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UNITE HERE! Local 5 (Hyatt Corporation d/b/a Hyatt Regency Waikiki) and Mark Tamosiunas and Agnes Demarke and Wayne Young and Steven Taono. Cases 20–CB–127565 and 20–CB–127695

August 25, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On September 18, 2015, Administrative Law Judge John J. McCarrick issued the attached decision. The Charging Parties filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Parties filed a reply brief. The Respondent also filed cross-exceptions and a supporting brief, the Charging Parties filed an answering brief, and the Respondent filed a reply 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 exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order.

We affirm the judge’s conclusion that the Respondent did not violate Section 8(b)(1)(A) of the Act by mistakenly sending its March 31, 2014 letter to the Charging Parties and other nonmember unit employees seeking to collect dues for a period when no collective-bargaining agreement was in effect.¹ In *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, relied on by the dissent, the Board found that a union violated Section 8(b)(1)(A) by circulating a flyer during a contract hiatus that “reasonably tended to restrain or coerce employees in the exercise of their Section 7 rights, which includes the right to refrain from paying union dues or fees *when there is no contractual obligation to do so.*” 355 NLRB 234, 235 (2010) (emphasis added), enf. mem. 440 Fed. Appx. 524 (9th Cir. 2011). The flyer there was distributed by the union in response to the employer’s statement that, because the contract expired, employees were no longer required to pay dues and fees. The Board found that the flyer, disputing the employer’s

¹ We note that at certain points in the judge’s decision, he referred to the unfair labor practice issue here as whether the Respondent’s letter constituted a “threat or coercion” under Sec. 8(b)(1)(A), whereas the statutory language refers to conduct that “restrain[s] or coerce[s]. . . employees in the exercise of the rights guaranteed in section 7.” The judge’s use of different terminology did not affect his analysis.

accurate statement, “wrongly” asserted that employees remained obligated to pay dues and fees under the expired contract. In the present case, the Respondent’s March 31 letter, sent more than 7 months after the parties’ successor collective-bargaining agreement took effect, only sought arrearages for unpaid membership dues—not unpaid core representational fees—and relied solely on the Respondent’s own internal membership rules as the authority for collecting dues arrearages. Unlike a contractual union-security clause, a union’s internal rules remain in effect during a contract hiatus and continue to apply to employees who wish to remain or become union members in good standing. The letter further underscored that it applied only to members by stating that the Respondent’s bylaws required the suspension of any “Member” whose dues arrearages exceeded 2 months. Accordingly, employees would have reasonably understood that the Respondent’s March 31 letter was not requiring nonmembers to pay fees under the lapsed union-security clause in the expired contract.

We also agree with the judge that the March 31 letter is distinguishable from the unlawful flyer in *Pomona Valley Hospital Medical Center* because the flyer in that case threatened employees that, if they did not continue to pay dues during the hiatus period, they would have to pay the arrearages in a lump sum, and suggested that employees could owe even more in a lump sum payment than if they had continued periodic payments. *Id.* at 236–237. Here, by contrast, the Respondent sent the March 31 letter to numerous employees, including full union members, notifying them that they owed back dues and needed to make their accounts current to restore full membership status. The letter’s sole reference to adverse consequences of nonpayment was that any *member* more than 2 months in arrears would be suspended from the Union. Because the Charging Parties and similarly situated employees were, by choice, already not union members, they would not have found this, the only cited consequence of nonpayment, to be applicable to them, much less coercive. Indeed, for almost 2 years preceding this letter, the Respondent had honored the rights of the Charging Parties and similarly situated employees to withdraw from membership and to pay only financial core fees for the Respondent’s representational activities during times when a contractual union-security clause was in effect. Notably, in October 2013, another letter from the Respondent to these same employees recognized their ongoing requests to pay only representational fees but encouraged them, in light of a recently executed collective-bargaining agreement, to consider joining the Union and thereby enjoy the benefits of full membership. This letter also explained that they would have to pay

accrued dues arrearages in order to do so. Therefore, upon receiving the March 31 letter, these employees would have reasonably understood that they were only required to pay dues arrearages should they decide to reinstate their membership or join the Union.

Under these circumstances, we find, contrary to the dissent, that the Charging Parties would not reasonably view the March 31 letter as an attempt to restrain or coerce them in the continued exercise of their statutory rights. Instead, the only objectively reasonable view of the letter, in context, was that it was mistakenly directed to them.² We agree with the judge that, while the Respondent erred by including nonmembers in its dues collection letter, this conduct, without more, would not reasonably tend to restrain or coerce those employees in continuing to exercise their statutory rights to refrain from membership in the Respondent or to pay monies to it that they were not obligated to pay.³

ORDER

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

Dated, Washington, D.C. August 25, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

As the Board's *Pomona Valley* decision reaffirmed, Section 7 of the Act protects employees' "right to refrain from paying union dues or fees when there is no contractual obligation to do so."¹ Section 8(b)(1)(A), in turn,

² To be clear, we do not rely on the fact that the letter was mistakenly sent to the Charging Parties; rather, we find that employees in their situation (i.e., nonmembers) would objectively understand that it was sent by mistake. Inasmuch as we do not find that the March 31 letter was unlawful, we do not reach the issue of whether the Employer's subsequent reimbursement of deducted dues would mitigate any coercive effect of the letter or the issue of whether the Respondent's May 13 letter to the Charging Parties would constitute an effective repudiation of unlawful conduct.

³ Chairman Pearce dissented in *Pomona Valley Hospital Medical Center* and adheres to his dissent for the reasons stated there, but he agrees that the instant case is distinguishable.

