

**Local Union 99, International Brotherhood of Electrical Workers, AFL–CIO (Electrical Maintenance & Control, Inc.) and Robert F. Carroll.**  
Case 1–CB–7683

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On March 5, 1993, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel also filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions,<sup>2</sup> and to adopt the recommended Order as modified and set out in full below.

As more fully detailed in the attached decision, the judge found that on or about July 11, 1991, Respondent Local Union 99 caused Electrical Maintenance & Control, Inc. (the Employer) to discharge employee Robert Carroll through the enforcement of the union-security clause in the parties' collective-bargaining agreement following its notification to the Employer that Carroll's union membership had been terminated. The Union acknowledged that such notices generally resulted in the employee's being discharged. The judge found that the Respondent's conduct violated Section 8(b)(1)(A) and (2) because, prior to seeking his discharge under the union-security clause, the Respondent did not carry out its fiduciary duty to Carroll to provide adequate notice of his obligations with respect to payment of membership dues. See, e.g., *Coopers NIU (Blue Grass)*, 299 NLRB 720, 723 (1990), and cases cited there. More specifically, the judge found that the Respondent's written notice of dues delinquency, received by Carroll on June 26, 1991, was deficient because it failed to state that the Respondent would seek his discharge if he did not tender his dues by June 30, the end of the second quarter. The judge further found that 5 days—from Wednesday, June 26, to Sunday,

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In addition to the unfair labor practices discussed below, the judge concluded that the Respondent violated Sec. 8(b)(1)(A) specifically by terminating Charging Party Carroll's union membership. We adopt the judge's finding and recommended Order in this regard only in the absence of exceptions.

June 30—did not provide Carroll with a reasonable opportunity to pay his dues in light of the specific, relevant circumstances. See, e.g., *Operating Engineers Local 150 (Willbros Energy)*, 307 NLRB 272, 275–276 (1992); *Forsyth Hardwood Co.*, 243 NLRB 1039, 1044–1045 (1979). To remedy the Respondent's unfair labor practices, the judge recommended, inter alia, that the Respondent be ordered to place Carroll at the top of the "out-of-work list" maintained by the Local, and to make him whole for any loss in pay over an apparently limited, but unclear, period of time.

We find no merit in the Respondent's exceptions to the violations found by the judge, and we affirm his unfair labor practice findings as indicated above.<sup>3</sup> We do find merit in the General Counsel's exceptions to the judge's recommended remedy, Order, and notice. In essence, the General Counsel argues that the judge did not provide the Board's standard remedy for unfair labor practices of the kind in this case. We agree that the Board's routine remedy is appropriate here, no grounds having been shown for the extraordinary remedy recommended by the judge. In cases in which, as here, a union has violated Section 8(b)(1)(A) and (2) by causing an employer to discharge an employee unlawfully through enforcement of the parties' contractual union-security provision, and there is no liability on the employer's part, the Board's basic remedy is as stated in *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773, 774 (1981), enfd. in relevant part 716 F.2d 1249 (9th Cir. 1983). We will therefore amend the judge's recommended remedy and modify his recommended Order in a manner consistent with the remedy and Order provided in *Zinsco* and otherwise consistent with an appropriate remedy in the circumstances of this case. See, e.g., *Willbros Energy Services*, supra at 276–277; *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822, 830–831 (1991).

AMENDED REMEDY

Having found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist and that it take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully caused Electrical Maintenance & Control, Inc. to discharge Robert Carroll, we shall order the Respondent to notify the above Employer, in writing, with a copy to Carroll, that it has no objection to the reinstatement of Carroll, and that it requests Carroll be reinstated. We shall also order the Respondent to make Carroll whole for any loss of wages and benefits he may have suffered as a result of the Respondent's action, less his net interim

<sup>3</sup> We find it unnecessary to rely on the judge's findings in the penultimate paragraph preceding the section of his decision entitled, "Conflicting Testimony."

earnings, until Carroll has been reinstated by the above Employer to his former or a substantially equivalent job, or until he obtains substantially equivalent employment elsewhere. *Sheet Metal Workers Local 355 (Zinsco Electrical)*, supra at 774. See also *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The amount of backpay shall be computed with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Local Union 99, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Terminating the union membership of Robert Carroll without providing him reasonable notice and opportunity to pay delinquent dues and assessments.

(b) Causing or attempting to cause Electrical Maintenance & Control, Inc. to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Robert Carroll for any loss of wages and benefits he may have suffered as a result of the unlawful discrimination against him, in the manner set forth in the amended remedy section above.

(b) Notify Electrical Maintenance & Control, Inc., in writing, with a copy to Carroll, that it has no objection to the reinstatement of Robert Carroll, and that it requests that Carroll be reinstated.

(c) Remove from its records any reference relevant to the discharge of Carroll and notify him, in writing, that this has been done and that evidence of his discharge shall not be used as a basis for future action against him, and request Electrical Maintenance & Control, Inc. to remove any reference to Carroll's discharge from its files, and notify Carroll that it has made this request.

(d) Post in conspicuous places at its business office and meeting hall, including all places where notices to members are customarily posted copies of the attached notice marked "Appendix."<sup>4</sup> Copies of this notice, on

forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt. Once posted, these notices shall remain posted for 60 consecutive days. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 1 signed copies of the notice in sufficient numbers to be posted by Electrical Maintenance & Control, Inc. in all places where notices to employees are customarily posted, if the Employer is willing.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT restrain and coerce Robert Carroll or our other members by terminating their membership without providing them reasonable notice and opportunity to pay delinquent dues and assessments.

WE WILL NOT cause, or attempt to cause, Electrical Maintenance & Control, Inc., or any other employer, to discharge or otherwise discriminate against Robert Carroll or any other employee for failure to tender periodic dues or initiation fees without adequately advising them of their obligations, in violation of Section 8(a)(3) of the National Labor Relations Act.

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL make Robert Carroll whole for any loss of wages and benefits he may have suffered as a result of the discrimination against him, plus interest.

WE WILL notify Electrical Maintenance & Control, Inc., in writing, with a copy to Robert Carroll, that we have no objection to the reinstatement of Carroll and that we request his reinstatement.

WE WILL remove from our files any reference relevant to the discharge of Robert Carroll and notify him in writing that this has been done and that evidence of his discharge will not be used as a basis for future action against him, and WE WILL ask the Employer to remove any reference to Carroll's discharge from its files and notify Carroll that we have asked the Employer to do this.

LOCAL UNION NO. 99, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORK-  
ERS, AFL-CIO

*William F. Grant, Esq.*, for the General Counsel.  
*Richard A. Skolmik, Esq. (Temkin, Lipsey & Skolmik, Ltd.)*,  
of Providence, Rhode Island, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. On a charge and an amended charge of unfair labor practices filed on October 23 and December 2, 1991, respectively, by Robert F. Carroll (Carroll or Charging Party), against Local Union 99, International Brotherhood of Electrical Workers, AFL-CIO (IBEW) (Respondent), a complaint was issued against the Respondent by the Regional Director for Region 1, on behalf of the General Counsel on January 22, 1992.

In substance, the complaint, as amended, alleges that pursuant to a written request on July 2 and an oral request July 10, 1991, the Respondent sought to, and did in fact, cause the Employer to terminate the employment of the Charging Party because his membership in Respondent Union had lapsed; and that such conduct by Respondent restrained and coerced employees in the exercise of their rights protected by Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act; and that such conduct by Respondent also caused the Employer to discriminate against the Charging Party, in violation of Section 8(a)(3) of the Act.

The hearing in the above matter was held before me in Boston, Massachusetts, on June 17 and 18, 1992. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses and my consideration of the briefs, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

At all times material, Electrical Maintenance & Control, Inc. (the Employer or EMC) is and has been at all times material, a corporation with an office and place of business in Foster, Rhode Island (the Foster facility), where it has been engaged as an electrical contractor in both the construction industry performing residential, commercial, industrial, and office construction, and in the repair and installation of electrical apparatus for individual and commercial customers.

At all times material, the Employer (EMC) has been a member of the Rhode Island and Southeast Massachusetts Chapter, National Electrical Contractors Association.

During the calendar year ending December 31, 1990, Employer (EMC), in the course and conduct of its business operations, received in excess of \$50,000 for performing electrical services in States other than the State of Rhode Island.

The amended complaint alleges, the parties stipulate, and I find that Employer EMC is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The amended complaint alleges, the answer admits, and I find that Local Union 99, International Brotherhood of Electrical Workers, AFL-CIO (Respondent) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

Robert Carroll, the Charging Party, joined the Respondent Union in 1966 when he worked and completed the apprenticeship program in temperature control maintenance at Honeywell. John (Jack) McGee also completed the course along with Carroll. Both men have been journeymen electricians for over 25 years. After completing apprenticeship training, they first worked together at Johnson Controls in 1983 where McGee was project manager. McGee hired Carroll to perform installation of temperature control systems until 1985. Carroll also worked for McGee in the same capacity when McGee was project manager for Westminster Electric.

The uncontroverted evidence further established that installation of temperature controls, involving heating, ventilating, and air-conditioning systems, is highly specialized and requires experience in reading temperature controls, mechanical blueprints, and proper installation of sensors and safety devices. This specialized knowledge is not common knowledge among regular electricians.

At all times material, the following named persons have occupied the positions set opposite their respective names, and are now, and have been at all times material, agents of Respondent within the meaning of Section 2(13) of the Act: Carmine (Cam) Gelsomino, business manager; Walter Perry,

office president; Curtis Hymel, recording secretary; and Alfred Spaziano, financial secretary.<sup>1</sup>

*A. Employer's (EMC's) Contractual and Membership Relations with the Union*

In 1986, McGee formed Electrical Maintenance & Control, Inc. (EMC) to perform the above-described services for Honeywell, Johnsons Control, Andover, and Trane Systems. As such, McGee became a "union contractor," retaining his membership in, and signed a letter of consent with the Union, becoming a party to the "Inside Wireman's Agreement of the Providence division of the Rhode Island and S.E. Massachusetts Chapter, National Electrical Contractors Association (NECA)," and successor agreements. The current agreement (G.C. Exh. 12) contains the clause as follows:

EMC is a small business employing four–seven workers. The Union has a hiring hall through which it refers members for employment. Carroll has been a member of the Union since 1966. In about 1986, McGee, owner of EMC, specifically requested Carroll through the Union's hiring hall and hired him. McGee performed the business responsibility of EMC, procuring work, paying bills, and keeping records, while Carroll performed essentially all of the specialized work in the field.

In 1990, EMC started experiencing a slowdown in business when it only had in its employ Carroll and apprentice Robert Tente. On days when business was slow, Carroll and Tente worked fewer hours. When business was very slow, McGee allowed them to miss a week or so and they would continue to work without reporting to the Union and being referred by the hiring hall.

*Dues*

Employees of employers bound by the contract with the Union paid local dues of 2-1/2 percent of their weekly paycheck by a dues-checkoff procedure. They also pay a per capita levy of \$53.40 per quarter, collected by the Union and remitted to the International.

The constitution and rules of the IBEW governing local unions and councils (G.C. Exh. 11) provides:

Article XXIII, Section 3. Any member indebted to his L.U. for three months dues, or having any past due indebtedness to the I.B.E.W. for dues or assessments, shall stand suspended, and the L.U. may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all indebtedness has been paid, unless waived by the L.U. However, dues cannot be waived. Section 4. Any member indebted to the L.U. for six months full dues shall be dropped from membership by the F.S. (financial secretary) and cannot become a member in good standing again in the I.B.E.W. except by joining as a new member.

Since joining the Union in the late 1960s, Carroll had paid his dues until the early 1980s when he was engaged in a divorce proceeding, and started paying the quarterly assessment late on several occasions. Whenever his payment was overdue he usually received a notice in the mail at the end of

<sup>1</sup> The facts set forth above are not controverted or in conflict in the record.

the first quarter for dues owing, plus a reinstatement fee, or he received a telephone call from the financial secretary, Alfred Spaziano, reminding him his dues were late.

Carroll testified that after he remarried in 1990, his wife assumed the bookkeeping responsibilities of his business. His local dues continued to be deducted from his paycheck and remitted to the Union. However, unbeknown to him, he said his wife neglected to pay the quarterly assessments for the first two quarters of 1991.

In a notice dated June 21, 1991, which Carroll said he received Wednesday, June 26, 1991, Union Secretary Spaziano informed him he owed \$106.80 in dues assessments for the first two quarters (January 1–June 30) 1991, plus a \$30-reinstatement fee. (G.C. Exh. 2.) The notice also directed Carroll's attention to article XXIII, sections 3 & 4 of the IBEW's constitution at the bottom of the notice which read as follows:

(1) Local union's shall collect dues from members either monthly or quarterly in advance.

*Article XX, Sec. 1*

(2) Any member indebted to his L.U. for three months' dues or having any past due indebtedness to the I.B.E.W. for dues or assessments shall stand suspended, and the L.U. may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all indebtedness has been paid, unless waived by the L.U. However, dues cannot be waived. [Art. XXIII, sec. 3.]

(3) Any member indebted to his L.U. for six month's full dues shall be dropped from membership by the F.S. and cannot become a member in good standing again in the I.B.E.W. except by joining as a new member. [Art. XXIII, sec. 4.]

Carroll further testified that after his receipt of the above notice on Wednesday, June 26, his wife reviewed his records on Thursday, June 27, and learned that she had not paid his dues; that he forgot to mail his payment on Friday, June 28, but that he mailed three checks (G.C. Exh. 3) for the full amount owing to the Union on Saturday, June 29, 1991. He said the mailbox where he mailed the checks indicated a scheduled pickup at 11 a.m. Saturday, June 29. However, the envelope with the checks was postmarked with the date July 1, 1991, and it was actually received by the Union on Monday, July 2, 1991. (R. Exh. 1.) On cross-examination, Carroll admitted that he lived only a short distance from the union hall and that he actually could have delivered the payment to the hall himself.

The checks were returned enclosed with a letter dated July 2, 1991, from secretary of the Union, Spaziano (G.C. Exh. 3), stating: "We regret to inform you that you have been terminated as a member of Local 99." (G.C. Exh. 3.) Members dropped from membership cannot become a member again except by joining as a new member.

At the hearing, the union business manager, Carmine (Cam) Gelsomino, testified that Carroll's membership was terminated pursuant to the constitution for nonpayment of dues for a period exceeding 6 months (January 1 to June 30, 1991).

Secretary Spaziano sent a letter to EMC (Jack McGee) dated July 2, 1991 (G.C. Exh. 4), which reads in pertinent part as follows:

This is to inform you that on July 1, 1991, Robert F. Carroll was terminated as a member of Local #99, International . . . .

At the hearing, Secretary Spaziano testified that he mailed about 10 such notices to employers informing them that certain employees were no longer members of the Union for nonpayment of dues. He stated that on the receipt of such notices from the Union, employers generally discharged employees for nonmembership in the Union.

#### B. EMC's Layoff or Discharge of Carroll

On his return from vacation July 8, 1991, McGee read the Union's notice about Carroll's termination and asked Carroll what had happened. Carroll told him what he testified to in this hearing and he told McGee he was going to discuss the matter with the Union. When Carroll met with Union Business Manager Gelsomino that evening, the latter referred him to the executive board. When Carroll met with the executive board Wednesday, July 10, he was told the board had only authority for approval of applications for new membership and if he desired to be reinstated, he was advised to appeal his expulsion to the International.

In a letter dated July 26, 1991, Carroll appealed his termination from the Union to the International Union and requested reinstatement of his membership in the Union. In a letter dated October 17, 1991, the International informed Carroll that his appeal was denied because he failed to comply with article XXIII, section 1 of the constitution. Carroll signed the out-of-work list October 21, 1991.

In a letter dated October 28, 1991, the International informed Carroll that effective November 1, 1991, he was terminated from the Union's health and welfare program because of his nonmembership in the Union.

#### Analysis and Conclusions

The complaint alleges that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

Specifically, Section 8(b)(1)(A) of the Act provides as follows:

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

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) or to discriminate against an *employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership* . . . . [emphasis added].

Article XXII, section 1, provides:

Local unions shall collect dues from members either monthly or quarterly in advance.

Section 1. No member is entitled to notice of the monthly or quarterly dues of his Local union, nor of arrearages, but must take notice when the payments are due.

Article XXIII, sections 3 and 4, provides:

Section 3. Any member indebted to his Local union for three months' dues, or having any past due indebtedness to the I.B.E.W. for dues or assessments, shall stand suspended and the Local union may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all indebtedness has been paid, unless waived by the Local union. However, dues cannot be waived.

Section 4. Any member indebted to his Local union for six (6) months' full dues shall be dropped from membership by the Financial Secretary and cannot become a member in good standing again in the I.B.E.W. except by joining as a new member.

The uncontroverted and credited evidence of record established that Charging Party Robert Carroll has been a member of the Union in good standing since as early as 1966. However, ever since the early 1980s when he was engaged in divorce proceedings, his payments of the \$52.40 quarterly assessments were paid late. The evidence does not show how late Carroll made his payments. Whenever he was late in paying his dues or assessments, he usually received a notice in the mail at the end of the first quarter for dues owing, plus a reinstatement fee, or he would receive a telephone call from the Union's financial secretary, Spaziano.

Although Carroll usually received written or telephonic notice of delinquent dues and assessments, section 1 of the Union's constitution explicitly provides that "no member is entitled to such notice for any delinquency or arrearages, but that such member must take notice when payments are due." Under these circumstances, it appears that past notices to Carroll for delinquency or arrearages were gratuitously given to him by the Union. In fact, the constitution provides that the due date for such payments is the beginning of each quarter, of which fact all members of the Union are aware.

In the instant case, Carroll was not only delinquent for an indebtedness to the Union for one quarter, but his delinquency was approaching the end of the second quarter, when he received written notice from the Union dated June 21, 1991, informing him of his delinquency and an arrearage in the amount of \$106.80 plus \$30 for a reinstatement fee. The bottom of the notice further informed Carroll that if such indebtedness for 6 months (January 1 through June 30, 1991) is not paid by June 30, 1991, he would be dropped from membership by the financial secretary.

Carroll testified he received the above notice from the Union June 26, 1991, but admitted he did not mail his checks for the full amount of indebtedness owing until Saturday, June 29, 1991. The evidence is uncontroverted that the envelope in which he mailed the checks is postmarked Monday, July 1, 1991. If Carroll did in fact mail his checks when he said he mailed them, in all probability, the mailbox at which Carroll mailed his checks did not have a pickup until Monday, July 1, 1991. Respondent acknowledged it received

the checks July 2, 1991, and that it promptly returned them to Carroll by registered mail the same day, on the ground that 6 months of nonpayment had elapsed and his membership was terminated pursuant to article XXIII of the Union's constitution. The Union informed Carroll of his right to appeal his termination to the vice president of the International and Carroll made such an appeal on July 26, 1991, and requested his reinstatement.

Also in a letter dated July 2, 1991, the Union notified employer EMC that Carroll's membership in the Union was terminated effective July 1, 1991. On October 17, 1991, the vice president denied Carroll's appeal on his termination and request for reinstatement on October 31, 1991, and Carroll appealed to the International president. In a letter dated October 28, 1991, while Carroll's appeal was pending, the Union informed Carroll that effective November 1, 1991, he was terminated from the Union's health and welfare program.

