

No. 16-1338

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MARK TAMOSIUNAS, STEVEN TAONO,
AGNES DEMARKE, and WAYNE YOUNG**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITE HERE! LOCAL 5

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE B. BROIDO
Supervisory Attorney

VALERIE L. COLLINS
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-1978

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MARK TAMOSIUNAS, STEVEN TAONO,)	
AGNES DEMARKE, and WAYNE YOUNG)	
)	
Petitioners)	
)	No. 16-1338
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	20-CB-127565
)	20-CB-127695
Respondent)	
)	
and)	
)	
UNITE HERE! LOCAL 5)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties and Amici:*** UNITE HERE! Local 5 was the respondent before the Board, and is an intervenor before this Court. Mark Tamosiunas, Steven Taono, Agnes Demarke, and Wayne Young were the charging parties before the Board, and are the petitioners before this Court. The Board’s General Counsel was a party before the Board. There were no intervenors or amici before the Board, and there are no amici in this Court

B. ***Rulings Under Review:*** This case is before the Court on the petitioners' petition for review of a Board decision and Order issued on August 25, 2016, and reported at 364 NLRB No. 94.

C. ***Related Cases:*** This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 26th day of May, 2017

GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Hyatt	Hyatt Regency Waikiki
J.A.	Joint Appendix
Petitioners	Mark Tamosiunas, Steven Taono, Agnes Demarke, and Wayne Young
Union	UNITE HERE! Local 5

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issue	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The stipulated facts	4
A. The collective-bargaining agreement, which contained a union-security clause, expires.....	4
B. The Petitioners ask the Union to stop collecting their financial core member dues; the Union complies with their request.....	4
C. The Union and the Hyatt reach a successor agreement; the Union sends the Petitioners a letter acknowledging their financial core status, expressing hope that they might want to join the Union, and noting the dues required for full membership under its constitution and bylaws	5
D. Several months later, the Union mistakenly sends the Petitioners a letter billing them for full union dues, and advising them that under its constitution and bylaws, it will suspend full members who are in arrears; the Hyatt deducts those dues from the Petitioners' paychecks, but then refunds them	6
II. The Board's conclusions and order	8
Standard of review	9
Summary of argument.....	10

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	12
The Board’s dismissal of the complaint was rational and supported by the stipulated evidence.....	12
A. Principles governing the complaint dismissal.....	12
B. The Union’s March 31 letter did not reasonably tend to restrain or coerce employees in maintaining their status as nonmember objectors.....	15
C. The Petitioners err in their heavy reliance on <i>Pomona Valley</i> and other distinguishable cases	21
Conclusion	26

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Auto Workers Local 785 (Dayton Forging),</i> 281 NLRB 704 (1986)	20
<i>Bethlehem Steel Co.,</i> 136 NLRB 1500 (1962), <i>remanded on other grounds sub nom.,</i> <i>Marine & Shipbuilding Workers v. NLRB</i> , 320 F.2d 615 (3d Cir. 1963)	13, 14
<i>Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,</i> 467 U.S. 837 (1984).....	9
<i>Commc’n Workers of Am. v. Beck,</i> 487 U.S. 735 (1988).....	13, 17
<i>ILA Local 333, AFL-CIO,</i> 267 NLRB 1320 (1983).....	14
<i>Iron Workers Local 455 (Precision Fabricators),</i> 291 NLRB 385 (1988)	20
<i>ITT Indus., Inc. v. NLRB,</i> 251 F.3d 995 (D.C. Cir. 2001).....	9
<i>Lincoln Lutheran of Racine,</i> 362 NLRB No. 188 (Aug. 27, 2015)	13, 14
<i>Local 32B-32J,</i> 266 NLRB 137 (1983).....	24
<i>Machinists v. NLRB,</i> 133 F.3d 1012 (7th Cir. 1998)	10

