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Stationary Engineers, Local 39, International Union of Operating Engineers, AFL–CIO *and* Rebecca Wood. Case 32–CA–20575–1

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The issue presented in this proceeding is whether the Respondent, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL–CIO (the Union), violated Section 8(a)(1) and (2) of the National Labor Relations Act (the Act) by requiring its clerical employees to become and remain members of the Union as a condition of employment. We find, contrary to the judge and the dissent, that the Union violated the Act by imposing the membership requirement on its clerical employees. Our reasoning is set out below.[1]

In *Retail Store Employees Local 428*, 163 NLRB 431, 432–433 (1967), the Board clarified the circumstances in which a union may require its employees to become and remain members of the union as a condition of employment. The Board observed that:

> A union-employer, just as any other employer, may impose on its employees requirements reasonably related to the proper performance of their jobs. . . . It is clearly proper for [a union] to be concerned about not hiring employees who do not adequately understand or agree with [its] general goals as well as its specific methods of operation and ways of achieving its goals to the extent such understanding is necessary for *the performance of their duties*. [Emphasis added.]

The Board explained that union membership could, for example, be required of the union's field representatives at issue in *Retail Store Employees* because these employees, "in conducting the [union's] business, might be asked to explain how the [union] functions as a collective-bargaining representative, or why it is desirable for workers to organize." Id. at 433. Accordingly, a union may impose membership on its employees who are "responsible for explaining to others the benefits and intricacies of union membership." *NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911, 917 (6th Cir. 1993).[2]

Our colleague says that a union can require its employees to be members of the union if membership is reasonably related to their performance of job duties. That formulation of the test concentrates exclusively on one sentence of the test, and not on the complete recitation of the test. As set forth above, the test explains that membership can be required of employees if an understanding of the union's goals is "necessary for the performance of their duties."

In addition, the test should be strictly applied. In essence, the issue is whether employees can be required to surrender their Section 7 right to refrain from membership in order to obtain or retain their jobs.

For the reasons set forth below, we conclude that union membership is not necessary for the performance of the clerical functions here. Further, even if the test is simply the "reasonably related" formulation espoused by our colleague, we conclude that the requirement of union membership is not reasonably related to performance of the clerical functions here.

We have carefully reviewed the evidence of the job duties of the clerical employees, and the record clearly shows that they have no responsibility for explaining to members or others the benefits of membership or how

[1] On June 16, 2004, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Union filed an answering brief. The Union filed limited exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

No exceptions were filed to the judge's dismissal of the complaint allegation that the Union violated Sec. 8(a)(1) of the Act by telling its clerical employees they had to be members of the Union to be eligible for its benefit plan. Additionally, on September 29, 2005, the Union notified the Board that it wished to withdraw its exceptions to the judge's finding that it violated Sec. 8(a)(4) and (1) of the Act by suspending and discharging employee Rebecca Wood because it believed she was allied with a former employee of the Union who had filed unfair labor practice charges against the Union. We grant the Union's request, and, in the absence of exceptions, we adopt the judge's finding. Further, on November 7, 2005, the General Counsel filed a motion to partially withdraw exceptions. Specifically, the General Counsel requested to withdraw his exceptions to the judge's finding that it was unnecessary to pass on the General Counsel's alternative theory that Wood's suspension and discharge independently violated Sec. 8(a)(1) of the Act. We grant the General Counsel's motion, and, in the absence of exceptions, adopt the judge's finding that it is unnecessary to pass on the independent 8(a)(1) theory.

[2] A second requirement for imposing union membership is that the union must affirmatively notify its employees of their right to engage in concerted protected activities unaffected by the membership requirement. *Retail Store Employees*, supra at 433. The General Counsel does not allege that the Union failed to satisfy this obligation.

the union functions. The judge summarized the clericals' "typical" job duties as follows:

- check dues payments from public agencies;
- maintain contract files for public and private sector employers and type summaries, amendments, and letters of adoption and forward them to the Union's San Francisco office;
- track contract openings and cost-of-living adjustments to advise business agents of these;
- take responsibility for computer back-up disks, office supply receiving tasks, mailings, and member research;
- type correspondence for the professional employees;
- post dues payments from employers via checkoff and from (a very few) individuals; and
- update members' records.

This recitation illustrates that the vast majority of the clericals' job tasks present no responsibility—or even opportunity—to explain unionization to members or other individuals.

Indeed, the record shows only two isolated and routine tasks performed by the clericals that even bring them into contact with members: responding to members' telephonic inquiries regarding dues arrearage and acting as receptionist. The former simply involves accessing the Union's database to answer members' inquiries concerning the amount of back dues owed. The latter involves greeting a telephone caller or visitor and directing them to their requested office at the Union. There is no evidence that, in performing these duties, the clerical employees have ever been called upon to explain how the union functions or the desirability of unionization. This limited and rote contact by the clericals with members falls well short of that required by *Retail Store Employees*, and illustrates that they bear little, if any, resemblance to union field representatives, of whom membership may appropriately be required.

Our dissenting colleague's reliance on the clericals' dues arrearage function is unavailing. The dissent's analysis of the central role of union policy in the clericals' interactions with members regarding their dues arrearages is based on pure speculation. There is no evidence in the record that clericals lobby members to maintain their level of membership, negotiate payment of arrearages, or engage in any of the other duties described by the dissent. Our dissenting colleague herself notes that it is only "likely" that the clericals perform these functions, revealing that the record does not contain such evidence. Indeed, the record shows only that the clericals perform the perfunctory task of accessing the database and reporting to members the extent of their arrearages. Such perfunctory duties, even if performed daily, do not constitute the kind of policy-oriented duties required by the case law to justify a membership requirement.

We are mindful of our duty to evaluate each case in this "critical area of labor relations" on the facts presented, and of the Board's directive that there is no "*per se* rule." *Retail Store Employees*, 163 NLRB 431, 433 (1967). Having done so, we find that the Union has failed to show that membership in the Union is either "necessary" for, or even "reasonably related" to, the clericals' proper performance of their job duties. *Retail Store Employees*, 163 NLRB at 432–433.[3] It is indeed difficult to perceive any meaningful relationship between the Union's membership requirement and the clericals' proper performance of their secretarial job tasks.[4]

Accordingly, we find that the Respondent violated Section 8(a)(1) and (2) of the Act by requiring its clerical employees to become and remain members of the Union as a condition of employment.

