Case Nos. 19-2033 and 19-2168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOCAL 600, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), 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 a Decision and Order of the National Labor Relations Board

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BRIEF FOR INTERVENOR LLOYD STONER IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD

Alyssa K. Hazelwood
Glenn M. Taubman
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
703-321-8510
akh@nrtw.org
gmt@nrtw.org

Counsel for Intervenor

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2033, 19-2168 Case Name: Local 600, UAW v. NLRB

Name of counsel: Alyssa K. Hazelwood

Pursuant to 6th Cir. R. 26.1, Lloyd Stoner
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on February 13, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Alyssa K. Hazelwood
Alyssa K. Hazelwood
Counsel for Intervenor Lloyd Stoner

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATUTES

STATEMENT REGARDING ORAL ARGUMENT

Intervenor Lloyd Stoner ("Stoner") does not believe oral argument is necessary, or that it would assist the Court. Notwithstanding Petitioner/Cross-Respondent Local 600, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO's ("Local 600" or "Union") statements to the contrary, this case involves a limited and straightforward factual record. The entirety of the hearing before the Administrative Law Judge ("ALJ") took just over two hours, resulting in a mere seventy-nine pages of transcript and twenty-nine exhibits. *See* JA 197–279.[1] This case involves the application of well-established law to this limited and straightforward record, thereby making oral argument unnecessary. However, should the Court grant oral argument, Stoner requests to participate fully.

[1] Stoner uses the following abbreviations: "JA" refers to the Joint Appendix of Petitioner/Cross Respondent UAW, Local 600, ECF Nos. 25–27; "Union Br." refers to Brief of Petitioner/Cross Respondent UAW, Local 600, ECF No. 28; and "Board Br." refers to Brief for the National Labor Relations Board, ECF No. 31.

STATEMENT OF JURISDICTION

Stoner agrees with and incorporates by reference Respondent/Cross-Petitioner National Labor Relations Board's ("Board" or "NLRB") statement of jurisdiction. Board Br. at 2.

STATEMENT OF ISSUES

Stoner adopts the Board's statement of the issues, as follows:

> 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).

Board Br. at 3.

STATEMENT OF THE CASE

Stoner adopts and incorporates by reference the Board's Statement of the Case. Board Br. at 3–10. Stoner wishes to clarify and/or bring the following additional facts to the Court's attention.

1. The collective bargaining agreement between Ford Motor Company ("Ford" or "Employer") and the Union, and the dues checkoff authorization ("checkoff") that Stoner signed, restrict an employee's ability to revoke his authorization for automatic dues deductions to a narrow and limited window period. JA 306, 308. Union Financial Secretary Mark DePaoli ("DePaoli") claimed that the

Union did not enforce these restrictions, JA 246, 249,[2] but Ford *did* enforce the restrictions against Stoner, as its rejection letter clearly shows. JA 313 (Ford's rejection letter); JA 225–26 (Stoner's testimony regarding Ford's rejection of his checkoff revocation). Stoner filed an unfair labor practice charge against Ford for its conduct, which resulted in a settlement agreement. JA 28–29.

2. DePaoli testified that when he received an employee's dues checkoff revocation letter, his practice was to draft a letter to Ford instructing it to cease deductions, send it to his secretary to print, and then sign the printed copy for the secretary to transmit. JA 249, 265, 267, 274. He testified that in Stoner's case he drafted the letter to Ford but he did not know if the letter was printed by his secretary. JA 265, 274–75. He admitted that he did not receive a final copy of a letter from the secretary to sign for transmittal. JA 274–75. He testified he took no further action on Stoner's revocation request until after he received Stoner's unfair labor practice charge, despite never having received a final letter to sign, as was the typical procedure. JA 267. The Union produced no evidence of any e-mail or transmittal from DePaoli to his secretary, nor did the Union explain why DePaoli did not take any

[2] It was not the Union's goodwill that caused it to refrain from enforcing its restrictions on employees' ability to revoke their dues checkoffs. Rather, these restrictions could not be enforced because it would have been illegal to do so, under cases like *IBEW, Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322 (1991) (hereinafter "*Lockheed*"). *See Mohat v. NLRB*, 1 Fed. App'x 258, 261–62 (6th Cir. 2001) (adopting the Board's analysis in *Lockheed*).

action when his secretary failed to produce a printed version of the letter for his signature.

3. Stoner testified, and the Union's counsel admitted, that as of the time of the ALJ hearing on January 7, 2019, the Union still had not fully reimbursed him for all of the dues unlawfully deducted from his wages and retained by the Union. JA 213 (Union's counsel stating: "[T]he difference in the amount of money as represented by the opposition is probably less than $100."); JA 241 (Stoner testifying he had not been fully reimbursed as of the trial date). Moreover, the Union tacitly concedes that it continues to retain money deducted from Stoner's wages. Union Br. at 6.

4. Stoner's cross-exceptions to the Board, which are no longer at issue, dealt with the scope of the relief granted, namely the adequacy of the ALJ's proposed notice posting remedy. JA 115–21. Those issues are not before the Court, and Stoner does not take issue with any of the Board's decision.

SUMMARY OF THE ARGUMENT[3]

The Union's arguments conflate two separate and distinct legal analyses, namely the statutory "restraint and coercion" analysis under National Labor Relations Act ("Act" or "NLRA") Section 8(b)(1)(A), and the duty of fair representation analysis, which, once satisfied, is a separate violation of Section 8(b)(1)(A). 29 U.S.C. § 158(b)(1)(A). When properly separated from each other, it is clear that the Board correctly applied the Act and its precedents to the facts, when it determined the Union committed two separate violations of the Act. Substantial evidence supports the Board's findings.

The Union's "dog ate my homework" defense falls flat, both as a matter of fact and law. As a matter of law, a union commits a Section 8(b)(1)(A) when it "restrain[s] or coerce[s]" an employee in the exercise of his Section 7 rights. 29 U.S.C. § 158(b)(1)(A); *see Tamosiunas v. NLRB*, 892 F.3d 422, 429 (D.C. Cir. 2018) (applying a "reasonable employee" standard to determine whether a Union's statement or action is coercive). Put simply, Section 8(b)(1)(A) has no scienter requirement, or a "we were very busy" defense. *See* Union Br. at 7. Here, the Union: failed to acknowledge Stoner's resignation and revocation letter for nearly five months;

[3] In order to avoid repetition and maximize efficiency, Stoner's brief incorporates by reference and mirrors the Board's brief, including using the same headings. Stoner's brief and only adds additional argument and explanation when necessary to highlight and/or clarify the Board's arguments.

retained of all of his dues money for two and a half months *after* it became aware that it had wrongfully accepted his dues; and continues to retain a portion of Stoner's dues. The Union's conduct clearly coerced and restrained Stoner in the exercise of his right to refrain from supporting the Union. *Id*. at 432 (union's threat to garnish employees' wages when no dues were owed constitutes unlawful restraint and coercion).

The Union *does not dispute* that Stoner's resignation and dues revocation were immediately effective at the moment he sent them. Union Br. 10 n.3. Rather, its sole defense to both of its violations rests on the faulty premise that its conduct was "inadvertent." This purported defense is refuted by the simple fact that the Union continues, to this day, to retain some of the money it acknowledges should be reimbursed to Stoner, a fact which even the Union tacitly admits. *See* Union Br. at 6; JA 213.[4] The Union makes much ado over the fact that it acted to rectify its "mistake" as soon as its representatives discovered it, but entirely ignores the dispositive fact that—even after it was made aware of the unlawful deductions in May 2018—it has intentionally retained some of the money it received from Stoner's wages since that

[4] The Union asserts there is "uncontested evidence that the delay was caused solely due to inadvertence." Union Br. at 10. This statement is clearly incorrect. The ALJ found DePaoli's testimony regarding the Union's "inadvertence" defense *not credible*. JA 152. Based on this and the record as a whole, *see infra* Part B.1., the ALJ and the Board correctly found that the evidence demonstrated the Union's conduct was intentional.

time. If the Union's conduct was really a moment of "inadvertence," surely it would have made certain to return *all* of the money it unlawfully retained, as soon as practicable. Moreover, if the Union was truly acting in good faith, it would not have excoriated Stoner for filing an unfair labor practice charge to protect his rights. JA 154, 330. In light of its knowing and glaring failures, the only reasonable explanation for the Union's conduct as a whole is that it was intentional, rather than a good faith but momentary lapse of attention, as the Union claims.

STANDARD OF REVIEW

Stoner adopts the Board's standard of review, with a few additions:

This Court defers "to the Board's findings of fact, reasonable inferences from the facts, and applications of law to the facts if they are supported by substantial evidence on the record considered as a whole." *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 469 (6th Cir. 2019) (citing *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 476, 478 (6th Cir. 2002)). "Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 114 (1985) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

It is only when the Board engages in interpretation of *judicial* precedents or non-NLRA statutes that the Court reviews the Board's determinations *de novo*. *Albertson's Inc. v. NLRB*, 301 F.3d 441, 448 (6th Cir. 2002); *Bowling Transp. Inc. v.*

NLRB, 352 F.3d 274, 280 (6th Cir. 2003); *see also Albertson's, Inc.*, 301 F.3d at 448 (citing *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1123 n.8 (6th Cir. 1997) ("deferring to the Board's definition of 'labor organization,' but noting difference in deference given to Board's reasonable interpretation of the NLRA as opposed to its interpretation of Supreme Court precedent construing the Act"). In a case such as this, where the Board is interpreting the Act itself and not judicial precedent, the Court owes the Board a high level of deference.

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)

Stoner generally agrees with and adopts the Board's arguments. In addition, he adds the following points:

The Sixth Circuit recognizes that: "[u]nder section 8(b)(1)(A), a union, like an employer, is prohibited from interfering with employees' Section 7 rights." *NLRB v. Mich. Conference of Teamsters Welfare Fund*, 13 F.3d 911, 919 (6th Cir. 1993) (citing 29 U.S.C. § 158(b)(1)(A)); *see also Int'l Ladies' Garment Workers'*

Union v. NLRB, 366 U.S. 731 (1961) (affirming a Section 8(b)(1)(A) violation despite the union's good faith). Period. There is no room for assessing a union's motive or intentions in this statutory analysis. "It is a well recognized rule in labor relations law that 'a man is held to intend the foreseeable consequences of his conduct.'" *NLRB v. Tenn. Packers, Inc.*, 339 F.2d 203, 204–05 (6th Cir. 1964) (quoting *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954)). Thus, "Section 8's protective cloak sweeps . . . broadly, proscribing any action by an employer or union that 'has a reasonable tendency' to coerce or restrain employees in the exercise of their Section 7 rights." *Tamosiunas*, 892 F.3d at 429; *see also Local 58, IBEW v. NLRB*, 888 F.3d 1313, 1317 (D.C. Cir. 2018) (citation omitted) ("The Board . . . reasonably interprets the NLRA to prohibit categorically union policies that 'delay or otherwise impede' a member's right to resign or revoke.").

Here, the Union continued to treat Stoner as a member by failing to acknowledge his resignation and accepting and retaining dues from his wages. Without any acknowledgement from the Union that Stoner was no longer a member, either by affirmative statement or by stopping dues deductions, it would be rational for any reasonable employee to believe the Union considered him a member despite his resignation, which restrained and coerced him in the exercise of his NLRA Section 7 right to refrain from supporting the Union. 29 U.S.C. § 157. The Union's

continued acceptance and retention of dues deducted from Stoner's wages even after he sent a valid resignation and checkoff revocation similarly restrained his exercise of the right to refrain from supporting the Union. By failing to promptly accept and act upon Stoner's resignation and checkoff revocation, and by accepting and continuing to retain dues deducted from his wages, the Union clearly restrained and coerced Stoner in the exercise of his Section 7 rights. *See* JA 325, 330.

As stated above, the Union's unlawful conduct goes beyond its initial failure to promptly accept and process Stoner's membership resignation and checkoff revocation. Each time the Union accepted dues deductions from Stoner's wages was a separate restraint on Stoner's Section 7 rights, and was a distinct violation of the Act. *Teamsters Gen. Local Union No. 200*, 367 NLRB No. 93, slip op. at 1 n.1 (Feb. 26, 2019) (citing *Kroger Co.*, 334 NLRB 847, 848 n.3 (2001)) ("[E]ach unlawful deduction restrains or coerces the individual employee in the exercise of his or her statutory right to refrain from supporting the union.").

Thus, even assuming, *arguendo*, that the Union's initial failure to honor Stoner's resignation and checkoff revocation did not violate the Act (which it did), each subsequent deduction without authorization, and the Union's retention of the dues deducted, constitutes distinct and additional violations of the Act. *Id*. Not only is it undisputed that the Union continued to retain the dues deducted from Stoner's wages until August 2018, it is undisputed that the Union never provided Stoner with

a full refund and continues to this day to retain amounts deducted from his wages. *See* Union Br. at 6; Board Br. at 8; JA 213, 241. Therefore, each Union acceptance of dues deducted from Stoner's wages, and its continued retention of a portion of those dues, violate the Act.

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

The Union argues that the Board wrongly applied precedent, but it is actually the Union that mischaracterizes precedent and obscures the appropriate standard of review. The Board's interpretation of its own decisions should be analyzed under the deferential, substantial evidence standard, rather than a *de novo* standard. *Albertson's Inc.*, 301 F.3d at 448. If the Court determines that the Board's ruling in this case is a reasonable construction of the Act and supported by substantial evidence, it should be upheld. The Union's (incorrect) arguments about the Board not properly interpreting its own precedent are irrelevant—the relevant question is whether the Board's interpretation of the Act is reasonable. *See Pattern Makers' League*, 473 U.S. at 114.

Even assuming the Court engages in an in-depth review of the Board's past precedent, the Board's decision in this case is consistent with the current and relevant Board law. *See generally NLRB v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016) ("the Board need not address 'every conceivably relevant line of precedent in [its] archives,'" so long as it discusses "'precedent directly on

point.'" (quoting *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)).

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

Stoner agrees with the Board's arguments, and would simply highlight the facts that: (1) *IBEW, Local 2088 (Lockheed Space Operations Co.*), 302 NLRB 322 (1991) (hereafter "*Lockheed*") was correctly decided and this Court has applied it in at least one case, see *Mohat v. NLRB*, 1 Fed. App'x 258, 261–62 (6th Cir. 2001); and (2) there is no dispute that Stoner's checkoff, which did not contain language binding him to pay dues after his resignation from membership, was validly revoked as of March 9, 2018, the date he transmitted his letter to the Union. Union Br. at 10 n.3; JA 308-10, 323; *Lockheed*, 302 NLRB at 329; *see also In re Allied Prod. Workers Union Local 12*, 337 NLRB 16, 19 (2001); *Graphic Commc'ns Int'l Union Local 735-S*, 330 NLRB 32, 34 (1999); *United Steelworkers of Am., Local 4671*, 302 NLRB 367, 368 (1991); *UFCW, Local 540*, 305 NLRB 927, 928–29 (1991); *Baltimore Sun Co.*, 302 NLRB 436, 437 (1991); *Int'l Woodworkers of Am.*, 304 NLRB 100, 101 (1991).

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

Stoner agrees with the Board's argument and highlights the following: The Board has properly held, in this case and others, that "inadvertence" is not a defense when a union fails or refuses to promptly process resignations and dues revocations. *See, e.g. Teamsters Local 385 (Walt Disney)*, 366 NLRB No. 96 (June 20, 2018). *Teamsters Local 385* fully explains the Board's rationale. There, an employee named Santana-Quintana validly resigned and revoked his checkoff, but the union failed to honor his resignation and revocation and continued to deduct dues from his wages. *Id.*, slip op. at 7. Because the union failed to respond, Santana-Quintana filed an unfair labor practice charge. The union then claimed its conduct was inadvertent—specifically, that Santana-Quintana's letter was misfiled—and refunded the unlawfully deducted dues in full. *Id.* Nevertheless, the Board found that the union's delay, even if due to an administrative error, was a distinct violation of Section 8(b)(1)(A). *Id.*, slip op. at 2 n.4. Here, the Union's conduct towards Stoner is even more egregious. Despite Stoner submitting a valid checkoff revocation letter and filing a charge with the Board, the Union failed to fully refund, and continues to this day to retain, a portion of the dues it accepted from Stoner's wages. *See* Union Br. at 6. The Board properly applied its own *Teamsters Local 385* precedent to Stoner's case, and its construction is the correct interpretation of the Act: Stoner, a

reasonable employee, was clearly coerced and restrained by the Union's multiple failures in this case. *See Tamosiunas*, 892 F.3d at 429 (applying a "reasonable employee" standard to determine whether a union's action is coercive).