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Mine Workers District 50 (Ruberiod Co.),</i> 173 NLRB 87 (1968).....	19, 20
<i>NLRB v. Gen. Motors Corp.,</i> 373 U.S. 734 (1963).....	12, 13, 17
<i>NLRB v. Hotel, Motel & Club Emps. Union, Local 568,</i> 320 F.2d 254 (3d Cir. 1963)	23
<i>NLRB v. Transp. Mgmt. Corp.,</i> 462 U.S. 393 (1983).....	9
<i>Radio Officers' Union v. Labor Bd.,</i> 347 U.S. 17 (1954).....	12
<i>*Service Employees Local 121RN (Pomona Valley Hospital Center),</i> 355 NLRB 234 (2010), <i>enforced mem.</i> , 440 F. App'x 524 (9th Cir. 2011).....	11, 13, 14, 21, 22, 23
<i>Teamsters Local 492 (United Postal Service),</i> 346 NLRB 360 (2006)	14
<i>*Thomas v. NLRB,</i> 213 F.3d 651 (D.C. Cir. 2000).....	10
<i>UAW Local 376 (Emhart Indus.),</i> 278 NLRB 285 (1986)	20
<i>UFCW Local 204 v. NLRB,</i> 506 F.3d 1078 (D.C. Cir. 2007).....	9
<i>*United Mine Workers of Am., Dist. 31 v. NLRB,</i> 879 F.2d 939 (D.C. Cir. 1989).....	9

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>United Steelworkers of Am. Local Union 14534 v. NLRB</i> , 983 F.2d 240 (D.C. Cir. 1993).....	9
<i>Weigand v. NLRB</i> , 783 F.3d 889 (D.C. Cir. 2015).....	14
 Statutes:	
Labor Management Relations Act (29 U.S.C. § 141, et seq.).....	4
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	14, 15, 23
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	12, 13, 14
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))	2, 3, 10, 11, 14-16, 20, 22
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	9
Section 10(f) (29 U.S.C. § 160(f))	2

* Authorities upon which we chiefly rely are marked with asterisks.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 16-1338

**MARK TAMOSIUNAS, STEVEN TAONO,
AGNES DEMARKE, and WAYNE YOUNG**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITE HERE! LOCAL 5

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Mark Tamosiunas, Steven Taono, Agnes Demarke, and Wayne Young, (collectively “the Petitioners”) to

review a Decision and Order of the National Labor Relations Board (“the Board”) dismissing an unfair-labor-practice complaint against UNITE HERE! Local 5 (“the Union”), which has intervened on the Board’s side. The Board’s Decision and Order, which issued on August 25, 2016, and is reported at 364 NLRB No. 94, is final with respect to all parties. (J.A. 140-49.)¹

The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court. Petitioners timely filed their petition for review on September 26, 2016; the Act places no time limit on such filings.

STATEMENT OF THE ISSUE

Whether the Board’s dismissal of the complaint, which alleged that the Union violated Section 8(b)(1)(A) of the Act by sending the Petitioners and similarly situated nonmember union objectors a letter seeking full membership dues in circumstances where they would have objectively understood that the letter

¹ “J.A.” refers to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

was sent to them by mistake and did not require them to pay dues, was rational and supported by the stipulated evidence.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

After investigation of unfair-labor-practice charges filed by the Petitioners, the Board's General Counsel issued a complaint, later amended, alleging that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)). The complaint alleged that the Union acted unlawfully by notifying Petitioners and similarly situated employees, who were represented by the Union as "financial core members" but were not full-fledged union members, that they owed dues for a period in which, under the Union's internal regulations, dues would be owed only by full union members. (J.A. 144; 58-65.)

By agreement of the parties, the case was submitted to an administrative law judge on a stipulated record. Thereafter, the judge issued a decision and Order recommending dismissal of the complaint. On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, as explained below. (J.A. 140.)

I. THE STIPULATED FACTS

A. The Collective-Bargaining Agreement, Which Contained a Union-Security Clause, Expires

Since at least 2006, the Union has served as the exclusive collective-bargaining representative of a unit of clerical, food, housekeeping, maintenance, steward, uniform services, portage, and parking department employees at the Hyatt Regency Waikiki (“the Hyatt”). (J.A. 144; 10-11.) From approximately July 1, 2006, to June 30, 2010, the Union and the Hyatt were parties to a collective-bargaining agreement that contained a union-security clause, which provided that employees “shall, as a condition of employment, become members of the Union.” (J.A. 145; 11.) The clause also provided for suspension and discharge of employees who failed to tender their dues and fees in accordance with the provisions of the Labor Management Relations Act (29 U.S.C. § 141 et seq.). (J.A. 145; 11.)

After the collective-bargaining agreement expired, the Union and the Hyatt engaged in negotiations for a successor agreement. However, from June 30, 2010, to August 11, 2013, no agreement was in effect. (J.A. 145; 11.)

