

Monson Trucking, Inc. and Calvin Anderson
General Drivers Union, Local No. 160, affiliated
with International Brotherhood of Teamsters,
AFL-CIO and Calvin Anderson. Cases 18-CA-
 11466 and 18-CB-3023

October 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
 HIGGINS

On March 18, 1992, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief; Respondents Monson Trucking, Inc. (Monson or the Employer) and General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO (Local 160 or the Union) filed answering briefs; and the General Counsel filed a reply brief.

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, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel excepts to the judge's dismissal of the consolidated complaint, which alleges that Monson violated Section 8(a)(1) and (3) of the Act by discharging Charging Party Calvin Anderson, and that the Union violated Section 8(b)(1)(A) and (2) by causing Monson to discharge Anderson, purportedly for nonpayment of the required union initiation fees and dues. The General Counsel contends, inter alia, that the Union's request that Monson discharge Anderson, and Monson's discharge of and initial failure to reinstate Anderson, were unlawful because Anderson timely complied with the Union's demand for payment of the dues and fees. We find merit in the General Counsel's contentions concerning the Union's conduct and Monson's failure to reinstate Anderson, but we agree with the judge that Monson's initial discharge of Anderson was lawful.¹

The essential facts are not in dispute. Anderson began his employment with Monson in July 1989, was briefly terminated and then rehired in late August 1989, and worked for Monson until his discharge on

¹There is no allegation that the union-security clause was unlawful, and the legality of the clause was therefore not litigated or even addressed by the judge or by the parties at any time during these proceedings. Nevertheless, our concurring colleague has used the occasion of our issuance of this decision to rule on the facial validity of this clause and all other similarly worded clauses. See also his dissenting opinion in *Teamsters Local 443 (Connecticut Limousine Service)*, 324 NLRB 633, 638 fn. 1 (1997). Accordingly, we decline to pass on the issues which our colleague decides in his concurrence until they are presented for decision in an appropriate adjudicatory or rulemaking proceeding.

August 31, 1990.² The collective-bargaining agreement between the Union and Monson included a union-security provision requiring, as a condition of employment, that employees become and remain members in good standing of the Union on and after their 61st day of employment. During most of his employment at Monson, however, Anderson failed to remit to the Union the required initiation fees and monthly dues. Anderson responded to a February 22 union notice and request for payment of initiation fees and dues by remitting a check for only 1 month's dues, which the Union did not cash, and he did not retrieve a June 12 certified letter also requesting payment. By letter dated August 23 and directed to Monson, the Union informed the Employer of Anderson's delinquency and requested that he be terminated unless, within 7 days of its receipt of the notice, Monson was notified that Anderson had made arrangements to pay his dues and initiation fees. A copy of the letter was sent to Anderson, with a handwritten notation specifying that he owed \$150 in initiation fees and \$48 in dues.

On receipt of the Union's request, Monson's personnel and safety manager, David Hoven, telephoned Anderson, who assured him that he would satisfy his financial obligations to the Union. Anderson subsequently mailed a check for \$198 to the Union, which received it on August 29, before the payment deadline set by the Union. Union President Terry Johnson, unaware that Anderson faced discharge for nonpayment of dues, left the check for posting by the secretary-office manager, Dorothy Marko. The check came to Marko's attention on August 31, when she undertook her weekly posting of checks. Knowing about Anderson's potential discharge, Marko telephoned Monson, but hung up after being put on hold for a few minutes.

Marko did not call Monson again until Tuesday, September 4, following the Labor Day holiday. Marko informed Hoven that Anderson had made the required payment, but Hoven stated that the discharge notice had already been issued.³ Later that day, Union Secretary-Treasurer James Schenk contacted Hoven and asked that Anderson be returned to his position. Hoven informed him that only Mark Monson could put Anderson back to work, and Mark Monson did not return Hoven's call. On September 11, Monson allowed Anderson to come back to work, but rehired him as a new probationary employee. Monson ultimately restored Anderson's seniority retroactively, but Anderson lost a 4-cent-per-mile pay differential and certain fringe benefits during the interim period.

In dismissing the complaint, the judge relied on *I.B.I. Security*, 292 NLRB 648, 649 (1989), in which the Board held that "a union's failure to fully comply

²All subsequent dates are 1990 unless otherwise indicated.

³Monson mailed the notice on August 31, and Anderson received it on September 4.

with the notice requirements [will be excused] when it is shown that the employee involved has 'willfully and deliberately sought to evade his union security obligations' [citing *Teamsters Local 30 (Ralph's Grocery)*, 209 NLRB 117, 125 (1974)]." The judge found that Anderson had deliberately and willfully evaded his financial obligations to the Union by his failure to pay the necessary fees and dues based on the Union's previous notices, and his failure to even claim the second notice at the post office. The judge further found that Anderson knew the Union had not collected any money from him by the end of August, because his March 7 check had not been cashed and the \$198 payment in August was merely "illusory" in that it was not accompanied by Anderson's social security number, which would be used to record the payment in the Union's computer system. Moreover, the judge relied on prior cases in which the Board held ineffective a last-minute payment of dues and fees after notice to the employee. See, e.g., *General Motors Corp.*, 134 NLRB 1107 (1961). With respect to Monson, the judge found that the Employer merely carried out its contractual obligation to discharge, at the Union's request, employees who have not paid the established fees and dues. For the reasons discussed below, we disagree with the judge's analysis.

A. *The Alleged Violations by the Union*

Section 8(b)(2) of the Act establishes that it is an unfair labor practice for a union

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (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[.]

Section 8(a)(3), prohibiting employer discrimination against employees on the basis of union activities, includes a proviso permitting employers to enter into union-security agreements with the bargaining representatives of their employees but stating in relevant part that

no employer shall justify any discrimination against an employee for nonmembership in a labor organization (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

In accordance with these provisions, a union may seek and an employer may carry out the discharge of

an employee who fails to meet the obligations of a negotiated union-security clause. The Board has long held, however, that "the extremity of the penalty against the employee for nonpayment of dues requires that it should not be sanctioned unless as a practical matter the Union has taken the necessary steps to make certain that a reasonable employee will not fail to meet his membership **obligation through ignorance or inadvertence but** will do so only as a matter of conscious choice." (Emphasis in original.) *Conductron Corp.*, 183 NLRB 419, 426 (1970). Thus, before a union may seek the discharge of an employee for failure to comply with financial obligations to the union under the union-security clause, the union must inform the employee of the amount owed, the method used to compute that amount, when such payments are to be made, and the fact that discharge will result from failure to pay. *I.B.I. Security*, supra at 649. Moreover, the union must also afford the employee a reasonable opportunity to make payment following adequate notice, before requesting his discharge. *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822, 827 (1991).

