

Office & Professional Employees International Union, Local 29, AFL-CIO (Park & Shop Market, Inc.) and Thais Jones. Case 32-CB-3956

July 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

On May 12, 1993, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Office & Professional Employees International Union, Local 29, AFL-CIO, Oakland, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

¹No exceptions have been filed to the judge's finding that it was unnecessary to pass on the complaint allegations that the Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by failing to notify the Charging Party of her rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), and by causing her discharge for failure to maintain union membership when Jones was under no obligation to pay any dues or fees given the Respondent's failure to notify her of her *Beck* rights.

²The 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³We agree with the judge's conclusion that the Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by causing the discharge of Charging Party Thais Jones. The judge found, and we agree, that the Respondent failed to satisfy its fiduciary duty owed to Jones by causing her discharge on July 27, 1992, *prior* to conducting an investigation into her dues status which was scheduled to take place on August 12, 1992. We accordingly find it unnecessary to pass on the judge's additional rationale that the Respondent by its other conduct failed to satisfy its fiduciary duty owed to Jones, and also violated Sec. 8(b)(1)(A) and (2) of the Act by causing the Employer to discharge Jones for failure to pay her dues for a period of time when she was under no obligation to maintain membership in the Respondent.

⁴We have modified the judge's recommended Order to reflect the judge's rationale we are adopting. This modification does not materially affect the terms of the judge's recommended Order, however. We shall also issue a new notice to employees and members.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

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.

WE WILL NOT cause or attempt to cause Park & Shop Market, Inc. to discharge or otherwise discriminate against Thais Jones, or any other employee, for her failure to tender to us periodic union dues and an initiation fee, when we have failed to comply with our fiduciary duty to deal fairly with the employee.

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

WE WILL make Thais Jones whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

WE WILL remove from our files and ask Park & Shop Market, Inc. to remove from its files any reference to our requests for Thais Jones' discharge and WE WILL notify her in writing that this has been done and that evidence of her unlawful discharge will not be used as a basis for future action against her.

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29,
AFL-CIO

Jo Ellen Marcotte, for the General Counsel.

James Eggleston, Esq. (Eggleston, Siegel & Lewitter), for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I held a hearing on February 3, 1993, is based on an unfair labor practice charge filed on August 14, 1992, by Thais Jones (Jones), and on a complaint issued on September 28, 1992, as amended at the hearing, on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Board's Regional Director for Region 32, alleging that Office & Professional Employees International Union, Local 29, AFL-CIO (the Respondent) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act), by attempting to cause and causing

Jones' employer, Park & Shop Market, Inc. (Employer), to terminate Jones' employment, and further violated Section 8(b)(1)(A) by failing to disclose to Jones her *Beck* rights.¹ On October 16, 1992, Respondent filed an answer to the complaint, which it amended during the hearing, denying the commission of the alleged unfair labor practices.²

On the entire record, and from my observation of the demeanor of the witnesses,³ and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

The Employer, which does business as Andronico's Park & Shop, is a California corporation with an office and place of business in Albany, California. It operates a chain of retail food supermarkets. Respondent is the exclusive collective-bargaining representative of the Employer's employees who perform office and/or clerical work.

The terms and conditions of employment of Respondent's office and clerical employees are governed by a collective-bargaining agreement between Respondent and the Employer effective by its terms from November 3, 1991, through November 5, 1994 (1991-1994 Agreement). The 1991-1994 Agreement succeeded an agreement effective by its terms from November 1, 1988, through November 2, 1991 (1988-1991 Agreement).

Section 3 of the 1988-1991 and 1991-1994 Agreements read, in pertinent part, as follows:

Section 3. UNION SECURITY

3.1 [Whenever] the Employer hires a new employee for a job covered by this Agreement, he will at once inform said employee of the terms and provisions of this Agreement and the employee's obligations thereunder. The Employer also agrees to furnish the Union

in writing within 7 calendar days from the date of hire the employee's name, address, telephone number, date of employment, job classification, and rate of pay.

3.2 Membership in the Union, as a condition of employment, shall be required on the thirty-first (31st) day following the beginning of employment, or the effective date of this Agreement, whichever is later, in the case of any particular employee.

3.3 Membership in the Union shall be available to employees upon their tendering the initiation fee and periodic dues, and shall be available upon the same terms and conditions generally applicable to all other members of the Union, provided that the Employer shall not be required to discharge any employee if it has reasonable grounds for believing that membership in the Union was denied or terminated for any reason other than failure of such employee to tender initiation fees and periodic dues uniformly required as a condition of employment.

Although the 1991-1994 Agreement is effective by its terms from November 3, 1991, the agreement on its face shows it was not executed by the parties until on or about September 8, 1992. Thus, if the 1988-1991 and the 1991-1994 Agreements are taken at face value, there was a hiatus of approximately 10 months between the expiration of the 1988-1991 Agreement and the execution of the 1991-1994 Agreement. As described *infra*, it is undisputed that Respondent was demanding that under the terms of the 1988-1991 Agreement's union-security clause, Jones' back dues obligation included this 10-month period. The complaint does not allege, the General Counsel does not contend, and the parties have not litigated, however, the issue of whether Respondent unlawfully demanded that Jones was obligated to pay dues as a condition of employment for this 10-month period, therefore I have not considered that issue.

Section 5.6 of the 1988-1991 Agreement, reads as follows:

5.6 Nothing contained herein shall preclude the use of part-time employees. In the event the Employer elects to utilize temporary office help supplied by agencies, any temporary employee who works three hundred sixty (360) hours within any one hundred twenty (120) day period shall be placed on the Employer's payroll. During the temporary employment term, such employees will not be covered by any other provisions of the collective bargaining agreement. Retention of agency personnel beyond the three hundred sixty (360) hours will establish a seniority date as of the first (1st) day of employment. The Employer agrees to notify the Union subject to Section 3.1 of the agreement.

Section 5.6 of the 1991-1994 Agreement reads, in pertinent part, as follows:

5.6 Nothing contained herein shall preclude the use of part-time employees. In the event the Employer elects to utilize temporary office help supplied by agencies, any temporary employee who works three hundred sixty (360) hours within any one hundred twenty (120) day period shall be placed on the Employer's payroll. During the temporary employment term, such employ-

¹ *Communications Workers v. Beck*, 487 U.S. 735 (1988).

² In its answer to the complaint Respondent admits it is a labor organization within the meaning of Sec. 2(5) of the Act, and in its answer, as amended at the start of the hearing, admits that the Employer meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I therefore find it will effectuate the policies of the Act for the Board to assert its jurisdiction in this case.