B. The Petitioners Ask the Union To Stop Collecting Their Financial Core Member Dues; the Union Complies with Their Request

The Petitioners are Hyatt employees who belong to the bargaining unit but were not full members of the Union because they objected to paying dues and fees

for nonrepresentational activities. Accordingly, pursuant to the collective-bargaining agreement, they and similarly situated employees—as financial core members—authorized the Hyatt to deduct from their paychecks dues covering representational activities only, and to remit them to the Union. (J.A. 145; 11.)

In April 2012, after the collective-bargaining agreement expired, the Petitioners and similarly situated employees sent the Union identical letters stating that they had authorized the Hyatt to stop payment of their financial core dues because the contract was no longer in effect. (J.A. 145; 12-13.) In their letters, they added that “in the future, when [the Union] and the Hyatt secure a compulsory dues contract, [they] will allow [the Hyatt] to commence deducting the required amount of dues,” namely, their “reduced fair share amount for financial core membership.” (J.A. 145; 12-13.) Upon receiving those letters, the Hyatt stopped withholding dues from those employees’ paychecks. (J.A. 145; 13.)

C. The Union and the Hyatt Reach a Successor Agreement; the Union Sends the Petitioners a Letter Acknowledging Their Financial Core Status, Expressing Hope that They Might Want To Join the Union, and Noting the Dues Required for Full Membership Under Its Constitution and Bylaws

The Union and the Hyatt entered into a successor agreement that took effect on August 11, 2013. It contained union-security provisions identical to those set forth in the prior agreement. (J.A. 145; 13.)

On October 2, 2013, the Union sent the Petitioners and similarly situated employees a letter acknowledging their prior “request[] to pay, in lieu of the full dues . . . that portion of dues and fees relevant to Local 5’s duties” as their collective-bargaining representative. (J.A. 145; 13, 75-78.) In its letter, the Union expressed its “hope” that based on the “excellent agreement with the Hyatt” negotiated by the Union, employees paying only financial core dues would “want to enjoy the benefits of full union membership.” (J.A. 145; 13, 75-78.) The letter also informed the Petitioners that to become full union members, they would need to “make arrangements to pay the arrearages” they had accrued. The letter stated that it was Union’s constitution and bylaws which “require paying dues as a condition of membership.” The letter made no mention of the union-security provisions in the new or expired agreement. (J.A. 145; 13, 75-78.)

D. Several Months Later, the Union Mistakenly Sends the Petitioners a Letter Billing Them for Full Union Dues, and Advising Them that Under Its Constitution and Bylaws, It Will Suspend Full Members Who Are in Arrears; the Hyatt Deducts Those Dues from the Petitioners’ Paychecks, but Then Refunds Them

On March 31, 2014, the Union sent a letter to union members who had accrued full dues arrearages. By mistake, the Union also sent the letter to the Petitioners and similarly situated employees. (J.A. 145-46; 79-86.)² The letter began by noting that it was “a statement” of their “account.” It added that “dues

² The Union sent 137 letters that were identical except for the names of the recipients and monetary amounts. (J.A. 146.)

must be made current”; that to facilitate dues collection the Union had billed the Hyatt for the employee’s account balance; and that they should expect a paycheck deduction. (J.A. 146; 79-86.) The letter also said that if the Hyatt refused to deduct the arrearages, employees would be responsible for paying the Union directly. (J.A. 146; 79-86.)

The letter then explained that the consequence of nonpayment would be suspension from the Union under its bylaws and constitution. Specifically, the letter stated: “Please be advised that the International Constitution Rules affirmed by Local 5 Bylaws must suspend any Member whose Dues are more than TWO Months in arrears.”³ (J.A. 146; 79-86.) The letter only cited the Union’s bylaws and constitution for authority. It made no mention of the union-security provisions in the parties’ expired agreement, the employees’ prior obligation to pay financial core dues under those provisions, or the contractual consequences of nonpayment, which were suspension and discharge. (J.A. 146; 79-86.)

After the Union sent the letter to employees, it asked the Hyatt to deduct arrearages up to a maximum of \$62.50 per pay period from the paychecks of Petitioners and similarly situated employees, which the Hyatt did. (J.A. 146; 87-94.) On April 15, the Hyatt sent those employees a letter apologizing for the

³ The letter also stated that recipients who are “retired or currently not employed,” or on “an extended medical or personal” leave of absence, should contact the dues office. (J.A. 146; 79-86.)

deductions, noting that they had been made in error. (J.A. 146; 135.) The Hyatt refunded the arrearages in the employees' next paychecks. (J.A. 146; 95-134.)