The Union here did take steps to inform Anderson of his delinquency concerning his financial obligations. As a preliminary matter, we find, contrary to the judge, that Anderson's failure to satisfy his dues obligation in response to the Union's February and June notifications is of limited significance in resolving the issues presented here. The Union's August 23 letter did not request Anderson's immediate discharge based on his failure to comply with the earlier notices, but instead set a new deadline for payment. The Employer also relied on this latest deadline in executing the discharge. Therefore, we find that the proper focus of our consideration must be the August 23 notice and subsequent events.

Viewing the conduct of Anderson and the Union with that focus, we find two facts determinative: that Anderson fully satisfied his financial obligations within the deadline set by the Union, and that the Union failed timely to withdraw its request for Anderson's discharge despite Anderson's compliance with the Union's demands.

The August 23 notice, as noted above, set a deadline for Anderson to fulfill his obligation to pay the initiation fees and dues, and Anderson's copy specified the amount required.⁴ The letter also indicated that if An-

⁴We note that, because the Union received Anderson's payment on August 29, it is unnecessary to consider whether the 7-day period set by the Union expired on August 30 or 31. In addition, we do not find it significant that the Union's request for \$198 included only 2 months' dues, even though the union-security clause would have entitled the Union to receive dues for approximately 10 months. In view of the Union's other conduct in this case, we find it unnecessary to pass on the General Counsel's contention that the self-executing form of the notice issued by the Union is in itself unlawful.

derson joined the Union and remedied his delinquency within the 7-day period, the Union intended to withdraw its request for his termination.

Anderson did not fail to meet his financial obligation “as a matter of conscious choice,” as contemplated in *Conductron*, supra, or even through ignorance or inadvertence. Rather, Anderson made a conscious choice to *satisfy* the Union’s demand, and did so effectively with a payment received by the Union on August 29, prior to the prescribed deadline.

We find, contrary to the judge, that Anderson’s failure to provide his social security number in order to accommodate the Union’s computer system does not undermine the effectiveness of his payment. Under Section 8(b)(2), a union may not cause or attempt to cause an employer to discharge an employee for any reason other than the employee’s “failure to tender” the dues and fees required under the union-security clause. There is no claim that the check submitted by Anderson was not valid, or that the Union could not have cashed or deposited his check without his social security number. The record shows only that the Union needed the social security number to *record* the payment in its computer system. Contrary to the judge, we find that the absence of a social security number did not render the payment “illusory,” and that regardless of whether or not the Union was able to record the payment in its computer system, Anderson’s submission of the check was a sufficient tender which eliminated the only ground on which the Union could have lawfully obtained his discharge. We note further that Union Officer Schenck admitted at trial that he considered the payment to be sufficient and that it was for that reason that he attempted to call off Anderson’s discharge.

In addition, we disagree with the judge’s finding that Anderson’s payment was insufficient because it was tendered at the last minute. In making this finding, the judge relied on *General Motors*, supra. We find *General Motors* inapposite because in that case the employee did not meet the deadline imposed by the union, but rather attempted to remedy his dues delinquency between that date and the effective date of his termination. Anderson, in contrast, complied with the Union’s deadline. Precisely when he paid within the prescribed period is immaterial.

We find that, following Anderson’s timely and effective payment of the amount demanded by the Union, the Union was no longer entitled to seek his discharge on the basis of his “failure to tender the periodic dues and initiation fees uniformly required as a basis of membership” under Section 8(b)(2), and that the Union’s failure to withdraw its request constitutes a violation of Section 8(b)(1)(A) and (2).⁵

⁵The Union’s apparent lack of animus in its conduct does not alter this result. In *H. C. Macaulay Foundry Co.*, 223 NLRB 815, 818

We further find that the Union violated Section 8(b)(1)(A) by failing to provide Anderson notice of his right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying dues and fees for union activities not germane to collective bargaining. The complaint alleges that the Union failed to provide such notice, and the Union does not assert that it was provided. Instead, the Union contends that Anderson did not request a breakdown of expenditures under *Beck* and that the General Counsel cited no case holding that the Union must offer financial core membership in the absence of a request by the employee. The judge found that, because Anderson did not request to become a financial core member, the Union was not required to offer a breakdown of chargeable and non-chargeable expenses. The Board, however, has held that a union is obligated to provide notice of *Beck* rights when or before it seeks to obligate an employee to pay fees and dues under a union-security clause. *California Saw & Knife Works*, 320 NLRB 224, 233–234 (1995). Accordingly, the Union here acted unlawfully in seeking Anderson’s discharge without providing notice of his *Beck* rights.

B. *The Alleged Violations by Monson*

Turning to the allegations against Monson, we agree with the judge that the Employer’s initial termination of Anderson simply constituted the required compliance with the union-security clause negotiated by the parties. Under the proviso to Section 8(a)(3), as set forth above, an employer may agree to a union-security provision establishing financial obligations to the union as a condition of employment, and may take action against an employee for noncompliance with these obligations, unless the employer “has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required” In view of the judge’s finding that Anderson did not inform Monson that he had paid the delinquent fees and dues, we find that Monson had no reasonable grounds to believe that Anderson had paid or that the Union was requesting his termination for any reason other than his failure to tender fees and dues. Under these circumstances, Monson had no obligation to make further inquiry of the Union before discharging Anderson.⁶ Therefore, we find that

fn. 9 (1976), enfd. 553 F.2d 1198 (9th Cir. 1977), the Board found that the respondent union had violated Sec. 8(b)(2) and (1)(A) even though it had acted in good faith and had sought the employee’s reinstatement when it became aware of the misunderstanding leading to the employee’s termination. Accordingly, the Union here is accountable for its errors and their consequences on Anderson’s employment status.

⁶This case is thus distinguishable from *Conductron*, supra at 427–428, and *Macaulay Foundry*, supra at 818–819, in which the Board

Continued

Monson acted within the proviso to Section 8(a)(3) when it first discharged Anderson.