³ In those instances where the testimony of Charging Party Jones conflicts with the testimony of Respondent's representatives' Preston and Rubyn, as described *infra*, I credited Jones' testimony because her testimonial demeanor—the way she spoke, the tone of her voice, and the way she looked and acted while testifying—persuaded me that, while Jones was not as articulate as either Preston or Rubyn, she was a sincere and conscientious witness, whereas both Preston's and Rubyn's testimonial demeanor was poor. In crediting Jones' disputed testimony, I considered the alleged instances of Jones' "evasion" and "contradiction," referred to by Respondent in its posthearing brief, and concluded, even if the record as a whole supports Respondent's assertion that, in certain respects, Jones' testimony can be characterized as "evasive" and "contradictory," Preston's and Rubyn's poor testimonial demeanor, as contrasted to Jones' good testimonial demeanor, warrants my acceptance of Jones' disputed testimony.

ees will not be covered by any other provision of the collective bargaining agreement. If such employees are retained beyond the three hundred sixty (360) hours set forth above, seniority only shall be retroactive to the first day of service with the Company. However, benefits do not begin to accrue to the employee until the actual date of permanent hire with the Company. The Employer agrees to notify the Union subject to Section 3.1 of the agreement.

Jones began work as an office clerical at the Employer's Albany, California facility on September 17, 1990. She was not employed as an employee of the Employer. Instead, she was on the payroll of Account Temps, an employment agency which supplied temporary office clericals to the Employer. Jones was employed by the Employer in this capacity, as a temporary employee, from September 17, 1990, to July 15, 1991. During this period she remained an employee of Account Temps and, although her work was supervised by the Employer's supervisors, her terms and conditions of employment were not governed by the 1988-1991 Agreement.

On July 15, 1991, Jones became an employee of the Employer. Shortly before that date, one of the Employer's office clericals retired and the job vacancy was posted. Jones, who at the time was working for the Employer as an employee of Account Temps, applied for the vacant job and was hired on July 15, 1991, to fill the vacancy.⁴ Page Ellis, the Employer's personnel director, testified that pursuant to the terms of section 5.6 of the 1988-1991 Agreement, *supra*, Jones should have been placed on the Employer's payroll and made an employee of the Employer prior to July 15, 1991, because Jones had previously been employed at least 360 hours within a period of 120 days, by Account Temps as a temporary employee for the Employer.

On September 25, 1991, in anticipation of the negotiations for an agreement to succeed the 1988-1991 Agreement, which was scheduled to expire in November 1991, Respondent, by letter, asked the Employer to provide it with, among other things, "[a] list of current employees including their names, dates of hire." On or about October 10, 1991, Personnel Director Ellis responded to this request by providing the Respondent with a list of the Employer's current employees covered by its agreement with Respondent. One of the employees named on the list submitted by Ellis to Respondent was Jones, whom Ellis stated had a "Hire Date" of "9/17/90." Ellis testified she does not know why she used this incorrect date as Jones' date of hire. Ellis further testified that her source for the September 17, 1990 hire date was the "employee master file" maintained by the Employer's personnel department.

In mid-December 1991, Jones received by mail from Respondent a document dated December 12, 1991, entitled "IMPORTANT DUES INFORMATION." The document was also subtitled: "Dues and Initiation Fees"; and "New Member dues." It informed Jones, among other things: "The regular dues of each member shall be payable on the 30th calendar day from date of employment and shall be \$24 per month.

⁴On July 15, when the Employer hired Jones to fill the clerical vacancy, Page Ellis, the Employer's personnel director, the manager of Jones' department, filled out a document entitled "Employee Information." Ellis wrote, among other things, that Jones' "Starting Date" was "7-15-91."

Dues are payable on or before the 1st day each month. After the 15th of each month there is a late fee charge of \$5." Continuing, the document notified Jones she owed Respondent a total of \$462, which it stated consisted of a \$100 "Initiation Fee," and "dues" of \$362 for the months of September 1990 thru December 1991. There was also a handwritten notation asking Jones to "please mail us copies of hours worked 1990-1991." Last, at the bottom of the page where it stated, "[t]he above amount should be received by this office by," there was no date, instead there was a handwritten notation stating "please call this office and make arrangements with Eileen Preston Secretary/Treasurer."

Enclosed with the above-described "IMPORTANT DUES INFORMATION" document, which Jones received in mid-December 1991, were several other documents (new member information packet), which welcomed Jones as a "member" of Respondent, explained the history of Respondent's logo, explained the various benefits afforded by union representation and union membership, explained the mechanics of contract negotiations and the members' role in those negotiations, and explained various matters related to Respondent's policy, operations, and finances.⁵

In dispute, however, is whether included among the documents in the "new member information packet," received by Jones in mid-December, there was a document, referred to herein as the "*Beck* Notice," which is a two-page document whose caption and first paragraph reads as follows:

Notice

LOCAL 29 POLICY REGARDING FEE REDUCTIONS For Non-Members Protesting Expenditures Unrelated to Collective Bargaining and Representation

Employees working under Local 29 Collective Bargaining Agreements containing Union security clauses are required, as a condition of employment, to pay monthly dues or service fees to the Union. Employees who are not members of Local 29 may file protests in accordance with the procedures described below to certain Union expenditures, considered to be unrelated to representation and the collective bargaining process.

. . . .

The "*Beck* Notice" thereafter goes on to set out in detail the rights of nonmembers of Respondent, who desire to protest those union expenditures considered to be unrelated to representation and the collective-bargaining process.

During the hearing the parties stipulated that General Counsel's Exhibit 13, Respondent's "Chargeable Expense Report for the year ending December 31, 1991," establishes

⁵As of December 1991, when Respondent mailed the "new member information packet" to Jones, Jones had not paid any money to satisfy her initiation fee or dues obligation and had not by word or other conduct led Respondent to believe she desired to become a member of Respondent, yet, according to the testimony of Eileen Preston, Respondent's secretary/treasurer, Respondent considered Jones to be one of its members, albeit not in good standing. When asked if Respondent ever sent anything to Jones which informed her she was a member of Respondent, Preston testified, "she got the new member packets," referring to the "new member information packet" received by Jones in mid-December 1991.

that during the time material Respondent incurred expenses which, in view of the General Counsel, cannot be charged to protesting nonmembers (Tr. 22-23). Respondent's counsel represented that Respondent would not challenge the General Counsel's view that these expenses are nonrepresentational expenses (Tr. 21).

Eileen Preston, Respondent's secretary-treasurer, testified Respondent's policy toward nonmembers who desire to protest union expenditures that are unrelated to representation and the collective-bargaining process was adopted on November 20, 1991. She testified that after the adoption of this policy, the "Beck Notice" was included in the packet of information sent to new members and that during the normal course of business, the clerical employees who put together the packet of documents mailed to Jones in mid-December 1991 would have included among those documents the "Beck Notice." Jones, however, testified that the "Beck Notice" was not included among "the new member information packet" she received from Respondent in mid-December 1991.

Preston further testified that the employees of Respondent who put together the January 1992 edition of Respondent's newsletter would have also included as a part of that newsletter the "Beck Notice," and further testified that since the same mailing list used by Respondent to mail the "new member information packet" to Jones in mid-December was used by Respondent to mail the January 1992 newsletter that Jones should have received a copy of the "Beck Notice" with the January 1992 newsletter. Jones, however, testified she did not receive a copy of Respondent's January 1992 newsletter let alone the newsletter with a copy of the "Beck Notice" included.

On receipt of the bill from Respondent in mid-December 1991, stating she owed a total of \$462 for dues and an initiation fee, Jones telephoned Respondent's office and asked to speak to the person who sent the bill. She was informed that the person, who was Respondent's dues clerk, Susan Hudak, was absent from work on sick leave disability. In fact Hudak was absent from work until approximately March 1992.

Early in January 1992 Jones again telephoned Respondent's office and this time spoke to Secretary-Treasurer Preston. She told Preston she had received a bill from Respondent for dues and an initiation fee, and the bill incorrectly stated she had worked for the Employer as an employee during 1990. She also informed Preston that if in fact it was correct that she had worked for the Employer as an employee in 1990, she did not believe she had been paid the proper rate of pay for that period. Jones also explained to Preston she had attempted to speak to dues clerk Hudak to clarify the matter, but Hudak was unavailable. Preston quoted a dollar amount to Jones, which Preston stated was the amount she thought Jones owed Respondent, and told Jones she would speak to Business Representative Tamara Rubyn, the business representative assigned to service the Employer's Albany facility where Jones worked, and have Rubyn look into the matter.

The above description of Jones' early January 1992 telephone conversation with Preston is based on Jones' testimony. Preston testified that during this conversation Jones questioned the date Respondent was claiming she was hired by the Employer, stated she thought there was confusion about her hire date, stated she could not afford to pay the

money which Respondent claimed she owed, and asked if she could make arrangements to pay the money.

Late in January 1992, after failing to hear from either Preston or Rubyn, Jones telephoned Respondent's office and spoke to Business Representative Rubyn about the bill she had received from Respondent in mid-December 1991. She told Rubyn she had been employed by an employment agency to work at the Employer's place of business in September 1990 and had not been placed by the Employer on the Employer's payroll until July 15, 1991. Rubyn explained to Jones that the amount set forth in the bill received by Jones probably included the amount Jones owed for "work permit fees," and, based on her belief that Jones probably owed Respondent for work permit fees for the time she worked for the Employer as an employee of the employment agency, Rubyn quoted Jones a dollar amount which Jones' owed Respondent, which differed from the dollar amount that Preston had quoted to Jones in their conversation earlier that month. Jones told Rubyn that the amount Rubyn quoted was the third different dollar amount quoted to her by Respondent. Jones also told Rubyn she had been unable to speak to dues clerk Hudak and had spoken to Preston only briefly about the matter and asked if Rubyn could get together with Preston and Hudak to discuss the matter and then let Jones know what was going on. Rubyn replied she would check on Jones' start date with the Employer.

The above description of Jones' late-January 1992 telephone conversation with Rubyn is based on Jones' testimony. Rubyn, who testified for Respondent, disputed only one part of Jones' testimony, namely, Rubyn testified Jones did not tell her she thought her hire date was July 15, 1991, whereas Jones testified she specifically told Rubyn she had gone on the Employer's payroll on July 15, 1991. On February 5, 1992, Jones paid \$60 to the Respondent. Jones testified she paid this money because:

I got the bill. I wanted to pay. I wanted to join the union. I wanted to find out how it works. I had kind of romanticized union membership. . . . They sent me a bill, I called, people were checking on it. Something went wrong, but they were checking on it. And I sent some money in February, because I still had not heard anything from them. And I thought if they got the check, they'd have to try to apply it. And then that would kind of like spark their memory. And then they could call and say well, you know, this is what we found out or this is what we're going to do.

Late in February 1992, Jones spoke to the Employer's personnel director Ellis, and questioned the Employer's use of July 15, 1991, as Jones' date of hire. Jones told Ellis that because of the length of time she had worked for the Employer as a temporary employee employed by Account Temps, she thought she should be given credit for being on the Employer's payroll earlier than July 15, 1991. It was her understanding, Jones told Ellis, that at least one other temporary employee who had become a permanent employee had her hire date backed up to the first day she began work as a temporary employee at the Employer's place of business.

Ellis considered Jones' request and on February 28, 1992, decided to change Jones' date of hire from July 15, 1991,

to June 1, 1991. She implemented this decision by giving the following note, dated February 28, 1992, to the Employer's payroll clerk: "Please change [Jones'] hire date to 6-1-91 and add 360 hours to her current hours." Ellis testified she changed Jones' hire date because any employee who works for the Employer as a temporary employee employed by an employment agency and does this for at least 360 hours in a 120-day period, under section 5.6 of the collective-bargaining agreement, is supposed to be made a permanent employee, and since Jones had been employed as a temporary employee for much longer than 360 hours in a 120-day period, that in order to clear up what appeared to be a violation of section 5.6 of the Agreement, Ellis decided to "just take what the contract said, which was the 360 hours and back the date up from July 15." Ellis further testified that in figuring Jones' correct hire date was June 1, 1991, she erred because, "June 1st is less than 360 hours," and testified she meant to back Jones' hire date ever further back in time than June 1, 1991, but erroneously failed to do so. Ellis testified that what she was trying to do on February 28, 1992, when she changed Jones' hire day from July 15, 1991, to June 1, 1991, was to "circumvent a problem with the union, because the company had made a mistake by not putting [Jones] on as a permanent employee before that."

Following Jones' late-January 1992 conversation with Business Representative Rubyn, the next time anyone from Respondent communicated with Jones about her dues—either verbally or in writing—was on June 10, 1992, when Respondent's dues clerk, Hudak, telephoned Jones at work, introduced herself, and told Jones she was calling about Jones' membership dues. Hudak told Jones she had documents from the Employer showing that Jones started to work for the Employer in September 1990. Hudak also told Jones that if Jones disputed that date of hire Jones would have to speak to Business Representative Rubyn. Regarding the money owed by Jones to the Respondent for her dues and initiation fee, Hudak quoted to Jones a figure which differed from what Preston had told Jones, differed from what Rubyn had told Jones, and differed from the total contained in the mid-December bill received by Jones. Jones responded to Hudak's remarks by stating she had previously spoken to Preston and Rubyn about the matter and they had quoted to her different dollar amounts and that Preston and Rubyn were supposed to be looking into the matter. Jones suggested that Hudak speak to Preston and Rubyn about the matter. This ended the conversation.

On or about June 12, 1992, Jones sent the following letter, which is dated June 12, 1992, to the Respondent:

Dear Local 29 Representative:

This letter will serve to confirm my conversation with Susan Hudak regarding an outstanding balance of \$562.00 as of our telephone conversation at 2:00 pm Wednesday afternoon, June 10, 1992.

On January 9, 1992 at 11:40 am I called and spoke with Illene Preston regarding payment on this account. I was informed that a start date of September 17, 1990 was on file. I questioned this. I was informed that the person assigned to my account was 'on leave'.

On January 23, 1992 I called again, the person assigned to my account was still on leave . . . I was referred to Tamara Rubyn. I was then told that my billing

included "work permit fees" and there had been an increase dues from \$24.00 to \$25.00. At this time, the start date was October 1990. Again, I stated that I was not sure about the billing and I requested a detailed statement. To date it has not been received.

I have made payments on this account. I do not agree with the start date or the probable billing for work permit fees. Please forward a detailed statement.

On or about June 19, 1992, Jones received in the mail a computer printout, unaccompanied by a covering letter or any other kind of correspondence. On its face the printout indicated it was from Respondent and was from Respondent's "Member's Master File Data" and that it was "Run" on June 15, 1992, and that the facts and figures contained therein concerned the monthly dues and initiation fee owed by Jones to Respondent. Item "18" on the printout read "Dof H: 09/01/90." The printout further stated: "DUES PAID THRU: 09/90-BALANCE DUE: 552.00," and stated Jones owed \$40 for her initiation fee, having previously paid \$60, and owed monthly dues of \$24 from October 1990 through October 1991, and \$25 a month from November 1991 through June 1992.

Subsequently, at the beginning of July 1992, Jones received in the mail another computer printout which was identical to the one she had received on or about June 19, 1992, except in two respects: (1) it had a "run" date of June 26, 1992; and (2) there was a handwritten note on the printout from dues clerk Hudak which informed Jones, "If I don't hear from you by 7-3-92 regarding this bill further action will be taken."

When Jones did not communicate with Hudak, in response to Hudak's request that she do so by July 3, 1992, Respondent's secretary-treasurer Preston sent a letter dated July 9, 1992, to the Employer which requested the Employer to "terminate the services" of Jones by July 16, 1992, in accordance with the provisions of the parties' collective-bargaining agreement, because Jones was not a member of Respondent in good standing, and further stated that before Jones could return to work it would be necessary for her to "remit all outstanding dues, initiation fees and monies owed" to bring her membership current through July 1992, and such payment must be made in full by July 16, 1992.

Upon its receipt by the Employer, Personnel Director Ellis showed the July 9 letter to Jones on or about July 9. Jones, however, was not notified by Respondent that she would be terminated by the Employer if she failed to pay the dues and initiation fees owed to Respondent. As a matter of fact, when Secretary-Treasurer Preston sent the July 9 letter to the Employer requesting Jones' termination, Respondent was in the process of re-evaluating Jones' date of hire and the amount of moneys she was obligated to pay to Respondent to satisfy her contractual union-security obligation. For, late in June or at the start of July 1992, Respondent's dues clerk, Hudak, and Secretary-Treasurer Preston expressed concern to Business Representative Rubyn about Jones' hire date. They asked Rubyn to verify Jones' correct date of hire. Based on her earlier conversation with Jones, Rubyn knew there was a problem with Jones' correct hire date and knew Jones was "very concerned" about this. Therefore, early in July 1992, Rubyn visited the Employer's Albany facility where Jones'

worked and with the assistance of Respondent's Shop Steward Inez Cline, who was also employed as an office clerical at the Albany facility, Cline accessed the Employer's master employment records, as programmed in the Employer's computer. On July 10, 1992, based on the information generated by the Employer's computer, Rubyn wrote a note to dues clerk Hudak which instructed Hudak to do the following: correct Jones' hire date to June 1, 1991; correct the amount owed by Jones to Respondent; send a new termination letter to the Employer and to Jones; and expedite Jones' termination.

In conducting her investigation concerning Jones' hire date, Rubyn did not speak to the Employer's personnel director, Ellis, nor to the Employer's payroll clerk, but relied entirely on Jones' record of employment as programmed in the Employer's computer.

Pursuant to Rubyn's July 10 note, Respondent, by Secretary-Treasurer Preston, on July 13, 1992, mailed a letter to the Employer and another letter to Jones. The July 13 letter to the Employer requested that it "terminate the services" of Jones by July 20, 1992, in accordance with the provisions of the parties' collective-bargaining agreement, because Jones was not a member of Respondent in good standing, and further stated that before Jones could return to work it would be necessary for her to "remit all outstanding dues, initiation fees and monies owed" to bring her membership current through July 1992 and stated that this payment must be made in full by July 20, 1992.

The July 13 letter to Jones, which enclosed a copy of the Respondent's July 13 letter to the Employer, read as follows:

The enclosed letter calling for your immediate termination has been sent to your Employer today.

We regret having to take this action; however, notices to you concerning your dues account have not resulted in bringing your account current.

According to our records, the following amounts must be paid by cashier's check or money order before we can release the termination request. This payment must be made within the time specified on the attached letter.

Reinstatement/ Initiation Fee	\$40.00 bal
Dues	\$321.00 for the months of July 91 thru July 92
Total	\$361.00

If you have any questions or would like to discuss this please contact the Dues Clerk at our office.

Sometime during July 14, 1992, while Jones was at work, Personnel Director Ellis gave Jones a copy of Respondent's July 13 letter to the Employer. Ellis instructed Jones to, "get it taken care of."⁶ Jones did not testify as to when Jones received Respondent's July 13 letter addressed to her, but I will presume that during the normal course of the mail she received the letter when she arrived home after work on July 14, 1992.

On July 14, 1992, at the start of her workday, Jones was told by Respondent's shop steward, Inez Cline, who worked

⁶On the face of the copy of the letter Ellis gave Jones, Ellis had written "\$361 owed."

in Jones' department, that Respondent was waiting for Jones to pay her dues. Jones responded by showing Cline a copy of the June 12, 1992 letter that Jones had sent to Respondent in which, among other things, she informed Respondent she disagreed with Respondent's claim that she had started work for the Employer in September 1990 and asked Respondent to forward to her "a detailed statement." Jones also told Cline she had been given more than one hire date by Respondent and thought someone from Respondent was going to review the situation. Jones asked Cline to provide her with specific information, in writing, showing the amount of dues she owed, the date she started to work for the Employer, and the name of the person who conducted the review which generated this information. Cline wrote down Jones' hire date and the amount of money Jones owed Respondent and then told Jones that Cline would have to telephone Respondent's office to learn who had conducted the review which had generated this information. However, after telephoning Respondent's office and speaking to someone, she destroyed what she had written and informed Jones that Jones would have to speak to Secretary-Treasurer Preston about the matter.

On the morning of July 14, following her above-described conversation with Cline, Jones received a telephone call at work from Preston. Rubyn, who was also on the telephone, told Jones that Jones had an outstanding bill which she owed Respondent, and Preston then asked if Jones needed to make arrangements to pay the money owed, and offered to set up a payment schedule to accommodate Jones' situation. Jones replied that the Employer that morning had brought her a copy of Respondent's request that the Employer terminate her and she did not think this was right. She told Preston she did not intend to pay the money which Respondent claimed she owed, that she intended to send Preston a fax requesting that Respondent furnish her with "certain information" (not enumerated by Jones), which she stated she believed she was entitled to receive, denied receiving the June 1992 computer printouts from Respondent, and informed Preston she thought the "deal" was that someone from Respondent would visit the Employer's premises and conduct a "review," and asked Preston if that had been done and, if so, for the name of the person who conducted the review. Preston did not answer Jones' inquiry, but stated she would provide Jones with another computer printout detailing the moneys Jones owed Respondent and, if after receiving that printout, Jones had questions she should telephone Preston. Jones indicated this was unsatisfactory and abruptly ended the conversation by slamming down the telephone receiver.⁷

Later, on July 14, in the afternoon, Respondent's shop steward, Cline, called Jones over to Cline's desk and told her that Business Representative Rubyn, who Cline had just spoken to over the telephone, was going to come to the Employer's place of business for the purpose of reviewing Jones' personnel file.⁸ Cline then had Jones speak to Rubyn, who

⁷Jones and Preston testified about the above-described July 14 conversation. Jones' testimony did not contradict Preston's nor did Preston's contradict Jones'. Accordingly, the above description of what was stated during the conversation is based on a composite of their testimony.

⁸The record reveals that Rubyn only sporadically visits the Employer's Albany, California facility, inasmuch as she is responsible

Continued

was still on the telephone, and Rubyn confirmed to Jones she would visit the Employer's place of business for the purpose of reviewing Jones' personnel file. Either Cline or Rubyn informed Jones that the date of Rubyn's visit would be August 12, 1992. Immediately following this conversation, Jones wrote a note to herself stating that Rubyn would visit the Employer's premises on August 12 to review her personnel file. Cline, at Jones' request, signed the note.⁹

On July 14, following her July 14 telephone conversation with Jones, Preston mailed a memo to Jones at her home on the subject of "dues," which stated: "Per our telephone conversation today I have enclosed a print out of the dues charges you owe. Hope this clarifies everything." Jones received this memo with the attached computer printout in the mail on Friday, July 17. The computer printout on its face indicates it came from Respondent's "Member's Master File Data" and that Jones owed Respondent \$361, which consisted of \$40 for her initiation fee, since she had paid \$60 of the \$100 fee on February 5, and also owed dues payments of \$24 a month from July 1, 1991, through October 30, 1991, and \$25 a month from November 1, 1991, through July 1, 1992. Item "18" of the printout stated Jones' "DofH" was June 1, 1991.

Jones' last day of work was Friday, July 17. She was scheduled to be absent from work on vacation during the week of July 20. In fact she was absent from work that week on vacation.

As I have found supra, Respondent, by Preston's letter to the Employer dated July 13, requested the Employer to terminate Jones' services for nonpayment of her membership dues and initiation fee, if the money was not paid to Respondent by July 20. So, on Monday, July 20, the Employer's personnel director, Ellis, telephoned Preston and asked if Jones had settled her debt with Respondent and was informed by Preston she had not, but that since Jones was on vacation that week the Respondent was agreeable to having the Employer wait until the close of business Friday, July 24, to see whether Jones settled her debt with Respondent. Subsequently, when, at the close of business on July 24, Ellis was informed by Preston that Jones had not settled her debt with Respondent, the Employer terminated Jones' employment, pursuant to Preston's July 13 request, and on Monday, July 27, Respondent notified Jones of her termination.

On October 6, 1992, Personnel Director Ellis wrote Jones stating that pursuant to a demand by the Respondent, "we are offering you an unconditional return to employment in the same classification, with the same wages, hours and benefits" and expect you to return to work on October 14, 1992. Jones accepted the offer of reinstatement and on October 14, 1992, was in fact reinstated by the Employer.

As I have found, supra, on July 14, 1992, by the end of the day, Jones had received from Respondent its July 13 letters to the Employer and Jones which, in substance, informed Jones that Respondent had requested the Employer to terminate her employment by July 20, 1992, pursuant to the terms

for servicing 56 different facilities which are located in a geographical area stretching from Reno, Nevada, to Redding, California, to Fresno, California, and throughout the San Francisco Bay Area.

⁹The above description of what occurred when Jones spoke to Cline and Rubyn on the afternoon of July 14 is based on Jones' testimony. Rubyn, a witness for Respondent, was not questioned about this conversation. Cline did not testify.

of the parties' collective-bargaining agreement, because Jones was not a member in good standing of Respondent and that Respondent could "release the termination request" if, by July 20, Jones paid Respondent a total of \$361 for her initiation fee and back dues for July 1991 through July 1992. Subsequently, on Friday, July 17, 1992, Jones received from Respondent a copy of a computer printout which explained to Jones how Respondent had computed her above-described initiation fee and back dues' obligation.

Jones testified that the receipt of the above-described information did not persuade her Respondent intended to cause the Employer to terminate her employment because, she testified: the Employer had not carried out Respondent's earlier request that the Employer discharge her by July 16, 1992, for her failure to pay the back dues and initiation fee requested by Respondent; and, Jones' July 14, 1992 conversation with Business Representative Rubyn and Shop Steward Cline had led Jones to believe Respondent was still checking into the matter. Jones also testified that following her July 17 receipt of the computer printout from Respondent, her failure to contact Respondent to question its assertion that she was obligated to pay dues from July 1, 1991, even though she believed she had not been hired by the Employer until July 15, 1991, was motivated by her belief that she was not obligated to pay her back dues at that time to avoid being terminated on July 20, 1992, because based on her July 14, 1992 conversation with Rubyn and Cline, "I thought it was all hooked up with representation, which was already set up [referring to Rubyn's July 14 agreement, confirmed by Cline, that Rubyn would visit the facility on August 12, 1992, to review Jones' personnel file], because they needed to come in and look at the dates." (Tr. 168.)

B. Discussion and Conclusions

As described in detail supra, by its letters of July 9 and July 13, 1992, Respondent requested that the Employer terminate the employment of Charging Party Jones, pursuant to the terms of the parties' contractual union-security clause, because she was not a member in good standing of Respondent, and on July 27, 1992, the Employer, acting in response to those requests, discharged Jones. The complaint alleges, in substance, that by engaging in the aforesaid conduct Respondent attempted to cause and caused the Employer to discharge Jones in violation of Section 8(b)(1)(A) and (2) of the Act. This allegation has merit for two different reasons: (1) Respondent was demanding that Jones pay back dues for a period where there was no contractual union-security obligation for Jones to maintain membership in Respondent; and, (2) in enforcing the contractual union-security clause against Jones, Respondent did not comply with its fiduciary duty to deal fairly with her.¹⁰ My reasons for reaching these conclusions are set forth hereinafter.

¹⁰I have not considered whether, as alleged in the complaint, Respondent violated Sec. 8(b)(1)(A) of the Act, by failing to disclose to Jones her *Beck* rights. Nor have I considered whether, as further alleged in the complaint, Jones was under no obligation to pay union dues and an initiation fee, given Respondent's alleged unlawful failure to disclose to Jones her *Beck* rights, and whether, as further alleged in the complaint, under these circumstances, Respondent violated Sec. 8(b)(1)(A) of the Act by attempting to cause and causing the Employer to discharge Jones for her failure to pay such dues and fee. I have not considered these allegations because even if they

I.

“It is well settled that a union’s demand for payment of back dues which arose during a period where there was no obligation to maintain membership cannot lawfully be imposed as a condition of employment, even under a valid union security agreement.” *Operating Engineers Local 139 (Camosy Construction)*, 172 NLRB 173, 174 (1968), and cases cited. Accord: *Hotel & Restaurant Employees Local 19 (Sunnyvale Hilton)*, 275 NLRB 461–461 (1985), and *Operating Engineers Local 139 (T. J. Butters Construction)*, 198 NLRB 1195 (1972).

In the instant case Respondent was attempting to collect back dues from Jones which arose in part during a period when Jones was under no obligation to maintain membership in Respondent. It was not until July 15, 1991, that Jones was hired by the Employer and placed on its payroll. Therefore, taking into account the 31-day statutory and contractual grace period to which Jones was entitled before being required to join Respondent, Jones was not obligated under the contractual union-security agreement to commence paying monthly dues to Respondent until August 15, 1991. Nonetheless, Respondent initially demanded that Jones pay back dues for a period commencing October 1, 1990, and subsequently caused the Employer to discharge her because she failed to pay back dues for a period commencing on July 1, 1991. Accordingly, the Respondent violated Section 8(b)(1)(A) and (2) of the Act, by attempting to cause and causing the Employer to discharge Jones, in part, because she failed to pay back dues for the period of July 1 to August 15, 1991, when she was not legally required to join the Respondent.¹¹

In reaching this conclusion I considered the following: (1) in February 1992, at Jones’ request, the Employer changed Jones’ date of hire from July 15, 1991, to June 1, 1991; and (2) in demanding that Jones pay back dues for the period commencing July 1, 1991, Respondent relied on employment information generated by the Employer’s computer, which showed Jones’ hire date was June 1, 1991.

Regarding (1) there is insufficient evidence, other than perhaps Jones’ seniority for vacation pay, that any of the other contractual benefits provided for in the 1988–1991 Agreement were made retroactive to June 1, 1991, when the Employer in February 1992 changed Jones’ hire date from July 15, 1991, to June 1, 1991. In any event, assuming this was done and that the Employer also reimbursed Jones for any loss of wages and other benefits suffered by not being covered by the 1988–1991 Agreement effective June 1, 1991, the Board has held that a union-security agreement may not

have merit, the remedial order would not be so significantly and materially different from the order which I am recommending, so as to warrant the delay in disposing of this case which would result because of the lack of Board decisions defining the law in this area.

¹¹ As described supra, Respondent assessed Jones a total amount that included the unlawfully imposed back dues charge and caused her discharge for failure to pay any portion of the assessed sum. As I have found infra, the evidence is insufficient to establish that Jones would not have tendered the lawful portion of the assessed back dues charges if properly detailed and explained by Respondent. “The key here is that [notice by Respondent to Jones of the correct amount of back dues Jones was lawfully required to pay] was not given, and we will not presume what would have happened in its absence.” *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454, 455 fn. 5 (1979).

be retroactively applied even where the workers receive retroactive monetary benefits in return for the payment of back dues. See *Teamsters Local 25 (Tech Weld)*, 220 NLRB 76, 77 (1975), and cases cited therein.

Regarding (2) under the principles enunciated in *NLRB v. Hotel & Restaurant Employees Local 568*, 320 F.2d 254, 258 (3d Cir. 1963), and its progeny, the extremity of the penalty against employees, loss of employment, requires that a labor organization in enforcing a union-security agreement be held to a strict fiduciary standard of fair dealing with the employees regardless of the union’s good faith or lack of evil intentions. Under the circumstances of this case, in relying solely on the information it received about Jones’ hire date, when it accessed the Employer’s computer to look at Jones’ date of hire, the Union breached its fiduciary duty to deal fairly with Jones before seeking her discharge for failing to comply with the requirements of the parties’ contractual union-security agreement. Thus, when Respondent caused the Employer to discharge Jones, the Respondent, through its business representative Rubyn, knew Jones had indicated that her date of hire was July 15, 1991, rather than September 1990 or June 1, 1991, and also knew Jones was concerned that Respondent in computing her back dues obligation was using an incorrect hire date. Also, Respondent had another reason to question the June 1, 1991 hire date generated by the Employer’s computer, inasmuch as previously, in response to Respondent’s request for Jones’ date of hire, the Employer had informed the Respondent that her date of hire was not June 1, 1991, but that it was September 1, 1990. Despite the aforesaid circumstances, Respondent never questioned the Employer about Jones’ hire date. I am of the view that given the circumstances, the Respondent, pursuant to its fiduciary duty to deal fairly with Jones when it enforced the union-security agreement, was legally obligated to do more than merely rely on the information generated by the Employer’s computer to determine Jones’ correct date of hire, but was obligated to have one of its representatives personally question the Employer’s personnel director, or some other qualified employer representative, about Jones’ hire date. I recognize that the Employer’s records would have shown that the Employer currently showed Jones’ date of hire as June 1, 1991. However, Respondent’s investigation would most certainly have revealed that Jones’ original hire date was July 15, 1991, and that it was not until February 1992 that the Employer changed her hire date to June 1, 1991.

II.

A labor organization seeking to enforce a union-security provision against an employee has a “fiduciary” duty to “deal fairly” with the employee affected. “At the minimum this duty requires that the Union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure.” *NLRB v. Hotel & Restaurant Employees Local 568*, supra. In *Teamsters Local 122 (Busch & Co.)*, 203 NLRB 1041, 1042 (1973), the Board defined the union’s duty as including at the very least, “a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount,” plus “an adequate opportunity to make payment.” In addition, the union must specify when such payments are to be made and make it clear to the employee that discharge will result from failure to pay. *West-*

ern Publishing Co., 263 NLRB 1110, 1112 (1982). Only “actual notice, not constructive notice” to the employee will satisfy the union’s fiduciary duty. *Teamsters Local 162 v. NLRB*, 568 F.2d 665, 668–669 (9th Cir. 1978). A union cannot rely on an employer to deliver a delinquency and/or termination notice. *Id.*

Even if a union does not fully comply with its fiduciary obligation, however, the law is settled that the Board never intended these requirements to be so rigidly applied so as to permit a recalcitrant employee to deliberately evade her union-security obligations or attempt to be a free rider. See *Teamsters Local 630 (Ralph’s Grocery)*, 209 NLRB 117 (1974). Rather these requirements were established to ensure that “a reasonable employee will not fail to meet his obligation through ignorance or inadvertence, but will do so only as a matter of conscious choice.” *Valley Cabinet & Mfg.*, 253 NLRB 98, 108 (1980), quoted with approval in *I.B.I. Security*, 292 NLRB 648 (1989). Thus, when it is shown that the employee involved has “willfully and deliberately sought to evade his union-security obligations,” the Board will excuse a union’s failure to fully comply with the notice requirements. See, e.g., *I.B.I. Security*, *supra*.