On May 13, the Union sent the Petitioners another letter clarifying that its March 31 letter had indicated the amount of dues needed to pay in order to become a full "member in good standing" under the Union's bylaws and constitution. (J.A. 146-47; 136-39.) In its May 13 letter, the Union noted that the March 31 letter did "not refer to the union security clause in your collective bargaining agreement or threaten your continued employment." (J.A. 146-47; 136-39.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 25, 2016, the Board (then-Chairman Pearce and Member Hirozawa; Member McFerran, dissenting) issued its Decision and Order, adopting the administrative law judge's dismissal of the complaint. In doing so, the Board agreed with the judge's conclusion based on the stipulated evidence that nonmember employees in the Petitioners' situation would have objectively understood that the Union sent the March 31 letter to them by mistake, and that the Union was not requiring them to pay dues under the lapsed union-security clause in the expired collective-bargaining agreement.

STANDARD OF REVIEW

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board's General Counsel bears the burden of establishing an unfair labor practice by a preponderance of the evidence. *See, e.g., NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983). Where, as here, the Board decides that the General Counsel has failed to establish a violation of the Act, the Court must uphold that determination “unless the Board ‘acted arbitrarily or otherwise erred in applying established law to facts.’” *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (internal citation omitted). When reviewing the Board's decision to dismiss a complaint, “[i]t is not necessary that [the Court] agree that the Board reached the best outcome in order to sustain its decision.” *United Steelworkers of Am. Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). Rather, the Court will not disturb the Board's findings and dismissal unless they are “irrational or unsupported by substantial evidence.” *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989).

When the Board interprets an ambiguous or silent provision of the Act – as is the case here with the Board's determination of a union's responsibility towards employees who wish to pay only financial core dues – it “is entitled to judicial deference.” *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43

(1984)) (internal quotation marks omitted). Indeed, this Court has highlighted the strong case for deference to the Board's determinations in this particular area of labor relations:

“All the details necessary to make the rule of [core representational fees] operational were left to the Board, subject to the very light review authorized by *Chevron*. It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the [Supreme Court's core representational fees] decision . . . into a workable system for determining and collecting agency fees.”

Thomas v. NLRB, 213 F.3d 651, 657 (D.C. Cir. 2000) (quoting *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998)). While the Court's review is not “toothless,” it “must be very cautious in entertaining an invitation to reverse the Board.” *Thomas*, 213 F.3d at 657.

SUMMARY OF THE ARGUMENT

The Board's dismissal of the complaint was rational and supported by the stipulated evidence. As the Board found, the Petitioners and similarly situated nonmember employees would have objectively understood that the March 31 letter was sent to them by mistake, given their status, long recognized by the Union, as nonmember objectors who are only obligated to pay financial core dues while a union-security clause is in effect. The Union's letter plainly did not apply to such objectors. To begin, the letter only sought arrearages for unpaid full membership dues, not financial core dues. Moreover, the letter relied for authority solely on the

Union's constitution and bylaws, not the union-security clause in the expired collective-bargaining agreement. In addition, the sole penalty for nonpayment mentioned in the letter was suspension of membership from the Union under its constitution and bylaws. As the Board aptly noted, because the Petitioners were, by choice, not full union members, they would not have found the prospect of suspension from the Union and loss of full union membership applicable to them, much less coercive. In these circumstances, the Board reasonably concluded that employees in the Petitioners' situation would have objectively understood that the letter was sent to them by mistake. The Board therefore dismissed the complaint, finding that the letter would not have tended to restrain or coerce employees in continuing to exercise their statutory right to refrain from joining the Union and paying anything other than financial core dues when a union-security clause is in effect.

The Petitioners' reliance on *Service Employees Local 121RN (Pomona Valley Hospital Center)*, 355 NLRB 234, 235 (2010), *enforced mem.*, 440 F. App'x 524 (9th Cir. 2011), is unavailing. To be sure, *Pomona Valley* reiterates certain undisputed principles pertaining to Section 8(b)(1)(A). But the Petitioners—ignoring key facts that make the outcome in *Pomona Valley* wholly distinguishable from the instant case—seriously overstate its holding. And, contrary to the Petitioners, *Pomona Valley* did not hold that the “mere demand” of *any* dues

arrears is unlawful if made when a union-security clause happens not to be in effect. Because the Petitioners' remaining challenges to the Board's dismissal of the complaint also lack merit, the petition for review should be denied.