ORDER[5]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

[3] The applicable standard is not clearly set forth in *Retail Store Employees*. On the one hand, the Board's decision states that a union-employer "may impose on its employees requirements reasonably related to the proper performance of their jobs." 163 NLRB at 432. On the other hand, the Board's Order states that membership may not be required "unless such membership is necessary to the performance of the employee's duties." We agree that, in general, an employer can impose requirements that are reasonably related to job performance. However, where, as here, the requirement is that a Sec. 7 right be waived (i.e., the right to be a non-member), we believe that the stricter test of "necessity" may well be warranted. In addition, the requirement that an employee be a member of the Union would at least be an impediment to an employee's representation by another union. In any event, *we* find it unnecessary to pass on which standard is appropriate because we find that the Union failed to satisfy either standard.

[4] The dissent's reliance on the clericals' filing and checking of the Union's contracts is unwarranted as it involves no contact with members and is rote in nature.

[5] We have modified the judge's recommended Order in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001), to reflect the violations found, and to correct inadvertent errors. Par. 2(d) of the Order herein requires the Union to reimburse certain present and former clerical employees for all dues, assessments, and initiation fees paid to the Union. This requirement applies to clericals whose employment began on or after November 18, 2002, because, as the parties stipulated and the judge found, on that day Union Business Manager Jerry Kalmar distributed to the clericals the Union's new personnel policy containing the membership requirement and told the clericals that they had to be members of the Union as a condition of their employment. We have also substituted a new notice to comport with these modifications.

modified and set forth in full below and orders that the Respondent, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL–CIO, Sacramento, California, its officers, agents, and representatives, shall

Cease and desist from

(a) Suspending, discharging, or otherwise disciplining employees who it believes have allied themselves with other individuals who have filed unfair labor practice charges against it with the National Labor Relations Board.

(b) Requiring its clerical employees employed at its office in Sacramento, California, as a condition of employment, to become and remain members of Stationary Engineers, Local 39, International Union of Operating Engineers, AFL–CIO (the Union or Respondent), unless such membership is necessary or reasonably related to the performance of the employee's duties.

(c) In any like or related manner interfering with, restraining, or coercing its employees 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) Within 14 days from the date of this Order, offer Rebecca Wood full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Rebecca Wood whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Rebecca Wood, and within 3 days thereafter notify her in writing that this has been done and that the suspension or discharge will not be used against her in any way.

(d) Reimburse all present and former clerical employees of the Union employed at its Sacramento, California office, who were not members of the Union in its capacity as a labor organization at the time they were hired by the Union in its capacity as an employer, and whose employment began on or after November 18, 2002, for all dues, assessments, and initiation fees paid to the Union in its capacity as a labor organization, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office in Sacramento, California, copies of the attached notice marked "Appendix."[6] 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 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 facility involved in these proceedings, it 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 November 18, 2002.

(g) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. January 31, 2006

Robert J. Battista	Chairman
Peter C. Schaumber	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Surely, the gateway to an organization is its clerical employees who have daily interactions with the public. That is especially true for a small organization, like a local labor union, whose clerical employees assist members who call in, or drop by, with concerns about their membership status or contract coverage. The question

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

presented here is whether the Union may require its clerical employees to be members of the Union. In *Retail Store Employees Local 28*, 163 NLRB 431 (1967), the Board recognized that a union may do so, when the membership requirement is reasonably related to employees' job duties. Here, the majority has concluded that the Union cannot impose a membership requirement, finding, remarkably, that membership by these clerical employees is not even *reasonably related* to the proper performance of their jobs. The majority's view interprets *Retail Store Employees* far too narrowly, undervaluing the clerical employees' duties as they relate to serving the membership of the Union.[1]

I.

In *Retail Store Employees*, the Board explained that "a union-employer's requirement that its employee[s] belong to it . . . need not, in and of itself, violate the Act." 163 NLRB at 433. A union may require its employees to become members if it: (1) shows that membership is "reasonably related to the proper performance of their jobs"; and (2) notifies the employees of their right to engage in concerted activities unaffected by the membership requirement and that they are free to select another union to bargain on their behalf. 163 NLRB at 432–433. Only the first prong of the test is at issue here.

While the majority hedges the question, I read *Retail Store Employees* to establish the "reasonably related" standard as the appropriate test for determining the lawfulness of such union-membership requirements. Although the decision also contains the phrase "necessary to the performance," the Board framed its entire analysis with the opening declaration that "[a] union-employer, just as any other employer, may impose on its employees requirements reasonably related to the proper performance of their jobs." 163 NLRB at 432. Further, as more fully discussed below, the "reasonably related" standard better accommodates a union's vital interest in maintaining a knowledgeable work force that understands, and can effectively communicate, its goals and objectives. Last, I find it significant, as well, that the "reasonably related" standard has been applied by one of the few courts to address this issue. See *NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911, 917 (6th Cir. 1993) (quoting *Retail Store Employees*, supra at 432)).

Under *Retail Store Employees*, the "reasonably related" standard is not insurmountable. As the Board stated, "[w]e deem it *not unreasonable*" for a union-employer "*normally* to require its employees" to fulfill obligations of regular union membership. 163 NLRB at 433 (emphasis supplied). The Board emphasized that a union may legitimately have "concern for [its] employees' understanding of its operation" in order to achieve its institutional goals on behalf of its members:

> [F]or example, a field representative, in conducting the [union's] business, might be asked to explain how the [union] functions as a collective-bargaining representative, or why it is desirable for workers to organize. It is clearly proper for [a union] to be concerned about not hiring employees who do not adequately understand or agree with [its] general goals as well as its specific methods of operation and ways of achieving its goals to the extent such understanding is necessary for the performance of their duties. [Id. at 432–433.]

Retail Store Employees should be considered in a broader context. As the Board has discussed, "[t]he [union's] product is its ability to represent employees and, further, its customers are its members." *Communications Workers Local 6360*, 268 NLRB 812, 819 (1984). And "unions' institutional interest in loyalty of its employees is 'well grounded in federal labor policy.'" *Operating Engineers Local 370*, 341 NLRB No. 114, slip op. at 3 (1994).

With these principles in mind, the judge properly found that the Union demonstrated that its membership requirement is reasonably related to the clerical employees' proper performance of their jobs.

II.

The following description of the clerical employees' job duties is based not on "speculation," as the majority claims, but on the evidence in the record and on reasonable inferences drawn from proven facts. See *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 813 (3d Cir. 1986) (well established that the Board has the "authority to draw 'legitimate inferences from proven facts'") (quoting *Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980)).

