Nos. 19-2033, 19-2168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 600, AFL-CIO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LLOYD STONER

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board ("the Board") submits that this case involves the application of established legal principles to factual findings which are well supported by record evidence and reasonable witness-credibility determinations, and that oral argument is therefore unnecessary. However, if the Court concludes that argument would be helpful, the Board requests to participate.

STATEMENT OF JURISDICTION

This case is before the Court on the petition of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 600, AFL-CIO ("the Union") for review, and the cross-application of the Board for enforcement, of a Board Decision and Order issued against the Union on August 28, 2019, and reported at 368 NLRB No. 54. Lloyd Stoner, the Charging Party who initiated the underlying proceedings before the Board, has moved to intervene in support of the Board's Decision and Order; the Court has granted his motion. The Board had jurisdiction over the unfair labor practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as amended ("the Act"). 29 U.S.C. § 160(a). The Board's Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

Whether substantial evidence supports the Board's findings that the Union's failure to promptly process Stoner's resignation of his membership and revocation of his dues checkoff authorization:

1. restrained and coerced him in violation of Section 8(b)(1)(A);
2. breached its duty of fair representation in violation of Section 8(b)(1)(A).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Union's Collective-Bargaining Relationship with the Company

The Union represents a bargaining unit of employees employed by Ford Motor Company ("the Company") at its Dearborn, Michigan facility. (JA 151; JA 300.)[1] The Company and the Union are parties to a collective-bargaining agreement ("the CBA") in effect from November 23, 2015 to September 14, 2019. (JA 151; JA 292-307.) Pursuant to Article 3 of the CBA, the Company withholds union membership dues from the wages of employees who authorize such

[1] "JA" references are to the Joint Appendix filed by the Union. "Br." references are to the Union's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

withholdings and remits those monies to the Union twice per month. (JA 151; JA 302.)

While the CBA states that resignation of union membership does not relieve an employee from a checkoff obligation, and that an employee may only revoke a dues checkoff authorization within a certain window of time, it is undisputed that those restrictions are not enforced. (JA 151 n.4; JA 215, Br. 2.) A bargaining unit employee may resign membership from the Union by sending a signed letter at any time to its financial secretary, Mark DePaoli. (JA 151; JA 246.) Upon receipt of such a letter, DePaoli customarily sends a letter notifying the Company's human resources manager at the Dearborn facility to cease deducting dues from the employee's wages. (JA 151; JA 249.)

B. Stoner's Employment with the Company and Membership in the Union

On January 26, 1994, Stoner began working for the Company. (JA 151; JA 219.) The same day, he executed a form, called a dues checkoff authorization, directing the Company to deduct membership dues from his wages and remit them to the Union. (JA 151; JA 308.) Since approximately 2009, Stoner has worked at the Company's Dearborn facility as a materials handler. (JA 151; JA 219-20.)

In February 2018, Stoner decided to resign his membership in the Union. (JA 152; JA 220.) Before resigning, Stoner left several voicemail messages for the Union's financial secretary, Mark DePaoli, requesting a copy of his checkoff

authorization form. (JA 152; JA 220-21.) DePaoli returned Stoner's phone call around the end of February or beginning of March. (JA 152; JA 221.) On March 5, DePaoli sent the authorization form to Stoner by email. (JA 152; JA 221, 324.)

C. In March, Stoner Resigned from the Union and Revoked His Dues Authorization, but the Union Did Not Process His Resignation and Revocation

On March 9, Stoner notified the Union and the Company by certified mail, return receipt requested, of his resignation from the Union "effective immediately." (JA 152; JA 222-23, 325.) In addition, Stoner wrote:

> Since I have resigned my membership in the union, you must immediately cease enforcing the dues check-off authorization agreement that I signed. That check-off authorization is hereby revoked. I signed that check-off authorization solely in conjunction with, and in contemplation of, my becoming a member of the union; and, as such, it is no longer valid. (JA 152; JA 325.)

Finally, Stoner's letter requested that the parties promptly inform him in writing if they refused to accept his membership resignation and dues checkoff revocation and to state the reasons for such refusal. (JA 152; JA 325.)

On March 12, the Union received Stoner's March 9 letter. (JA 152; JA 262.) Upon receiving Stoner's request, DePaoli drafted a letter instructing the Company's human resources manager to cease deducting dues from Stoner's paycheck. (JA 152; JA 260-61, 326-27.) Contrary to DePaoli's customary practice, he did not forward the letter to his assistant for printing on letterhead, nor

did he take any other action at that time to notify the Company about Stoner's resignation and revocation. (JA 152; JA 265.)

D. The Union Continued Accepting Dues Remittances From Stoner's Wages Through June

On March 19, the Company sent a letter to Stoner stating that because his revocation was not received within the time frame and in the manner specified in the CBA, the automatic dues checkoff would continue until Stoner complied with the requirements of the CBA.[2] (JA 152; JA 225-26, 313.) Subsequently, on March 26 and continuing into June, the Company continued to deduct money from Stoner's wages and remitted those funds to the Union notwithstanding the lack of an employee authorization for the deductions and remittance. (JA 152; JA 226-27, 314-18.) The Union continued accepting the dues that the Company deducted from Stoner's paycheck for the remainder of March, all of April, all of May, and part of June. (JA 152; JA 272-73, 314-18.)