ARGUMENT

THE BOARD'S DISMISSAL OF THE COMPLAINT WAS RATIONAL AND SUPPORTED BY THE STIPULATED EVIDENCE

A. Principles Governing the Complaint Dismissal

The Board's decision to dismiss the complaint in this case is informed by several overlapping principles. To begin, it is settled that although employees are not required to become full-fledged members of the Union or to pay full union dues, they can be obligated to pay core representational dues and fees. As the Supreme Court held long ago, Congress—recognizing “the validity of unions’ concern about ‘free riders,’ i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union”—retained language in the proviso to Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) that “gave unions the power to contract to meet that problem.” *Radio Officers’ Union v. Labor Bd.*, 347 U.S. 17, 41 (1954).

Accordingly, although the proviso to Section 8(a)(3) permits unions and employers to enter into agreements requiring “membership” as “a condition of employment,” the requisite “membership” is whittled down to its “financial core,” such that employees are only required to pay dues covering the cost of the union’s collective

bargaining, contract administration, and grievance adjustment duties. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963); *see also Commc'n Workers of Am. v. Beck*, 487 U.S. 735,745 (1988) (Section 8(a)(3) does not permit unions to collect and expend funds over the objections of its nonmembers if those funds are used for non-representational purposes).

Moreover, the obligation to pay financial core dues is triggered by the inclusion of a union-security clause in an extant collective-bargaining agreement, requiring unit employees to pay such dues to their bargaining representative. *Gen. Motors*, 373 U.S. at 743. Such a clause normally does not survive expiration of the agreement, based on the express terms of the proviso to Section 8(a)(3), which makes it clear that the Act does not preclude employers and unions from entering into agreements requiring such payments. *Pomona Valley*, 355 NLRB at 235 & n.6 (citing *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963)). As the Board subsequently explained in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (Aug. 27, 2015), *Bethlehem Steel* held in relevant part that because the proviso to Section 8(a)(3) explicitly conditions the legitimacy of a union-security clause on the existence of a collective-bargaining agreement, parties can impose such a clause “only ‘[s]o long as such a[n agreement] . . . is in force.’ Thus, once . . . [the agreement] expires, so too does a union-security [clause] . . .

established in that [agreement]” *Lincoln Lutheran*, 362 NLRB No. 188, at *6 (quoting *Bethlehem Steel*, 136 NLRB at 1502).⁴ Moreover, a union-security clause cannot be applied retroactively after the agreement expires. *Teamsters Local 492 (United Postal Service)*, 346 NLRB 360, 364 (2006).

Finally, Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A))—which furnishes the basis for the unfair-labor-practice complaint in this case—makes it unlawful for a union to take actions that would reasonably tend to “restrain, coerce, or intimidate employees” in the exercise of rights protected under Section 7 of the Act (29 U.S.C. § 157). *Weigand v. NLRB*, 783 F.3d 889, 894 (D.C. Cir. 2015); *ILA Local 333, AFL-CIO*, 267 NLRB 1320, 1321 (1983). For the reasons noted above (pp.12-14), Section 7 protects not only the right to join and support a labor organization, but also the right to refrain from doing so. The latter includes “the right to refrain from paying union dues when there is no contractual obligation to do so.” *Pomona Valley*, 355 NLRB at 235.

⁴ In *Lincoln Lutheran*, 362 NLRB No. 188, at *6, the Board held that *Bethlehem Steel*’s finding about the effective term of a union-security clause was “compelled by the Act’s plain language” and is “not in dispute.” *Lincoln Lutheran* went on to reach a holding that does not apply here because it involves dues-checkoff authorizations, not union-security clauses. Specifically, *Lincoln Lutheran* further held that although employees still have the right to revoke their dues-checkoff authorizations at contract expiration, the employer’s obligation to check off union dues does not automatically end when the collective-bargaining agreement expires. *Lincoln Lutheran* applied this holding prospectively only.