The job duties of the Union's clerical employees are principally to deal with membership and collective-bargaining issues.[2] With respect to membership issues,

[1] I join the majority in granting the Union's and the General Counsel's respective motions to withdraw exceptions. Accordingly, I agree with the majority to adopt, in the absence of exceptions, the judge's finding that the Union violated Sec. 8(a)(4) and (1) of the Act by suspending and discharging Rebecca Wood, as well as the judge's further finding that it is unnecessary to pass on the General Counsel's alternative theory that Wood's suspension and discharge independently violated Sec. 8(a)(1).

[2] The judge found that the clerical employees also type correspondence, assemble mailings, post dues payments, and have "secondary

the clericals interact daily with members inquiring about dues arrearages.[3] The record shows that most inquiries are from employees whose membership has been placed in suspended status because they owe dues. Each interaction therefore may be a critical moment for the Union, as a clerical employee may be faced with a member questioning not only the amount of the dues arrearage, but also the need for the dues payment in the first place.

Needless to say, dues payments are vital to a labor organization's ability to sustain its collective-bargaining related activities, as acknowledged by the Act's express provision for union-security agreements.[4] It is entirely reasonable for the Union to conclude that a clerical employee who is also a dues-paying member will be better able to explain to other members the importance of timely dues payments to the accomplishment of the Union's mission.

The Union's membership requirement is further justified by the likelihood that a member may question a clerical employee about changing his membership status to reduce his future dues. Unions legitimately prefer that employees maintain full membership and dues obligations.[5] But a union cannot compel membership.[6] Rather, it must rely on its ability to persuade employees that membership is advantageous. Since its clerical employees are likely to have that conversation with members, the Union has a strong institutional interest in ensuring that they appreciate and endorse the Union's views on membership and dues. Requiring the clericals to be union members themselves is a reasonable means of achieving that objective.

The majority errs by undervaluing the clericals' daily interaction with members on dues-related matters, and by measuring the clericals' job functions against the functions performed by union field representatives. While *Retail Store Employees* describes certain job duties of the field representative position as an "example," it did not set the responsibilities of the field representatives as a base line standard that must be met to justify a union membership requirement. The effect of today's decision is, however, precisely that.

The majority further errs by ignoring the significance of the clericals' duties relevant to collective bargaining and contract administration issues. They are responsible for assisting the Union's business agents by: (1) monitoring and timely advising them of contract openings and cost-of-living adjustments; (2) maintaining contract files for the Union's many organized employers; and (3) typing summaries, amendments, and letters of adoption for the contracts and forwarding them to the Union's main office. Their proper performance of these often time-sensitive duties is critical to the Union's ability to vindicate employees' contractual and statutory rights, central goals of any labor union.[7] The Union legitimately may wish to ensure that the clerical employees understand this connection, and the membership requirement reasonably relates to that objective. It also may foster the bond of "loyalty" between the clericals and the Union as they act together on behalf of members on important collective-bargaining issues.

In sum, the judge's key finding—that "the clericals who perform duties dealing with membership issues and collective bargaining are performing the type of work which permits [the Union] to require them to be members and thus sisters or brothers to the members it represents"—is consistent with record evidence and the principles of *Retail Store Employees*.

Dated, Washington, D.C. January 31, 2006

Wilma B. Liebman Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

responsibility" for computer back-up disks and office supply receiving tasks.

[3] The clericals access a computerized database, which monitors the records of each member.

[4] Sec. 8(a)(3) of the Act; see also *NLRB v. General Motors Corp.*, 373 U.S. 734, 740–741 (1963) (Congress recognized that in the absence of a union-security provision many employees sharing the benefits of what unions accomplish through collective bargaining will refuse to pay their share of the cost); *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976) (same).

[5] Full membership strengthens unions by, among other things, minimizing the well-recognized problem of "free riders"—those who enjoy the benefits of union representation without contributing to them. See *California Saw & Knife Works*, 320 NLRB 224, 225 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[6] An employee may simply pay dues without becoming or maintaining union membership. See *NLRB v. General Motors Corp.*, supra, 373 U.S. at 742. In addition, once an employee declines or resigns union membership, he then may choose not to pay for union expenses unrelated to its role as collective bargaining representative. See *Communications Workers v. Beck*, 487 U.S. 735 (1988). Further, in so-called "right-to-work" states, a nonmember may avoid paying dues altogether. See Sec. 14(b) of the Act.

[7] This point is well illustrated by *Boghosian Raisin Packing Co.*, 342 NLRB No. 32 (2004). The majority there concluded that 42 strikers lost their "employee" status, and thus were lawfully denied reinstatement, when, due to a clerical error, the union failed to comply with the notice requirements of Sec. 8(d) of the Act.

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discipline employees who we believe have allied themselves with other individuals who have filed unfair labor practice charges against us with the National Labor Relations Board.

WE WILL NOT require our clerical employees employed at our office in Sacramento, California, as a condition of employment, to become and remain members of Stationary Engineers, Local 39, International Union of Operating Engineers, AFL–CIO, unless such membership is necessary or reasonably related to the performance of the employee's duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Rebecca Wood full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Rebecca Wood whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful suspension and discharge of Rebecca Wood, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension or discharge will not be used against her in any way.

WE WILL reimburse all our present and former clerical employees employed at our Sacramento, California office, whose employment began on or after November 18, 2002, and who were not at the time they commenced their employment members of the Union, for all dues, assessments, and initiation fees paid to the Union in our capacity as a labor organization, plus interest.

STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

Gary M. Connaughton, Esq., for the General Counsel.
Matthew J. Gaugher and *William A. Sokol, Esqs.* (*Weinberg, Roger & Rosenfeld*), of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Sacramento, California, on February 12, 2004, upon a complaint issued on October 22, 2003, by the Regional Director for Region 32. The complaint, amended at the hearing, is based on an unfair labor practice charge filed by Rebecca Wood, an individual (Wood), on May 16, 2003, and amended on October 21, 2003. It alleges that Stationary Engineers Local 39, International Union of Operating Engineers, AFL–CIO (Respondent) has violated Section 8(a)(1), (2), and (4) of the National Labor Relations Act (the Act). In its final form, the complaint makes two discrete allegations.

