This letter set a deadline of April 5 for Carter to pay \$213, and warned that if no payment was received, Respondent would demand Carter's termination. (GCX 6). But, Respondent took no such action on April 5.

The last written "final notice" that Carter received from the Respondent is dated May 10. (GCX 7; Tr. 26-27, 93-94, 113). That notice states that the amount of Carter's delinquency "from pay period **11/7/2009 through pay period 4/24/2010** is \$236.16." (emphasis added). Katherine De Jesus, an auditor for the Respondent, testified at the hearing concerning the May 10 notice. De Jesus testified that she calculated the \$236.16 figure by reviewing the earnings information provided by the Employer, and "based on the dues rate for that facility at that current time I calculated that [Carter's] outstanding amount was \$236.16." (Tr. 92). At the hearing, De Jesus never mentioned whether she credited Carter for any of the earlier payments that the Respondent received from Carter. (Tr. 89-95). De Jesus never spoke to Carter regarding his union dues. (Tr. 95).

Unlike the prior two final notices, the May 10 notice did not reference Article 23 of the CBA. Instead, the letter reads:

If we do not receive your payment for fee arrearages in the amount of \$236.16 by May 31, 2010, we will demand that [the Employer] begin proceedings to remove you from employment due to your failure to comply with **Article 3**, Sections A.1-A.2. of the contract which states:

. . . An employee who fails to comply with his requirement shall be replaced within forty-five (45) days after written notice to the Employer by the Union concerning delinquency, unless the employee has remedied the delinquency within said forty-five (45) day period. (emphasis added).<sup>5</sup> (GCX 7).

Although the May 10 letter set a deadline of May 31 for Carter to pay before the Respondent sought Carter's termination, the Respondent again took no action when the deadline

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<sup>5</sup> This language is different from the language in Article 23 of the CBA between the Respondent and the Employer.

imposed was reached. As noted below, the Respondent took no action until July 9, when it first sought Carter's termination.

There was no reference to Carter's interim payments in any of the "final notices" received by Carter, nor did the letters provide any explanation of whether or how those payments were applied to his dues. (GCX 4, GCX 6, GCX 7).

**D. Carter has a conversation with Union Representative Cory Cordova regarding union dues.**

About a month or two before Carter's termination, Carter had a conversation about his dues with Union Representative Cory Cordova ("Cordova") in the cafeteria patio of the Employer's facility. (Tr. 50). Carter testified that Cordova asked him whether he knew that he (Carter) owed union dues, and Carter replied that he would pay the dues when he received an itemized bill. Carter also testified that Cordova mentioned that Carter could lose his job. (Tr. 50). According to Carter, he repeated that he would pay the dues when he received an itemized bill to ensure that the amount he was being charged was accurate. (Tr. 50-51). Carter further testified that during this conversation, Cordova did not mention anything about the amount of dues owed by Carter, the dates that Carter owed dues for, the method used to compute the amount, or a deadline to pay. (Tr. 51-52).

Cordova testified at the hearing about a conversation he had with Carter on June 18 in the cafeteria patio. According to Cordova, at this meeting, he gave Carter a copy of the May 10 final notice inside a sealed envelope. (Tr. 98-99). Cordova further testified that he told Carter that Carter was "a couple hundred dollars" behind; to contact De Jesus who would "break it down" for him; and that a payment plan could be worked out. Cordova contends that Carter's response

was that he was 100 percent caught up. (Tr. 99-100). According to Cordova, in subsequent phone conversations with Carter, Carter repeated that he was 100 percent caught up. (Tr. 108).

On cross-examination, Cordova admitted that he never informed Carter of the specific amount of dues owed, how the amount of dues was calculated, or a specific deadline to pay. (Tr. 115-116). However, Cordova claims that during June 18 meeting, he told Carter that, “we were giving him 21 days to comply.” (Tr. 116). Cordova provided an affidavit to the NLRB regarding this case, where he discussed the June 18 conversation with Carter. In his affidavit, Cordova never mentioned that he told Carter that he had 21 days to comply. (Tr. 117-118). Carter denied that Cordova ever told him that he had 21 days from June 18 to comply. (Tr. 122).