¹ *Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 235 (2010), enf. mem. 440 Fed. Appx. 524 (9th Cir. 2011). In *Pomona Valley*, the respondent union distributed a flyer,

makes it an unfair labor practice for a union to "restrain or coerce . . . employees in their exercise of" Section 7 rights. Here, the Respondent Union, UNITE HERE!, Local 5, sent the Charging Parties and other employees who were *not* members of the Respondent a letter that told them—wrongly—(1) that they owed dues to the Respondent, (2) that their Employer had been billed for those dues, and (3) that if the Employer did not deduct the dues owed from employees' paychecks, each employee was responsible for paying the Respondent directly. The Employer then *did* make paycheck deductions for amounts wrongly billed. Only weeks later—after the Employer refunded the deductions and after an unfair labor practice charge was filed—did the Respondent attempt to clarify its actions. Given the plain language of the letter, it is clear that the Respondent violated Section 8(b)(1)(A) by demanding dues from employees who did not owe them. My colleagues' attempt to distinguish *Pomona Valley* on its facts is unpersuasive, as is their claim that the "only objectively reasonable view" of the Respondent's letter, from the perspective of the employees who received it, was that the letter was a harmless mistake.

I.

Charging Parties Agnes Demarke, Mark Tamosiunas, Steven Taono, and Wayne Young are employees of the Employer, Hyatt Regency Waikiki. The Charging Parties are nonmember objectors who pay only core financial dues to the Respondent for representational activities. On April 21, 2012, during the period when there was no collective-bargaining agreement in effect,² the Charging Parties and other nonmembers sent a letter informing the Respondent that they had authorized the Employer to stop automatic dues deductions from their pay until the parties reached a new contract. The Employer stopped withholding dues from the nonmembers until a new contract went into effect on August 13, 2013.³

On March 31, 2014, the Respondent sent a letter to approximately 137 employees, both members who were in arrears and nonmembers who did not pay full dues, in-

erroneously stating that employees were legally obligated to pay union dues during a contract hiatus and when no union-security clause was in effect, or they would risk having to make such dues payments in a lump sum upon contract ratification. The Board found that the union's flyer was coercive in violation of Sec. 8(b)(1)(A).

² There was no collective-bargaining agreement in effect between July 1, 2010, and August 12, 2013.

³ The parties' July 1, 2006 to June 30, 2010 contract, and the current August 13, 2013 contract, both contain a union-security clause, which requires that, as a condition of employment, unit employees must pay union dues or agency fees to the Union.

cluding the Charging Parties. The letter read in pertinent part:

THIS IS A STATEMENT OF YOUR ACCOUNT AS OF THE ABOVE DATE. Your dues must be made current. To facilitate this we have billed your employer for the balance listed below. A deduction will be reflected on an upcoming pay stub. If your employer doesn't deduct arrearages, you are responsible for paying this balance directly to Local 5.

Please be advised that the International Constitution Rules affirmed by Local Union 5 Bylaws must suspend any Member whose Dues are more than TWO Months in arrears.

ATTENTION FOOD SERVERS: Please note that if there are insufficient funds available in your weekly paycheck to cover dues deduction then you are responsible for sending your dues directly to Local 5. PLEASE REMIT THE BALANCE STATED.

At the bottom of the letter, the Respondent listed the total balance due from each of the Charging Parties, which ranged in amount from \$644.76 to \$1,294.49. The balance was the amount the Charging Parties would have to pay to become full union members, not arrearage amounts for core representational fees.

The Respondent emailed the Employer a list of employees who it said owed dues, including the Charging Parties, and requested that the Employer deduct the maximum allowable amount of dues (\$62.50) directly from the employees' pay. On April 11, the Employer made the requested deductions.⁴

On April 28, the Charging Parties filed the underlying unfair labor practice charge alleging, inter alia, that the Respondent violated Section 8(b)(1)(A) by demanding dues payments from the Charging Parties when no security clause was in effect.⁵ On May 13, the Respondent sent a letter only to the Charging Parties, which attempted to "clarify" the March 31 letter stating, in part, that "[t]he amount listed in the statement of your account

indicates the amount of dues you need to pay in order to become a member in good standing with the Union."⁶

II.

Under the Board's *Pomona Valley* decision, the test for determining whether the March 31 letter violates Section 8(b)(1)(A) is whether it "reasonably tended to restrain or coerce employees in the exercise of their Section 7 rights, which includes the right to refrain from paying union dues or fees when there is no contractual obligation to do so." 355 NLRB at 235. See also *Longshoreman ILA Local 333 (ITO Corp.)*, 267 NLRB 1320, 1321 (1983), and the cases cited therein. What matters is whether, considering the entirety of the letter's message, its "words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Pomona Valley*, 355 NLRB at 235. Finally, under *Pomona Valley*, no threat of discharge for failure to pay dues is required to establish a violation, so long as the union threatens to *collect* lump-sum dues that are not owed. *Id.* at 237.

Faithfully applying the *Pomona Valley* standard requires the Board to find a violation here. The Respondent's March 31 letter told employees who in fact owed the Respondent nothing that:

"[y]our dues must be made current;"

"we have billed your employer for the balance listed;" a "deduction will be reflected on an upcoming paystub;" and

"if your employer doesn't deduct arrearages, you are responsible for paying the balance directly" to the Union.

For each employee, finally, the letter listed an account balance, which in one instance totaled over \$1200.

The words of the Respondent's March 31 letter made plain to employees that, in its view, the employees owed money to the Respondent and that it would take steps to collect that money in a lump sum. To be told that you are delinquent in paying a bill, and that steps to collect will be taken, obviously has a reasonable tendency to coerce payment from you—which was precisely the point of the Respondent's letter, on its face. And, of

⁴ On April 15, the Employer sent a letter to the Charging Parties and similarly situated employees apologizing for the erroneous deductions and informing them that they would be credited \$62.50, which they were on April 25. The Employer's subsequent refund of the improper deductions does nothing to mitigate the coerciveness of the Respondent's March 31 letter, interpreted on its face.

⁵ The allegation that the Respondent violated the Act by requesting the Employer deduct dues directly from the employees' pay was dismissed before the hearing. The dismissal of this allegation has no bearing on whether the March 31 letter reasonably tended to coerce employees into paying union dues in violation of Sec. 8(b)(1)(A).

⁶ The Respondent's May 13 letter did not effectively repudiate the violation inherent in its March 31 letter, under the standard of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The Respondent sent the May 13 letter only after the Charging Parties filed an unfair labor practice charge, and then only to the four Charging Parties, not to any of the other nonmembers. *Passavant* requires that repudiation of the unlawful conduct be made to all affected employees. *Id.* at 139. Furthermore, the Respondent did not admit to wrongdoing in the May 13 letter, and did not assure employees that it would refrain from similar action in the future, as *Passavant* also requires. *Id.* And while the Employer promptly corrected the erroneous deduction and apologized for it in its April 15 letter, the Respondent did not expressly join the Employer in this communication.

course, the Respondent did succeed in having money deducted from employees' paychecks—a fact that obviously bears on employees' reasonable construction of the letter, even if its language were not already so clear.

My colleagues argue (1) that “the letter’s sole reference to adverse consequences of nonpayment was that any *member* [emphasis in original] more than 2 months in arrears would be suspended from the union;” and (2) that *nonmembers*, like the Charging Parties, would have recognized that this consequence did not apply to them. This argument misses the essential point here: that the collection of the dues—potentially in a lump sum or other financially burdensome fashion—was an adverse consequence. The Respondent’s letter falsely claimed that employees owed dues, informing them their employer had been “billed” and that a “deduction” would be made from their paychecks, and insisting that (if the employer did not make the deduction) they were “responsible for paying.” Perhaps nonmembers understood that they could not be suspended from the Union. But it is also clear that they reasonably could construe the letter to say that they owed dues payments to the Union and that the Union was taking steps to collect that money. *That* is what made the March 31 letter coercive.

My colleagues point out that the March 31 letter was preceded by an October letter from the Respondent to employees, encouraging them to join the Union and explaining that to do so they would have to pay accrued dues arrearages. In light of the October letter, according to the majority, “employees would have reasonably understood that they were only required to pay dues arrearages should they decide to reinstate their membership or join the union.” But whatever the October letter said, the March 31 letter was unequivocal in its assertions that employees owed dues, that money would be deducted from their paychecks, and that they were financially responsible to the Union. Even if the October letter somehow suggests that a noncoercive construction of the March 31 letter was reasonable, it does not preclude an alternative, reasonable, and coercive construction—all that *Pomona Valley* requires to find a violation.

My colleagues insist that the Respondent’s March 31 letter is distinguishable from the flyer at issue in *Pomona Valley*, but the factual distinctions they draw are meaningless under the legal standard the Board applied. In determining whether the words of the letter could reasonably be construed as coercive, it does not matter that the letter was sent to employees who did owe the Respondent dues, as well as those who did not; that the letter did not invoke a union-security clause in asserting its demand on employees; or that the Respondent had previously complied with the law. These facts—even if we

assume they were known to the Charging Parties and other nonmembers—at most might support a noncoercive construction of the letter. But given the clear language of the letter, that is not the *only* reasonable construction. And because the letter’s “words could reasonably be construed as coercive,” *Pomona Valley*, 355 NLRB at 235, the violation here is established. Indeed, the fact that unowed dues *were* deducted from employees’ paychecks, just as the Respondent’s letter threatened, confirms that a coercive construction of the letter was not just reasonable, but demonstrably correct.⁷

Because the violation of Section 8(b)(1)(A) in this case is straightforward under controlling law and the record here, I dissent.

Dated, Washington, D.C. August 25, 2016

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

Jeff F. Beerman, Esq. and *Meredith A. Burns, Esq.*, for the General Counsel.

Eric B. Meyers, Esq. (Davis, Cowell & Bowe, LLP), for the Respondent.

Sarah E. Hartsfield, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case has been submitted on a stipulated record, without testimony, by the parties after a telephonic hearing, agreed to by all parties on April 27, 2015. The case was tried *upon* the consolidated complaint in Cases 20–CB–127565 and 20–CB–127695 on January 29, 2015, by the Regional Director for Region 20.

The complaint alleges that Unite Here, Local 5 (Respondent) violated Section 8(b)(1)(A) of the Act by notifying the Charging Parties, Agnes Demarke (Demarke), Mark Tamosiunas (Tamosiunas), Steven Taono (Taono), and Wayne Young (Young) and other employees who were financial core members that they owed Respondent dues for a time period when there was no collective-bargaining agreement in effect.

Respondent filed a timely answer to the complaint and stated it had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the Counsel for the General Counsel, Charging Parties and Re-

⁷ To be clear, finding the violation here in no way depends on the employer’s actual deduction of dues. The March 31 letter, on its face, had a reasonable tendency to coerce employees because it could reasonably be construed as threatening employees with dues deductions when, in fact, they had no financial obligation to the Union.

spondent, I make the following findings of fact.

I. JURISDICTION

The parties stipulated that the Employer herein, Hyatt Corporation d/b/a Hyatt Regency Waikiki, operates a hotel in Honolulu, Hawaii, and, in conducting operations during the 12-month period ending December 31, 2014, the Employer derived gross revenue in excess of \$500,000 and purchased and received products, goods, and materials valued in excess of \$5000 directly from points outside the State of Hawaii. At all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that it represents workers in the hotel and hospitality industry in Hawaii and that it is a labor organization within the meaning of Section 2(5) of the Act. Respondent admitted and I find that, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The relevant facts herein are set forth in the parties' joint factual stipulations and joint exhibits, received as Joint Exhibit 19 (Jt. Exh. 1).