First, that Respondent has unlawfully under Section 8(a)(1) and (2) required its employees to become members, promulgating a personnel rule to that effect, using the justification that membership was required so that its clerical employees could have access to membership records both in order to perform their jobs and to be eligible to participate in its fringe benefit plans.

Second, the complaint asserts that Respondent discharged its employee, Wood, because she assisted a former employee who had filed unfair labor practice charges with the Board. Assertedly, that violates Section 8(a)(4). Alternatively, Respondent believed she was acting in cahoots with the former employee in support of the latter's civil suit against Respondent and the discharge violated Section 8(a)(1).

Respondent denies the allegations. First it contends that there is nothing unlawful about a union-employer requiring union membership of its clerical staff, particularly in circumstances where membership is reasonably related to the performance of their jobs. Second, it asserts that Wood did not engage in activity protected by Section 7 of the Act, whether under Section 8(a)(4) or independently under Section 8(a)(1).

Both parties have filed briefs which have been carefully considered. Based on the record as adduced during the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a labor organization organized as an unincorporated association, headquartered in San Francisco, California, and having several suboffices, including one in Sacramento. It represents employees in collective bargaining with their employers and further admits that it annually collects and receives dues and initiation fees in excess of $500,000, of which more than $50,000 was remitted to its parent, the International Union of Operating Engineers, AFL–CIO, located in

Washington, D.C. Accordingly, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts Regarding the Membership Issue

This case has arisen against a background of two settled unfair labor practice charges concerning Respondent's practice of requiring its own employees to be its members as a condition of employment as set forth in a collective-bargaining contract Respondent supposedly had with itself. A complaint, dated June 28, 2002, was issued on the first, filed by Juleen Stenzel on April 19, 2002. The second was filed on August 9, 2002, by Lisa Van Wormer. Both cases were consolidated for settlement and the Regional Director approved an informal settlement agreement on November 22, 2002. Van Wormer filed her charge in the wake of being discharged for misconduct.[1]

In the settlement agreement Respondent agreed to remedy several of its personnel practices. Without attempting to quote its terms verbatim, Respondent agreed to modify its requirement that its employees also be its members so long as it gave them assurances the membership requirement was being imposed only as a necessary component of their job; that Respondent did not propose to represent them for collective bargaining/grievance processing purposes; that the employees had the right to join any other union and if a majority chose representation by another union; if so, it would recognize and bargain with that union.

In addition, Respondent agreed to cease making certain threats said to have violated Section 8(a)(1), would rescind the "in-house" collective bargaining contract it had with itself and would reimburse both professional and office employees for any dues they had paid under that 'contract' (which, due to a statutory limitations period, only extended back to October 24, 2001).

The 'contract' was immediately replaced by a near-identical personnel policy manual which continued the requirement that this Union's employees become members (by their 31st day of employment).

On November 18, 2002, 4 days before the Director's approval, Jerry Kalmar, Respondent's business manager held a meeting at the Sacramento office during which he read the settlement's notice to employees to the assembled clerical staff. There is testimony about this meeting which will be discussed in more detail below. The parties have stipulated[2] that Kalmar distributed the new personnel policy manual (GC Exh. 3) at that meeting and told the clericals that they must continue to be members as a condition of their employment. Section 1 of that manual is the requirement that employees join the Union; section 2 is a nondiscrimination clause which assures employees that there will be no discrimination based on, inter alia, union activities.

While neither Respondent nor the General Counsel chose to go into great detail regarding the duties performed by the Union's office workers, there is really little that isn't evident from a simple perusal of the record. These clericals have access to the Union's computer system which maintains the records of each member or former member. Employees who have access to the computer system are required to sign a document known as the "Security of Computer Records, Files and Information" policy. They post dues payments whether coming from individuals (very few for this union) or employers per a check-off arrangement. Some clericals type correspondence for the professional employees. They keep members' records up to date and perform a wide variety of miscellaneous functions. Naturally some perform as receptionists and the receptionist is the first employee to greet a member or visitor whether in person or on the telephone. They are expected to have knowledge regarding the Union's procedures and policies or know to whom an inquiry should be routed. Apparently, every office worker commonly performs the receptionist task, even if only momentarily, whenever the assigned receptionist is temporarily diverted or unavailable. Indeed, as will be seen, Wood was substituting when the incident for which she was discharged occurred.

Wood's duties, as set forth in her job description, are probably typical. She checked dues payments from the public agencies, she updated members' status, such as addresses and other changes, she maintained contract files for both the public and private sector employers and typed summaries, amendments and letters of adoption and forwarded them to the San Francisco office. She also tracked contract openings and cost of living adjustments and advised the agents as these came up on the calendar so the agents could follow up. In addition, she had secondary responsibility for the computer back-up disks and did the office supply receiving tasks. She was also called upon to do mailings, member research and other miscellaneous chores. Undoubtedly the staff, to some extent, collectively shared each other's primary duties.

It is fair to say that most of the records kept in the office, whether relating to collective bargaining or to union members is regarded as private and for the eyes of union officials only. I do not use the term 'confidential' because that word carries with it some legal implications which are best avoided here as potentially confusing. Nevertheless, it is clear that whatever business is performed in that office is not public information and the Union wanted to keep its business information to itself and persons it trusts, i.e., its members. For that reason it has insisted that its employees also be its members.

b. Facts Relating to Rebecca Wood's Discharge

Rebecca Wood was hired in March 1998 as a clerical and has worked for Respondent continuously since that time in various clerical capacities. When she was hired, her immediate supervisor was Linda Middleton; later it was Perry Bonilla. Beginning in 2000, she became a secretary to some of the business representatives. Her last supervisor was Joan Bryant who ex-

[1] Van Wormer was discharged for engaging in conduct deemed to be both dishonest and a breach of trust. It is not necessary to repeat the specifics here. They are listed in R. Exh. 2.