On May 29, Stoner filed an unfair labor practice charge with the Board alleging, *inter alia*, that the Union violated the Act by failing to process his

[2] In its letter, the Company (apparently in error) cited the restrictions which are indisputably not enforced; the Union does not rely upon those restrictions to argue that Stoner's resignation or revocation were ineffective. (JA 151 n.4; JA 215, Br. 2.)

resignation and revocation, and by continuing to accept dues deducted from his wages. (JA 152; JA 6-8.)

E. In June, the Union Processed Stoner's Resignation and Revocation After Receiving His Unfair Labor Practice Charge

On June 1, after receiving Stoner's unfair labor practice charge from the Board, the Union notified the Company in writing that Stoner had resigned from the Union and directed the Company to cease deducting dues from Stoner's wages. (JA 152; JA 267, 328, 332.) At the same time, the Union made no immediate attempt to contact Stoner to discuss the matter. (JA 152; JA 232, 273-74.)

On June 4 and 8, the Union continued to accept dues deducted from Stoner's paychecks. (JA 152; JA 316-18.) At some point after June 8, the Union ceased accepting Stoner's dues, but continued to retain the amounts previously deducted from his wages. (JA 152.)

F. On August 16, the Union Responded to Stoner and Issued a Partial Refund

On August 16, approximately five months after Stoner's resignation and revocation, and approximately three months after Stoner filed the instant unfair labor practice charge, DePaoli sent him a letter that stated:

> Based on your recent charges filed through the NLRB, it appears that Ford Motor Company is still deducting union dues from your wages. Unfortunately, we have to wait for the company to send us a report of all the dues deducted each month, and currently we only have records through June. If you had contacted me, as you did so many times in the past when you wanted a copy of your dues check off authorization card, I could've resolved

> the issue just by getting copies of your check stubs that show the amount of dues deducted, and I could've reimbursed you within a week. This current process takes much longer. Here is what our records show and what I am authorized to reimburse at this time:
>
> April - $75.25
>
> May - $75.25
>
> June - $66.75
>
> TOTAL - $217.25
>
> Should Ford Motor Company deduct any further dues, you can contact me for prompt reimbursement, or you can continue to contact the NLRB and they will let me know. (JA 152; JA 225, 232, 319.)

DePaoli enclosed a check for $217.25, the amount referenced in the letter. (JA 152; JA 270-71, 320, 329-31.) However, the amount deducted from Stoner's pay after he resigned from the Union in March and continuing through June was $247.35. (JA 152-53; JA 232, 239-40; 314-20.)

G. The Board's General Counsel Issued a Complaint

On August 23, following an investigation, the Board's General Counsel issued an unfair labor practice complaint alleging that the Union violated two sections of the Act.[3] (JA 11-20.) First, the complaint alleged that the Union violated Section 8(b)(1)(A) when it restrained and coerced Stoner in the exercise of

[3] Initially, the complaint against the Union was consolidated with a complaint against the Company. On January 7, 2019, after the Company executed a settlement agreement, the Board's General Counsel issued an order severing the cases and withdrew the allegations against the Company. (JA 149 n.3; JA 28-29.)

his Section 7 right to refrain from joining or assisting a labor organization by failing to promptly process his resignation of union membership and revocation of dues checkoff authorization. (JA 11-20.) The complaint alleged that the Union committed an additional violation of Section 8(b)(1)(A) by breaching its duty of fair representation. (JA 11-20.) Second, the complaint alleged that the Union violated Section 8(b)(2) by attempting to cause and causing the Company to continue to deduct dues from Stoner's wages and remit those monies to the Union notwithstanding the absence of an employee authorization for the deductions and remittances. (JA 11-20.) An administrative law judge held an evidentiary hearing and, on February 21, 2019, issued a recommended decision and order finding that the Union committed both alleged violations of Section 8(b)(1)(A), as well as the 8(b)(2) violation. (JA 149; JA 30-42.) The Union filed exceptions to the judge's decision with the Board, and Stoner filed cross-exceptions. (JA 149; JA 45-48, 115-21.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Ring and Members McFerran and Emanuel) unanimously affirmed the administrative law judge's findings that the Union's failure to promptly process Stoner's resignation of union membership and revocation of dues checkoff authorization restrained and coerced Stoner, and constituted a breach of its duty of fair representation, in violation of Section

8(b)(1)(A) of the Act. (JA 149 n.4.) Contrary to the administrative law judge, the Board unanimously found that the Union did not violate Section 8(b)(2) by attempting to cause or causing the Company to continue to deduct dues from Stoner's wages because the Union's inaction did not satisfy the "affirmative act" required to establish an 8(b)(2) violation. (JA 149 n.4.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found, and from, in any like or related manner, restraining or coercing employees in the exercise of their statutory rights. (JA 150.) Affirmatively, the Board's Order requires the Union to: honor Stoner's request to resign from membership and to revoke his dues checkoff authorization; reimburse Stoner for the dues deducted from his wages and remitted to the Union since March 12, 2018, with interest; preserve and provide to the Board records necessary to analyze the amount of backpay due; post remedial notices at its Dearborn, Michigan facility, as well as distribute such notices to its members electronically and by mail. (JA 150.)

SUMMARY OF ARGUMENT

Given the undisputed fact that Stoner's resignation and revocation were effective immediately upon the Union's receipt of his March 9 letter, the only dispute is whether the Union's failure to promptly process his request violated the Act. The Board found that the Union committed two violations: the Union

violated Section 8(b)(1)(A) by its sheer delay, regardless of intent, and additionally by its intentional mistreatment of Stoner, which breached the duty of fair representation. Substantial evidence supports both of the Board's conclusions.

First, the Board applied well-settled law to undisputed facts to conclude that the Union's failure to promptly process Stoner's resignation from membership in the Union, and revocation of dues checkoff authorization, restrained and coerced him in violation of Section 8(b)(1)(A). The Board correctly reasoned that, even if the Union's two-and-a-half-month delay in processing Stoner's request was inadvertent as the Union claims, the Union restrained Stoner from exercising his right to refrain from supporting the Union by continuing to accept dues deducted from his wages after he had resigned from the Union.

Second, the Board concluded that the Union's failure to promptly process Stoner's resignation and revocation breached its duty of fair representation, constituting a separate violation of Section 8(b)(1)(A). The Board's conclusion is based on its well-supported findings that the Union intentionally ignored Stoner's resignation and revocation, and then responded reproachfully to him after he filed an unfair labor practice charge.

While both of the Board's conclusions are supported by substantial evidence, and therefore entitled to enforcement, the remedy contained in the

Board's Order would remain the same if the Board were to prevail on either violation.

STANDARD OF REVIEW

"It is well established that [the Court] review[s] the Board's factual determinations as well as the Board's application of law to a particular set of facts under a substantial evidence standard." *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002); *see also* 29 U.S.C. § 160(e) (Board's factual findings shall be conclusive "if supported by substantial evidence on the record considered as a whole"). Substantial evidence exists if there is "sufficient evidence for a reasonable factfinder to reach the conclusions the Board has reached." *Dupont Dow Elastomers LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). "[U]nder this standard, [the Court] defer[s] to the Board's reasonable inferences and credibility determinations, even if [it] would conclude differently under de novo review." *Painting Co.*, 298 F.3d at 499. Specifically, "[t]he Board's choice between two equally plausible and reasonable inferences from the facts cannot be overturned on appellate review, even though a contrary decision may have been reached through de novo review of the case." *Exum v. NLRB*, 546 F.3d 719, 724 (6th Cir. 2008) (internal quotation marks omitted); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Court affords even more deference to the Board's witness credibility determinations and will not normally set aside the Board's conclusions. *NLRB v. Galicks, Inc.*, 671 F.3d 602, 607 (6th Cir. 2012); *see Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 692 n.3 (6th Cir. 2006) (holding that "credibility determinations are the province of the Board"); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 812 (6th Cir. 2002) (noting that courts are "uniquely *unsuited* to pass upon the legitimacy of such disputes" (emphasis original)).

Where the Board interprets the Act, this Court will "defer to the Board's reasonable interpretations of the NLRA, giving respect to the Board's judgment as long as it is 'reasonably defensible.'" *Kellogg Co. v. NLRB*, 840 F.3d 322, 327 (6th Cir. 2016) (citing *NLRB v. Int'l Bhd. of Elec. Workers*, 514 F.3d 646, 650 (6th Cir. 2008)) (legal conclusions not related to the Act are reviewed *de novo*).

ARGUMENT

Substantial Evidence Supports the Board's Findings That the Union's Failure To Promptly Process Stoner's Resignation of His Membership and Revocation of His Dues Checkoff Authorization Violated the Act

A. Substantial Evidence Supports the Board's Finding That the Union's Failure to Promptly Process Stoner's Resignation and Revocation Restrained and Coerced Him in Violation of Section 8(b)(1)(A)

1. By continuing to accept Stoner's dues for months after he resigned his membership and revoked his dues checkoff authorization, the Union restrained and coerced him in the exercise of his right to refrain from union support in violation of Section 8(b)(1)(A)

Among other rights, "Section 7 of the Act, 29 U.S.C. § 157, grants employees the right to 'refrain from any or all [concerted] ... activities....'" including the right to refrain from joining or assisting a labor organization. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 100 (1985). "This general right is implemented by § 8(b)(1)(A). The latter section provides that a union commits an unfair labor practice if it 'restrain[s] or coerce[s] employees in the exercise' of their § 7 rights." *Id.* at 100-01.

It is well-settled that employees have an absolute right to resign from a union at any time, and any restriction on that right is "inconsistent with the policy of voluntary unionism" implicit in the Act. *Id.* at 104 (citing *Int'l Ass'n of Machinists, Inc., Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB 1330 (1984) (any restriction imposed on a member's right to resign union membership or to

otherwise refrain from Section 7 activities violates Section 8(b)(1)(A)). "For more than 30 years, and with the Supreme Court's approval, the Board has adhered to the principle that any restrictions placed by a union on its members' right to resign are . . . unlawful because, among other reasons, when a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities." *Local 58, IBEW (Paramount Indus., Inc.)*, 365 NLRB No. 30, slip op. at 2 (Feb. 10, 2017), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018) (quotations omitted).

Similar to an employee's unfettered right to resign from union membership, employees have "a statutory right to revoke their [dues] checkoff authorizations," and "nothing will be permitted to prevent the free exercise of that right," with the exception of certain ministerial restrictions not relevant here. *Atlanta Printing Specialties*, 215 NLRB 237, 240 (1974) (union's failure to process an employee's revocation of dues authorization violated Section 8(b)(1)(A)), *enforced*, 523 F.2d 783, 784 (5th Cir. 1975). A union violates Section 8(b)(1)(A) by continuing to accept dues deducted from an employee's wages after he revokes a dues checkoff authorization. *See Int'l Brotherhood of Elec. Workers, Local No. 2008 (Lockheed Space Operations)*, 302 NLRB 322, 330 (1991).

A union's delay in processing a resignation request or dues revocation constitutes an unlawful restriction in violation of Section 8(b)(1)(A). *See*, *e.g.*, *Affiliated Food Stores*, 303 NLRB 40, 45 (1991) (union's 10-week delay in processing an employee's resignation and revocation violated Section 8(b)(1)(A)). This holds true even when the union's delay is inadvertent. *See Teamsters Local 385 (Walt Disney)*, 366 NLRB No. 96, slip op. at 2 n.4 (2018) (union violated Section 8(b)(1)(A) by failing to timely revoke a dues checkoff because the employee's revocation letter was misfiled).

Here, there is no dispute that Stoner resigned from membership in the Union and revoked his dues checkoff authorization by letter dated March 9. Nor is there any dispute that, after receiving Stoner's valid resignation and revocation on March 12, the Union failed to direct the Company to cease deducting dues, and instead accepted dues from Stoner's paychecks throughout the remainder of March, all of April, all of May, and through June 8. Finally, it is undisputed that the Union continued to retain the misappropriated dues until August, months after Stoner filed an unfair labor practice charge with the Board.

Each time the Union accepted dues from Stoner's wages, funds that belonged to Stoner were used to support the Union against his wishes and, thus, the Union unlawfully coerced him in his right to refrain from lending it support. *See*, *e.g.*, *Lockheed Space Operations*, 302 NLRB at 330 ("by continuing to collect . . .

regular dues from [employee's] wages after he communicated his intent to resign membership and to revoke his authorization, the [union] is treating him as if he is still a member of [the union] or has agreed to pay dues even when not a member" in violation of 8(b)(1)(A)); *Affiliated Food Stores*, 303 NLRB at 41 (union violated Section 8(b)(1)(A) by refusing to process resignation request in timely manner and continuing to accept dues). That is precisely the type of restraint or coercion that Section 8(b)(1)(A) prohibits.

2. The Union's arguments in support of its position that it did not restrain and coerce Stoner all fail

The Union's argument that it did not restrain and coerce Stoner when it admittedly failed to promptly process his resignation and revocation can be distilled to three basic contentions. The first contention, an attempt to distinguish *Lockheed Space Operations* and *Affiliated Food Stores, Inc.*, fails because the Board's reliance on those cases is factually sound. The second contention, that the Union's coercion of Stoner can be excused by a purportedly inadvertent error, is refuted by *Teamsters Local 385 (Walt Disney).* The third contention, that a smattering of cases undermines the Board's analysis, fails because none of those cases involve a union that failed to process a member's resignation or revocation of dues authorization.

a. *Lockheed Space Operations* and *Affiliated Food Stores, Inc.* cannot be distinguished on their facts

The Union's attempt to distinguish *Lockheed Space Operations* and *Affiliated Food Stores, Inc.*, cited by the Board (JA 153-54), is unavailing. The Union argues that *Affiliated Food Stores, Inc.* is inapplicable because the union in that case engaged in an affirmative act, *i.e.*, it "***instructed*** the employer to continue making dues deductions," whereas the Union here wholly failed to take any action beyond accepting and retaining Stoner's dues. (Br. 14 (emphasis original.)) While true, in that case, the union's affirmative act formed the basis of a Section 8(b)(2) violation, an allegation which the Board here correctly dismissed on the facts. (JA 149 n.4.) The Section 8(b)(1)(A) violation in *Affiliated Food Stores, Inc.*, however, rested solely on the union accepting and retaining dues after the employee made a valid resignation request, just as the Board found that the Union did here. Thus, *Affiliated Food Stores, Inc.* supports the finding of a Section 8(b)(1)(A) violation here even with no affirmative act.

Lockheed Space Operations is directly on point. In that case, the union "did not accept [the employee's resignation] letter as effecting a valid resignation," but took no action except to "continue[] receiving and retaining membership dues deducted from [the employee's] wages." 302 NLRB at 323. On that ground, the Board found a Section 8(b)(1)(A) violation, just as it did here. *See id*. at 330 (union restrained and coerced employee in violation of Section 8(b)(1)(A) "[b]y

receiving, accepting, and retaining membership dues withheld from the pay of" an employee after his resignation and revocation). Because the evidence did not establish that the union "took any affirmative steps to cause the employer to continue to deduct [the employee's] dues postresignation," the Board dismissed the 8(b)(2) allegation, just as it did here. *See id*. Whereas the union in *Lockheed Space Operations* deliberately refused to process the employee's request, the Union here claims its failure to process Stoner's resignation and revocation was inadvertent. As explained in Section b, below, the Union's purported inadvertence is no defense.

b. Under *Teamsters Local 385 (Walt Disney)*, the Union's purportedly inadvertent clerical error does not excuse its coercion

The Union blames its coercion of Stoner on a purportedly inadvertent clerical error and asks this Court to excuse its misconduct on that basis. The Union's argument is refuted by *Teamsters Local 385 (Walt Disney)*, where the Board found numerous violations stemming from a union's failure to timely process resignations and revocations, including one where the Board rejected that union's "inadvertence" defense on nearly identical facts. 366 NLRB No. 96, slip op. at 1-2, 7, 15-16.

There, employee Santana-Quintana submitted to the union a valid resignation and revocation of his dues checkoff authorization. Slip op. at 7. Although the union received the request, it failed to take any action and continued

accepting dues deducted from Santana-Quintana's wages. *Id.* About four months later, and just days after Santana-Quintana filed a charge with the Board, the union sent him a letter acknowledging his request, explaining that his request had been inadvertently misfiled, and enclosing a check that fully refunded the misappropriated dues. *Id.* The Board found that the union violated Section 8(b)(1)(A) by failing to promptly respond to or honor Santana-Quintana's resignation and revocation, even though the union had voluntarily issued a full refund. *Id*. Notably, the Board unanimously held that those facts did not require analysis under the duty of fair representation, but instead constituted unlawful restraint and coercion in violation of Section 8(b)(1)(A). *Id*. at 2 n.4.

Here, the Union's misconduct is eerily similar to that in *Teamsters Local 385*. As in *Teamsters 385*, the Union admitted that it received Stoner's March 9 resignation and revocation letter and that it neither notified the Company of Stoner's request nor replied to him until months later, after Stoner filed an unfair labor practice charge on May 30. On those facts alone, the Board could have safely followed *Teamsters Local 385* to reject the Union's inadvertence defense. But the facts provide an additional reason to reject the defense: even worse than the union in *Teamsters Local 385*, which provided Santana-Quintana a full refund within a week of receiving his unfair labor practice charge, the Union here retained Stoner's misappropriated dues for nearly three more months before issuing only a

partial refund on August 16. Even if the Union's clerical error could justify its delay in notifying the Company to cease deducting dues, the additional three months that the Union waited before returning (only some of) Stoner's dues cannot be explained. The Union stops short of claiming that it could not immediately issue a refund because—as its August 16 letter states—it could have calculated the amount to be refunded based on his pay stubs and reimbursed Stoner "within a week." (JA 152; JA 319.) Clearly, from June 1 through August 16, the Union's retention of Stoner's dues was no longer inadvertent; neither is the Union's ongoing retention of the dues that the Union never refunded.

The Union argues that *Teamsters Local 385* stands for the proposition that the Board may find a Section 8(b)(1)(A) violation only if there is evidence supporting an inference of "a union's intent to interfere with Section 7 rights." (Br. 14.) That is incorrect as a matter of law and irrelevant as a matter of fact.

As a matter of law, *Teamsters Local 385* supports the Board's finding of a Section 8(b)(1)(A) violation independent of the Union's intentional misconduct. In that case, as the Union points out (Br. 14), the Board made "factual findings that the [union] repeatedly and deliberately failed to respond in any manner to the Charging Parties' letters, telephone calls, and/or in-person inquiries regarding revocation of their dues checkoff authorizations." Slip op. at 1. However, the conclusion that the union violated Section 8(b)(1)(A) by ignoring employee

revocation requests relied upon those factual findings only insofar as six of the eight employees had made untimely and ineffective revocations. Slip op. at 2 n.4. In the case of Santana-Quintana and one other employee who made a timely and effective revocation request, the Board employed a straightforward "restraint and coercion" analysis. *Id.* Similarly here, where Stoner made a timely and effective revocation request, the Board reasoned that the absence of a broader pattern of willful misconduct encompassing multiple employees "does not negate the fact that [the Union]'s inaction or delay amounted to a restraint on Stoner's Section 7 right to refrain from union affiliation." (JA 154.)

An additional violation found in *Teamsters Local 385* underscores the point that, where there is no dispute that a union has failed to honor an employee's effective resignation from a union, a Section 8(b)(1)(A) violation does not require the union's failure to be deliberate. *Id.* at 2. Completely apart from that union's repeated and deliberate failure to respond to revocation requests, the Board found a separate violation of Section 8(b)(1)(A) when that union simply failed to honor the timely and effective membership resignation requests of seven employees. *Id.* Thus, even though the evidence may show that a union engaged in deliberate misconduct, such a showing is not necessary for the Board to find a violation of Section 8(b)(1)(A). The Board followed that reasoning here, where it found a "restraint and coercion" violation of Section 8(b)(1)(A) based solely on the

Union's failure to promptly process Stoner's timely and effective resignation and revocation, and then examined evidence pertaining to the Union's intent only to evaluate whether the Union fulfilled its duty of fair representation.

Finally, as a matter of fact, the Union's argument that a Section 8(b)(1)(A) violation may only be found if there is evidence supporting an inference of "a union's intent to interfere with Section 7 rights" (Br. 14.), is irrelevant. As explained more fully in the duty of fair representation analysis, *infra*, the Board found that the Union "intentionally ignored" Stoner's resignation and revocation when, shortly after receiving the request, DePaoli drafted a responsive letter and then "decided to sit on it for a while." (JA 155.) Thus, even if the Act required a finding of intent to support a violation of Section 8(b)(1)(A), which it does not, such a requirement would be satisfied by the record evidence.

c. The remaining cases cited by the Union do not support its contention that its purported clerical error excuses its coercion

Aside from attacking *Teamsters Local 385*, the Union relies on four cases to support the proposition that an inadvertent clerical error excuses a violation of Section 8(b)(1)(A) or to otherwise criticize the Board's sound analysis. (Br. 15-17.) However, none of the four cited cases involve a union restraining and coercing an employee by refusing to process a resignation request, or by accepting and retaining misappropriated dues in the absence of a valid authorization.