**E. On July 9, July 29, and July 30, Cordova requested that the Employer terminate Carter for alleged dues arrearages.**

Cordova claims that on June 18 he informed the Employer’s Director of Human Resources, Mary Okuhara-Yip (“Okuhara-Yip”), that Carter had been given his final notice.<sup>6</sup> (Tr. 110). During his testimony about his June 18 conversation with Okuhara-Yip, Cordova mentioned *for the first time* that on June 18, he told Carter that Carter had 21 days to comply with his dues. (Tr. 110). Specifically, when Respondent asked Cordova whether he said anything else to Okuhara-Yip, Cordova stated:

And I did inform her of the same thing I informed [Carter]. I’m not sure if I stated this earlier, but that, you know, the goal isn’t to get people fired and we’re going to give him 21 days from the hand delivery of the letter. And she said I will see you then if nothing changes. (Tr. 110).

On July 9, (21 days after June 18), Cordova emailed Okuhara-Yip, and stated:

As we have discussed Mr. Terrence Carter has been in noncompliance with his dues and is not a member in good standing. Today is the official date of the Union’s Notification to Lakewood Regional Medical Center of Mr. Carters (sic) failure to meet his obligation

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<sup>6</sup> It is not clear what Cordova regarded as the final notice. Presumably it is the May 10 final notice and/or Cordova’s alleged June 18 conversation with Carter.

to Article 23 of the CBA. Attached is the notification the Union has been consistently (sic) using and has used with Tenet employees.

The format of the letter is actually a notice ,from (sic) the employer to the employee, of HR's notification from the Union and the process to be followed. (GCX 19, Tr. 80-81, 109).

The attachment referenced in Cordova's email is a draft letter addressed to Carter. It reads, in part:

[The Respondent] has reported that you have failed to meet the obligation described above and has requested that we remind you of our contract requirements to act if you continue to fail to do so. You have until July 19, 2010 to prove you have come into compliance; otherwise, we have no option but to terminate your employment with [the Employer].”

The Employer never provided a copy of this draft letter to Carter, and never informed him that he had until July 19 to comply. (Tr. 81). There is no evidence that the Respondent ever notified Carter that he had until July 19 to comply.

On cross-examination, Cordova testified that the first time that he requested that the Employer terminate Carter was on July 9. (Tr. 113). Cordova also admitted that he never informed Carter that the Union was going to request Carter's termination on July 9, July 29, or July 30. (Tr. 114-115).

Cordova also testified that about a week after June 18, he received a call from Kathy Myrick (“Myrick”), assistant labor-relations director for the Employer, who suggested that they give Carter another 15 working days in addition to the 21 days to comply, and that Cordova agreed to do so. (Tr. 111). However, Carter was never informed that he had an additional 15 working days to pay. According to Cordova, Myrick asked Cordova to send another letter to the Employer to “notify us to enforce the Article 23” if Carter did not comply after the 15 days. (Tr. 111-112).

On July 29 and July 30, Cordova again wrote to Okuhara-Yip requesting Carter's discharge. (GCX 20, 21; Tr. 82-83). The first paragraph in both the July 29 and the July 30 letters states:

It has come to my attention that Terrence Carter has been and is currently delinquent in his arrears to the Union **through pay period ending 7/17/10**. Our membership department has sent him several notices regarding his delinquency and has failed to settle this delinquency, nor has he submitted a signed Payroll Deduction form for Union dues. (emphasis added) (GCX 20, 21).

There is no evidence in the record that Carter was ever informed of the amount of dues that he owed through pay period ending July 17. The last written notice that Carter received was the May 10 "final notice" which stated that he owed \$236.16 "from pay period **11/7/2009 through pay period 4/24/2010**." Cordova never informed Carter of the amount that he owed through pay period ending July 17. Cordova conceded that did not know the amount of union dues owed by Carter through pay period ending July 17. (Tr. 118-119). But, Cordova acknowledged that he was aware that Carter had submitted payments for union dues prior to that date. (Tr. 119).

**F. On July 30, the Employer terminated Carter in response to the demands by the Respondent.**

Okuhara-Yip testified for the Acting General Counsel at the hearing. She testified that on July 30, in response to the Respondent's demands, she terminated Carter. (Tr. 84). Carter was informed of his termination in a letter from Okuhara-Yip, which was hand-delivered to Carter by a courier at his home on July 30. (GCX 9; Tr. 84-85).<sup>7</sup>

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<sup>7</sup> On June 30, Carter was informed by the Employer about a reduction-in-force that included the elimination of Carter's position. Carter was told that his position was going to be eliminated effective July 31—the day after he was terminated at the Respondent's request. (GCX 8; Tr. 44-46).

#### IV. ARGUMENT

A. The ALJ properly concluded that Respondent failed to meet its fiduciary obligations under Philadelphia Sheraton.

A union seeking the termination of an employee for failing to pay dues and fees has a fiduciary duty to deal fairly with the employee. Philadelphia Sheraton Corp., 136 NLRB 888 (1962), *enfd.* 320 F.2d 254 (3rd Cir. 1963). Before seeking an employee's termination for failure to pay dues, at a minimum, the union must provide an employee with a precise amount of dues owed, the time period in question, the method of computation, and a reasonable opportunity to meet the dues obligation. *Id.* at 896. When a union fails to meet these requirements, it violates Section 8(b)(1)(A) and (2) of the Act. Laborers Local 335 (Burdco Environmental), 303 NLRB 350 (1991).

1. The ALJ properly found that Respondent failed to notify Carter of how the alleged dues arrearages were calculated.

Respondent excepts to the ALJ's finding that the Union failed to fulfill its fiduciary duty to Carter by failing to provide him with an accounting of how his dues were calculated.

Respondent argues that it satisfied its fiduciary obligations by sending three letters to Carter.

However, the three "final notice" letters received by Carter are ambiguous because Respondent completely failed to specify how it applied Carter's interim payments, or explain why the interim payments did not clear earlier arrearages. None of the notices provided any explanation of the debt to which Carter's earlier payments had been applied. Thus, Carter could not ascertain whether the amounts requested by the Respondent in those letters represented accurate and precise figures of what he owed. Contrary to Respondent's contentions, the letters sent to Carter failed to properly inform him of his financial obligations.

Respondent also argues the May 10 letter satisfied its obligation to inform Carter of the total amount due, the time period of the alleged delinquency, and the method used to compute the amount. But, the May 10 letter is flawed because after the May 31 deadline set forth in the letter, Carter made three additional payments to the Respondent: two \$30 payments on June 8, and a \$29 payment on July 1. None of those payments were rejected by the Respondent. Nevertheless, Respondent never recalculated Carter's dues delinquency after receipt of these payments, and never notified Carter of the amount he still owed before his termination on July 30. Contrary to Respondent's assertions, the May 10 letter did not constitute proper notice of Carter's dues obligations. *Id.* at 632-633.

In addition, the May 10 notice states that the amount owed by Carter from pay period 11/7/2009 to pay period 4/24/2010 is \$236.16. De Jesus, who was responsible for calculating this amount, never mentioned whether she credited Carter for his interim payments when determining this figure. Since the May 10 letter made no reference to Carter's interim payments, whether Carter in fact owed \$236.16 as of April 24 remains unknown. The Board has stated that "[w]hen a union demands that an employee be discharged, the law requires that there be no mystery about what the employee owes." L.D. Kichler Co., 335 NLRB 1427, 1431 (2001). Similar to the situation in Kichler, here, the precise amount of Carter's arrearages cannot be determined based on the record evidence. *Id.* at 1431. Respondent's failure to properly compute Carter's arrearages and its failure to explain whether Carter's prior payments were credited rendered the May 10 notice inadequate.