[2] The parties' stipulation, G.C. Exh. 2, in two places contains an inadvertent error, mistakenly reciting the date as November 18, 2003; there is no dispute that the meeting occurred, as Kalmar testified, on November 18, 2002. Wood even signed a slip that day acknowledging receipt of the manual.

panded Wood's duties in 2002. That year, after Van Wormer's discharge, Bryant assigned Wood some of Van Wormer's duties, including public sector employer dues deposits (from payroll checkoff) and began training to do the same thing with private sector employers. On a daily basis Wood responded to member inquiries regarding dues arrearage questions, even though most of those came from private sector members. If their dues were not current, such members were supposed to be carried as suspended until the proper payment was made. Wood routinely provided this information to the member or his/her spouse whenever the proper social security number was provided.[3] The inquiries also came from retirees who were checking on membership connected insurance matters. She, in the Sacramento office, could answer most of those questions, but sometimes needed to refer the caller to the Union's main office in San Francisco. To obtain the required information she used the office computer located on her desk, accessing the information by using the member's social security number, which the Union uses as a presumably-secure identification number. (Social security numbers themselves are supposed to be kept confidential.) The screen that shows the dues record also shows whether the member is in good standing or suspended ("active," "inactive," "withdrawal card," "issue withdrawal card" or "suspended.")

As with any employee who has access to the computer system, Wood has signed (in 2001) the security policy document. The document stated that since the computer files were being placed on the Union's Sacramento server, those using it needed to be aware of the security concerns. The policy document says that information is "not to be released to unauthorized persons." It goes to say that if any question comes up about how the information is to be used, the employee should consult with one of two named managers, one of whom was business manager Kalmar. It went on to say that a breach of the policy would be considered an act of major misconduct (*unauthorized removal of . . . records or information; divulging confidential information*) and would be grounds for immediate discharge.

On May 5, 2003, Wood was serving as a receptionist because the regular receptionist was sick that day. That morning she fielded a call from Van Wormer. She testified that Van Wormer simply asked for the amount of dues she had paid in August, September, and October 2001. Following procedure, Wood asked Van Wormer for her social security number and after Van Wormer provided it, called up the information on her computer screen. She noted that the screen showed Van Wormer to be on 'suspended' status.

That status was of no concern to Wood, since she regularly gave dues information to suspended members. Indeed, although Wood was acquainted with Van Wormer due to their having worked together, they were not close friends. Therefore, she treated Wood's inquiry in the same fashion she treated all inquiries. She provided the requested information to Van Wormer.

Because she had gotten a call from a former coworker, she thought other coworkers would be interested. On the following day, she mentioned the call to Middleton, now the regular receptionist. Middleton later mentioned it to Bryant late one afternoon. Bryant initially thought nothing of it.

However, on May 12, 2003, Van Wormer caused a small claims lawsuit to be served upon Respondent, claiming back dues for a time period earlier than the time frame covered by the NLRB settlement. Receipt of that suit triggered the events leading to Respondent discharging Wood. Almost immediately upon service of the lawsuit, Bryant called Wood to her office and asked her to confirm that she had spoken to Van Wormer on the telephone. Wood replied that she had; when Bryant asked if Wood had provided dues information to Van Wormer, readily responded that she had.

Wood testified that Bryant then asked if she "realize[d] that Van Wormer is in litigation with Local 39." Wood responded that she was not. Indeed, when Wood responded to Van Wormer's inquiry, Van Wormer was not in litigation with Respondent. The NLRB matter had been resolved; the posting period was over and no direct challenge to Respondent's compliance therewith was pending, even if the case had not yet been formally closed. Nevertheless, Wood testified Bryant then asked Wood if she remembered the [settlement] notice the Union had to post. Wood replied that the posting had occurred 6 months earlier.

Wood testified Bryant then asserted that Wood had given Van Wormer confidential information. Wood replied that she had only done what she normally did on a daily basis and had provided the information without any malicious intent.

Wood said Bryant continued, asking if Wood recalled being told during the staff meeting of August 8, 2002, concerning Van Wormer's discharge and job reassignments, that Bryant had told the staff they were to direct any calls Van Wormer made to the office to either Bryant or another member of the managerial staff. Wood said she did not. Certainly, as the General Counsel observes, Bryant issued no written instructions to that effect. Bryant testified, that she did give such a directive. Even so, it appears that it was never reiterated during the following 9 months.

Bryant was not directly asked about this conversation, but did testify that Van Wormer's newly filed small claims suit and the NLRB charges/settlement had nothing to do with the decision to discharge Wood.

On May 14, Bryant summoned Wood to a meeting in the office of one of the Sacramento managers, Perry Bonilla, the director of public employees division. Bonilla told her that Bryant had advised him what had happened, that he was very disappointed in her and that she was being placed on paid administrative leave while the Union investigated the matter further. On May 16, having been called to the office, Bryant terminated Wood for violating the major misconduct rule, giving her a discharge memo describing the transgression. (G.C. Exh. 10.)

The memo stated:

> On or about May 5, 2003, you gave confidential dues records to Lisa Van Wormer who is not a member of Local 39. Dis-

[3] The procedure Wood followed here was consistent with the instructions she had been given when first trained by coworker Middleton acting under Bryant's instructions.

> trict Representative Joan Bryant questioned you about this matter [and] you admitted speaking to Lisa Van Wormer and . . . giving her three (3) months of dues records.
>
> . . . .
>
> It should also be noted that you were specifically warned and directed not to speak to Lisa Van Wormer during work time and to direct all of her phone calls and inquiries to a management representative.
>
> . . . .
>
> In addition, you were aware that Lisa Van Wormer had filed past litigation against Local 39. You were made aware of this fact on several occasions. The fact that you gave confidential information to an individual, who is not a member of the Union, and who has in the past and has currently filed litigation against the Union is unacceptable, inappropriate, and terribly disappointing.

The memo concluded by observing that Wood had suffered four earlier disciplines: December 29, 2000 (letter of reprimand); May 9, 2001 (counseling memo); April 9, 2001 (3-day suspension); July 3, 2001 (15-day suspension).

III. ANALYSIS AND CONCLUSIONS

A. The Union Membership Requirement

The briefs of both parties on the union membership issue have been very helpful. The conflicting analyses bring a close focus upon the issue. The General Counsel asserts that a labor union may not require its employees to be members, citing language found in *Retail Store Employees Local 428*, 163 NLRB 431 (1967), unless that membership is reasonably related to the employee's duties. It also cites *NLRB v. Michigan Conf. of Teamsters Welfare Fund*, 13 F.3d 911 (6th Cir. 1993), enfg. 306 NLRB 243 (1992), primarily for contrast purposes. Respondent cites the same cases, together with some *Retail Store Employees* progeny to highlight that its requirement of union membership is not only job related, it is critical to its mission, for its employees need to understand the Union's goals, since its employee members were expected to attend membership meetings and stay abreast of what it was seeking to accomplish, so they would better communicate with the membership and understand and explain the underlying reasoning behind its policies.