B. The Union's March 31 Letter Did Not Reasonably Tend To Restrain or Coerce Employees in Maintaining Their Status as Nonmember Objectors

Based on the foregoing principles, the Board dismissed the complaint, which had alleged that the Union violated Section 8(b)(1)(A) by sending a letter to the Petitioners and similarly situated nonmember objectors dunning them for arrearages in full union membership dues. As shown below, in seeking those dues, the letter relied exclusively on the Union's constitution and bylaws, which apply only to full union members. The letter made no mention of the union-security clause in the expired collective-bargaining agreement, and it only sought arrearages for full membership dues—not for the core representational dues that had been owed by the Petitioners and other nonmember objectors under the union-security clause before it expired. Moreover, the only sanction mentioned in the letter was suspension from the Union—a penalty that plainly did not apply to the Petitioners, who had already chosen not to join the Union based on their objection to funding anything other than core representational activities. In these circumstances, the Board found that employees in the Petitioners' situation—whose nonmember status the Union had previously recognized—would objectively have understood that the letter was not applicable to them, and was not requiring them to pay dues under the lapsed union-security clause in the expired agreement. Rather, they would have objectively understood that the letter was sent to them by

mistake, and not as an attempt to restrain or coerce them in violation of Section 8(b)(1)(A) of the Act.

Critically, as the Board found, the letter did not seek core representational fees, which were owed only during the effective period of the contractual union-security clause. Thus, the letter made it clear that the sole consequence of nonpayment would be suspension from full membership under the Union's constitution and bylaws. Specifically, the letter stated: "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." (J.A. 140, 146, 149.) This plainly referred only to the prospect of suspension from the Union (a penalty that would have no effect on the Petitioners and other nonmember objectors), and not to the possibility of suspension and discharge from the job for nonpayment of core representational dues owed under the collective-bargaining agreement when it was in effect. Indeed, the March 31 letter did not even mention the union-security clause in the lapsed agreement, let alone the contractual provision governing suspension and discharge from the job for nonpayment of such dues. In these circumstances, the Board reasonably concluded that the Petitioners would have objectively understood that the letter did not seek to invoke the contractual provisions governing discipline and discharge for the failure pay such dues.

The Board's dismissal of the complaint is further supported by the history of the Petitioners' status as nonmember objectors who paid only core representational dues. (J.A. 140, 149.) Notably, the Union had long made it clear that, as required by *General Motors* and *Beck*, it would respect employees' right to become limited, financial core members rather than full members of the Union. As the Board noted, the Union did just that: during the effective term of the 2006-2010 agreement, and for nearly two years after that, it had honored the right of Petitioners and similarly situated nonmember objectors to pay only financial core dues for representational activities, and only when the contractual union-security clause was in effect. (J.A. 140.) Thus, employees in the Petitioners' situation would have objectively recognized that full union membership was voluntary, and therefore that the March 31 letter seeking full membership dues was sent to them by mistake. Moreover, as the Board aptly concluded, because the Petitioners "were, by choice, already not union members, they would not have found this [the letter's reference to suspension from the Union for nonpayment of full dues] applicable to them, much less coercive." (J.A. 140.)

The Union's October 2, 2013 letter, sent to the Petitioners and other employees several months before the March 31, 2014 letter, further underscored the distinction between full union membership, which is voluntary, and financial core membership, which was obligatory only when the union-security clause was

in effect. In its October 2 letter, the Union acknowledged the Petitioners' ongoing status as nonmember objectors, but encouraged them to consider rejoining the Union as full members. (J.A. 140; 75-78.) The October 2 letter explained that in order to become full members, they would have to pay accrued dues arrearages. (J.A. 140; 75-78.) As a result, the Board concluded that, rather than presume the Union in its March 31 letter was informing the Petitioners of financial core dues owed under the union-security clause of the expired agreement—a topic that the March 31 letter never mentioned—the Petitioners would have “reasonably understood that they were only required to pay dues arrearage should they decide to reinstate their membership or join the Union.” (J.A. 141.)

Furthermore, in a May 13, 2014 letter to the Petitioners, the Union again clarified the distinction between full union membership and financial core dues by explaining that the amount listed in its March 31 letter “indicate[d] the amount of dues . . . need[ed] to become a member in good standing with the Union”—i.e., a full union member. (J.A. 146-47; 136-39.) Like the March 31 letter, the May 13 missive identified the sole source of that obligation as the Union's constitution and bylaws.⁵ In addition, the May 13 letter noted the obvious point that the March 31 letter had not mentioned the union-security clause in the expired agreement, nor

⁵ As the Board noted, “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 members in good standing.” (J.A. 140.)

had it threatened the Petitioners' continued employment pursuant to that clause.

(J.A. 146-47; 136-39.)

In these circumstances, the Board rationally determined on the stipulated evidence that employees in the Petitioners' situation would have objectively understood that the March 31 letter was sent to them by mistake, and that it was not improperly seeking to collect financial core dues pursuant to the expired union-security clause. Instead, as the Board found, the Petitioners "would have reasonably understood that they were only required to pay dues arrearages should they decide to reinstate their [full] union membership and rejoin the Union." (J.A. 141.) Accordingly, "the only objectively reasonable view of the letter, in context, was that it was mistakenly directed to them." (J.A. 141.)

Finally, the Board's decision is consistent with Board precedent. Specifically, the Board emphasized that unlike the instant case, in cases where a violation was found, "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" under that clause. (J.A. 149.) For example, in *Mine Workers District 50 (Ruberiod Co.)*, 173 NLRB 87 (1968), the Board found a violation where a union made numerous explicit threats of job loss if the employees refused to authorize their employer to deduct dues. *Id.* at 91-93. There, the union told employees that

they would lose their job if they did not sign the dues authorization card, and warned that employees who did not authorize the deductions “would possibly be fired.” *Id.* at 91. Similarly, in *Auto Workers Local 785 (Dayton Forging)*, 281 NLRB 704 (1986), the union implicitly threatened “to invoke the security provision of the [expired] contract.” *Id.* at 707. And in *UAW Local 376 (Emhart Indus.)*, 278 NLRB 285 (1986), the Board found that a union unlawfully sought retroactive dues payment under an expired union-security clause by telling employees they were “required, as a contractual obligation,” to pay back dues “as a condition of continued employment.” *Id.* at 285; *see also Iron Workers Local 455 (Precision Fabricators)*, 291 NLRB 385, 387 (1988) (union sought retroactive dues payments and discharge of employees based on expired union-security clause).

As the Board noted (J.A. 148-49 n.15), in contrast with those cases, the Union here did not base its request for dues on an expired union-security clause, nor did the Union even mention the expired agreement. Rather, the Union’s letter relied “solely on . . . [its] own internal membership rules as the authority for collecting dues arrearages.” (J.A. 140.) In these circumstances, the Board appropriately adopted the judge’s dismissal of the complaint, and found that the March 31 letter did not tend to restrain or coerce the Petitioners and similarly situated employees in contravention of Section 8(b)(1)(A) of the Act.

C. The Petitioners Err in Their Heavy Reliance on *Pomona Valley* and Other Distinguishable Cases

In challenging the Board's finding that the Union's March 31 letter was not objectively coercive, the Petitioners present (Br.19-24, 33-36) a litany of circular arguments, most of them asserting that the Board misinterpreted and misapplied *Pomona Valley*. In so doing, the Petitioners ignore key facts that make the outcome in *Pomona Valley* wholly distinguishable from the instant case.

In *Pomona Valley*, the employer and a group of employees who opposed the union accurately informed employees that during a contract hiatus they no longer had to pay dues under the expired union-security clause. *Pomona Valley*, 355 NLRB at 234. In response, the union distributed a flyer disputing that statement, and wrongly asserting that employees remained "obligated to pay dues and fees during the period of negotiations." *Id.* at 235. The flyer also implicitly threatened employees with enforcement of the expired union-security clause by declaring, contrary to settled law, that "retroactivity may occur prior or upon ratification of the contract." *Id.* at 236. In addition, the flyer emphasized that antiunion employees were "still paying dues," suggesting that "even employees who were not union members continued to have a financial obligation to the Union." *Id.* The flyer also threatened employees that if they failed to pay contractual dues during the hiatus period—dues that they did not legally owe—then the arrearages could be collected in a "lump sum" exceeding the amount of periodic core financial dues.