Although Respondent claims that on June 18 and in subsequent phone conversations Cordova also notified Carter about his dues obligations, the record shows that Cordova fell short in meeting Respondent's obligations imposed by Philadelphia Sheraton. It is undisputed that

Cordova never mentioned the precise amount owed. He also never stated the dates that Carter owed money for, the method of computation, or the deadline to pay the money.

Respondent argues that Cordova told Carter that he could contact Katherine De Jesus, an auditor for Respondent, who could “break it down” for him. Respondent cites to Teamsters Local 630 (Ralph’s Grocery), 209 NLRB 117 (1974), to argue that Carter was obligated to inquire to the Union about his financial obligations. However, that case is distinguishable from the instant case. The employee in that case never made an attempt to pay any amount due and failed to comply with the union-security obligations during the entire time he worked at the employer. 209 NLRB at 125. In this case, Carter remitted dues payments almost every month and Respondent kept those payments. Furthermore, Respondent’s assertion that Carter failed to make any inquiries is not true. Carter twice wrote to the Union requesting a full accounting of his dues, and he also told Cordova that he would pay as soon as he received this information from the Union. Yet, the Union never bothered to respond to Carter’s inquiries.

In addition, Respondent demanded Carter’s termination under a claim that he was delinquent in his arrears through the pay period ending July 17, but the Respondent never mentioned anything to Carter about the amount he owed through that pay period. Cordova’s demand to the Employer for Carter’s termination, states that Carter “is currently delinquent in his arrears to the Union through pay period ending 7/17/10.” However, it is undisputed that Carter was never specifically informed that he owed dues through that pay period or the amount that he owed as of July 17. He was also never told how that amount was calculated; he was never given any deadline to pay that amount; he was never informed that he would be terminated if he failed to pay that amount; and he was never provided with any opportunity to pay the amount that he owed as of July 17.

Therefore, the ALJ properly concluded that Respondent failed to give Carter a proper accounting of dues arrearages, how that amount was determined, and whether his payments were being applied to the balance owed. (ALJD 14:18-20).

2. The ALJ properly concluded that Respondent failed to timely provide Carter with a deadline to cure the delinquency.

On page 8, lines 7-11 of its brief in support of exceptions, Respondent contends that the ALJ erred in finding that Respondent did “not provide Carter timely with the date by which the delinquency must be cured.” Respondent argues that Cordova hand-delivered a copy of the May 10 letter to Carter on June 18, gave Carter 21 days from June 18 to pay, and then an additional 15 days as suggested by the Employer. But, the May notice and subsequent events further demonstrate that Respondent did not engage in fair dealings with Carter.

The May 10 notice was the last written notice given to Carter prior to his termination. Although the May 10 notice set a deadline of May 31 for Carter to pay before his termination was sought, Respondent took no action until July 9, when Cordova, for the first time, asked the Employer to terminate Carter. This sequence of events demonstrates Respondent’s “less than careful attention to its dues-collection processes.” Service Employees Local 32B-32J, 289 NLRB 632, 632 (1988). Respondent’s carelessness is also evidenced by its failure to reference the correct union-security clause, Article 23, in the May 10 letter.

Cordova’s claim that on June 18, he informed Carter that Carter had 21 days to comply is not credible. The first time that Cordova raised this claim was when he testified about his conversation with Myrick *after* Cordova had already testified about his June 18 interaction with Carter. Carter credibly denied that Cordova told him that he had 21 days to comply. Cordova never mentioned in his affidavit that he told Carter about the 21 days to comply. In addition,

Cordova admitted that he never notified Carter that Cordova was going to seek his termination on July 9, on July 29, or on July 30. Therefore, Cordova's assertion that he told Carter about the 21 days to comply is not credible.

Even if Carter had been informed on June 18, that he had 21 days to comply, Cordova hand-delivered a copy of the May 10 letter to Carter on that same date. Such combination created ambiguity about the deadline since the May 10 letter set a different deadline of May 31.

Furthermore, Cordova testified that at Myrick's request, he agreed to give Carter an additional 15 days to comply. However, Carter was never informed that he had another 15 days to comply. Had Respondent truly been interested in preserving Carter's job as it contends, it could have easily told Carter that he had 15 days to pay. Also, Respondent could have sent Carter copies of the letters that it sent to the Employer requesting his termination. But, Respondent did not bother to do so. Nor did Respondent ever bother to notify Carter that it was going to seek his termination on July 9, July 29, or July 30. Such conduct directly contradicts Respondent's claim that the delay in seeking the termination was due to an abundance of caution. Thus, the ALJ properly concluded that Respondent failed to provide Carter with an adequate deadline to pay. (ALJD 14: 16-17).

In summary, the Respondent did not correctly notify Carter of the amount of dues he owed in any of the final-notice letters, and the Respondent completely failed to notify Carter of the amount of dues he owed as of pay period ending July 17. The alleged June 18 verbal notice was likewise deficient because Carter was not provided with a specific amount of dues owed, the method used to compute that amount, the time period in question, or a deadline to pay. Finally, Carter was not provided with a clear deadline to pay. The May 10 notice set a deadline of May 31, but the Respondent took no action on that deadline. Carter submitted three additional

payments after May 31, and he was not informed of any further deadlines. He was never given any opportunity to pay the amount that he owed as of the pay period ending July 17.

Accordingly, the ALJ properly found that Respondent failed to fulfill its fiduciary duty to Carter, in violation of Section 8(b)(1)(A) and (2) of the Act.

**B. The ALJ properly concluded that Respondent failed to prove its free-rider defense.**

A “free rider” is defined by the Board as an employee who willfully and deliberately seeks to evade his or her union security obligations. Teamsters Local 630 (Ralph’s Grocery), 209 NLRB at 125. Negligence and inattention to union concerns do not constitute a willful evasion of dues obligations. Hemsley-Spear, Inc., 275 NLRB 262, 263 (1985). When a “free rider” consciously and willfully evades his dues obligations, a union may cause his discharge without fully complying with Philadelphia Sheraton. See I.B.I. Security, Inc., 292 NLRB 648, 649 (1989).

In addition, the Board has stated that, “the [union’s] obligations to members under [Philadelphia Sheraton] will be relaxed only in extreme circumstances. The evidence must disclose a conscious determination by the employee to frustrate payment.” Operating Engineers Local 542 (Ransome Lift), 303 NLRB 1001, 1004 (1991)(employee who consistently failed to remit monthly dues did not willfully evade his dues obligations where the union failed to regularly bill the employee).

Respondent argues that the ALJ improperly concluded that the free-rider defense was not applicable in this case. In this regard, Respondent excepts to the ALJ’s finding that Carter’s basis for failing to fully comply with his dues obligations was the Union’s failure to provide him with a full accounting of his dues. Respondent argues that Carter admitted that he was going to slow down payments to the Union in protest due to his dissatisfaction with the Union. Indeed, the

ALJ found that Carter's reduced payments were an act of protest. (ALJD 16: 10-11). The ALJ also found that Respondent's failure to provide Carter with a full accounting of his arrearages resulted in Carter's failure to fully satisfy his dues obligations. (ALJD 16: 40-50). Contrary to Respondent's contentions, this conclusion is wholly supported by the record evidence.

Undisputed evidence shows that Carter, on his own, made numerous payments from August 2009 to July even though he never received an itemized bill. Respondent accepted and retained all of those payments. Carter was never told that those payments were improper or insufficient.

Furthermore, in August 2009, Carter requested the Respondent to place him on a quarterly billing cycle, but the Respondent never provided an answer nor explained why this request could not be accommodated. On a number of occasions Carter requested that the Respondent provide him with a full accounting and an itemized statement of his dues so that he could examine whether the amounts that he was being charged were accurate. However, Carter's multiple inquiries proved futile. Contrary to Respondent's assertions, the ALJ properly relied on Teamsters, Local Union 150 (Delta Lines), 242 NLRB 454, 455 (1979), for the proposition that a union's failure to respond to an employee's repeated inquiries concerning dues obligations "is evidence of that employee's lack of bad faith in failing to pay his obligations. (ALJD 17: 33-36). In that case the Board clearly stated that an employee's unanswered inquiries "simply show [the employee's] lack of bad faith in failing to pay his obligations." Id. at 455.

Here, Carter's multiple unanswered inquiries show that his conduct does not rise to the level of willful and deliberate attempt to avoid his financial obligations. See Auto Workers Local Lodge No. 376 (Colt's Manufacturing Co.), 342 NLRB 64, 67-68 (2004). (employee who failed

to respond to union's demands for payment was not a free rider because the union failed to respond to his requests for an alternative to signing a dues-checkoff authorization).

The evidence shows that Carter was willing to pay his financial obligations. Carter told Cordova in person that he would pay once he received an itemized bill. And Carter did make multiple and routine payments during the 11-month period from August 2009 to July, even though he was not properly billed. There is no evidence to establish that Carter would not have complied had he been given a proper demand. Therefore, the ALJ properly found that "the failure of the union to provide such an accounting was the basis and motive for Carter's failure to completely satisfy his arrearages." (ALJD 16: 49-50).

Respondent cites to John J. Roche & Co., 231 NLRB 1082 (1977), to argue that the free-rider defense is applicable to this case. However, that case is distinguishable. The employee in that case deliberately refused to satisfy his financial obligations and his union refused to accept payment of dues owed before seeking his termination. *Id.* at 1082-1083. In this case, Carter paid union dues almost every month and the Respondent kept all of those payments. Respondent also argues that similar to the employee in John J. Roche, Carter was well aware of his dues obligations. However, an employee's awareness of dues obligations is insufficient to relieve the union of its fiduciary duty owed to the employee. See National Independent Coopers Union, Inc. (Blue Grass Cooperage Co.), 299 NLRB 720, 723 (1990), citing Hemsley-Spear, Inc., 275 NLRB 262 (1985).

The record evidence shows that Respondent failed to provide Carter with adequate notice of the precise amount owed and the deadline to pay the amount, failed to explain how his interim payments were being applied to his dues, and ignored his repeated requests for an itemized bill. Nevertheless, Carter continued to make monthly payments to Respondent. Thus, the ALJ

properly found that “Carter did not want to cross the line from “slowing down” dues payments to “refusing to pay.” (ALJD 18: 2-3). Furthermore, the free-rider defense is not applicable where, as here, a union fails to provide basic notice of the amount due. See Service Employees Local 32B-32J, 289 NLRB at 632.

As discussed above, the evidence is insufficient to establish that Carter made an unequivocal conscious decision to evade his dues responsibilities. Thus, the ALJ properly rejected Respondent’s free-rider defense.

#### V. CONCLUSION

The record and Board precedent provide abundant support for the ALJ’s credibility determinations, findings, and conclusions that Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing Carter’s termination without providing him with proper and adequate notice of his dues delinquency. Accordingly, it is recommended that the ALJ’s rulings, findings, and conclusions be affirmed and that Respondent’s exceptions be rejected.

Respectfully submitted,



Irma Hernández  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 21

Dated at Los Angeles, California, this 9<sup>th</sup> day of September, 2011.

## STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Exceptions of Service Employees International Union, United Healthcare Workers-West to the Administrative Law Judge's Decision in Case 21-CB-15007 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board on September 9, 2011. The following parties were served with a copy of the same documents by electronic mail.

Jacob J. White, Attorney at Law  
Weinberg, Roger & Rosenfeld  
[jwhite@unioncounsel.net](mailto:jwhite@unioncounsel.net)

Bruce Harland, Attorney at Law  
Weinberg, Roger & Rosenfeld  
[bharland@unioncounsel.net](mailto:bharland@unioncounsel.net)

Florice O. Hoffman, Attorney at Law  
Law Offices of Florice Hoffman  
[fhoffman@socal.rr.com](mailto:fhoffman@socal.rr.com)

  
Irma Hernández  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 21

Dated at Los Angeles, California, this 9<sup>th</sup> day of September, 2011.