Specifically, the Board said in *Retail Store Employees*, at 432–433:

> A union-employer, just as any other employer, may impose on its employees requirements reasonably related to the proper performance of their jobs. Here, for example, a field representative, in conducting the Respondent's business, might be asked to explain how the Respondent functions as a collective-bargaining representative, or why it is desirable for workers to organize. It is clearly proper for the Respondent to be concerned about not hiring employees who do not adequately understand or agree with the Respondent's general goals as well as its specific methods of operation and ways of achieving its goals to the extent such understanding is necessary for the performance of their duties.[6] We deem it not unreasonable, therefore, for a union-employer normally to require its employees to attend its meetings and fulfill certain other obligations of regular union membership.[7] Indeed, in this sense and because of the undesirability of a per se rule in this critical area of labor relations, we believe that a union-employer's requirement that its employee belong to it, pay dues, fees, and assessments to it, and attend its meetings need not, in and of itself, violate the Act.
>
> . . . .
>
> As indicated above, we recognize that in certain circumstances a union, when acting as an employer, may impose upon its own employees obligations similar to those required of its members.[9] The business needs of a union must, however, be accommodated to the freedom of its employees to exercise their rights under the Act, for it is now well settled that "when a labor union takes on the role of an employer, the Act applies to its operations just as it would to any other employer."[10]

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[6] Cf. *Blue Flash Express, Inc*., 109 NLRB 591; *American Book-Stratford Press, Inc.*, 0 NLRB 914, 915. See also *Whitin Machine Works*, 100 NLRB 279, 291.

[7] The courts have recognized that an employer's imposition of certain requirements on its employees sometimes must be viewed as separate and apart from the proscriptions in the Act. As was aptly stated by the Supreme Court in *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Company)*, 346 U.S. 464, 472–473:

There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.

Congress, while safeguarding, in § 7, the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," did not weaken the underlying contractual bonds and loyalties of employer and employee.

See, also, *N.L.R.B. v. International Ladies' Garment Workers' Union, AFL—CIO (Slate Belt Apparel Contractors' Assn.)*, 274 F.2d 376 (C.A. 3).

[9] With respect to attendance at union meetings, we note that the Trial Examiner limited his unfair labor practice findings to the office clerical employees, recognizing that in order for the Respondent to function properly it might be necessary for the Respondent to require its field representatives to attend such meetings.

[10] *Office Employees International Union, Local 11 v. N.L.R.B.*, 353 U.S. 313. See also *Oregon Teamsters' Security Plan Office*, 119 NLRB 207; *Seafarers International Union of North America, Great Lakes District*, 138 NLRB 1142.

Respondent observes that the employees, and Wood in particular, have access to private information about its members, but also participate in the collective-bargaining/contract administration processes. Wood even served as the secretary to at least one business agent and had the responsibility to track contracts coming up for renewal and to type contract proposals as well as final agreements. Respondent argues that it is essential that such a person be closely attuned to the needs of the

Union. That bond, it argues, can only be acquired through holding the same membership as its represented members.

In fact, the General Counsel does not directly meet that argument. He appears to concede these facts, but argues that there is still an insufficient nexus to the employees' actual duties, arguing that the record is inadequate on the point. I disagree. I find that not only does Wood's testimony support Respondent, so does the job description and the fact that employees are required to be able to perform an absent colleague's duties. There is a great deal of crossover among the clericals. Since the focus of the evidence is primarily upon Wood, and the requirement that she be a member, it would be inappropriate to over-generalize about all types of workers the Union may employ and whether they all can be required to join. I simply observe that Wood and the clericals who perform duties dealing with membership issues and collective bargaining are performing the type of work which permits Respondent to require them to be members and thus sisters or brothers to the members it represents.

This in no way prohibits the clerical staff from utilizing Section 7 for the purpose of mutual aid and protection, including the election procedures under Section 9 or the enforcement of rights under Section 8(a). Respondent, in posting the remedial notice in the Stenzel/Van Wormer settlement, clearly stated it would not represent its own employees in collective bargaining and its employees were free to seek representation by another union and if that union obtained majority status, Respondent would bargain with it. Moreover, even if it had not been compelled to make those statements as part of the settlement agreement, its failure to do so, in an atmosphere free of unfair labor practices, is not an independent violation of the Act, but is instead a remedial matter. See *Teamsters Local. 688 (Corrine C. Freant)*, 215 NLRB 852 (1974), where the Board said:

> The administrative law judge found, and we agree, that Respondent Union violated Section 8(a)(1), (2), and (3) by negotiating and entering into a collective-bargaining agreement with itself and by requiring its employees to join Respondent. The Administrative Law Judge also properly found that Respondent did not commit additional 8(a)(1) and (2) violations by failing, prior to the commencement of negotiations, to advise its employees of their rights under Section 7 of the Act. However, we believe that it will effectuate the purposes of the Act to expand the administrative law judge's remedy for Respondent's unlawful conduct by now requiring it to advise the employees of their Section 7 rights.

In connection with the discussion about membership being a legitimate requirement of employment by a labor union, I cannot find that Business Manager Kalmar on November 18, 2002 told employees that they had to be members of the Union in order to be eligible for Respondent's benefit plans. However, consistent with the prerequisite that the clericals become union members, he did tell them that they had to be members to have access to union membership information. Undoubtedly this was due to his perception, if not the clericals', that their jobs were closely connected to the overarching task of representing persons employed in the building engineering industry and membership of the Union's own employees was deemed to be vital to that task.

In that circumstance it is really not necessary to deal with clerical membership insofar as union benefit plans are concerned. I do observe that these employees were covered by the benefit plans regardless of their membership. But since membership was required for employment, there would be no point in telling employees that membership was also required in order to participate in the fringe plans. That would have been entirely unnecessary, since if they were employed, a fortiori, they would already be members and as employees, eligible for the plans. Furthermore, the General Counsel did not offer any language utilized by the plans in question which would lead me to a different conclusion. If the plans required membership, the General Counsel's theory becomes plausible. If not, it is less so. Here, the absence of any evidence from the plans requiring membership renders the allegation less likely. All this together requires the conclusion that the General Counsel has not proven that Kalmar told the employees on November 18, 2002, that membership was an eligibility requirement of the fringe benefit plans.