Monson lost the protection of the proviso, however, when it failed to rescind the discharge upon learning from the Union that Anderson had satisfied the Union's demand for payment.⁷ As described above, Monson's termination notice to Anderson was mailed on Friday, August 31, and received by Anderson on Tuesday, September 4, the day after the Labor Day holiday. On that same day, September 4, Marko and Schenk informed Monson that Anderson had in fact paid his delinquent dues and asked that Anderson be reinstated, but Monson initially failed to do so. Letting the discharge stand despite the knowledge that it could not be based on Anderson's failure to pay required dues and fees, Monson could no longer rely on the proviso to justify its action. Moreover, the record does not demonstrate that Anderson's reinstatement would have caused a great inconvenience for Monson or that his job was no longer available, particularly in view of the immediate notification of the error and Anderson's scheduled vacation during that week. In fact, Monson did reinstate Anderson on September 11, but accorded him the status of a new hire serving a probationary period and earning lower pay and benefits than he had previously enjoyed. We conclude that Monson's initial failure to reinstate Anderson and its subsequent failure to employ him at his former pay and benefits constitute unlawful discrimination against Anderson in violation of Section 8(a)(3) and (1). *Conductron*, supra; *Macaulay Foundry*, supra; *GreenTeam of San Jose*, 320 NLRB 999 (1996).

REMEDY

Having found that the Union violated Section 8(b)(1)(A) and (2) and that Monson violated Section 8(a)(3) and (1), we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Because Anderson has been reinstated and later restored to his former seniority, we shall order make-whole relief to compensate Anderson for the temporary loss of seniority, pay, and benefits between the date of his discharge and the date he was restored to his former status. We shall order the Union to make Anderson whole for any loss of wages and other benefits he may have suffered

found that the employees' protests concerning their dues status were sufficient to furnish the employers reasonable grounds to believe that the unions' requests were improper.

⁷The consolidated complaint does not separately allege that Monson unlawfully failed to rescind the discharge and fully reinstate Anderson. We find, however, that this conduct constitutes an unlawful continuation of the discharge alleged in the complaint, and that the matter was fully litigated at the hearing. We also note that the charge filed by Anderson against Monson alleges that Monson "terminated and/or demoted its employee Calvin Anderson to the status of a new employee."

as a result of the discrimination against him, less interim earnings, between the date of his discharge and September 4, when the Union requested Monson to reinstate Anderson. We shall order the Union and Monson jointly and severally to make Anderson whole for any loss of wages and other benefits he may have suffered as a result of the discrimination against him, less interim earnings, between September 5 and 9, the 5 days following the Union's request for Anderson's reinstatement. *Westwood Plumbers*, 131 NLRB 562, 562-563 (1961). Monson shall be solely liable for any loss of wages and other benefits incurred by Anderson after that date, including, for the period following his reinstatement, the difference between the pay and benefits that Anderson would normally have received in the absence of his discharge and the amount he actually received.⁸ The amount due and interest shall be computed in accordance with the formulas in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Union to notify Anderson of his *Beck* rights.⁹ Finally, we shall order the Union to provide Anderson with the reimbursement remedy set forth in *Rochester Mfg.*, 323 NLRB No. 36 (Mar. 12, 1997).

CONCLUSIONS OF LAW

1. Monson Trucking, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause and causing Monson to discharge Calvin Anderson, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By seeking to obligate Calvin Anderson under the union-security clause of the collective-bargaining agreement without having notified him of his rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to pay fees and dues only for activities germane to the Union's role as collective-bargaining representative, the Union has engaged in and is engaging

⁸Monson asserts that the Union's liability is not tolled 5 days after its request for Anderson's reinstatement because the Union did not cash Anderson's check for the required dues and fees until February 1991. Any issues or delay related to the cashing of the check, however, do not negate the Union's September 4 request that Monson bring Anderson back to work, and we find that Monson is solely liable for the continuation of the discharge after the Union's request.

⁹The complaint allegations are limited to the Union's attempting to cause and causing Monson to discharge Anderson. The complaint does not allege a failure to provide nonmember employees generally with notice of their *Beck* rights. Accordingly, the remedy addresses the violations as alleged. See *Production Workers Local 707 (Mavo Leasing)*, 322 NLRB 35 (1996).

in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. By failing to rescind the discharge of Calvin Anderson and subsequently reinstating him to a position of lower seniority, pay, and benefits, Monson has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1).

ORDER

A. The Respondent, Monson Trucking, Inc., Red Wing, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging membership in General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO, or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Jointly and severally with Respondent General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO, make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from September 5 through September 9, 1990, in the manner set forth in the remedy section of this decision.

(b) Make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from September 10, 1990, until the date he was restored to his former seniority, pay, and benefits, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful continuation of Calvin Anderson's discharge after September 4, 1990, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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.

(e) Within 14 days after service by the Region, post at its Red Wing and Virginia, Minnesota facilities cop-

ies of the attached notice marked "Appendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 13, 1990.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO, Rochester, Minnesota, its officers, representatives, and agents, shall

1. Cease and desist from

(a) Causing or attempting to cause Monson Trucking, Inc. to discriminate against Calvin Anderson or any other employee in violation of Section 8(a)(3) of the Act.

(b) Failing to notify Calvin Anderson of his rights under *Communication Workers v. Beck*, 487 U.S. 735 (1988), when it first seeks to obligate him to pay fees and dues under a union-security clause.

(c) In any like or related manner restraining or coercing employees of Monson Trucking, Inc., in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from August 31 through September 4, 1990, in the manner set forth in the remedy section of this decision.

(b) Jointly and severally with Respondent Monson Trucking, Inc., make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from September 5 through September 9,

¹⁰If 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."

1990, in the manner set forth in the remedy section of this decision.

(c) Notify Calvin Anderson of his rights under *Communication Workers v. Beck*, supra, including that he has the right to be or remain a nonmember and that nonmembers have the right to object to paying for union activities not germane to the union's duties as bargaining agent, and to obtain a reduction in fees for such activities. In addition, this notice must include a description of any internal union procedures for filing objections. If Anderson, with reasonable promptness after receiving this notice, elects nonmember status and makes *Beck* objections with respect to one or more of the accounting periods covered by the complaint, process his objections, nunc pro tunc, as it would otherwise have done, in accordance with the principles of *California Saw & Knife*, 320 NLRB 224 (1995), and reimburse Anderson for the reduction in his dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which he has objected.

(d) Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from the Employer's files, any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the discharge against him in any way.