On January 17, 1992, the International president ruled that Carroll's payment to the Local was timely received (on or before June 30, 1991) because his postmarked envelope was not in the record. He informed Carroll to contact the Local and pay the full amount of indebtedness owed so he could maintain his good standing in the Local.

Although the Local subsequently forwarded Carroll's envelope postmarked July 1, 1991, to the International president and requested reconsideration of his ruling, the International president denied the Local's request. Carroll paid his indebtedness and was reinstated to full membership in the Union.

When McGee was asked whether he could have reinstated Carroll to his former position after the latter's union membership was reinstated, McGee testified that he would have had to lay off Laden in order to do so; and that EMC would have had to request Carroll's replacement from the Union's out-of-work list. According to the Union's business manager, Gelsomino, once Carroll signed the out-of-work list he could not have been referred to his position at EMC because there were 230-240 members on the out-of-work list ahead of Carroll. He said if EMC reinstated Carroll to work after he was reinstated by the Union, EMC would have violated both its contract with the Union and the constitution of the Union.

Article II, section 3 of the IBEW, Inside Construction Agreement, provides the following union-security clause:

All employees who are members of the Union on the effective date of this Agreement shall be required to remain members of the Union as a condition of employment during the term of this Agreement. New Employees shall be required to become and remain members of the Union as a condition of employment from and after the thirty-first day following the date of their employment, or effective date of this Agreement, whichever is later.

Aside from the above documentary evidence, the only other evidence the General Counsel presented to substantiate the allegations that Respondent caused EMC to discharge Carroll is McGee's reported conversations between himself and the Union's secretary, Curtis Hymel, and conversations between himself and Union Business Manager Gelsomino. McGee's account is not corroborated by any other witnesses, nor is Hymel's account.

A determination of whether McGee or Hymel creditably testified about their conversation regarding the layoff of Carroll will be deferred until after an analysis and discussion of the evidence of Respondent's termination of Carroll's union membership.

In this regard the General Counsel argues that Respondent's notice terminating Carroll's membership was not reasonable and sufficient notice for Carroll to respond to the Union by the deadline date of June 30, 1991; and that consequently, Respondent had failed to provide Carroll with the required timely and reasonable notice of termination of his membership. In support of his position the General Counsel cites *NLRB v. Hotel Employees Local 568*, 320 F.2d 254, 258 (3d Cir. 1963), and *Machinists Local 946 (Aerojet-General Corp.)*, 186 NLRB 561 (1970), where the Board and the court, respectively, held that "The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty to deal fairly with employees."

"That duty requires the Union to inform the employees of the dues obligation, the amount owed and method of calculation, and provide a reasonable opportunity to take whatever action is necessary to protect his/her job." *Electrical Workers IBEW Local 3 (Mulvihill Electric)*, 266 NLRB 224 (1983); *Radio-Electronics Officers Union*, 306 NLRB 43 (1992); and further, "It is also settled that the employees must be notified that failure to tender the dues will result in discharge." See *Forsyth Hardwood Co.*, 243 NLRB 1039, 1044-1045 (1979); *Machinists Local 946*, supra at 562.

I find merit in the General Counsel's argument because Respondent's notice to Carroll was apparently mailed to him Monday, June 24, or Tuesday, June 25, accounting for his receipt of it June 26, since Respondent presented no evidence establishing when its notice was mailed. This means that Carroll had only 4 days from the Union's deadline of June 30 to take necessary action to pay his indebtedness and preserve his job. The evidence failed to show that Respondent notified Carroll of his delinquent indebtedness at anytime between January 1 and June 26, 1991. This failure is particularly significant when it is considered that it was the undenied past practice of Respondent to call Carroll or otherwise remind him to pay delinquent dues and assessments and allow him an opportunity to do so. *Electrical Workers IBEW Local 3*, supra; *Radio-Electronics Officers Union*, supra.

The lack of adequate notice to a member is a key element of the performance of a union's duty to its members to treat them fairly. *Teamsters Local 122 (August A. Busch & Co.)*, 203 NLRB 1041, 1042 (1973). Under the circumstances in the instant case, I find that 4 or 5 days was not ample or reasonable notice to Carroll. This is especially true when the amount of the indebtedness, as well as the fact that Respondent failed to follow its past practice of notifying Carroll of his delinquency are considered.

The Board and reviewing courts have also long held "that a union may be held accountable for results triggered by what on the surface appears an innocent act which the union well knew would produce the desired result." *Quality Mechanical*, 307 NLRB 64 (1992). In the instant case Respondent Union acknowledged that when it notifies an employer a member's membership has been terminated, the employer generally terminates the member's employment. Thus, Re-

spondent not only should have known, but it knew that by notifying EMC (McGee) Carroll's membership was terminated July 1, that EMC in all probability was going to lay off or terminate him, as in fact it did. Respondent Union therefore achieved the result it knew would occur by notifying EMC.