B. Wood's Discharge

The General Counsel condemns Respondent's discharge of Wood (and her preliminary suspension) on two separate grounds. It principally asserts that the discharge was a violation of Section 8(a)(4) based on statements made by Bryant and because of language in the discharge memo. It also asserts it independently violated Section 8(a)(1) because Wood appeared to have been assisting Van Wormer in the vindication of a perceived employee right. These will be dealt with separately.

The Supreme Court has held that Section 8(a)(4) is to be given a broad interpretation, despite its narrow language.[4] This is because that section is designed to provide and protect employee access to the Board. *NLRB v. Scrivener*, 405 U.S. 117 (1972); *General Services, Inc.*, 229 NLRB 940, 943 (1977). As a result, the statute protects not only employees who file charges or cooperate with the Board, but those who are closely connected to those employees as well. An employer's transferred illegal purpose will protect a dischargee if that transfer is linked to an employee or institution that actually invoked the Board's processes. *Norris Concrete Materials*, 282 NLRB 289, 291–292 (1986) (violation of §8(a)(4) where employer discharged father as reprisal for son's having file unfair labor practice charge); *Yukon Mfg. Co.*, 310 NLRB 324 (1993) (violation of Sec. 8(a)(4) where employer laid off fellow employees in response to individual employee filing charges). The transferred purpose theory is frequently seen in Section 8(a)(3) cases. See, for example, *Harbor Cruises*, 319 NLRB 822, 841–842 (1995) (discharge of son for pretextuous reason violated §8(a)(3) because real object was reprisal for mother's union activity). The concept has even protected business contracts. See *Operating Engineers Local 400*, 265 NLRB 1316

[4] Sec. 8(a)(4) in its entirety states: "It shall be an unfair labor practice for an employer—to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

(1982) (union-employer violated Section 8(a)(1) when it canceled wife's janitorial contract because her husband engaged in union organizing activity, since the retaliation had an inhibitory effect on the exercise Sec. 7 rights by statutory employees.)

With that concept in mind, I look to the evidence. First is Wood's unchallenged testimony that on May 12, Bryant, after confirming that Wood had given Van Wormer the dues information, asked Wood if she "realize[d] that Van Wormer is in litigation with Local 39" (as of the date of the telephone call, May 5). The only 'litigation' that Van Wormer had directed toward Respondent was her unfair labor practice charge (settled 6 months earlier). This was followed by the discharge memo in which Bryant stated, inter alia: "you were aware that Lisa Van Wormer had filed past litigation against Local 39 . . . .The fact that you gave confidential information to an individual, who is not a member of the Union, and *who has in the past* and has currently *filed litigation against the Union* is unacceptable, inappropriate, and terribly disappointing." (Emphasis supplied.)

Thus, in two separate communications, Bryant referenced the fact that Wood's conduct was connected to Van Wormer's filing an unfair labor practice charge. And, it is worth noting, that Van Wormer's charge, albeit joined with Stenzel's, triggered a severe change in the manner in which Respondent was required to deal with its employees. More important than being required to return a manageable amount of dues, Respondent could no longer shield itself from scrutiny via the collective bargaining contract it had had with itself. That deprived it of a comfort system that had been in place for many years. Now it had become exposed to the same sort of outside matters all nonunion employers face.

These circumstances qualify as a prima facie case under Section 8(a)(4), for the statements are an admission that it perceived Wood as connected to Van Wormer's NLRB litigation against it. Why Respondent arrived at that perception is not clear; plainly it did so, but its logic eludes me.[5] It then used that conclusion as a reason to discharge Wood. Nevertheless, since Wood's Van Wormer connection constituted a significant share of Respondent's decision, the elements of the prima facie case have been established.

Indeed, its defense really does not address the prima facie case very well. Its response takes two tacks. First, it asserts that Wood failed to follow (even defied) an outstanding instruction not to speak to Van Wormer on the office telephone and to direct all of Van Wormer's calls to one of the managers. Second, it argues that Wood improperly provided "confidential" information to Van Wormer, her own dues records.

The truly curious thing about Respondent's defense is that it never understood that Wood really had no connection to Van Wormer at all. She was the unlucky recipient of Van Wormer's phone call that day. It is true that Wood is on good terms with Van Wormer. That can probably be said of any of the clericals who, like Wood, were unaware of the reasons for Van Wormer's discharge. Indeed, Respondent did not provide to the remaining clericals any reason for Van Wormer's discharge. Wood recalls that Bryant, during the announcement, did refer to something "legal" pertaining to the discharge, but further clarification never transpired. Wood was not aware of any ongoing dispute between Respondent's management and Van Wormer, although she surmised that they were not on good terms. She did recall that Bryant told her when Van Wormer was fired, that staff members were not to call Van Wormer during work time (to commiserate) and that she did so after work that night. She later called Van Wormer from the office during the Christmas season, some 5-1/2 months after her discharge to thank Van Wormer for some flowers she had sent the clericals. Even then, she never spoke to Van Wormer, only leaving a message on an answer machine.[6]

Because Respondent never understood that Wood was not connected in any way to Van Wormer, the connection it sees is based upon a mistake. It incorrectly believed Wood was providing assistance to Van Wormer because the two were confederates of some sort. From a legal viewpoint that mistake amounts to Respondent's admission that its principal motive was to punish Wood for cooperating with Van Wormer. Respondent's aversion toward Van Wormer was so great it did not want to deal with Van Wormer in any way or even deal with her indirectly through a surrogate. It saw Van Wormer as an enemy or turncoat, one to be shunned, and anyone cooperating with her was instantly deemed a co-conspirator. This attitude contaminated its thought process when it drew a connection between Van Wormer and Wood.

Such poisoned thinking led Respondent to discharge Wood. Even so, that motive does not provide Respondent any refuge from Section 8(a)(4), for its admissions still stand. In fact, it has offered reasons for the discharge which do not even begin to withstand scrutiny and seem to be make-weight, if not pretextuous.

Its first reason, the claim that Wood didn't follow Bryant's outstanding instruction to route all of Van Wormer's calls to higher management is not persuasive. First, there is only Bryant's testimony that such an instruction was given; she has not been corroborated. If such a directive was given, it was never reduced to writing and could not possibly have been seen by the clerical staff as anything but a momentary instruction destined to become stale as soon as Van Wormer's discharge faded from memory. Second, on its face the announcement could not reasonably be seen to apply to routine membership matters, such as providing dues records to a member. The clerical staff provided dues information so frequently to any member who asked, the procedure had long since acquired a momentum of its own. If Bryant intended her instruction to apply to dues information, the directive was too unclear and too mild to have stopped this habitual and routine clerical procedure. In fact, Bryant didn't even become alarmed about it until she realized

[5] It is probably accurate to say that Respondent's antipathy toward Van Wormer is based on two things. The first is its conclusion that Van Wormer was dishonest and a source of possible corruption. The second is Van Wormer's ability, despite her revealed dishonesty, to prevail before the Board with her unfair labor practice charge. With those two items as a predicate, it looks as if Van Wormer had had the last word and Respondent resented it.