In the first two cases, the Board analyzed whether a union's operation of a hiring hall violated Section 8(b)(1)(A). *Plumbers & Pipefitters Local Union No. 520, (Aycock, Inc.)*, 282 NLRB 1228, 1232 (1987) (evidence insufficient to show union operated hiring hall in discriminatory manner); *Jacoby v. NLRB*, 325 F.3d 301, 302 (D.C. Cir. 2003) (same). In each case, the Board engaged in a fact intensive inquiry and found insufficient evidence to establish an unlawful motive or intentional deviation from established procedures. As the Board explained in its decision underlying *Jacoby*, excusing inadvertent errors makes sense in the context of a hiring hall because:

> When […] a union officer in charge of referrals intends to follow the prescribed procedures and thinks that he has done so, his inadvertent failure to do so, even to the detriment of an applicant, simply does not carry the message that applicants had better stay in the good graces of the union if they want to ensure fair treatment in referrals. …. [M]ere negligence does not constitute a display of "union power" which would carry a coercive message that could reasonably be thought to encourage union membership.

Steamfitters Local Union No. 342, 336 NLRB 549, 552 (2001). That rationale has no application to the instant case not involving a hiring hall, where the "restraint and coercion" lies not in encouraging union membership under threat of a withheld

job referral, but in forcing an individual to surrender his Section 7 right to refrain from associating with or contributing money to a union.[4]

In addition to the two hiring hall cases, the Union adds two more cases that only serve to further muddle the analysis under Section 8(b)(1)(A). (Br. 15-16.) The first one, *NLRB v. Local 299, International Brotherhood of Teamsters*, 782 F.2d 46, 52 (6th Cir. 1986), speaks to Section 8(b)'s legislative history as it pertains to violence, but certainly does not stand for the Union's stated proposition that "violence, intimidation and reprisals or threats thereof" are the only types of conduct that give rise to a Section 8(b)(1)(A) violation. Similarly, *NLRB v. International Brotherhood of Electrical Workers, Local 429*, 514 F.3d 646, 649 (6th Cir. 2008), outlines a burden-shifting framework for analyzing retaliation and discrimination on the basis of anti-union views, but there is no support in the law for applying that framework to other types of Section 8(b)(1)(A) violations not involving disputed motivation as the Union asks the Court to do.

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[4] Aside from citing *Plumbers & Pipefitters Local Union No. 520*, 282 NLRB at 1232, and *Jacoby*, 325 F.3d at 302, for the proposition that an inadvertent clerical error excuses a violation of Section 8(b)(1)(A), the Union also cites *Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985). Because that case analyzes whether a union's negligent grievance handling breaches its duty of fair representation, the Union's reliance on it to defend against the duty of fair representation violation is discussed *infra* at 33.

B. Substantial Evidence Supports the Board's Finding That the Union's Failure to Promptly Process Stoner's Resignation and Revocation Breached its Duty of Fair Representation in Violation of Section 8(b)(1)(A)

1. The Board applied well-settled law to its reasonable findings that the Union intentionally ignored Stoner and responded reproachfully after he filed a charge with the Board

A union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union's actions are arbitrary if its conduct is so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). Bad faith is shown when a union acts with an improper intent, purpose, or motive encompassing fraud, dishonesty, or other intentionally misleading conduct. *Ohlendorf v. United Food & Commercial Workers Int'l Union, Local 876*, 883 F.3d 636, 644 (6th Cir. 2018).

Here, the Board concluded that the Union breached its duty of fair representation by "intentionally ignoring" Stoner's resignation and revocation requests until Stoner filed a charge with the Board over two and a half months later. (JA 149, 154.) To support this conclusion, the Board relied upon its finding that DePaoli's explanations for the delay were "vague and less than credible." (JA 152 n.7.) Rather than credit DePaoli's self-serving testimony, the Board drew the reasonable inference that he drafted a letter promptly upon receiving Stoner's

resignation and revocation, "and then decided to sit on it for a while." (JA 155.)[5] While the Union argues that DePaoli "only realized that he had not transmitted the notification letter when he received Stoner's initial NLRB charge" (Br. 28), the Union provides no reason to overturn the Board's finding that DePaoli's testimony on this subject was not credible.[6] (JA 152 n.7; JA 258-67, 272-75.) Even if the Court believes that an honest mistake on DePaoli's part is just as likely as intentional delay, "the Board's choice between two equally plausible and reasonable inferences from the facts cannot be overturned on appellate review." *See Exum*, 546 F.3d at 724.

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[5] The judge's finding that DePaoli "decided to sit on" the letter to the Company appears in his analysis of the Section 8(b)(2) allegation, which the Board ultimately dismissed. (JA 155.) That factual finding is analytically inseparable from the judge's earlier finding, which appears in his analysis of the duty of fair representation, that the Union "intentionally ignor[ed]" Stoner's resignation and revocation. (JA 154.) The Board disavowed the judge's legal conclusion that the Union violated Section 8(b)(2), but in all other respects, "decided to affirm the judge's rulings, findings, and conclusions." (JA 149.) Thus, while the Board reasoned that the finding of Union inaction did not demonstrate the required affirmative act for a Section 8(b)(2) violation, the Board did not disturb or disavow the judge's factual finding that such inaction was intentional. (JA 149 n.4.)

[6] The Union merely argues that the Board used its credibility findings "to reach unreasonable conclusions." (Br. 22.) As the Union's opening brief has developed no argument that the Board's credibility determinations should be overturned or a basis for such reversal, the issue is waived. *See Lou's Transp., Inc. v. NLRB*, 945 F.3d 1012, 1027 (6th Cir. 2019) (issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are forfeited); *see also* Fed. R. App. P. 28(a)(8)(A).

In addition to intentionally ignoring Stoner's resignation and revocation, the Board found that the Union breached its duty of fair representation by "responding reproachfully" after learning that Stoner had exercised his Section 7 rights by filing a charge with the Board. (JA 149, 154.) The Union's reproachful response was twofold: it first forced Stoner to wait an additional three months before issuing a partial refund, and when it finally did respond to him, it "excoriated Stoner for exercising his Section 7 rights." (JA 154.) The Union does not dispute that it continued to delay in refunding any dues to Stoner until August 16. The Union does argue that its August 16 letter is innocuous (Br. 25), but ignores the obvious meaning underlying its statement, "[i]f you had contacted me […] I could've reimbursed you within a week. This current process takes much longer." (JA 319.) The message to the employee-member is clear: the Union alone controls when misappropriated dues are reimbursed, and those who exercise their right to contact the Board will be punished with delay. The letter then suggested that Stoner would suffer further delay to obtain the remainder of his dues if he continued contacting the Board: "you can contact me for prompt reimbursement, or you can continue to contact the NLRB and they will let me know." (JA 319.) Those completely unnecessary statements demonstrate the Union's failure to fulfill its duty to Stoner.

The Union cites *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 470 (6th Cir. 2019), for the proposition that "similar innocuous language in a letter by an employer to employees was not an unfair labor practice." (Br. 225.) However, the Court's decision in *Hendrickson* arose from an entirely different context in which an employer attempted to persuade its employees, who were engaged in an organizing campaign, that a union would not be in their best interest. *Id*. at 471, 474 (employer lawfully informed employees that if they became represented by a union, negotiations would begin from scratch, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency"). The result turned on Section 8(c) of the Act, which the Court found "manifest[s] a congressional intent to encourage free debate on issues dividing labor and management," and "favor[s] uninhibited, robust, and wide-open debate in labor disputes" so that "both the employer and employees may express themselves on the merits of the dispute in order to influence its outcome." *Hendrickson*, 932 F.3d at 470.[7] In that context, the Court applied Supreme Court precedent holding that "the distinction between lawful advocacy and coercive threat turns on whether the

[7] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

employer communicates that predicted adverse consequences of unionization are 'outside [the employer's] control' or instead 'taken solely on [the employer's] own volition.'" *Id.* at 470-71 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969)).

Hendrickson has no application here. The Union does not argue in its opening brief, nor did it argue before the Board, that its August 16 letter is protected under Section 8(c). In contrast to persuasive statements made to support or oppose an organizing campaign, it is difficult to imagine how the letter could be construed to fall under Section 8(c)'s protections because it does not express any "views, argument, or opinion" regarding "the merits of [a labor] dispute in order to influence its outcome." *Hendrickson*, 932 F.3d at 470. Even if Section 8(c) were to apply, *Hendrickson* demonstrates that the Union's letter falls outside its protections because the letter implicitly threatens adverse consequences on a matter solely within the Union's control, *i.e.*, when Stoner will finally receive a refund of his misappropriated dues, if ever. *See id.* at 471.

2. The Board did not misapply precedent because it found that the Union's intentional acts amount to more than mere negligence

The Union boldly claims that the Board "disregarded dozens of rulings holding that negligence or inadvertence is not the type of conduct that violates the duty of fair representation." (Br. 17-19.) The Union spills much ink on various case citations supporting the mundane proposition that negligence is insufficient to

prove a breach of the duty of fair representation. *See, e.g., United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990); *Int'l Union, United Auto., Aero. & Ag. Implement Workers of America, Local 1700 v. NLRB*, 844 F.3d 590 (6th Cir. 2016); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988); *Adams v. Budd Co.*, 846 F.2d 428 (7th Cir. 1988); *Eichelberger*, 765 F.2d at 854-55; *H & M Int'l Transp., Inc.*, 363 NLRB No. 139, slip op. at 32 (Mar. 1, 2016). Here, as the Board found, intentional conduct like the Union's decision to ignore Stoner, as well as the Union's reproachful response to Stoner's protected activities, constitutes "more than mere negligence." (JA 155.)

The Board did not apply a diluted duty of fair representation standard, as the Union claims. The Union attempts to mislead the Court by taking out of context two of the Board's statements. First, the Board's statement that "intent is not a required element of an 8(b)(1)(A) violation" (JA 154; Br. 20), is accurate as a matter of law, given that it has nothing to do with the Board's duty of fair representation analysis, and only appears in the independent 8(b)(1)(A) analysis. Second, the Union quotes a passage from that same section of the Board's analysis, that "'the evidence failed to establish . . . a pattern of behavior on the part of Local 600 to willfully ignore Stoner's request.'" (Br. 20.) Conveniently, the Union's ellipsis omits the key words, "as Local 600 puts it," thereby obscuring the fact that the Board was addressing the Union's argument. (JA 154.) Even if the quoted

passage were to be applied to the duty of fair representation analysis, it would not undermine the Board's conclusion as the Union claims. The absence of a broader pattern of malfeasance does not negate the Union's intent to drag its feet in honoring Stoner's resignation and revocation.

In short, as those out-of-context statements do not pertain to the Board's duty of fair representation analysis, they do not support the Union's "sleight of hand" argument that the Board applied a diluted standard. Rather, the Board applied the well-established duty of fair representation standard to the Union's decision to intentionally ignore Stoner, as well as the Union's reproachful response to Stoner's protected activities, and correctly concluded that the Union breached its duty in violation of Section 8(b)(1)(A).

C. The Union's Remaining Arguments Fail

Because the Union's opening brief blurs the duty of fair representation analysis with the independent 8(b)(1)(A) analysis, some of its arguments do not fit neatly under one heading or the other. Those arguments fail for the reasons described below.