Id. In these circumstances, the Board held that employees would reasonably have understood the flyer to be telling them that they had to pay dues and fees under the expired collective-bargaining agreement, and found that the flyer was unlawfully coercive under Section 8(b)(1)(A) of the Act. *Id.*

The facts in the instant case could not be more different. As the Board noted, the Union's letter here made no mention of dues owed under an expired union-security clause. Instead, it relied solely on the Union's constitution and bylaws, internal union regulations which have no application to nonmember objectors like the Petitioners. As the Board also explained, further distinguishing *Pomona Valley*, the only consequence of nonpayment identified in the letter was suspension from union membership, a penalty that the Petitioners would have objectively recognized as having no effect on them, given their nonmember status. Simply put, because the Petitioners "were, by choice, already not union members, they would not have found this [suspension from the Union] to be applicable to them, much less coercive." (J.A. 140.)

The Petitioners seriously overstate the holding in *Pomona Valley* by incorrectly claiming (Br. 19-24) that it outlaws *any* attempt to collect dues arrearages when a union-security clause is not in effect. In fact, *Pomona Valley* expressly recognizes that there is no such blanket rule, and that the appropriate test is whether a communication tends to restrain or coerce employees in the exercise

of their Section 7 rights. *Pomona Valley*, 355 NLRB at 235. *Pomona Valley* also emphasizes that the Board’s “responsibility [is] to evaluate the entirety of the [communication’s] message in its overall context” in determining “whether the words could reasonably be construed as coercive.” *Id.* The Board fully complied with that duty here.

The Petitioners also miss the mark by asserting (Br. 9, 22) that, in the instant case, the Board interpreted *Pomona Valley* as prohibiting only demands for payment of dues arrearages in a “lump sum.” Rather, the Board simply noted that one aspect of the *Pomona Valley* flyer that contributed to its coerciveness was its suggestion that employees could owe “lump sum” payments in excess of the total amount of periodic fair share dues. (J.A. 140.) In any event, the Petitioners’ claim is a non-issue, as the Union’s letter did not seek such payments.

Nor can the Petitioners rely on other plainly inapposite cases to declare, incorrectly, that the Union’s letter “demands payment under the new union security clause” in the parties’ successor collective-bargaining agreement. For example, the Petitioners erroneously cite (Br. 26-27) *NLRB v. Hotel, Motel & Club Employees Union, Local 568*, 320 F.2d 254 (3d Cir. 1963), where the court found that the union unlawfully refused to inform employees of their dues obligations, including the amount owed and due date, and then demanded their dismissal when the employees became delinquent. That case does not even remotely involve a

situation like the instant case, where the Union mistakenly sent nonmember objectors a billing statement plainly intended for full union members.

For similar reasons, the Petitioners waste ink in relying (Br. 28) on *Local 32B-32J*, 266 NLRB 137, 139 (1983), a distinguishable case where employees signed “dual-purpose cards” that served as applications for membership and authorizations to deduct dues. The union subsequently requested that the employer deduct retroactive dues, arguing that employees, in signing the dual-purpose cards, voluntarily opted to pay dues for a period before the execution of the collective-bargaining agreement. *Id.* The Board rejected that argument, and found that the union violated the Act, because the “very nature of the dual-purpose card was such that it did not allow employees the choice to refrain or not from paying retroactive dues.” *Id.* By contrast, in the instant case, the Union had long honored the Petitioners’ right to refrain from paying core representational dues when no union-security clause was in effect, and the March 31 letter did not seek such dues under an expired union-security clause.⁶

⁶ The Petitioners gain no more ground in arguing (Br. 29) that because union membership is an internal union matter, the Union would not have asked the Hyatt to collect full union dues via dues-checkoff agreements. The stipulated record does not support the Petitioners’ apparent claim that employees lacked dues-checkoff agreements. Moreover, as shown above (p. 7), on April 15 the Hyatt sent the Petitioners letters advising them that the dues deductions had been made in error, and that those sums would be reimbursed in their next paychecks.

In sum, because nonmember objectors in the Petitioners' situation would have objectively understood that the Union's March 31 letter was sent to them by mistake, the letter would not have reasonably tended to restrain or coerce them in continuing to exercise their statutory right to refrain from paying core dues they were not obligated to pay during a contract hiatus. Accordingly, the Board's dismissal of the complaint was rational and supported by the stipulated evidence, and the petition for review should be denied.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review.

/s/ Julie Broido
JULIE BROIDO
Supervisory Attorney

/s/ Valerie L. Collins
VALERIE L. COLLINS
Attorney
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2996
(202) 273-1978

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

May 2017

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT (“THE ACT”)

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or

terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization

affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

Eric Briner Myers, Esquire
McCracken, Stemerma & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105

/s/Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 26th day of May, 2017