After the hearing closed, on June 3, 2015, counsel for the General Counsel filed a motion to strike portions of Respondent's Brief to the administrative law judge. On June 4, Charging Parties also filed a motion to strike portions of Respondent's Brief to the administrative law judge. On June 9, 2015, Respondent filed its opposition. General Counsel and Charging Parties contend that Respondent's brief to the Administrative Law Judge made factual and other assertions that were not a part of the stipulated record. General Counsel and Charging Parties cite five items that should be stricken from Respondent's brief:

1. The first four paragraphs of Respondent's "Introduction" on page 1, where Respondent created a fictitious tale of Charging Party Steven Taono's initial reading and response to the Union's demand for payment in "early April 2014."¹

2. Respondent's statement, "Pursuant to the terms of the Charging Parties' April 21 letters, Hyatt commenced withholding fees for representational purposes after the collective bargaining agreement went into effect. See Exhibit 12."²

3. Respondent's statement, "It is clear from the letter that they were auto-generated by a computerized billing system."³

4. The entirety of footnote 3 on page 6 of Respondent's brief. This footnote states: "There are many reasons why a union member might accrue an arrearage. For ex-

ample, an employee may be out on leave of absence and not have wages from which to deduct his or her monthly membership dues commitment in a given period. Local 5's effort to collect dues arrearages from members is not at issue in this proceeding. Stip. note 2."⁴

5. Respondent's statement, "It was sent during a time of labor peace in an atmosphere entirely free from other allegations of coercion."⁵

Respondent counters the motions to strike by arguing that the Introduction in its brief is quite obviously rhetorical prose presented in an effort to persuade the decision maker that an employee would not reasonably find the March 31, 2014 letter to be coercive, that the statement, that Hyatt commenced withholding fees after the collective-bargaining agreement went into effect, is supported by inferences that can be drawn from the extant record, that Local 5's assertion that it is "clear" that the March 31 letter was auto-generated by a computerized billing system is a permissible observation based on a document in the record, that Local 5's statement that there are many reasons a union member might accrue an arrearage is a statement of general practice in the field in which the Board has expertise, and is not objectionable and that Local 5's assertion that the March 31 letter was sent during a time of labor peace in atmosphere free of other allegations of coercion is supported by the record and perfectly appropriate.

As to the first item General Counsel and Charging Parties seek to strike from Respondent's brief, I find it is in the nature of argument not fact and I will not consider it as a matter of fact. As to item two, I find it is a reasonable inference to be drawn from extant documents and I will not strike this item. With respect to the third matter, while the documents seem similar, there is no way to conclude they were auto generated and I will grant the motion to strike. I will grant the motion to strike item four since I find the information irrelevant and a matter of speculation not encompassed by the record herein. As to item five, while there may have been reference to "labor peace" in record documents, this issue was not fully litigated in this proceeding and I will grant the motion to strike.

The parties' factual stipulations set forth in Joint Exhibit. 11 reflect the following:

11. Since at least July 1, 2006, Local 5 has been the exclusive collective-bargaining representative of the following bargaining unit of employees employed by the Employer:

All employees of the Employer described in the most current collective-bargaining agreement between Respondent and the Employer, including employees in the Banquet Department, Beverage Department, Food Preparation Department, Food Service Department, General Clerical Department, House-keeping Department, Maintenance Department, Steward Department, Uniform Services Department, Porterage Participants, and Parking Department.

12. Local 5 and the Employer were parties to a collective bargaining agreement (the "Collective Bargaining Agreement")

¹ R. br. at p. 1, LL. 2-15.

² Id. at p. 5, LL. 17-19.

³ Id. at p. 6, L. 6.

⁴ In its opposition, Respondent erroneously refers to this as fn. 2.

⁵ R. br. at p. 7, LL. 2-3.

between approximately July 1, 2006, and June 30, 2010.

Section 7 of the collective-bargaining agreement stated:

SECTION 7, UNION SECURITY

7.01 Employees who are now members of the Union shall, as a condition of continued employment, remain members of the Union. All other employees and all new employees shall, as a condition of continued employment, become members of the Union no later than the thirty-first (31 s) day following the execution of this Agreement or their date of employment, whichever is later.

7.02 Five (5) days after receipt of written notice from the Union that an employee has failed to tender his uniform dues and initiation fees in accordance with the provisions of the Labor Management Relations Act of 1947, as amended, Hyatt shall suspend such employees for seven (7) days pending termination. If within the seven (7) day period of suspension the Union notifies Hyatt that the employee has complied with Section 7.1, the employee shall be immediately reinstated to work without back pay. If Hyatt is not so notified by the Union the employee shall be discharged and shall not have access to the grievance procedure as provided in Section 18 of this Agreement.

13. From about July 1, 2010, until about August 13, 2013, the Employer and the Union did not have a collective-bargaining agreement.

14. At all material times, Charging Parties have been employees in the Unit.

15. At all material times, Charging Parties have not been members of Local 5 and have objected to the payment of dues and fees for nonrepresentational activities.

16. Certain other employees in the Unit are similarly-situated to the Charging Parties inasmuch as they either were employees in the Unit, were not members of Local 5 at material times hereto, objected to the payment of dues and fees for nonrepresentational activities, and were subject to certain conduct described below that the General Counsel alleges is unlawful. Said employees will be referred to herein as "'similarly-situated employees'"

17. The Parties do not presently agree on the number of similarly-situated employees. Local 5 believes that the number of similarly-situated employees (exclusive of the Charging Parties) is 22; the General Counsel believes that the number may exceed that. The Parties agree that in the event that the NLRB orders a remedy that requires identification of similarly-situated employees by name, the counsel for the General Counsel may seek to ascertain the names of all similarly-situated employees as a matter of compliance; provided, however, that Local 5 does not waive arguments concerning the appropriateness of this remedy before the Administrative Law Judge and the NLRB.