1. The Act imposes no duty to mitigate damages on an employee resigning from a union and revoking dues authorization

The Union argues that the Board's purported failure to consider Stoner's "failure to mitigate his damages is contrary to established precedent" and requires vacating the Board's decision and order. (Br. 11, 28.) Conspicuously absent from

that argument is any citation to the supposedly established precedent. One of two cases relied upon by the Union for the proposition, *Eichelberger v. NLRB*, considers an employee's "inaction" in the grievance handling context and to evaluate whether "union negligence [is] the solitary and indivisible cause of the complete extinguishment of an employee's grievance rights." 765 F.2d at 855. By its own terms, *Eichelberger* imposes an especially demanding standard to circumscribe the exceptional case where mere negligence may violate Section 8(b)(1)(A). *Id.* As the Board found "more than mere negligence" here, *Eichelberger* does not apply. (JA 155.) Moreover, there is no support in the law for applying such a demanding standard where a union has infringed on its member's absolute right to resign, *see Pattern Makers' League*, 473 U.S. at 100, and has admittedly accepted and retained dues without the necessary authorization, *see Lockheed Space Operations*, 302 NLRB at 330.

The second case, *Contractor Services, Inc.*, centers on the well-settled principle that an employee who is discharged in violation of the Act can only recover a make-whole backpay remedy if he mitigates his losses by searching for work. 351 NLRB 33, 36 (2007); *see also, Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 n.7 (1957). That axiom has no relevance to this case.

Here, there is no dispute that Stoner did the only thing he needed to do to resign from the Union and revoke dues authorization: make a written request to

the Union. That is where his responsibility came to an end; the Union failed to keep up its end of the bargain. In fact, Stoner went above and beyond his obligation by approaching the Company when it sent a letter refusing to cease dues deductions. (JA 226-27.) Having received no such refusal from the Union, Stoner had no reason to think that the Union would do anything other than fulfill its legal obligation, which was to direct the Company to cease deducting dues, and refuse to accept any such dues remitted to it.

2. The Board did not ignore exculpatory evidence

The Union argues that the Board ignored purported exculpatory evidence, including (1) testimony showing that DePaoli had answered Stoner's questions about resigning from the Union before Stoner submitted his written request, (2) evidence showing that DePaoli promptly drafted (but did not print, sign, or send) a letter directing the Company to cease deducting dues, and (3) testimony showing that DePaoli was unaware that dues continued to be deducted after Stoner revoked authorization. (Br. 26.)

The Board did not ignore that evidence, but instead made findings of facts consistent with it. In the first instance, the Board found that "DePaoli returned Stoner's call" and "emailed Stoner a copy of his dues check-off authorization card," but only after Stoner had left "several voicemail messages." (JA 152.) In the second instance, the Board found that "DePaoli drafted a letter but did not

email it to his assistant for printing." (JA 152.) In the third instance, the Board noted DePaoli's explanation to Stoner in August that, "unfortunately, we have to wait for the company to send us a report of all the dues deducted each month, and currently we only have records through June." (JA 152.)

Moreover, to the extent that the Board did not engage in a protracted analysis of those facts, it is because examples of the Union's good behavior prior to Stoner's resignation, and excuses for the Union's bad behavior after Stoner's resignation, are simply not relevant to finding a violation of Section 8(b)(1)(A). The Board explained as much in its reasoning: "The fact that the evidence failed to establish, as [the Union] puts it, 'a pattern of behavior on the part of [the Union] to willfully ignore [Stoner's] request' does not negate the fact that [the Union's] inaction or delay amounted to a restraint on Stoner's Section 7 right to refrain from union affiliation." (JA 153-54.) Or, in the Board's own words, this type of evidence is irrelevant "because intent is not a required element of an 8(b)(1)(A) violation," and therefore not dispositive of the result. (JA 154.) Because the Board did not ignore relevant evidence as the Union contends, but instead addressed the allegedly contradictory evidence, its order is supported by substantial evidence and should be enforced. *See Loral Def. Sys.-Akron v. NLRB*, 200 F.3d 436, 452 (6th Cir. 1999) (enforcing Board order that adopted judge's findings of

facts, even though those findings did not directly address every piece of evidence purported to be contradictory).[8]

* * *

The Board's conclusions, that (1) the Union independently violated Section 8(b)(1)(A) by its sheer delay, regardless of intent, which restrained and coerced Stoner and (2) breached its duty of fair representation by its intentional mistreatment of Stoner, are supported by substantial evidence. Each finding of a violation is therefore entitled to enforcement. However, the remedy contained in the Board's Order would remain the same if Board were to prevail on either violation.

[8] The Union briefly argues that the Board erred by finding that the Union violated Section 8(b)(1)(A) when it failed to copy Stoner on its June 1 letter to the Company directing it to cease deducting dues from Stoner's pay. (Br. 24.) In reality, the Board found no such violation. Rather, the passages cited by the Union (JA 149 n.4, 154) merely note that the Union breached its duty of fair representation "by intentionally ignoring Stoner's resignation and revocation requests for over two and one-half months" beginning in March. (JA 154.) While the Union might have avoided this entire proceeding by merely replying to Stoner's resignation letter, the Board never held that the Act required the Union to do so.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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January 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 600, AFL-CIO	*	
Petitioner/Cross-Respondent	*	Nos. 19-2033, 19-2168
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 7-CB-221096
Respondent/Cross-Petitioner	*	
and	*	
LLOYD STONER	*	
Intervenor	*	

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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and	*	
LLOYD STONER	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,407 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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