(e) Within 14 days post in its office and meeting halls copies of the attached notice marked "Appendix B."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I agree with my colleagues' findings. In doing so, I note that the complaint does not allege that the language of the union-security clause requiring employees to acquire "membership in the Union" is unlawful. I write separately to again state my view that a collective-bargaining agreement containing a union-security clause which compels "membership" or "membership in good standing" as a condition of employment is facially invalid under the National Labor Relations

Act.¹ In order for such a clause to be valid, the collective-bargaining agreement must define membership as *only* the obligations to pay periodic dues and initiation fees related to representational costs. In some respects, I am in accord with the Court of Appeals for the Sixth Circuit in *Buzenius v. NLRB*.² To the extent, however, the court relied on *Pattern Makers League v. NLRB*, and states that "[o]ne of the Act's core policies is that of voluntary unionism," I disagree and would reverse *Pattern Makers*.³

The Court's decision in *Pattern Makers* is predicated on a deference to the National Labor Relations Board's expertise, an expertise that was erroneously applied in connection with the right to resign. In affirming the Board's view expressed in *Machinists Local 1414 (Neufeld Porsche-Audi)*,⁴ that the right to resign is absolute, the deciding vote cast by Justice White in that 5 to 4 decision was predicated on deference to the Board's exercise of its expertise.⁵ Indeed, a substantial part of Justice Powell's majority in *Pattern Makers* was similarly rooted in this policy of deferral to administrative expertise.⁶

In deferring to the Board's expertise, the Court has long recognized that "the responsibility to adapt the Act to the changing patterns of industrial life is entrusted to the Board . . . and its special competence in this field is justification for the deference accorded its determinations." *NLRB v. J. Weingarten, Inc.*⁷ To be sure, *Weingarten* involved a shift in the Board's construction of the Act *prior* to a ruling by the Supreme Court. The reasoning, however, is equally applicable where the Board's construction of the Act shifts after the Court has deferred to the Board's expertise.⁸

¹ See my dissenting opinion in *Teamsters Local 443 (Connecticut Limousine Service)*, 324 NLRB 633 (1997).

² 124 F.3d 788 (1997), revg. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995).

Contrary to my colleagues, I only "state my view" that "[i]n some respects, I am in accord with the Court of Appeals for the Sixth Circuit in *Buzenius v. NLRB*." Since the issue is not explicitly before us, it cannot be said that I "rule" on this matter.

³ *Buzenius*, supra at 792 (citing *Pattern Makers*, 473 U.S. 95, 104-106 (1985)).

⁴ 270 NLRB 1330 (1984).

⁵ 473 U.S. 116-117.

⁶ 473 U.S. at 114-115.

⁷ 420 U.S. 251, 266 (1975), and cases cited therein.

⁸ Interestingly, in the context of Sec. 8(f) of the Act, the Board had shifted its views, the Court deferred to the Board's then current view, and, after the Court's decision, the Board announced a different interpretation intended to better serve the statutory policies of industrial stability and employee free choice in the construction industry. Thus, in *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978), the Court rejected the union's assertion that the Board's construction of Sec. 8(f) was not entitled to deference because the Board had shifted its position. The Court observed that "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction *de novo* and without regard to the administrative understanding of the statute." *Id.* at 351.

¹¹ See fn. 10, supra.

Thus, the Court has also recognized that “[c]umulative experience’ begets understanding and insights by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.”⁹

In my view, *Pattern Makers* is inconsistent with the Act’s objectives and, under certain circumstances, I believe unions may impose sanctions in the interest of solidarity.¹⁰ What was at stake in *Pattern Makers* was the proper balance between the competing principles of employees’ right to engage in concerted activity favored by Federal labor policy as interpreted by the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*,¹¹ and the right to refrain from such activity. In *Pattern Makers*, first the Board and then, by relying on the Board’s expertise, the Court gave focus solely to the right to refrain from concerted activity. The result has been an erosion of the core Section 7 right to engage in concerted activities which, coupled with the employer’s right to permanently replace economic strikers upheld in *NLRB v. Mackay Radio & Telegraph Co.*,¹² has in many circumstances made exercise of the right to strike protected by Section 13 difficult if not well nigh impossible. Accordingly, I am of the view that the Board can and should change its mind on this matter and reject the *Pattern Makers* rationale.

Although I would not rely on *Pattern Makers*, there is another theme to *Buzenius*, which should be followed by the Board. A union-security clause requiring “membership in good standing” does not mean what it literally says and cannot be applied as it is drafted.¹³ The Supreme Court, in *NLRB v. General Motors*

Corp.,¹⁴ held that membership within the meaning of Section 8(a)(3) does not consist of full membership but consists exclusively of the obligation to pay periodic dues and initiation fees as a condition of employment under a valid union-security clause. Thus, by whittling down the meaning of membership as set forth in Section 8(a)(3) to its “financial core,” the Court made the dismissal of employees on the ground that they have not assumed full membership obligations, as opposed to the tender of periodic dues and initiation fees, unlawful. In light of this decision, a collective-bargaining agreement that speaks in terms of “membership” or “membership in good standing” without further definition misleads employees into believing that they can be terminated if they do not become formal, full-fledged union members.

In *Communications Workers v. Beck*,¹⁵ the Court revisited the meaning of “membership” under Section 8(a)(3). The issue before the Court was “whether th[e] ‘financial core’ includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.”¹⁶ The Court said that the most that may be required under Section 8(a)(3) is the payment of “those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.’”¹⁷ Thus, although Section 8(a)(3) may be literally read to permit an employer and an exclusive collective-bargaining representative to enter into an agreement requiring full union membership and the payment of full dues, the Supreme Court decisions interpreting Section 8(a)(3) find that a union-security clause may lawfully compel only the payment of fees and dues related to representational activities.

Moreover, a union-security clause that requires “membership” or “membership in good standing” without concurrent definition of that term in the collective-bargaining agreement undercuts and dilutes the notice which the Board established in *California Saw & Knife*.¹⁸ In that case, the Board stressed that a union meets its obligation “as long as it has taken reasonable steps to insure that all employees whom the union seeks to obligate to pay dues are given notice of their rights” not to do anything more than pay dues and

After the Court deferred to the Board’s construction of Sec. 8(f) in *Higdon*, the Board again shifted its position in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. 843 F.2d 770 (3d Cir. 1988). The Board acknowledged “certain tensions” between the new interpretation of Sec. 8(f) announced in *Deklewa* and language in *Higdon*. The Board noted, however, that *Higdon* had “to be read in the context of the Board’s then current efforts to balance the multiple legitimate conflicting interests present in Section 8(f),” and, since the *Higdon* decision, the Board had experienced the application of its 8(f) rules in a multitude of circumstances and been able to evaluate the extent to which those rules served their objectives. 282 NLRB at 1388. Based on its experience, the Board concluded that its old 8(f) rules had failed to achieve the objectives for which they had been created and that the new rules would correct the problems that had become evident and better achieve the objectives of the Act. 282 NLRB at 1389.

⁹ *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953).

¹⁰ See Gould, *Solidarity Forever—or Hardly Ever: Union Discipline, Taft Hartley and the Right of Union Members to Resign*, 66 Cornell L. Rev. 74 (1980).