In fact when it is considered that Carroll might not have had \$136.80 in his home or in his bank account on June 26, that it may not have been possible for him to get to his bank within a day or so, or as he testified, that his checks foreseeably or understandably could have been mailed on the weekend as he testified they were, and not picked up by the post office until Monday, July 1, it becomes clear that Respondent Union was more interested in taking advantage of a deadline technicality, than it was of carrying out its fiduciary duty to deal fairly with Carroll. The Board has also held that the union must notify the employees that their failure to tender their delinquent dues will result in discharge. *Forsyth Hardwood Co.*, supra at 1044–1045 (1979); *Machinists Local 946*, supra at 562. Respondent's notice to Carroll did not inform him of the consequence of losing his job if he failed to timely pay the indebtedness to the Union by June 30, 1991.

In all the above respects the Board and the courts have long held that the authority vested in the Union as the exclusive agent of employees leads to employee dependence on the labor organization, and that there necessarily arises out of that dependence a fiduciary duty to deal fairly with employees. *NLRB v. Hotel Employees Union*, supra at 258; *Machinists Local 946*, supra.

It is obvious from the above essentially uncontroverted evidence that Respondent did not deal fairly with Carroll as his agent. This conclusion is further supported by the fact that Respondent's International president ruled that Respondent's receipt of Carroll's checks on July 2 was sufficiently timely to preserve his membership in the Union in good standing. A request by the Union for reconsideration of the decision was denied by the International president. Notwithstanding, Respondent's lack of good faith in carrying out its fiduciary duty to Carroll is further demonstrated by Respondent having had Carroll sign the out-of-work list, instead of complying fully with the International's ruling of restoring Carroll to full membership in good standing. Since Carroll's checks were ruled timely received by the Local, his membership was considered never interrupted and Respondent should have so treated him, by formally notifying EMC that Carroll's membership was not terminated. Not only did Respondent not so notify EMC, but it had Carroll sign the out-of-work list in late October 1991, and did not remove him from that list after it received the ruling of the president of the International in January 1992.

I therefore conclude and find on the foregoing analysis of the evidence and cited legal authority, that Respondent breached its fiduciary duty to deal fairly with Robert Carroll by failing to properly notify him, and afford him a reasonable opportunity to take action to preserve his union membership and his job with EMC. *Forsyth Hardwood Co.*, supra; *Teamsters Local 122*, supra at 1042.

#### Conflicting Testimony

The factual dispute in this proceeding involves testimonial accounts of EMC's owner, Jack McGee, The Union Record-

ing Secretary Curtis Hymel, Union Business Manager, Carmine Gelsomino, and alleged discriminatee Robert Carroll, regarding conversations between McGee and Hymel, and conversations between McGee and Gelsomino, with respect to the reason or cause for McGee (EMC) terminating the employment of Carroll. In this regard, McGee testified that on or about July 11, 1991, his friend, Union Secretary Hymel told him it would be in the best interest of himself and Carroll to lay off Carroll. In this way, McGee said Hymel told him, he (McGee) would avoid violating the Local's rules by which he (EMC) was bound by his contract with the Union to hire and retain only union members in his employ.

Carroll testified that later that afternoon (July 11) he spoke with McGee by telephone, and McGee told him he (McGee) was told by Hymel that he (McGee) had to lay him (Carroll) off. Hymel said he had had lunch with Curt, who told him he had a message from Gelsomino (Cam) for him to lay off Carroll. Thereafter, McGee told Carroll to finish up the job he was working on and go to the office. At the office McGee told him he did not know what he was going to do; that business was terrible, he did not want to lose him (Carroll); but he may have to shut the doors. He then told Carroll that he had to lay him off; that it was in the best interest of himself and Carroll; that he did not know what he was going to do with the business but he could not afford anymore problems. Carroll and Tente were scheduled to work a part of the next week and McGee said he would decide whether to continue in business by that time. McGee testified he laid off Carroll because he (McGee) was in violation of his contract with the Union.

Union Secretary Hymel testified that McGee called him Monday, July 8, and told him "it was not his responsibility and he did not want to get involved in it." A few days later at lunch, McGee mentioned the letter (notice) he received from the Union concerning the termination of Carroll's membership. McGee, who appeared nervous and upset because he would not have the skilled help he needed without Carroll, asked was he (McGee) still legal and could he employ anyone. Hymel denied he told McGee it would be in the best interest of himself (McGee) and Carroll if Carroll were laid off, or that he should lay off Carroll. Hymel also denied he had any conversation with Gelsomino, made any reference to Gelsomino, or that the latter had made any suggestion to him about the layoff or retention of Carroll.