Assuming Jones’ obligation to comply with the 1988–1991 Agreement’s union-security clause, included back dues for the period commencing July 1, 1991, through July 1992, Respondent’s successful effort to cause the Employer to discharge her for failing to pay those dues, violated Section 8(b)(1)(A) and (2) of the Act, inasmuch as Respondent breached its fiduciary duty to deal fairly with Jones, because: Respondent conducted only a cursory investigation to determine the initial date on which Jones became obligated to maintain membership in Respondent under the union-security agreement; Respondent failed to explain to Jones its basis for determining that Jones owed back dues from July 1, 1991, even though she was not hired by the Employer until July 15, 1991; and, Respondent engaged in conduct which was reasonably calculated to lead Jones to believe she could ignore Respondent’s July 13, 1992 demand that Jones satisfy her back dues obligation by July 20, 1992, or be terminated.

On July 14, 1992, Jones received from Respondent its July 13 letters to the Employer and to Jones which, in substance, informed Jones Respondent had requested the Employer to terminate her employment by July 20, 1992, pursuant to the terms of the parties’ collective-bargaining agreement, because Jones was not a member of Respondent in good standing and that Respondent could “release the termination request” if, by July 20, Jones paid Respondent a total of \$361 for her initiation fee and back dues owed Respondent for July 1991 through July 1992.

Prior to her receipt of the July 13 letters, Jones had been notified by Respondent, in mid-June 1992 and again in early July 1992, that it believed her date of hire was September 1, 1990, and because of this she owed back dues for October 1990 through July 1992, and, in its July 9, 1992 letter to the Employer, Respondent demanded that the Employer terminate Jones by July 16, 1992, if she failed to pay the back dues for October 1990 through July 1992. However, as described above, 4 days later, on July 13, 1992, Respondent abruptly changed its position and now notified Jones that her back dues obligation commenced on July 1, 1991, rather than on October 1, 1990.

Neither in its July 13 letter nor in the conversations between Jones and Respondent’s representatives on July 14, did Respondent explain to Jones, why, despite the fact that Jones had advised Respondent’s business representative Rubyn that Jones had not been hired until July 15, 1991, Respondent was now using July 1, 1991, as the date Jones’ dues-paying obligation commenced. Nor was Respondent’s determination that Jones was obligated to join Respondent as of July 1, 1991, based on an investigation which involved communication between Respondent and a representative of the Employer. Rather it was the result of Business Representative Rubyn, assisted by Shop Steward Cline, accessing certain employment information programmed into the Employer’s computer.

Respondent engaged in its above-described conduct—its cursory investigation of Jones’ date of hire and its failure to explain to Jones why it had decided she was obligated to pay dues commencing with July 1, 1991—even though Respondent was aware of the following: Jones was very concerned that Respondent was using an incorrect date of hire in computing her dues obligation and had communicated this concern to Respondent; Jones had informed Respondent that she was not hired by the Employer until July 15, 1991; Respondent knew that prior to her being hired by the Employer that Jones had worked for the Employer as an employee of an employment agency, not of the Employer, and during that period of time was not obligated by the contractual union-security agreement to join Respondent; on the two occasions Respondent had made an effort to learn about Jones’ date of hire—in the fall 1991 and in early July 1992—it was furnished with drastically different dates of hire; and, despite this contradictory information and despite the cursory nature of its investigation which led it to use June 1, 1991, as Jones’ date of hire, Respondent failed to question anyone from the Employer in an effort to determine whether the June 1 date of hire generated by the Employer’s computer was Jones’ correct date of hire for union-security agreement purposes.¹²

Additionally, Respondent failed to comply with the fiduciary obligation it owed Jones, by engaging in conduct which was reasonably calculated to lead Jones to believe a representative of Respondent would visit the Employer’s facility on August 12, 1992, to conduct a more thorough investigation to determine Jones’ correct date of hire and, in the in-

¹²I have considered that on Friday, July 17, 1992, Jones received from Respondent a computer printout which explained the method used to compute the amount of dues owed by Jones and, in doing so, stated that Jones’ “Dof H” was June 1, 1991. However, Jones had been notified previously by Respondent on July 14, 1992, that she would be terminated by Monday, July 20, if she did not pay her dues obligation. Respondent did not inform Jones that the July 20 date for her termination had been extended to July 24, by agreement between Respondent and the Employer. In view of these circumstances, I have doubts whether Jones was afforded a reasonable period of time to satisfy her dues obligation after being informed for the first time on July 17 that it was computed based on a “Dof H” of June 1, 1991. In any event, for the reasons set forth above, I am persuaded that, under the circumstances of this case, to comply with its fiduciary duty to treat Jones fairly, Respondent was obligated to conduct more than its cursory investigation of Jones’ date of hire and was also obligated to explain to Jones its basis for determining she owed back dues from July 1, 1991, even though she was not hired by the Employer until July 15, 1991.

terim, Respondent would not demand Jones' discharge. Thus, as described supra, when Jones on July 14, 1992, spoke to Respondent's representatives, Preston, Rubyn, and Cline, she questioned the accuracy of the information Respondent had relied on to establish the back dues owed by Jones, stated she did not intend to pay the amount of money Respondent claimed she owed, but instead intended to fax to Respondent a request for certain information which she indicated she thought she was entitled to receive before complying with Respondent's request, and told Preston she thought that the "deal" had been for Respondent to have one of its representatives visit the Employer's facility to conduct a "review" to determine Jones' date of hire. Preston responded by indicating Respondent did not intend to conduct such a review, but instead would mail to Jones a computer printout detailing what she owed, which Preston stated Jones could question Preston about. Jones at this point, however, abruptly ended the conversation by indicating that Preston's proposed alternative to a "review" was unsatisfactory and by slamming down the telephone receiver. That same day, a short time later, Business Representative Rubyn, who had been on the telephone with Preston when Preston earlier that day had spoken to Jones, telephoned Jones and, in effect, indicated to Jones that Respondent had agreed with Jones' request for a "review," by stating to Jones that Rubyn would visit the Employer's premises for the purpose of reviewing Jones' personnel file. Respondent's, shop steward, Cline, at this time also spoke to Rubyn, and after speaking to Rubyn confirmed to Jones that Rubyn would come to the Employer's place of business on August 12, 1992, to review her personnel file.

Considering the context in which Rubyn agreed to come to the Employer's facility on August 12, 1992, to review Jones' personnel file, Jones had good reason to believe that Preston had reconsidered and had agreed to Jones' request that before taking action against Jones for failing to pay what she owed Respondent, that Respondent would first have one of its representatives come to the Employer's facility and conduct a further review or investigation to determine when Jones had been hired by the Employer. In addition, I note that Jones testified that following her Friday, July 17, 1992 receipt of the computer printout from Preston, her failure to contact Respondent to question its assertion that she was obligated to pay dues from July 1, 1991, even though she knew she had not been hired by the Employer until July 15, 1991, was motivated by her belief that she was not obligated to immediately pay her back dues to avoid being terminated, because based on her July 14 conversation with Rubyn and Cline, "I thought it was all hooked up with representation, which was already set up [referring to Rubyn's July 14 agreement, confirmed by Cline, that Rubyn would come to the Employer's facility on August 12, 1992, to review Jones' personnel file], because they needed to come in and look at the dates" (Tr. 168).