¹¹ 388 U.S. 175 (1967).

¹² 304 U.S. 333 (1938).

¹³ *Buzenius*, supra at 792.

¹⁴ 373 U.S. 734 (1963). Accord: *Radio Officers v. NLRB*, 347 U.S. 17 (1954). The view accepted by the Court in *General Motors* and explicitly endorsed in *Allis-Chalmers*, which draws a distinction between full and limited membership, has been reiterated by the Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988).

¹⁵ 487 U.S. 735 (1988).

¹⁶ 487 U.S. 735, 745. The Court did not address the issue of what language is permissible in a union-security clause.

¹⁷ 487 U.S. at 762–763 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

¹⁸ 320 NLRB 224, 231–235 (1995).

fees relating to representational purposes.¹⁹ The Board stated that a union could notify such employees through an annual publication and that newly hired employees must be given notice before they are asked to join the union and pay dues under a union-security clause.²⁰ This notice is not adequate where the collective-bargaining agreement sends a contrary message and instruction to employees within the bargaining unit. Most collective-bargaining agreements speak simply of “membership” without defining it in accord with the statute as interpreted by the Supreme Court. As the Board has previously acknowledged “it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial obligations, e.g., assessments. At a minimum, they will be confused about their obligations.”²¹ Requiring a notice that explains employees’ rights *separate* from the union-security clause does little to protect those rights because there is no guarantee that employees will recall such notice when faced with the literal language of the clause.

Since the words “membership” and “membership in good standing” do not retain either their literal or familiar meaning in the context of a union-security clause, in my view, it is unlawful for such language to remain in the collective-bargaining agreement. The mere fact that Section 8(a)(3) speaks in terms of membership does not justify the retention of the language. As Judge Posner noted in *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 991 (7th Cir. 1997):

[N]othing we have said has been intended to suggest that unions and employers have the privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either by itself or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

Thus, as the Court of Appeals for the Sixth Circuit said in *Buzenius*, there is no “legitimate reason” which explains such language in the collective-bargaining agreement. Notwithstanding some of the unfortunate policy consequences promoted as a result of this line of authority, the Board’s duty is to enforce the law as it has been defined by the United States Supreme Court. As I have said elsewhere, “if there is to be a

different result, it must come from the President and the Congress and not the Board.”²²

Accordingly, I would require unions and employers to revise their collective-bargaining agreements to define membership as only the obligation to pay periodic dues and initiation fees related to representational costs. Where it is demonstrated that an employee became a member because of the unlawful union-security clause, I would require that the dues and initiation fees be refunded.²³

²² *Leslie Homes, Inc.*, 316 NLRB 123, 131 (1995) (Chairman Gould concurring in the Board’s finding that the Supreme Court’s decision in *Lechmere v. NLRB*, 502 U.S. 527 (1992), creates no distinction between organizing activity and area standards activity in determining the access rights of unions to an employer’s property), and *Connecticut Limousine*, 324 NLRB at 638 (Chairman Gould dissenting from the Board’s conclusion that it can remand the chargeability of organizational expenses to dues *Beck* objectors consistent with *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)).

²³ *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961).

APPENDIX A

NOTICE TO EMPLOYEES
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 encourage membership in General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL jointly and severally with Respondent General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, AFL-CIO, make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from September 5 through September 9, 1990, less any net interim earnings, plus interest.

WE WILL make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the action against him during the period from September 10, 1990, until the date he was restored to his former seniority, pay, and benefits, less any net interim earnings, plus interest.

¹⁹ 320 NLRB at 233.

²⁰ *Id.*

²¹ *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993) (footnote omitted), enf. denied 41 F.3d 1532 (1994).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Calvin Anderson's discharge after September 4, 1990, and WE WILL, within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

MONSON TRUCKING, INC.

APPENDIX B

NOTICE TO 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 Monson Trucking, Inc. to discriminate against Calvin Anderson or any other employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT fail to notify Calvin Anderson of his rights under *Communication Workers v. Beck*, 487 U.S. 735 (1988), when we first seek to obligate him to pay fees and dues under a union-security clause.

WE WILL NOT in any like or related manner restrain or coerce employees of Monson Trucking, Inc., in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of his discharge during the period from August 31 through September 4, 1990, less any net interim earnings, plus interest.

WE WILL jointly and severally with Respondent Monson Trucking, Inc., make Calvin Anderson whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him during the period from September 5 through 9, 1990, less any net interim earnings, plus interest.

WE WILL notify Calvin Anderson of his rights under *Communication Workers v. Beck*, supra, including that he has the right to be or remain a nonmember and that nonmembers have the right to object to paying for union activities not germane to the union's duties as bargaining agent, and to obtain a reduction in fees for such activities. In addition, WE WILL include a description of any internal union procedures for filing objections.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from the Employer's files, any reference to the discharge, and WE WILL, within 3 days thereafter, notify the employee in writing that this has

been done and that the discharge will not be used against him in any way.

GENERAL DRIVERS UNION, LOCAL NO.
160, AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-
CIO

Joseph H. Bornong, for the General Counsel.
David J. Duddleston (Mackall, Crouse & Moore), of Minneapolis, Minnesota, for Respondent Employer.
Stephen D. Gordon (Gordon-Miller-O'Brien), of Minneapolis, Minnesota, for Respondent Union.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. These cases were tried at Minneapolis, Minnesota, on April 17, 1991. The initiating charges were filed on September 13, 1990, and December 17, 1990, as CA and CB cases, respectively. On February 15, 1991, a third consolidated complaint was issued in which certain primary issues were contained. In the CA case these are whether Monson Trucking, Inc. (Respondent Employer), unlawfully discharged Calvin Anderson despite knowledge that he had tendered uniformly required initiation fees and dues pursuant to an applicable collective-bargaining agreement, and because he engaged in concerted protected activities under the Act. In the CB case the primary issue is whether General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent Union) attempted to cause, and caused, Respondent Employer to discharge Anderson for reasons other than his failure to tender periodic dues and the initiation fee uniformly required as a condition of acquiring and retaining membership in Respondent Union. The third consolidated complaint alleges that by the described acts and conduct Respondent Employer violated Section 8(a)(1) and (3) of the Act, and that Respondent Union violated Section 8(b)(1)(A) and (2).

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by all litigants, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer is a corporation with an office and place of business in Duluth, Minnesota, where at all times material to this proceeding it has been engaged in the interstate and intrastate transportation of general freight and commodities. In the course and conduct of such business operations during calendar year 1990, Respondent Employer both derived gross revenue in excess of \$50,000 from the interstate transportation of freight and commodities from the State of Minnesota directly to points outside Minnesota, and purchased and received at its Minnesota facilities products, goods and materials valued in excess of \$50,000 directly from suppliers located outside Minnesota. On these admitted facts I find that Respondent Employer is an employer en-

gaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, as also admitted, that Respondent Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Uncontested Facts*

This trucking company operates from both its Duluth area headquarters, and terminals in Red Wing, Minnesota, approximately 200 miles further south, plus at Virginia, Minnesota, to the north from Duluth. A separate Teamsters local represents drivers at the Duluth location. Respondent Union is headquartered in Rochester, Minnesota, about 40 miles from Red Wing, where it also provides a part-time business agent in a building shared with other unions. A sizeable minority of the over 100 drivers used by Respondent Employer are, as the case with Charging Party Calvin Anderson, "domiciled" at the Red Wing terminal. As contemplated in an applicable collective-bargaining agreement Respondent Union has designated a job steward at the Red Wing terminal.

The Respondents are parties to a labor contract which is effective from certain dates in 1989 through 1993. A typical union-security clause provides that newly hired employees become and remain in good standing members of Respondent Union as a condition of employment after 61 days from beginning it. This union-security clause is followed by enforcement language as contained in section 1.2(c) reading:

Any employee who has failed to acquire, or thereafter maintain, membership in the Union as herein provided, shall be terminated seven (7) days after the Company has received written notice from an authorized representative of the Union (a copy of which notice shall have been also sent to the affected employee) certifying that membership has been, and is continuing to be, offered to such employee on the same basis as all other members and, further, that the employee has had notice and opportunity to make all dues and initiation fee payments.

Anderson was first employed as a truckdriver in July 1989. Anderson was terminated briefly in late August 1989, but then rehired for continuous employment of more than 1 year before the triggering event of this case happened. He worked handling both interstate and intrastate loads and was subject to the driver's daily log reporting requirements of the Department of Transportation, Federal Highway Administration. Anderson resides in Sun Rise, Minnesota, a community small enough that the closest post office is in a nearby town named Harris. Anderson's home mailing address is a post office box at Harris. His terminal at Red Wing is approximately 100 miles south of Sun Rise. Anderson is on the road most of each workweek, performing driving and related functions throughout at least 18 central States of Respondent Employer's midwest operations. His first month of being responsible for payment of union dues and an initiation fee was November 1989.

By letter dated February 22, 1990, James A. Schenk, Respondent Union's secretary-treasurer, wrote for the first time to Anderson as follows:

As you may know, Teamsters Local #160 is party to a collective bargaining agreement with your employer that requires that you hold good standing membership in the Union after 60 day of employment, to the extent of tendering to the Union its uniform initiation fee and periodic monthly dues. In your industry, the uniform initiation fee is \$150.00 and the periodic monthly dues are \$23.00. Please complete and return the enclosed cards for your information. The check-off authorization form authorizes your employer to deduct union dues and remit to our office. The initiation fee should be returned with the cards in the self-addressed envelope within 10 days from the receipt of this letter.

Thanking you in advance for your prompt response to this matter.

This letter was sent to Anderson's home address by certified mail and duly received upon his signing of a postal receipt. Anderson soon showed the letter to David Hoven, Respondent Employer's personnel and safety manager based in Duluth. Hoven testified that he advised Anderson to make the called-for payment, and he wrote a file note to that effect for retention in records. On March 7, 1990, the date Hoven fixed as when this conversation occurred, Anderson sent Respondent Union his check No. 2046 for \$23, which he testified was all he could afford at the time. Subsequent events, including Anderson's eventual tender of a \$198 amount with check No. 2187 dated August 25, 1990, are viewed differently by the parties.¹

Anderson's termination was effective with what would have been a week of vacation starting in early September. In fact, negotiations between the parties soon led to his rehire as a new employee, and a subsequent retroactive restoration of seniority. Anderson did, however, lose a 4-cent-per-mile wage differential during the extended probationary period which resulted from new employee status, and certain fringe benefits during that time delay.

B. *The Case According to the General Counsel*

The General Counsel's version of the case is that Anderson was terminated without being given fair opportunity to understand his dues obligations. In terms of correspondence arising in August, and happenings in connection with this correspondence, the General Counsel reasons that Respondent Union failed in providing Anderson with legally sufficient notice and opportunity respecting dues delinquency. As to Respondent Employer, the General Counsel asserts that it knew, or should have known, that Anderson had paid a quoted dues delinquency, and nevertheless proceeded to unlawfully terminate him as Respondent Union had conditionally demanded. Regarding Respondent Union, General Counsel's brief states that here "culpability . . . is manifest both in the deficiencies in its notice" and in its "handling of . . . payment."

C. *The Case According to the Union*

Respondent Union contends that it made every effort to notify the elusive Anderson about his dues obligations and finally requested his discharge when all efforts had failed.

¹ All dates and named months hereafter are in 1990, unless otherwise indicated.

Following the February 22 letter, Respondent Union wrote similarly on June 12, but this too was unavailing. In consequence of this, Respondent Union sent the following letter dated August 23 to Respondent Employer, with a copy to Anderson. It read:

In accordance with Article 1 - 1.2 Section (c) of our collective bargaining agreement, we are requesting termination of the following employee: [*Calvin Anderson*] if he has not made arrangements within seven days of receipt of this notice. A letter was sent on *June 12, 1990* offering membership to this employee, and is continuing to be offered on the same basis as all other members to make all dues and initiation fee payments, which he has failed to do as of this date.

If you are not notified of his joining by the end of the seventh day, we will expect you to comply with our request.

Anderson's \$198 payment was received in Respondent Union's office on August 29, but without the provided membership application or requested social security number. It was physically received on that date by Terry Johnson, the organization's president, and as customary for him to do left with other Monson Trucking mail for clerical handling by Secretary Office Manager Dorothy Marko. She testified that other duties absorbed her until August 31, when she did posting for that week and first saw the check. As with the March check internal procedures would not allow it to be cashed because Anderson's social security number was still not known. This information was necessary before any financial posting under the nationally used "Titan" computer system of the International Union could be made. In the circumstances Marko telephoned to Respondent Employer at Duluth, intending to at least advise that a check was in. Such a call could not be completed, and Marko put the matter over until Tuesday, September 4, after the holiday weekend would be through. She reached Hoven on September 4 to say the check had been received, and learned from him that a termination letter had already gone out to Anderson. Marko immediately turned the matter over to Schenk.