18. Prior to the events described below, the Charging Parties and other similarly situated employees authorized the Employer to deduct fees for representational activities from their paychecks and to remit such fees to the Union.

19. On or about April 21, 2012, Charging Parties and other similarly situated employees sent individualized letters to Erie

Gill, Local S's Financial Secretary-Treasurer. The letter stated:

RE: CANCELLATION OF UNION DUES NO CONTRACT
HYATT REGENCY WAIKIKI BEACH RESORT & SPA

Dear Mr., Gill,

This letter is to notify you that I have authorized the Hyatt Regency Waikiki Beach Resort & Spa to stop payment of my Union dues effectively immediately due to no contract between Local 5 and the Hyatt. In the future, when Local 5 and the Hyatt secure a compulsory dues contract, I will allow my employer to commence deducting the required amount of dues, my reduced fair share amount for financial core members, that is demanded by the Union.

Sincerely,

[NAME AND SIGNATURE].

The letters were identical except that for the name and signature. A copy of the letters submitted by the Charging Parties is attached to (Jt. Exh. 1 as exhibit 10(a)-(d)). Local 5 received 34 such letters on or around April 21, 2013. Following receipt of these letters, the Employer stopped withholding dues and/or fees from the paychecks of the aforesaid employees.

20. The Employer and the Union reached a successor agreement (the "Successor Collective Bargaining Agreement") that became effective on or around August 11, 2013. The Successor Collective Bargaining Agreement contains the identical union security provision set forth in paragraph 12 above.

21. On or about October 2, 2013, Local 5 delivered effectively identical correspondence to the charging Parties and other similarly-situated employees. A copy of correspondence that Local 5 delivered to the Charging Parties is attached to Jt. Exh. 1 as exhibit 11(a)-(d). The letters were identical except for the name of the recipients and the monetary amount identified in the letters. The letter signed by Respondent's Organizer Raina Whiting states:

We understand that you have previously requested to pay, in lieu of the full dues and initiation fees of UNITE HERE Local 5, the fair share fee — that portion of dues and initiation fees relevant to Local 5's duties as your collective bargaining representative.

Now that we have secured an excellent agreement with the Hyatt and will embark on this time of labor peace, we hope that you will want to enjoy the benefits of full union membership and will make arrangements to pay the arrearages you have accrued. The Local 5 bylaws and the IU constitution require paying dues as a condition of membership. Once you make arrangements to pay the arrears you have accrued ([TOTAL AMOUNT OWED]), your full membership will be reinstated.

Please contact Jessie in Local 5's dues department at 941-2141 and she will work with you to arrange a payment plan.

22. On March 31, 2014, Local 5 sent correspondence to certain Unit employees, including the Charging Parties and other similarly-situated employees. A copy of the letters that Local 5

sent to Charging Parties is attached to Jt. Exh. 1 as exhibit 12(a)-(d). Local 5 sent such correspondence to Local 5 members who had dues arrearages, as well as to Charging Parties and similarly-situated employees. Local 5 avers and the General Counsel has no basis to dispute, that Local 5 sent approximately 137 letters in total to Local 5 members, to Charging Parties, and to the similarly-situated employees. The letters were identical except for the names of the recipients and the monetary amounts identified in the letters. The letter states:

THIS IS A STATEMENT OF YOUR ACCOUNT AS OF THE ABOVE DATE. Your dues must be made current. To facilitate this we have billed your employer for the balance listed below. A deduction will be reflected on an upcoming pay stub. If your employer doesn't deduct arrearages, you are responsible for paying this balance directly to Local 5.

Please be advised that the International Constitution Rules affirmed by Local Union 5 Bylaws must suspend any Member whose Dues are more than TWO Months in arrears.

ATTENTION FOOD SERVERS: Please note that if there are insufficient funds available in your weekly paycheck to cover dues deduction, then you are responsible for sending your union dues directly to Local 5. PLEASE REMIT THE BALANCE STATED. Your prompt payment is appreciated.

If you are retired or currently not employed, please contact the dues office. If you are on extended medical or personal LOA, the dues staff will help determine if you are eligible for a withdrawal card.

Please contact the dues office at (808) 941-2141 or (800) 585-4373. (Id.)

The Total Balance Due listed on the March 31 letters for the Charging Parties is as follows:

Agnes Demarke \$674.83 (from June 1, 2012, to September 1, 2013); Mark Tamosiunas \$644.76 (from July 1, 2012, to September 1, 2013); Steven Taono \$867.21 (from July 1, 2012 to September 1, 2013); Wayne Young \$1,294.49 (from February 1, 2012, to September 1, 2013).

23. Beginning on or about March 31, 2014, Local 5 communicated to the Employer, requesting it to deduct arrearages up to the maximum amount of \$62.50 per paycheck from the paychecks of the approximately 137 persons to whom Local 5 had sent the March 31, 2014 letter. A copy of this communication email message chain is attached to (Jt. Exh. 1 as exh. 13). Included with the March 31, 2014 e-message was a billing report. A copy of this billing report is attached to Jt. Exh. 1 as exhibit 14. The Employer subsequently made deductions from employee paychecks in an amount of up to \$62.50, including from the paychecks of the Charging Parties and similarly situated employees. The Employer then refunded the arrearages deducted from the Charging Parties and similarly-situated employees in their following paycheck. A copy of the Employer's payroll records for employees that had Local 5 arrearages deducted and refunded is attached to (Jt. Exh. 1 as exhibit 15(a)-(nn)). The emails reflect that:

On March 31, Jessie DeCoite (DeCoite) from Respondent's dues department sent an email to Karen Taira (Taira) from the Employer's human resources department requesting that the Employer deduct dues arrearages from Unit employee paychecks.⁶ Attached to the March 31 email from DeCoite to Taira was a billing report including the employee's name, the dues arrearage balance, and the maximum deduction allowable per paycheck.⁷ The maximum amount of dues arrearages that may be deducted from employee paychecks is \$62.50. The billing report lists dues arrearage information for 137 employees, including the Charging Parties and the similarly-situated Employees.⁸ Id. The dues arrearages listed on the billing report for the Charging Parties is identical to the dues arrearages Respondent listed on the letters it sent to unit employees on March 31.

On April 1, Taira responded to DeCoite's March 31 email by asking DeCoite whether Respondent had informed employees of the dues arrearages amounts and how they were calculated.⁹ DeCoite sent the following response to Taira's email approximately 2 hours later:

The letter informs the employees of their dues balance and a billing report was submitted to their employer for the balance stated and a deduction will be reflected on an upcoming pay stub. It also state[s] that if there are no deductions, they are responsible for paying the balance directly to Local 5.¹⁰

On April 11, the Employer deducted the maximum allowable of \$62.50 from the Charging Parties and the similarly-situated employees' paychecks.¹¹

24. On or around April 15, 2014, the Employer delivered a letter to the Charging Parties and the similarly-situated employees regarding the payroll deductions described in paragraph 22. A copy of the letter delivered to Young is attached to (Jt. Exh. 1, as exhibit 16). The other letters were identical except for the name of the recipient. The counsel for the General Counsel does not allege that further arrearages were deducted from employees' paychecks, or that the Charging Parties or any similarly-situated employee is owed any money arising out of the allegations set forth in the amended complaint. The letter apologizes for deducting retroactive union dues in the amount of \$62.50, informing the employees that the deduction was made in error, and the full \$62.50 would be credited in the employees' April 25 paycheck.¹²

25. On or around May 13, 2014, Local 5 sent a letter to the Charging Parties attached to (Jt. Exh. 1 as exhibit 17(a)-(d)). Local 5 did not send a similar letter to any other employees. Local 5 does not, however, stipulate that the number of similarly-situated employees is 34 or that every employee who mailed the April 21, 2012 letter to the Union is a similarly-situated employee. The letter states:

⁶ Jt. Exh. 1, p. 8, par. 23; Exh. 13.

⁷ Jt. Exh. 1, page 8, par. 22; Exh. 14.

⁸ Jt. Exh. 1, p. 8, par. 23.

⁹ Jt. Exh.1, Exh. 14.

¹⁰ Id. Exh.13.

¹¹Jt. Exh.1, p. 8, par. 23; Exh. 15(a)-(nn).

¹² Jt. Exh.1, p. 9, par. 25; Exh. 17(a)-(d).

This letter is to clarify the March 31, 2014 letter you received from UNITE HERE Local 5's dues department. The amount listed in the statement of your account indicates the amount of dues you need to pay in order to become a member in good standing with the Union. The letter does not refer to the union security clause in your collective bargaining agreement or threaten your continued employment. The International Constitution and the Local 5 bylaws indicate that any member in good standing who accrues more than two months in arrears will have their Union membership suspended. (Emphasis in original.)

The Analysis

General Counsel and Charging Parties contend that Respondent violated section 8(b)(1)(A) of the Act by unlawfully threatening to collect dues arrearages in its March 31, 2014, letter and by failing to effectively repudiate this conduct. Respondent counters that both the text and the context of the March 31 letter make clear that it did not restrain or coerce *Beck* objectors in their right not to pay dues and fees as a condition of employment while there was no union-security clause in effect and that it effectively repudiated the March 31 letter.

All parties cite *Service Employees Local 121 RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40 slip op. at 2 (2010), in support of their arguments.

The facts in *Pomona Valley* reflect that the employer hospital and respondent union were parties to a collective-bargaining agreement that expired May 27, 2007, but was extended from month to month by agreement of the parties until the union gave notice that it was terminating the contract. The expired agreement contained a union-security clause. Upon termination of the contract the employer advised bargaining unit employees they were no longer required to pay union membership dues and fees under the contract's union-security clause. In addition, the employer informed the employees that, if they chose, they could resign from union membership and/or revoke their dues-checkoff authorizations. In reply, the respondent union distributed flyers at the hospital. The flyer stated:

Work with an expired contract . . . What does it mean?

The hospital and their representatives i.e. Managers, directors, and antiunion nurses have put out misleading and incorrect information regarding having "NO CONTRACT."

In, truth the NLRA* requires management (Pomona Valley Hospital) to maintain contract terms and conditions of employment while it bargains on a new agreement. Abandoning or changing a pre-existing condition is an unfair labor practice (ULP), giving the union a basis for filing an NLRB charge, calling a ULP strike, or filing a challenge to a lockout.

YOU CONTINUE TO BE COVERED BY THE TERMS AND CONDITIONS OF YOUR CONTRACT!

An employer (Pomona Valley Hospital) must maintain the status quo after the expiration of a collective bargaining agreement until a new collective bargaining agreement has been negotiated or the parties have bargained to impasse. When a contract expires, a union can file a unilateral-change charge to enforce a term on the agreement that had been fol-

lowed by the parties, a past practice independent of the contract, or a past practice that conflicts with the contract. Under the NLRA*, dues and fees may be collected back to the expiration of the collective bargaining agreement (contract).

Many of you have inquired about the stop dues form being distributed by the hospital and their representatives. You may have been misled [sic] into believing that you are not obligated to pay dues and fees during the period of negotiations. This is untrue and retroactivity may occur prior or upon ratification of the contract. Please ask yourselves why all the anti leaders are still paying dues. Could it be they don't want the possibility of owing more in a lump sum?

DUE [sic] AND FEE [sic] OBLIGATIONS REMAIN INTACT AND MAYBE [sic] COLLECTED PRIOR OR UPON RATIFICATION OF THE CONTRACT. WHEN YOU ARE NOT A MEMBER IN GOOD STANDING, YOU FORFEIT YOUR VOICE, RIGHTS TO PARTICIPATE IN UNION EVENTS AND FORFEIT YOUR VOTING PRIVILEGES.

In *Pomona Valley* the Board held that a union-security clause in a collective-bargaining normally does not survive expiration of the contract.¹³ Additionally, the Board has held that a union-security clause may not be applied retroactively, and therefore that a union cannot demand dues as a condition of employment for periods before the execution of the agreement, citing *Teamsters Local 492 (United Parcel Service)*, 346 NLRB 360, 364 (2006). The Board further concluded that the test for determining whether the union's action violated Section 8(b)(1)(A) was whether the action reasonably tended to restrain or coerce employees in the exercise of their Section 7 rights, including the right to refrain from paying union dues or fees when there is no contractual obligation to do so. The Board stated that in determining if a threat has been made the Board must evaluate the entirety of the union's message in its overall context.

In reaching its conclusion that the Union's flyer was coercive the Board said the flyers:

. . . rhetorical question did not highlight the benefits of voluntarily maintaining membership, but instead emphasized that if employees chose not to do so during the period when no contract was in effect, their continuing obligation to pay dues and fees would likely be enforced in a more onerous manner later, i.e., through collection of "a lump sum" which could, the flyer suggested, be "more" than the sum of periodic payments to be made during the hiatus.¹⁴

Respondent also relies on *International Brotherhood of*

¹³ In *Lincoln Lutheran of Racine (Service Employees International Union Healthcare Wisconsin SEIU-HCWI)*, 362 NLRB No. 188 slip op. at 1(2015), the Board reversed its long standing holding in *Bethlehem Steel*, 136 NLRB 1500 (1962), and held that "an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement." Since the Board held that its decision in *Lincoln Lutheran* would only be applied prospectively, it is not binding in this decision.

¹⁴ *Service Employees Local 121 RN (Pomona Valley Hospital Medical Center)*, supra at pp. 3-4.

Teamsters, Local Union No 89 (United Parcel Service, Inc.), 361 NLRB No. 5 (2014), for the proposition that it is not unlawful for the union to take action to collect fees other than by threatening or seeking the employee's discharge. I find this case inapposite as there was a valid union-security clause.

In *United Parcel* the Board, citing *Johnson Controls II*, held that Section 8(b)(1)(A) and Section 8(a)(3) of the Act bars the threatened or actual enforcement of a union-security clause by threat of discharge. It does not prohibit a union from seeking to collect fees from an ex-member who has been lawfully expelled but continues to receive representation. Nor is a union is barred from seeking ongoing payment in some form from a lawfully expelled employee by lawful means other than by threatening or seeking the employee's discharge.

Here, the record reflects that Respondent and the Employer were parties to a collective-bargaining agreement that contained a valid union-security clause between approximately July 1, 2006, and June 30, 2010. The contract expired and from about July 1, 2010, until about August 13, 2013, the Employer and the Respondent had no collective-bargaining agreement. On or about April 21, 2012, Charging Parties and other similarly situated employees sent individualized letters to Ernie Gill, Respondent's financial secretary-treasurer stating they had authorized the Hyatt Regency Waikiki Beach Resort & Spa to stop payment of union dues effectively immediately since there was no contract between Local 5 and the Employer. Charging Parties and similarly situated employees authorized deduction of dues as financial core members when a new contract was agreed upon. Following receipt of these letters, the Employer stopped withholding dues and/or fees from the paychecks of the aforesaid employees.

The Employer and Respondent reached a successor collective-bargaining agreement effective on or around August 11, 2013. This agreement contained an identical union-security provision to the most recently expired contract set forth above.

On or about October 2, 2013, Respondent delivered identical letters to the Charging Parties and other similarly-situated employees stating inter alia,

Now that we have secured an excellent agreement with the Hyatt and will embark on this time of labor peace, we hope that you will want to enjoy the benefits of full union membership and will make arrangements to pay the arrearages you have accrued. The Local 5 bylaws and the IU constitution require paying dues as a condition of membership. Once you make arrangements to pay the arrearages you have accrued ([TOTAL AMOUNT OWED]), your full membership will be reinstated.

On March 31, 2014, Respondent sent letters to Charging Parties and other similarly-situated employees stating in part:

THIS IS A STATEMENT OF YOUR ACCOUNT AS OF THE ABOVE DATE. Your dues must be made current. To facilitate this we have billed your employer for the balance listed below. A deduction will be reflected on an upcoming pay stub. If your employer doesn't deduct arrearages, you are responsible for paying this balance directly to Local 5.

Please be advised that the International Constitution Rules af-

firmed by Local Union 5 Bylaws must suspend any Member whose Dues are more than TWO Months in arrears.

ATTENTION FOOD SERVERS: Please note that if there are insufficient funds available in your weekly paycheck to cover dues deduction, then you are responsible for sending your union dues directly to Local 5. PLEASE REMIT THE BALANCE STATED. Your prompt payment is appreciated.

Beginning on or about March 31, 2014, Respondent requested that the Employer deduct arrearages up to the maximum amount of \$62.50 per paycheck from the paychecks of approximately 137 persons to whom Respondent had sent the above March 31, 2014 letter. The Employer subsequently made deductions from employee paychecks in an amount of up to \$62.50, including from the paychecks of the Charging Parties and similarly situated employees. The Employer then refunded the arrearages deducted from the Charging Parties and similarly-situated employees in their following paycheck.

On April 11, the Employer deducted the maximum allowable of \$62.50 from the Charging Parties and the similarly-situated employees' paychecks.

On or around April 15, 2014, the Employer delivered a letter to the Charging Parties and the similarly-situated employees regarding the payroll deductions described above. The letter apologizes for deducting retroactive union dues in the amount of \$62.50, informing the employees that the deduction was made in error, and the full \$62.50 would be credited in the employees' April 25 paycheck.

On or around May 13, 2014, Local 5 sent a letter to the Charging Parties that letter states:

This letter is to clarify the March 31, 2014 letter you received from UNITE HERE Local 5's dues department. The amount listed in the statement of your account indicates the amount of dues you need to pay in order to become a member in good standing with the Union. The letter does not refer to the union security clause in your collective bargaining agreement or threaten your continued employment. The International Constitution and the Local 5 bylaws indicate that any member in good standing who accrues more than two months in arrears will have their Union membership suspended.

Here I must determine if Respondent's March 31, 2014, letter violated Section 8(b)(1)(A) of the Act by threatening and coercing Charging Parties and similarly situated employees by demanding repayment of dues arrearages under *Pomona Valley*, supra.

In *Pomona Valley* as well as numerous cases¹⁵ cited in that

¹⁵ *International Brotherhood of Teamsters, Local Union No 89 (United Parcel Service, Inc.)*, 361 NLRB No. 5 (2014); (no violation where was a valid union-security clause); *Teamsters Local 492 (United Parcel Service)*, 346 NLRB 360, 364 (2006) (violation in union's threat of termination for failure to pay dues in the absence of a valid union security clause.); *Bay Cities Metal Trades Council*, 306 NLRB 983, 985 (1992), enf. mem.15 F.3d 1088 (9th Cir. 1993) (case does not involve recovery of union dues under an expired or nonexistent union security clause.); *Iron Workers Local 455 (Precision Fabricators)*, 291 NLRB 385, 387 (1988) (Despite expired union security clause, union sought retroactive dues payments and sought discharge of employees);

decision and in the briefs of the parties, there was either some threat or implied threat to discharge employees for failure to make dues payments or in the *Pomona Valley* case there was a threat to collect dues or more in a lump sum in the absence of a valid union security clause.

In the instant case, both General Counsel and Charging Parties urge me to find coercion by the Respondent Union in seeking to enforce collection of back dues in the absence of a valid union-security clause absent a threat of discharge or some other implied threat. Here, the financial core members were invited to be reinstated to full membership but there was no threat to invoke any discipline for failure to do so. While the Charging Parties and similarly situated employees had their balances due set forth in the Respondent's letter, unlike *Pomona Valley* there was no threat that the entire amount was due in a lump sum or that something more might be added. The Board has never held that the sole act of requesting dues arrearages in the absence of a valid union-security clause violates Section 8(b)(1)(A) of the Act. In all of the Board cases prior to *Pomona Valley* where it was found the union violated Section 8(b)(1)(A) of the Act in seeking collection of retroactive dues in the absence of a valid union-security clause, the union took some action such as the threat of enforcement of the union-security clause provision requiring termination for nonpayment of dues or threatening that employees might owe a lump-sum payment or more of past dues. I find no support in case law for a finding that demanding payment of retroactive dues, standing

Auto Workers Local 785 (Dayton Forging), 281 NLRB 704, 707 (1986) (violation by union's implied threat of discharge by invoking union security clause for nonpayment of dues during hiatus in contracts.); *UAW Local 376 (Emhart Industries)*, 278 NLRB 285 (1986) (Union sought discharge of employees for nonpayment of dues pursuant to expired union-security clause); *Local 32B-32J, SEIU (Star Security Systems)*, 266 NLRB 137, 138-139 (1983) (violation where a contract contained a union shop provision requiring membership in good standing an implied threat of discharge); *Teamsters Local 25 (Tech Weld Corp.)*, 220 NLRB 76, 77 (1975) (violation by union's threat of discharge for non-payment of dues in the absence of a valid union-security clause.); and *Mine Workers District 50 (Ruberoide Co.)*, 173 NLRB 87, 92-93 (1968) (violation by threat of discharge in invoking union security clause for retroactive dues payment when no valid union-security clause existed.)

alone, in the absence of a valid union-security clause, constitutes a threat or coercion under section 8(b)(1)(A) of the Act.

Here I find Respondent Union made no threat. In its March 31, 2014 letter to Charging Parties and similarly situated employees Respondent gave each employee an account of alleged dues arrearages, stating, "Your dues must be made current." A total balance due was set forth in the letter to each of Charging Parties but no demand was made that the full amount be paid in a lump sum. In fact Respondent requested the employer to deduct no more than \$62.50 from the employees' paychecks each pay period. There is nothing in this language that a reasonable person would find to be a threat. I find no implied threat as in *Pomona Valley* where the union implied that non-members or those who resigned their memberships would have dues collected in a lump sum or "more." It was this threat of collecting dues in a lump sum or more that the Board found coercive and violated Section 8(b)(1)(A) of the Act.

Having found that Respondent did not threaten or coerce Charging Parties or similarly situated employees, I find that Respondent did not violate Section 8(b)(1)(A) of the Act and I will recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1 The Employer herein, Hyatt Corporation d/b/a Hyatt Regency Waikiki, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(b)(1)(A) of the Act and the complaint is dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹⁶

ORDER

IT IS ORDERED that the complaint is dismissed.
Dated, Washington, D.C. September 18, 2015

¹⁶ 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 shall be waived for all purposes.