Having demanded that the Employer discharge Jones in the event Jones' payment was not received by Friday, July 24, 1992, the Respondent had a fiduciary duty to give Jones clear notice of the procedures which had to be followed to retain her job. Since Jones' July 14 conversations with Business Representative Rubyn and Shop Steward Cline, indicated to Jones that Jones could delay paying her debt to Respondent until after Respondent had conducted a further in-

vestigation on August 12, 1992, the burden was on Respondent to advise the Employer of this change in Respondent's plans. See *Sheet Metal Workers v. NLRB*, 716 F.2d 1249, 1255 (9th Cir. 1983). By failing to do so, Respondent did not comply with its fiduciary duty to deal fairly with Jones when enforcing the contractual union-security agreement against her.

I considered Respondent's contention that Jones willfully and deliberately sought to evade her union-security obligations and, because of this, Respondent did not violate the Act by causing her discharge, even if it failed to comply with its fiduciary duty to deal fairly with her.¹³ This contention lacks merit because, as described in detail supra, and summarized below, Jones' conduct does not rise to the level of bad faith or a willful and deliberate attempt to avoid her dues-paying obligation.

On receipt of Respondent's bill for an initiation fee and back dues, mailed to her in mid-December 1991, Jones contacted Respondent in December 1991, January 1992, and February 1992, and made a sincere effort to pay the money she owed. She was unable to do so, because Respondent was demanding she pay back dues for a period commencing with October 1990, even though Jones had not been hired and placed on the Employer's payroll until July 15, 1991. When Jones, because of her July 15, 1991 date of hire, questioned Respondent's right to demand back dues commencing as far back as October 1990, Respondent agreed to look into the matter of Jones' date of hire. Subsequently, when Respondent failed to communicate with Jones concerning this matter, Jones mailed a check for \$60 to Respondent on February 5, 1992, hoping its receipt by Respondent would remind Respondent she was waiting for it to recompute her dues obligation based upon her correct date of hire. Despite this, it was not until more than 4 months had elapsed, in June 1992, that a representative of Respondent again communicated with Jones about her back dues obligation. Once again Respondent demanded that Jones pay back dues commencing from October 1, 1990, even though Jones had not been hired by the Employer and placed on its payroll until July 15, 1991. Jones, who previously had indicated to Respondent she did not feel obligated to pay back dues for that period because she had not been hired until July 15, 1991, once again understandably questioned the accuracy of Respondent's bill. Subsequently, early in July 1992, Jones received a computer printout from Respondent demanding she pay back dues commencing with October 1990 based on a date of hire of September 1, 1990. Jones ignored this demand because she reasonably believed she was not obligated to pay back dues for that period because she was not hired and placed on the Employer's payroll until July 15, 1991.

On July 14, 1992, when, for the first time, Jones received a demand from Respondent stating, in effect, it was no

¹³There is insufficient evidence to support Respondent's assertion that Jones boasted to other employees "about her ability to free-load," not pay union dues. This assertion is based on the testimony of Respondent's business representative Rubyn that Rubyn was informed by approximately three of the Employer's employees that Jones was "boasting she was not paying dues." No other evidence was presented that Jones, in fact, said anything to that effect to employees. In view of this, I am of the view that there is insufficient circumstantial evidence to warrant the inference that Jones in fact made such statements to employees.

longer demanding back dues from October 1, 1990, but was now demanding back dues from July 1, 1991, Jones did not take the position she would not pay the back dues and initiation fee she owed Respondent. Rather, Jones informed Respondent, in words to the effect, that she was willing to pay whatever she owed but only after Respondent conducted a further investigation into the question of her date of hire and explained to her why she was obligated to pay dues from July 1, 1991, when she was hired by the Employer subsequent to that date. In response to Jones' request, Respondent eventually agreed to conduct such an investigation by having a representative come to the Employer's premises on August 12, 1992, to review Jones' personnel file, so when Jones subsequently, on July 17, 1992, received a computer printout from Respondent stating she owed back dues for the period commencing on July 1, 1991, she chose to ignore that printout and await the outcome of Respondent's scheduled investigation.

Based upon the foregoing, it is apparent that Jones made a good-faith and sincere effort to pay whatever dues and initiation fee she owed Respondent. However, her initial effort was stymied by Respondent's insistence that she was obligated to pay back dues for a period of time when she was clearly not an employee of the Employer and by Respondent's failure to communicate with her about the matter. Later, when Respondent did resume communicating with Jones about her dues obligation, Jones, who was not hired by the Employer until July 15, 1991, was understandably suspicious of Respondent's demand that she was obligated to pay dues from July 1, 1991, so, Jones understandably demanded Respondent conduct a further investigation into her date of hire.

CONCLUSION OF LAW

The Respondent violated Section 8(b)(1)(A) and (2) of the Act when it attempted to cause and caused the Employer to discharge Thais Jones for not complying with her obligation under the parties' contractual union-security agreement, because in engaging in this conduct Respondent did not comply with its fiduciary duty to deal fairly with Jones and demanded that Jones pay dues for a period of time during which there was no obligation for Jones to maintain membership in Respondent.

REMEDY

Having found that by the aforementioned conduct Respondent has violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that Respondent cease and desist therefrom, and to take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondent caused the Employer to unlawfully discharge Thais Jones, I shall order the Respondent to remove from its files, and ask the Employer to remove from its files, any reference to Jones' unlawful discharge and its requests for her discharge and to notify Jones in writing that this has been done and that evidence of this unlawful action shall not be used as a basis for future action against her. I shall also order Respondent to make Jones whole for any loss of earnings and other benefits she may have suffered as a result of her unlawful discharge, from the date of the discharge until the date she was reinstated, less any net interim earnings. The amount of backpay shall be computed

with the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Office & Professional Employees International Union, Local 29, AFL-CIO, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Employer to discharge or otherwise to discriminate against Thais Jones, or any other employees, for failure to tender to the Respondent periodic dues for a period of time during which there was no obligation for the employee to maintain membership in Respondent.

(b) Causing or attempting to cause the Employer to discharge or otherwise to discriminate against Thais Jones, or any other employees, for failure to tender to the Respondent periodic dues and an initiation fee, when Respondent has failed to comply with its fiduciary duty to deal fairly with the employee.

(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 those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

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

(a) Make Thais Jones whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest, as set forth in the remedy section of this decision.

(b) Remove from its files, and ask the Employer to remove from the Employer's files, any reference to Thais Jones' unlawful discharge and its requests that she be discharged and notify her in writing that this has been done and that the evidence of this unlawful action shall not be used as a basis for future action against her.

(c) Post at its business office copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵If 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 Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 32 for posting by the Employer at its place of business in Albany, California, in places where notice to employees are customarily posted, if the Employer is willing to do so.

(e) 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.

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