As the eventful morning of September 4 unfolded, the termination letter arrived in the mail, and Anderson was calling in to discuss happenings. Schenk reached Hoven by telephone and asked that Anderson simply be put back to work for the time being. Hoven responded that only official Mark Monson could authorize this, and Schenk later unsuccessfully attempted to reach him. While Schenk never actually talked to Monson on the point, his intentions were plainly known. In consequence of this Respondent Employer carried out the desired rehiring, and Anderson resumed his truckdriver employment on September 11.

D. *The Case According to the Employer*

Respondent Employer's version of these happenings is that it was innocently involved and did no more than respond to contractual obligations in making a correctly administered termination. It emphasizes how Hoven reminded Anderson of his contractual obligation to pay dues and the imminent penalty for failure. This occurred on Friday, August 24, when Hoven telephoned Anderson on the matter at his mother's number in North Branch, Minnesota, and received his assurance that the obligation would be handled immediately.

Hoven considered that a 7-day count under terms of the notification letter would expire on Thursday, August 30. He testified to waiting for still another day because of the lag from his company's 4 p.m. mail dispatch time and the close of business at 5 p.m. Hoven felt that influencing information could occur by telephone during such final hour. Having received no advice from Respondent Union by August 31, or further contact with Anderson, Hoven issued a letter of that date to him. It succinctly referred to Respondent Union's invocation of the union-security requirement, and advised Anderson of his "immediate termination from the employment rolls."

Hoven expressly denied receiving a claimed telephone call from Anderson on August 29, telling that the obligation had been satisfied. As unknown to Respondent Employer, Anderson had set up the necessities for a certified mailing of his \$198 check from the Harris post office on Saturday, August 25. While this facility was closed that day, Anderson in some manner left his item of mail and \$2 in cash for the certified mail charges, expecting this to be handled by the Harris postal functionary when it opened on Monday. Plainly such was effective, for this was the transmittal that Johnson actually received in Rochester on August 29.

E. *Credibility*

I generally discredit Anderson whose testimony was shifting, implausible, and given with a totally unconvincing demeanor. This is particularly true with regard to Anderson's testimony about telephoning Hoven from Virginia on August 29, to inquire if Respondent Union had lifted its demand. This testimony was offered against a background of two signed affidavits, in which Anderson stated that (1) the contact with Hoven was made personally in Duluth on August 29, and (2) that it was made by telephone on August 28, respectively.

Anderson's testimony is so unreliable that even his explanations are inherently faulty, illogical, self-contradictory, and generally make his renditions incredulous for the most part. This evaluation particularly applies to his conversion of the claimed Hoven contact on August 29 from a personal face-to-face experience to one vaguely done by telephone. I discredit Anderson's explanation that he would have possibly forgotten the significant experience of direct discussion with Hoven at Duluth, in the midst of a week during which he ranged throughout Minnesota, Wisconsin, Indiana, and Illinois, as so described in an affidavit made less than 30 days from the event. This is not the only specific infirmity. Anderson would have it believed that he knew nothing about the disposition of his \$23 check, yet for several months following its mailing, his bank statements showed no clearance of the item. Notably too, any rural postal patron who can make an absentee arrangement to deposit certified mail can equally arrange to receive a certified mail article sent to him, if he has any bona fide intentions other than the dodging of it. As to his testimony about not having the Union's address, this ludicrous claim warrants only the comment that such would readily be available from any manner of commonly used public sources, as well as within his employment setting.

Such shifting claims, coupled with Anderson's astonishing evasiveness about why he could not ascertain Respondent Union's Rochester business address, and a suspect demeanor,

cause me to reject all points about which he is contradicted by other witnesses and as to his general intentions regarding fulfillment of initiation fee and monthly dues payments as contractually required.

Contrarily, I credit Hoven and Schenk on grounds of their favorable demeanor. In addition I also credit Marko, who testified with a convincing demeanor. Of these further witnesses only Hoven is involved in a significant contradiction of fact, and in crediting him I expressly find that no telephone contact ensued between him and Anderson on August 29, as claimed, or in any other manner as would have the same effect.

F. Discussion

Section 8(b)(2) of the Act prohibits a labor organization from discriminating against an employee on grounds other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of membership. A related obligation exists in Section 8(a)(3) under a proviso of which an employer may be liable if it improperly fulfills the attempt of a union to discriminate unlawfully, when the employer sufficiently aware of illegal intentions. See *General Motors Corp.*, 134 NLRB 1107 (1961); *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), enf. sub nom. *NLRB v. Hotel, Motel and Club Employees' Union, Local 568*, 320 F.2d 254 (3d Cir. 1963). A union's valid demand for discharge of an employee does not lead to an employer violation of the Act when the request is based on an employee's failure to pay dues. Contrarily an employer may not lawfully discharge employees at the behest of a labor organization for an impermissible reason. The application of what is impermissible is rooted in Section 8(a)(3) of the Act, stating in relevant part that no employer shall discriminate if it has "reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required"

In *Teamsters Local 630*, 209 NLRB 117, 124 (1974), a case involving "conventional" union-security provisions, the Board held:

It must be assumed, however, that the policy of the Board was never intended to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations.

This case contained a specific finding that an individual "willfully and deliberately sought to evade his [financial] union-security obligations" by the pretext that he lacked notification.

In *I.B.I. Security*, 292 NLRB 648, 649 (1989), the Board comparably held:

[T]hese [fiduciary] 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" [footnote omitted]. Thus, the Board will excuse a union's failure to fully comply with the notice requirements when it is shown that the employee involved has "willfully and deliberately sought to evade his union-security obligations."

Furthermore, once the union fulfills its fiduciary obligation by giving required notice, an employee cannot avoid the consequences of discharge by waiting until "the last minute" to pay his dues. The Board finds such conduct to be a frustration of "the orderly administration" of lawfully structured collective-bargaining agreements. *General Motors Corp.*, supra at 1109.

The chief factor in background to this case of an untoward nature is Respondent Union's seeming nonchalance about enforcing its union-security entitlement. This is somewhat offset by nature of the industry, scattered locations involved, the ambulatory life of Anderson and others, plus the fact that significant responsibility was pinned on job steward Bill O'Donnell to achieve voluntary compliance by new employees about to come under the contract's union-security clause. In this context, it is not totally startling that monthly gaps occurred to the point that Anderson had avoided well over a half year of union dues.

The larger question, however is whether Respondent Union's notifications to Anderson, particularly the last one, were sufficient at law in their letter and by their intent. Each time written advice was given the specifics were accurately and fully summarized. A union's fiduciary duty requires that it inform the employee of the amount owed, the method used to compute that amount, when such payments are to be made, and the fact that discharge will result from failure to pay. *I.B.I. Security*, supra at 649. This fiduciary obligation is to ensure that any employee discharge based on failure to pay dues is the result of conscious choice not to pay on the part of the employee, rather than through ignorance or inadvertence on their part. *Conductron Corp.*, 183 NLRB 419, 426 (1970). It is also noteworthy that on the day before its final letter dated August 23, Respondent Union filed an unfair labor practice charge against Monson Trucking on grounds of a claimed refusal to furnish information necessary for Local 160 to function as a bargaining representative. As much as anything this charge, signed as it was by Schenk, showed an institutional tightening up of its affairs. Furthermore the advice to Anderson on August 23 was coupled with closely comparable form letters on two other employees. The evidence established that out of these three cases, and a fourth one during that 12-month period, two of the individuals quit in the face of such a demand and another, as temporarily so with Anderson, was terminated for nonpayment. All possibility of suggesting the presence of protected concerted activities on the part of Anderson was negated during his testimony, with the result that no motivation was left for either the employer or union to engage in pretextual action toward him. Overall, the context for seeking payment from delinquent employees, as actually done, was legitimate under a composite of Board doctrine on the subject.

The parties differed on their interpretation of the 7-day calculation. In part this results because of the letter's grammatical departure from actual terminology in the labor contract. In further point it simply represents a differing lay view of how to make a count of days over a stated period. In the labor contract a termination is contemplated 7 days after the company has received written notice. The form letter converts this to phrasing of *within* 7 days of receipt. The underlined variance permits loose interpretation; and it was just such a lay view that caused Hoven to conclude, as he testified to doing, that the seventh day arose on August 30

(24–30, inclusive). Schenk, on the other hand, more correctly applied matters of syntax, law, logic, and intent to exclude the day of August 24 from the count. His result in believing August 31 was the last day for Anderson to pay the obligation was shared by Marko, and is in fact the respectable mode of counting.

These particulars of viewpoint set the stage for the admitted “mistake” in having the termination letter issued. Query: Whose mistake and what effect does it have on the issues? As between the Respondents each would have the other solely liable if any party must be. Respondent Employer asserts that an inexcusable delay in attending Anderson’s check left it no choice but to follow the formal letter request. This is argued both in terms of the “extra” day added by Hoven to his count, and the fact that Anderson had at least verbally expressed to Hoven an intention to pay. Respondent Employer argues, however, that only Schenk’s office could have aborted the termination, and its negligence saddles it with any and all liability. Respondent Union counters with a creative argument that Hoven was truly wrong in his count, and has admitted that a termination letter of the type sent should have issued “on the first working day” after the count ended. In this case that would have been Tuesday, September 4, after the 3-day holiday weekend was over. Having mounted this analysis Respondent Union then terms Hoven’s action as “precipitous and premature” since to have waited into September would have permitted time for advice about receiving check No. 2187 to have been relayed. Respondent Union is also constrained to make the alternative, albeit unpalatable, argument that for such purposes Anderson should be credited about having made a telephone contact to Hoven on August 29 with word that his payment was actually in.

I bear this important background in mind, but believe the case is decidable on other controlling grounds. These are that Anderson has identified himself with a class of person for whom the Board will not offer grace under the strictures of *I.B.I. Security* and *Teamsters Local 630*. The rationale of both cases was recently approved in a holding that brought current the Board’s belief as to willful and deliberate evasion of union-security obligations. See *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001 (1991). Anderson was well aware that by the end of August, Respondent Union had not collected a penny from him in required dues and initiation fee payment. He had picked and chosen such written communications from his bargaining representative as he wanted to see, ignored ordinary expectations for new employee, and frustrated the local’s financial affairs by withholding a necessary item of information from his furtive submissions. The Teamsters are this country’s largest union by membership, and a sophisticated “Titan” computer system is easily to be expected. It is also notable here that Schenk testified without contradiction how his organization had once sought social security numbers directly from the Company and had the request refused on grounds of confidentiality. Thus Anderson’s payment of \$198 was actually illusory, having no more effect than the much lesser one nearly 6 months previously. In fact a further delay starting with Schenk’s followup efforts to first get Anderson back on the job and secondly seek, insofar as possible, to make him whole for this second employment interruption, resulted in Anderson’s membership documents and effective financial tender not to

occur until February 1991. Furthermore the remittance of August 29 was a “last minute” tender of the type long held to be ineffectual after reasonably fair and valid notice. *General Motors Corp.*, supra. I see this as principally a situation in which the employee is not entitled to relief for the awkward happenings of late August. A strongly contrasting situation arising out of this same industry was present in *Teamsters Local 150*, 242 NLRB 454 (1979), where the fact situation showed an absence of bad faith on the part of the employee involved. It would be “rigid” indeed to permit a profiting by Anderson from his own “dereliction.” See *Teamsters Local 630*, supra.

On other subsidiary issues I first disregard the “free rider” subject which was briefed, believing instead this was purely and simply a case of notice, motive and circumstances. Cf. *Conductron Corp.*, supra. I do not therefore associate Anderson’s “free rider” status to the dynamics of his willful and deliberate evasions, and for this reason pass without comment on the General Counsel’s cited authority of *Western Publishing Co.*, 263 NLRB 1110 (1982), and *Helmsley-Spear, Inc.*, 275 NLRB 262 (1985). The General Counsel’s other assertion that a statement of “what percentage of [Respondent Union’s] funds were spent for non-representational activities” and related phrasing, injects the *Beck* decision into the case.² But here there has been no request by Anderson to become a “financial core” member, and no proportional breakdown of chargeable and nonchargeable expenses need have been offered. Finally, I disagree with the General Counsel’s argument respecting employer liability alone, on the theory that final inquiry should have been made to Schenk’s office. On this point I emphatically downplay Anderson’s verbal assurance of August 24, unreliable as he was shown to be, or that Hoven should have worried beyond the plain presentation of a contractual right to be fulfilled absent occurrence of a specific condition. For this reason I find *Forsyth Hardwood Co.*, 243 NLRB 1039 (1979), and *C.B. Display Service*, 260 NLRB 1102 (1982), both cited by the General Counsel, to be distinguishable.

CONCLUSIONS OF LAW

1. Monson Trucking, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers Union, Local No. 160, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The named Respondents did not engage in unfair labor practices as alleged.

On the findings of fact and conclusions of law and the entire record, I make the following recommended³

ORDER

The third consolidated complaint is dismissed in its entirety.

² *Communications Workers v. Beck*, 487 U.S. 735 (1988).

³ If 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.