McGee testified that he talked to Gelsomino who offered to refer a replacement for Carroll; that the latter agreed for McGee to pay Tente journeymen's wages, and permitted Carroll to finish the job as a nonworking supervisor of Tente. However, when EMC resumed operations July 22, he said the Union referred a journeyman electrician (Ferrell Laden) to EMC who did not have temperature control experience to replace Carroll. When Gelsomino testified, he admitted he had talked to McGee but said McGee asked him could Carroll be allowed to be a working supervisor for only a day or two, and he said "sure." He also said McGee asked for a journeyman and he (Gelsomino) agreed to refer Laden. Gelsomino denied he authorized McGee to work with his tools or that he knew when Carroll signed the out-of-work list. The General Counsel did not produce any specific evidence that Gelsomino knew when Carroll signed the out-of-work list.

In this proceeding, McGee testified, apparently with some reservations, that he laid off Carroll *because he (McGee) was in violation of his contract with the Union.*

#### Questions

The preliminary credibility question raised by the above partially conflicting testimonial versions of Jack McGee and the testimonial versions of Union Officials Alfred Spaziano, Curtis Hymel, and Carmine Gelsomino regarding conversations concerning Carroll's union membership and layoff, is who is telling the truth.

The principal question presented for determination is, whether the Respondent Union attempted to cause or did in fact cause the layoff or discharge of Robert Carroll by EMC.

#### Who Testified Truthfully?

In evaluating the credibility of the conflicting testimonial versions of McGee versus Hymel and Gelsomino, with respect to conversations they held regarding the termination of Carroll by EMC (McGee), it is first noted that all of the conversations assertedly occurred on and after July 8, 1991. This was approximately 7 days after Respondent Union notified EMC on July 2, that Carroll's union membership was terminated July 1, 1991. Hence, the credibility of the afore-named witnesses who participated in those conversations have little or no causative effect on the previous findings, that Respondent did not deal fairly with Carroll in providing him adequate and reasonable notice.

Notwithstanding, although McGee testified Hymel told him Gelsomino said it would be in the best interest of McGee and Carroll for McGee to lay off Carroll; that McGee should lay off Carroll because if he did not, he (McGee) would be in violation of his agreement with the Union; and that Carroll stood a better chance of being reinstated in the Union if he (McGee) did not violate his contract with the Union. Hymel categorically denied he told McGee any of the remarks attributed to him by McGee. Instead, according to Hymel, it was McGee who called him July 8 telling him he (McGee) did not want to be involved in the Carroll issue; and that it was McGee who asked him was he (McGee) still legal and could hire anyone, because he was concerned about losing his skilled electrician (Carroll).

As I closely observed both witnesses testify, I was persuaded by the demeanor of both that neither was telling the truth, or at least not the whole truth. They knew each other well. It was not a novelty for them to have lunch together, and I was persuaded that they at least discussed the Carroll dilemma. Both were members of the Union and presumably knew the consequences of either violating the constitution or contracts with the Union. As manifested by the evidence of record McGee did not want to violate his agreement with the Union, and Hymel did not want to be accused or be responsible for the consequences of the Union telling McGee to lay off or discharge Carroll. Except, McGee had another dilemma, he did not want to face up to telling his longtime colleague and only skilled field worker on whom he depended so heavily that he had to lay him off. Evidence inferring the latter manifestations is the fact that McGee, for the first time, invited Carroll and his wife to his home for dinner where he expressed uncertainty about remaining in business, and some bewilderment—confusion (partially reflected on

the record)—suggesting he was trying to give Carroll a soft landing (prior to layoff).

Likewise, with respect to McGee's conversations with Gelsomino, I was persuaded by the demeanor by each witness that neither was telling the truth, or at least not the whole truth, regarding permission for Carroll to finish the job and for EMC to obtain a prospective referral for Carroll's replacement. Although Gelsomino denied the statement attributed to him by Hymel through McGee, I was persuaded by the contents of their respective versions that they did have discussions on how to make an accommodation on the Carroll dilemma, without Gelsomino violating the president of the International's ruling against the Local, and thereby caused Respondent to violate the Act, without McGee violating his contract with Respondent, as well as McGee facing his good friend and essential electrician (Carroll) to tell him he had to discharge or lay him off.

Throughout his testimony, McGee's demeanor, as well as the substance of his testimony (partially reflected in the record), manifested a struggle of trying to stay in good favor with the Union (Respondent) and at the same time, not say anything against Carroll to adversely affect his personal interest and work relationship with Carroll. It is for all of the foregoing reasons that I do not credit or rely on the testimony of McGee, Hymel, or Gelsomino in reaching a decision in this case. If, for a moment, I had the slightest inclination to believe and rely on the smallest aspects of the testimony of McGee, Hymel, or Gelsomino, which I do not rely on, that inclination would go in favor of McGee simply because some of his version would be more consistent with the past conduct of Respondent's failure to deal fairly with Carroll and his membership.

Additionally, Respondent Union's failure to deal fairly with Carroll's interests is clearly demonstrated by: (1) its swift notice to Carroll by registered mail terminating his membership on the very day it received his checks for full payment, (2) its immediate return of Carroll's 2 days' late payment the same day it was received, (3) immediately mailing notice of its termination of Carroll's membership to his Employer (EMC) on the same day it so notified Carroll, and (4) its failure to notify Employer that Carroll won his appeal on termination of his membership which was wrongfully interrupted on July 1, 1991, and that Carroll was then and still is a member of the Union in good standing.

#### Procedural Note

Charging Party Robert Carroll was the first witness called by the General Counsel on Wednesday, June 17, 1992, and he testified and was cross-examined in full. The General Counsel then called Jack McGee (the Employer) who testified, was cross-examined in full, and was excused from the hearing without objection.

The Union's financial secretary, Alfred Spaziano, was called by the General Counsel. He testified, was cross-examined in full, and the General Counsel rested his case. At no time did counsel for Respondent inquire as to whether Carroll or McGee had submitted an affidavit. Nor had he requested to view any affidavits.

Thereafter, counsel for Respondent Union called Curtis Hymel, recording secretary of the Union, and Walter Perry, office president, both of whom testified and were cross-examined in full. Respondent then called Carmine Gelsomino,

business manager for the Union, who proceeded to testify but the trial was adjourned around 5 p.m. until the next morning, Thursday, June 18, 1992.

In spite of several omissions in the transcript of a discussion the next morning (Thursday, June 18) regarding an affidavit assertedly given to the General Counsel by Carroll and McGee, counsel requested to examine Carroll. Carroll was permitted to testify concerning his affidavit. However, since McGee was excused without objection after completing his direct and cross-examination the day before, he was not present in the courtroom on Thursday morning when counsel for Respondent raised the question about the existence of an affidavit of McGee.

The bench first thought the parties were willing to stipulate admission of McGee's statement, but the General Counsel objected on the ground that McGee would not have been present to explain or answer questions on the statement. The objection was sustained and counsel for Respondent was advised that he could address the bench's ruling in his posthearing brief. The bench did not see the affidavit and no further argument or motion was made by Respondent.

Although counsel for Respondent wanted to have McGee's affidavit admitted in evidence over the objection of the General Counsel, it was not established that McGee was unavailable to testify at anytime. The General Counsel did not offer to recall, and Respondent did not offer to call McGee as a witness, at its own expense.

Under the foregoing circumstances, I, in my discretion, denied admission of McGee's affidavit and it was not made a part of the record or considered by me in reaching my decision.

#### Findings

Consequently, I find that the General Counsel has established by a preponderance of the evidence of record, that Respondent breached its fiduciary duty to Carroll by failing to provide him with adequate and reasonable notice of his delinquent union assessments; that it thereafter unlawfully terminated his membership on July 2, 1991, and that on the same day, it notified his Employer (EMC) that Carroll's membership in the Union was terminated July 1. I further find, on such evidence, that Respondent, by its conduct, attempted and did in fact successfully cause EMC to lay off or discharge Carroll on or after July 11, 1991, and that by doing so, Respondent restrained and coerced Carroll in the exercise of his rights guaranteed in Section 7, and thereby caused Employer (Electrical Maintenance & Control, Inc.) to discriminate against Carroll, in violation of Section 8(b)(1)(A) and (2) of the Act. *Forsyth Hardwood Co.*, 243 NLRB 1039, 1044-1045 (1979); *Teamsters Local 122*, 203 NLRB 1041 (1973); *United Metaltronics*, 254 NLRB 601-606 (1981); and *Western Publishing Co.*, 263 NLRB 1110, 1112-1113 (1982).

#### THE REMEDY

Having found that the aforescribed conduct by Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act, I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Union interfered with, restrained, and coerced its member by failing to provide Carroll with reasonable notice of his delinquent dues and assessments, and affording him reasonable opportunity to pay them, Respondent Union violated Section 8(b)(1)(A) of the Act; and that by taking the above action and notifying Carroll's employer that his membership in the Union was terminated, Respondent failed to deal fairly with its member, and thereby caused Carroll's employer to discriminate against him, in violation of Section 8(b)(2) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct, and that it make Robert Carroll whole for any loss of earnings he may have suffered by reason of the discrimination Respondent caused to be practiced against him; and that such loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest on any backpay due in accordance with the Board's policy in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except as specifically modified by the wording of such recommended Order.

#### CONCLUSIONS OF LAW

1. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
2. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. By terminating the membership of Robert Carroll without providing him reasonable notice and opportunity to pay delinquent dues and assessments, Respondent Union has restrained and coerced its members in the exercise of rights guaranteed in Section 7, in violation of Section 8(b)(1)(A) of the Act.
4. By wrongfully informing Robert Carroll's employer that his membership was terminated, Respondent Union attempted and did in fact cause his employer to discriminate against him by laying off or discharging him, in violation of Section 8(b)(2) of the Act.
5. By failing to represent Robert Carroll in a fair and impartial manner, Respondent Union breached its fiduciary relations to him, in violation of Section 8(b)(1)(A) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.  
[Recommended Order omitted from publication.]