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

Stoner agrees with the Board's arguments and makes the following additional observations:

First, the hiring hall cases the Union cites, *Plumbers Local 520 (Aycock, Inc.)*, 282 NLRB 1228 (1987), and *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003), both recognize the Board's public policy interest in incentivizing a union hiring hall recordkeeping: "[I]f a union hiring hall voluntarily chooses to implement a system of recordkeeping to ensure to its membership a means of monitoring its referral rights, that union should not be prejudiced by finding it in violation of the Act for every possible mistake it might make in administering that system." *Plumbers Local 520*, 282 NLRB at 1232; *Jacoby*, 325 F.3d at 305 (quoting *Plumbers Local 520*, 282 NLRB at 1232). Such a public policy interest is not present here. Indeed, and to the contrary, the only public policy interest at issue in this case is seeing that employees' Section 7 right to refrain is protected and not unduly restrained. *See, e.g.*, *Local 58, IBEW (Paramount Indus., Inc.)*, 365 NLRB No. 30, slip op. at 4 (Feb. 10, 2017)

(holding a union has "no authority to unilaterally impose any restriction on the revocation of dues checkoff"), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018). Here, the Union's actions, inaction, and inordinate delay negated Stoner's right to revoke his checkoff just as surely as if the Union maintained and enforced formal policies restricting revocations. Thus, these cases are inapplicable to this case.

Second, not only is *NLRB v. Local 299, International Brotherhood of Teamsters*, 782 F.2d 46 (6th Cir. 1986) distinguishable on its facts, it is not good law for the proposition that only "violence, intimidation, and reprisals or threats thereof" constitute a Section 8(b)(1)(A) violation. *See id.* at 52; Union's Br. at 15–16. The Supreme Court and other courts have found Section 8(b)(1)(A) violations without such heinous acts. *See, e.g.*, *Pattern Makers' League*, 473 U.S. 95 (holding a union's enforcement of rules restricting employees' right to resign violates Section 8(b)(1)(A)); *NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am., Local 22*, 391 U.S. 418 (1968) (holding a union violated Section 8(b)(1)(A) by requiring an employee to exhaust internal union procedures before filing a charge with the Board); *Local 58, IBEW*, 888 F.3d 1313 (enforcing a Board order that struck down union rules restricting resignations and revocations); *Tamosiunas*, 892 F.3d at 429–31 (holding a union violated Section 8(b)(1)(A) by demanding and accepting union dues from employees' paychecks after they had resigned and objected to paying full union dues); *Quick v. NLRB*, 245 F.3d 231, 249 (3d Cir. 2001) (finding that a union

violated Section 8(b)(1)(A) by attempting to collect dues after the employee resigned). In fact, the D.C. Circuit has specifically held "Section 8(b)(1)(A)'s prohibition against restraint or coercion . . . is not limited to union conduct involving threats of violence or economic coercion." *Helton v. NLRB*, 656 F.2d 883, 887 (D.C. Cir. 1981) (footnote omitted).

Third, the Union cites *NLRB v. IBEW Local 429*, 514 F.3d 646 (6th Cir. 2008), for its claim that a burden-shifting analysis applies. That case, however, is inapposite. There, this Court specifically stated: "When reviewing claims of *union discrimination against an employee* in violation of §§ 8(b)(1)(A) and (2) of the Act, the NLRB applies the burden-shifting analysis described in *Wright Line*." *Id.* at 649 (emphasis added) (citing *Wright Line, Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)). In that case, the employee alleged he was retaliated against for dues delinquency and for anti-union views. *Id.* at 647. Here, there is no such allegation of retaliatory or discriminatory conduct, simply a Union refusal or failure to promptly process an employee's resignation and revocation. The application of the *Wright Line* test, therefore, is inappropriate in this case. *See generally Radio Officers'*, 347 U.S. 17 (holding that parties are liable under Section 8 for the natural and foreseeable consequences of their conduct); *Tenn. Packers, Inc.*, 339 F.2d at 204–05.

Fourth, the Union cites *Meijer, Inc. v. NLRB*, 463 F.3d 534 (6th Cir. 2006) for the proposition that "motivation" is a required element of a Section 8(b)(1)(A) violation. *Meijer* deals with Section 8(a)(1), an *employer's* violation of the Act. 29 U.S.C. § 158(a)(1). In *Meijer*, this Court reasonably held in order to establish that an employer took an unlawful action *because* of an employee's protected activity, the employer must *know* (and therefore be motivated by) the fact the employee was engaged in a protected activity. *Id.* at 540–41. To hold otherwise would prevent employers from being able to make ordinary business decisions with respect to their employees. *See id.* The employer in *Meijer* asked the employee to leave a parking lot because it received a complaint he was "bothering people," but had no knowledge the employee was handing out union flyers—a protected activity. *Id.* at 537, 544. Here, the Union's actions have nothing to do with an employer making decisions with respect to its employees in the ordinary course of business, and its motivations in delaying Stoner's revocation letter are irrelevant. To the extent these principles could apply, the action Stoner took in this case—sending a resignation and revocation letter to the Union—made it self-evident that he was engaged in protected activity. Therefore, *Meijer* has no relevance to this case.

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

Stoner agrees with the Board's arguments and makes the following additions:

First, the Union's entire defense is that it did not intentionally violate the Act, and any delay in stopping Stoner's deductions and refunding his dues was reasonable in light of the circumstances. This argument ignores the dispositive fact that the Union's belated letter, dated August 16, 2018, not only excoriated Stoner for filing a Board charge to enforce his Section 7 rights but also failed to completely refund all of the dues it accepted and retained from Stoner's wages. JA 212, 241; Union Br. at 6 (Union tacitly admits that not all of the dues it collected have been relinquished). To this day, the Union retains a portion of the dues deducted from Stoner's wages. *See* Union Br. at 6. This fact alone refutes the Union's claims of good faith and momentary "inadvertence."

Second, the Board's inference that the Union's conduct was intentional is based on substantial evidence. "The Board . . . is viewed as particularly capable of drawing inferences from the facts of a labor dispute. Accordingly, it has been said that a Court of Appeals must abide by the Board's derivative inferences, if drawn from not discredited testimony, unless those inferences are 'irrational,' 'tenuous' or

'unwarranted.'" *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995) (quoting *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977)); *see also Radio Officers'*, 347 U.S. at 56–57 (Frankfurter, J., concurring) ("The Board's task is to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn."). The Court will "not displace the Board's reasonable inferences even if we would have reached a different conclusion." *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003) (citing *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 776 (6th Cir. 2002)).

The Union's assertion that the evidence presented was insufficient to find a violation is incorrect. *See* Union Br. at 19. On the contrary, the record as a whole supports the Board's inference that the Union's conduct was intentional. The Union does not contest that it should have promptly accepted and acted upon Stoner's dues checkoff revocation, and also admits that all of the dues deducted from Stoner's wages and retained by the Union after he resigned and revoked should have been refunded. Union Br. 10 n.3; JA 249, 270, 319, 329–330. DePaoli admitted that he received Stoner's letter on March 12, 2018, and that he did not immediately send his customary letter to Ford to cease dues deductions. JA 258, 260–62, 265–67. He claimed that he forwarded a draft letter to his secretary to print, but it was never printed, apparently because the Union had "a lot going on" around that time. JA

265, 274–75. However, he failed to produce the e-mail he allegedly sent to his secretary and provided no justification for why he did not have one. *See* JA 152. He also admitted that he normally signs all of his letters once they are printed by his secretary, but again failed to explain why he did not realize the letter he drafted to Ford to stop Stoner's deductions was never printed by his secretary or signed by him. JA 274–75. These inconsistencies give rise to a reasonable inference that DePaoli intentionally decided to "sit on" Stoner's letter, as the ALJ held based upon his own firsthand credibility determinations. JA 155.

Moreover, the Union's actions after Stoner filed his unfair labor practice charge bolster the inference that its conduct was intentional. Stoner filed his unfair labor practice charge on May 29, 2018, after months of illegal dues collections. JA 6–7, 314–18. That filing triggered the Union to finally cease accepting dues from Stoner's wages after June 8, 2018. But the Union continued to retain the amounts unlawfully deducted between March 9 and June 8—it was not until at least August 20, 2018,[5] that the Union responded to Stoner with an "explanatory" letter and a partial reimbursement. JA 319–20. To this date, the Union has not reimbursed

[5] While the Union's letter is dated August 16, 2018, the partial refund check enclosed was dated August 20, 2018. JA 319–20.

Stoner for the entire amount it received and retained from his wages, and its "explanatory" letter took the opportunity to excoriate him for having the temerity to file an unfair labor practice charge. *See* JA 319.

The Union has not provided a justification for its continued failure to return all of the money unlawfully deducted. DePaoli testified that his initial delay in refunding Stoner's money resulted from the fact that it takes Ford a month to get the dues reports to the Union. JA 273. On the date of the ALJ hearing, January 7, 2019, it had been *ten* months since Stoner had resigned from the Union and revoked his checkoff authorization, and now it has been nearly two years since he sent in his letter. The Union did not (and indeed could not) provide a reasonable justification for its continued retention of Stoner's dues. Thus, based on the ALJ's credibility findings and record as a whole, the Board's conclusion that the Union's actions were intentional is justified.

Third, the contents of the Union's letter dated August 16, 2018, JA 319, should be analyzed under the standards outlined by the D.C. Circuit in *Tamosiunas*. Namely, this Court should consider whether the letter had a "reasonable tendency to coerce or restrain" Stoner in the exercise of his Section 7 rights. *Tamosiunas*, 892 F.3d at 430. "[W]hether a communication will be restraining or coercive turns on 'whether the words *could* reasonably be construed as coercive,' even if that is not

the 'only reasonable construction.'" *Id.* (quoting *SEIU, Local 121RN (Pomona Valley Hosp.)*, 355 NLRB 234, 235 (2010)). As the Board correctly stated in its brief, a reasonable employee like Stoner could believe that he was being punished for enforcing his rights through the Board, and would continue to be penalized for doing so with respect to further reimbursements. Board Br. at 28. This forecast in fact proved prescient, as the Union still refuses to fully refund the amounts it has unlawfully retained from Stoner's wages.

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

Stoner agrees and adopts the Board's arguments, with the following additions:

First, the Board properly discounted the Union's proffer that it did not immediately communicate with Stoner based on the advice of counsel. Union Br. 24. The Union fails to offer (and cannot offer) any legal precedent allowing it to excuse its behavior because it relied on the advice of counsel. Simply stated, no lawful policy or practice prevented the Union from promptly stopping the dues collections and promptly refunding the unlawfully collected money to Stoner. Testimony that counsel told the Union not to take these simple remedial actions would not change the fact that the Union's conduct violated Section 8(b)(1)(A).

Second, the Union's claim that it was unaware of the amounts deducted from Stoner's wages after he resigned and revoked his checkoff is inconsistent with record evidence. DePaoli testified, and his letter dated August 16 stated, that it takes a

month for Ford to send him dues deduction reports. Dues were deducted from the time Stoner resigned in March 2018 until around June 8, 2018. *See* JA 314–18. DePaoli did not send his "explanatory letter" until at least August 20, over two months *after* the last unlawful dues deduction, and nearly three months after Stoner filed his May 29 unfair labor practice charge. JA 6, 319. Moreover, as noted frequently above, the Union continues to retain portions of the dues it deducted from Stoner's wages. Even based on the Union's justification for its delay, namely that it had to wait until it received Ford's monthly report, it should have had the relevant information to refund to Stoner the entirety of his dues by July 2018. There is no rational justification for its continued retention of Stoner's dues, and the Union's excuses simply underscore the ALJ's and Board's conclusion that the Union's actions were intentional.

C. The Union's Remaining Arguments Fail

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

Stoner agrees with and incorporates the Board's arguments. Stoner adds that the Supreme Court's decision in *Felter v. Southern Pacific Co.*, 359 U.S. 326, 337 (1959), rebuts the Union's contention that Stoner had some duty to contact the Union to apprise it of its errors or to mitigate his damages: "Additional . . . correspondence, after he once has indicated his desire to revoke in writing, might well be some deterrent, so Congress might think, to the exercise of free choice by an individual

worker." *See also Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488, 489 (4th Cir. 1981) (refusal to honor checkoff revocations based upon restrictive procedures held unlawful). Stoner was under no duty to come back to the Union to attempt to fix the problem the Union itself created.

2. The Board did not ignore exculpatory evidence

Stoner agrees with and adopts the Board's arguments.

CONCLUSION

The Board's decision is supported by substantial evidence. The Union's petition for review should be denied, and the Board's petition for enforcement granted.

Respectfully submitted this 13th day of February 2020.

s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood
Glenn M. Taubman
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
703-321-8510
akh@nrtw.org
gmt@nrtw.org

Counsel for Intervenor

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g)(1), I hereby certify that the foregoing brief complies with the type limitations, typeface, and type-style requirements provided in FRAP 32(a)(5)–(7). The foregoing brief was prepared using Microsoft Word 2016 and contains 5,521 words in 14-point proportionately-spaced Times New Roman font.

s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood

Counsel for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Intervenor's Brief to be served this 13th day of February 2020 on all counsel of record via the Court's CM/ECF filing system.

s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood

Counsel for Intervenor