[6] Respondent learned of this brief call after it had suspended Wood.

Van Wormer had used the information to support her small claims suit.[7]

The second reason, connected to the first, is Respondent's contention that confidential information cannot be provided to a nonmember such as Van Wormer and that in doing so Wood breached the misconduct rules. This reason is misleading. There is no evidence that Wood or any clerical knew that Van Wormer was no longer a member. There is no evidence on this record that she had been expelled or had somehow lost her membership. Moreover, the computer screen showed only that Van Wormer was a 'suspended' member. Suspended members are considered members for dues purposes, since it is usually a suspended member who is inquiring about dues information. The appellation 'suspended' offered no signal that Wood was breaching a rule barring her from providing information about a member's own dues. In addition, the fact that Van Wormer no longer worked for Respondent is not determinative of whether she had lost her membership. For all anyone might know, Van Wormer may have found a job in one of the industries the International Union of Operating Engineers services. A suspended member might well want to know what her dues status was as she came into such a field. Beyond that, I am of the view that the Labor-Management Reporting and Disclosure Act of 1959 (the LMRDA), sometimes known as the Landrum-Griffin Act, requires a labor union to provide such information to a member, whether active, suspended or expelled. (See 29 U.S.C. sec. 411(a)(5).) A member's own dues information is not confidential to that member—it is proprietary to him or her. Respondent's contention on the issue is without merit and deserving of no weight. It is an obvious red herring.

In some respects, giving these defenses the credence of discussion is unproductive. Respondent's admissions are controlling, since Respondent itself has given primacy to Wood's perceived alliance with Van Wormer. Its own words undermine the other reasons. Van Wormer had filed NLRB charges and Respondent used that fact as a warrant to discharge Wood. Claims of rule violations simply do not change that fact, particularly since they are unpersuasive. Accordingly, I find, in agreement with the General Counsel, that Respondent violated Section 8(a)(4) of the Act when it discharged Wood.

For that reason it is really unnecessary to probe the General Counsel's alternative theory, that under Section 8(a)(1) Wood was perceived as offering Van Wormer Section 7 "mutual aid and protection"[8] in prosecuting her small claims lawsuit to recover wrongfully collected dues. I will make no findings on the point, but do observe that Van Wormer's suit itself had no purpose other than to vindicate her personal claim. It was not aimed at the mutual benefit of anyone else. Usually Section 7 protects employees who seek to vindicate employee rights in forums outside the workplace, such as a state legislature or a court of law. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Altex Ready Mixed Concrete*, 223 NLRB 696 (1976), enfd. 542 F.2d 295 (5th Cir. 1976). However, where the lawsuit is designed only for an individual plaintiff, Section 7 will not protect the individual. *Briley Marine*, 269 NLRB 697 (1984) (Employee's *Jones Act* suit was not protected because he had "acted alone and solely on his own behalf.")

One may then properly query whether Wood providing factual data to Van Wormer in support of her personal suit constituted a concerted act of mutual aid and protection as contemplated by Section 7. I believe a credible argument can be constructed here to the effect that it did not, since Van Wormer was no longer a statutory employee, having been fired for good cause.[9] Wood's conduct, therefore, would not be qua employee and mutual aid and protection of employees would not be implicated. Cf., *AFSCME*, 262 NLRB 946 (1982), where a full Board unanimously held that an employee who testified in state court on behalf of his supervisor to vindicate the supervisor's rights under a strike settlement agreement was not engaging in Section 7 activity, since supervisors are not Section 2(3) employees. However, it is unnecessary to provide an answer as it relates to Wood and I decline to do so. In any event, the remedy would essentially be the same as the remedy being ordered under Section 8(a)(4).

IV. THE REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Additionally, it will be ordered to take certain affirmative action including offering Rebecca Wood immediate reinstatement and to make her whole for any loss of earnings and other benefits she may have suffered, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondent shall be required to expunge from Wood's personnel file any reference to her illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practice which has been found.

Based on these findings of fact, legal analysis, and the record as a whole, I make the following

[7] Counsel for Respondent's argument that Wood's providing the dues information undermined the discovery procedures of the state courts and therefore qualified as misconduct borders on the silly. It, too, relies upon the mistaken belief that Wood was in cahoots with Van Wormer. In any event, Wood had no reason to know a state court proceeding was Van Wormer's objective. Besides, there is no discovery in California small claims court.

[8] Sec. 7 reads, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining *or other mutual aid or protection*."

[9] Sec. 2(3) of the Act defines who are employees. It includes individuals who have lost their jobs due to a labor dispute or because of an unfair labor practice. It does not include former employees who are filing personal lawsuits against their former employer and who have lost their jobs for other reasons.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On May 14 and 16, 2003, Respondent violated Section 8(a)(4) and (1) of the Act when it first suspended and then discharged its employee Rebecca Wood because she was believed to have been allied with a former employee who had filed unfair labor practice charges with the National Labor Relations Board.

3. The General Counsel has failed to prove any other allegation of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Stationary Engineers Local 39, International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise assisting employees who it believes have allied themselves with other individuals who have filed unfair labor practice charges against it with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees 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)Within 14 days from the date of this Order, offer Rebecca Wood full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Rebecca Wood whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Wood's unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her 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, including an electronic copy of the records if stored in electronic form, 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 offices wherever clerical employees are employed, including Sacramento, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since May 14, 2003.

(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.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, June 16, 2004

APPENDIX

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discipline you even if we believe you have allied yourself with any individual who has filed unfair labor practice charges against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you if you choose to exercise the above rights which are guaranteed you by Federal law.

WE WILL within 14 days from the date the Board's Order, offer Rebecca Wood full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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[10] 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.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Rebecca Wood whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, plus interest.

WE WILL within 14 days from the date of the Board's order, remove from our files any reference to Rebecca Wood's unlawful discharge and within 3 days notify her in writing that we have done so and that the discharge will not be used against her in any way.

STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO