

NO ORAL ARGUMENT REQUESTED

**Nos. 08-9564, 08-9569**

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 578**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**TABLE OF CONTENTS**

<b>Headings</b>	<b>Page</b>
Statement of jurisdiction .....	1
Statement of the issue presented .....	3
Statement of the case.....	3
Statement of facts.....	4
I. The Board’s findings of facts .....	4
A. Background; the Company’s laborers are required, by the terms of the collective-bargaining agreement, to become members of the Union; Lopez registers to use the Union’s hiring hall, receives preliminary information about union membership, and is later dispatched to work as a laborer for the Company .....	4
B. While working for the Company, Lopez fails to pay union membership fees and dues; he receives a letter from the Union, calling for his discharge based on membership delinquency .....	6
C. Lopez takes steps to cure the delinquency, in accordance with instructions from union officials; the Union nonetheless proceeds to request that Lopez be discharged for failure to maintain union membership; the Company complies and discharges Lopez.....	8
II. The Board’s conclusions and order.....	11
Summary of argument.....	12
Argument.....	14

**TABLE OF CONTENTS**

**Headings – Cont’d**

**Page(s)**

Substantial evidence supports the Board’s findings that the Union violated the Act by failing to give employee Lopez adequate notice of, and an opportunity to cure, his delinquency under the contractual union-security provision before putting him in apprehension that he would be discharged, and before actually requesting and causing his discharge, based on the delinquency .....14

A. Applicable principles and standard of review .....14

    1. Unions and employers have a limited statutory right to compel union membership as a condition of employment; for a union, this compulsory power comes with a correlative duty to deal fairly with subject employees.....14

    2. Before proceeding against an employee under a contractual union-security provision, fairness demands that the union give the employee notice of his union-security obligations, and a reasonable opportunity to fulfill those obligations .....16

    3. It is unlawful for a union to impose a requirement of union membership, except in fair enforcement of a valid union-security provision .....18

    4. The Board’s findings are entitled to deference if supported by substantial evidence .....19

B. The Board properly found that the Union’s November 1 letter, purporting to request Lopez’s discharge under the union-security provision, violated Section 8(b)(1)(A) of the Act because the Union had no right to enforce the union-security provision as of that date.....20

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
C. The Board properly found that the Union’s successful November 14 request for Lopez’s discharge under the union-security provision violated Section 8(b)(1)(A) and (2) of the Act because the Union had no right to enforce the union-security provision as of that date .....	22
D. The Union’s arguments lack merit .....	23
Conclusion .....	29

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>In re Yoder</i> , 758 F.2d 1114 (6th Cir. 1985) .....	24, 25, 26
<i>Int'l Bhd. of Elec. Workers, AFL-CIO</i> , <i>Local #99 v. NLRB</i> , 61 F.3d 41 (D.C. Cir. 1995) .....	14, 15, 16, 19, 21, 27
<i>Local 545, Operating Engineers</i> , 161 NLRB 1114 (1966) .....	17
<i>McLane/Western v. NLRB</i> , 723 F.2d 1454 (10th Cir. 1983) .....	20, 27
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963) .....	15
<i>NLRB v. Hotel, Motel &amp; Club Employees' Union, Local 568</i> , 320 F.2d 254 (3d Cir. 1963) .....	15, 19
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020 (10th Cir. 2003) .....	19
<i>NLRB v. Local 1445, United Food &amp; Commercial Workers</i> <i>Int'l Union, AFL-CIO</i> , 647 F.2d 214 (1st Cir. 1981) .....	16, 21, 23, 26, 27
<i>Nunley v. City of Los Angeles</i> , F.3d 792 (9th Cir. 1995) .....	24, 25, 26
<i>Operating Engineers, Local 13</i> , 13 NLRB 25 (1993) .....	22
<i>Operating Engineers Local 542C (Ransome Lift)</i> , 303 NLRB 1001 (1991) .....	15, 17

**TABLE OF AUTHORITIES**

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>Osteopathic Hosp. Founders Ass'n v. NLRB</i> , 618 F.2d 633 (10th Cir. 1980) .....	20
<i>Public Service Co. of Oklahoma v. NLRB</i> , 318 F.3d 1173 (10th Cir. 2003) .....	17
<i>Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB</i> , 347 U.S. 17 (1954).....	14
<i>Rosenthal v. Walker</i> , 111 U.S. 185 (1884).....	24, 25
<i>S. Frederick Sansone Co.</i> , 127 NLRB 1301 (1960) .....	25, 26
<i>Sheet Metal Workers Int'l Ass'n, Local No. 355 v. NLRB</i> , 716 F.2d 1249 (9th Cir. 1983) .....	23
<i>Sorrentino v. Internal Revenue Service</i> , 383 F.3d 1187 (10th Cir. 2004) .....	24
<i>Teamsters Local 122</i> , 203 NLRB 1041 (1973), <i>enforced mem.</i> , 502 F.2d 1160 (1st Cir. 1974) .....	12, 16, 17, 19, 21, 27
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	19
<i>Western Publishing Co.</i> , 263 NLRB 1110 (1982) .....	16, 17, 19, 23, 28
<i>Witt v. Roadway Express</i> , 136 F.3d 1424 (10th Cir. 1998) .....	24, 25, 26

## TABLE OF AUTHORITIES

<b>Statutes</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3(b) (29 U.S.C. § 153(b)).....	2, 3
Section 7 (29 U.S.C. § 157) .....	18, 22
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) .....	2,3,4,11,12,13,18,19,20,21,22
Section 8(b)(1)(A)(2) (29 U.S.C. § 158(b)(1)(A)(2))... ..	2, 3, 4, 11, 12, 13, 18, 19, 22
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	12, 13, 15, 18
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2
Section 10(f) (29 U.S.C. § 160(f)).....	2
 <b>Other Authorities:</b>	
<i>Quorum Requirements</i> , Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).....	3
10 <i>Moore's Federal Practice</i> § 301.04[2] (2d ed.) .....	24

## **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28.2(C)(1), Board counsel are unaware of any prior or related appeals.

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**UNITED STATES COURT OF APPEALS  
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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Laborers' International Union of North America, Local 578 ("the Union") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Union. The Board's Decision and Order issued on July 31, 2008, and is

reported at 352 NLRB 1005. (A 109-20.)<sup>1</sup> In its decision, the Board found that the Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(b)(1)(A) and (2)) (“the Act”), by requesting and causing the discharge of union member Sebedeo Lopez from Shaw Stone and Webster Construction, Inc. (“the Company”), pursuant to a contractual union-security provision, without first meeting certain fiduciary obligations to Lopez. (A 109, 117-18.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Pueblo, Colorado, and because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).<sup>2</sup> (*See* A 109 n.2.)

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<sup>1</sup> Record references are to the appendix (“A”) filed with the Union’s opening brief, and to the supplemental appendix (“SA”) filed with the Board’s brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Union’s opening brief.

<sup>2</sup> In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of

The Union filed its petition for review on September 29, 2008. The Board filed its cross-application for enforcement on November 5, 2008. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's findings that the Union violated the Act by failing to give employee Lopez adequate notice of, and an opportunity to cure, his delinquency under a contractual union-security provision before putting him in apprehension that he would be discharged, and before requesting and causing his discharge, based on the delinquency.

### **STATEMENT OF THE CASE**

Acting on a charge filed by Sebedeo Lopez (A 1), the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by demanding Lopez's termination, on November 1 and November 14, 2006, and by ultimately causing Lopez's termination on November 14, 2006. (A 5-7.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the

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Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

Union's November 1 conduct violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)), and that the Union's November 14 conduct violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)). (A 51-71, 110-20.) The Union filed timely exceptions to the judge's unfair-labor-practice findings.<sup>3</sup> (A 72-79.) After considering those exceptions, the Board issued a decision affirming the judge's findings in all respects. (A 109.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACTS

#### A. **Background; the Company's Laborers are Required, by the Terms of the Collective-Bargaining Agreement, To Become Members of the Union; Lopez Registers To Use the Union's Hiring Hall, Receives Preliminary Information About Union Membership, and is Later Dispatched to Work as a Laborer for the Company**

The Union and the Company are parties to a collective-bargaining relationship. (A 111; A 5, 13.) For purposes of collective bargaining, the Union represents "[a]ll laborers, journeymen laborers and apprentice laborers" at the Company's Pueblo, Colorado jobsite. (*Id.*) The collective-bargaining agreement between the Union and the Company provides that:

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<sup>3</sup> There were no exceptions to the judge's dismissal of the allegation that the Union's November 1 conduct violated Section 8(b)(2) of the Act. (A 109 n.1.)

[a]ll [represented] employees shall, as a condition of employment with the [Company], become members of [the Union] within eight (8) days of the date of the collective bargaining agreement and all [represented] employees hired after that date shall, as a condition of employment with [the Company], become members of [the Union] within eight (8) days of the commencement of their employment.

(*Id.*) This “union-security” (A 111) provision, like the collective-bargaining agreement as a whole, took effect on or around March 3, 2006. (*Id.*)

In 2005 and 2006, Sebedeo Lopez registered to secure work through the Union’s hiring hall. (A 111; A 34-36, 38.) As part of the registration process, Lopez had to file an application for union membership containing the following acknowledgment:

I understand that if I am over two (2) months in arrears with the payment of my monthly membership dues I will be suspended on the first day of the third month without notice. Initiations not completed within 30 days are to be automatically cancelled and all monies forfeited.

(A 111; A 41.) Lopez also had to sign and return an information sheet prepared by the Union for “Construction Member[s].” (A 111; A 40.) This information sheet included the following statements about the obligations of construction members:

#### INITIATION FEES

The initiation fee is \$344.00. \$44.00 is paid now for the registration fee to get on the out-of-work-list. \$300.00 is paid after employment, in installments of \$100.00 per week for 3 weeks. To stay on the out-of-work-list, \$29.00 a month for dues must be paid. All payments are your responsibility. . . .

### QUARTERLY DUES

One month of dues is waived while payments are made for the initiation fees. Dues are usually paid in quarterly payments of \$87.00 (or \$29.00 per month). Suspension will occur in two months and one day. A \$25.00 penalty will be assessed to reinstate.

(*Id.*) Lopez signed and submitted to the Union both the membership application (A 41) and the information sheet (A 40). He did not recall ever receiving a copy of either document to retain for his records. (A 111; A 45-46.)

On July 14, 2006, the Union dispatched Lopez to serve as a laborer at the Company's Pueblo jobsite. (A 111; A 38.) The dispatch slip, which Lopez signed, included a form acknowledgment that Lopez would have to pay "a regular fee" to the Union, even if he chose not to accept any of the other obligations of union membership. (*Id.*)

### **B. While Working for the Company, Lopez Fails To Pay Union Membership Fees and Dues; He Receives a Letter from the Union, Calling for his Discharge Based on Membership Delinquency**

Lopez began his work for the Company on July 17, 2006, and continued to work for the Company, without incident, into October 2006. (A 112; A 28, 31.) In early October, however, the Union discovered that Lopez had not yet made any payments towards his union initiation fee and monthly membership dues. (A 112; SA 4, 11.) The Union accordingly prepared a form delinquency letter, dated

October 12, 2006, and sent it to Lopez by regular mail. (A 112, 115-16; SA 4-8, 11, 12-15.) Lopez never received this letter. (A 112, 115-16; A 21, 29.)

On finding, in late October, that Lopez still had not made any dues payments, the Union prepared a second form delinquency letter, to be delivered to both the Company and Lopez. (A 112-13; A 37, SA 5, 11.) This second letter, which was dated November 1, 2006, and addressed only to the Company, stated, in relevant part:

Dear Madams/Sirs:

In accordance with our collective bargaining agreement as it pertains to Union Membership, we are requesting the **dismissal** of:

**Sebedeo Lopez** SS# [omitted]

For failure to comply with the contract. In order to assure good standings it would require **immediate** payment to our office of:

**\$415.00 (Initiation Fee, and Dues)**

**Mr. Lopez is currently not a member in the Laborers International Union.**

**Mr. Lopez** will need a referral from our office to continue on the job or we can provide a laborer to replace this employee right away.

(A 112-13; A 37.)<sup>4</sup>

Lopez received a copy of the above letter while at work on November 1, 2006. (A 112-13; A 19-20.) Job Steward Dave Lucero handed Lopez the letter, in the presence of Union Secretary Treasurer Rudy Ortiz, and advised Lopez to pay the amount indicated “as soon as possible.” (A 113; A 20.) Lucero additionally told Lopez to contact Union Office Manager Patricia Martinez to “make arrangements” if he had “any problems as far as the money.” (*Id.*)

**C. Lopez Takes Steps To Cure the Delinquency, in Accordance with Instructions from Union Officials; the Union Nonetheless Proceeds to Request that Lopez Be Discharged for Failure To Maintain Union Membership; the Company Complies and Discharges Lopez**

Following Lucero’s instructions, Lopez contacted Union Office Manager Martinez to arrange for payment of the amount indicated in the November 1 letter. (A 113; A 21.) Lopez told Martinez, sometime between November 1 and November 5, that he had \$200 to put towards the amount stated in the November 1 letter. (*Id.*) Martinez replied that this was “[o]kay,” and provided no further instructions or comments regarding the November 1 letter. (A 113; A 21-22.) The following week, on Friday, November 10, Lopez purchased a money order for \$200. (A 113; A 23, 39.)

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<sup>4</sup> The October 12 letter that the Union mailed to Lopez was nearly identical to the November 1 letter, but stated that Lopez owed \$120 in “Late Dues” and \$25 in “Reinstatement fees.” (A 112; A 37, 42.)

On Monday, November 13, Lopez worked a half-day at the Pueblo jobsite and then left to go to the hospital, as he was feeling ill. (A 113; A 23.) While at the hospital, Lopez called Martinez to inform her that he had a money order for \$200 and would bring it to the Union's main office, in Colorado Springs, as soon as he left the hospital. (A 113; A 23-24.) Martinez volunteered that Lopez "didn't have to go all the way to Colorado Springs" because Union Secretary Treasurer Ortiz would be at the Pueblo office that day, and Lopez could drop the money order off with him. (A 113; A 24.)

In light of Martinez's comment, Lopez decided to take the money order to the Union's Pueblo office on the afternoon of Monday, November 13. (A 113; A 24-25.) When Lopez arrived at the Pueblo office, however, he found it locked and apparently unstaffed. (A 113; A 25.) Lopez accordingly called Martinez again to find out what he should do. (*Id.*) Martinez, at this point, instructed Lopez to "go ahead and fill out the money order and throw it in the slot in the door." (*Id.*) When Lopez asked if he should also sign the back of the money order, Martinez said no, but told him to "put the initials NINIP on the front." (*Id.*) Lopez followed these instructions and dropped the money order in the mail slot of the office door. (*Id.*) He retained the stub of the money order, bearing his hand-written notation "INIP." (A 113 n.2; A 39.)

After receiving instructions from Martinez about the money order, Lopez asked Martinez if he could have until Friday, November 17, to pay the remaining \$215 that he owed pursuant to the November 1 letter. (A 113; A 25.) Martinez refused to allow him until Friday to pay this outstanding balance. (*Id.*) She told him that he had to pay it by Thursday, November 16. (*Id.*)

Notwithstanding the above payment arrangements between Lopez and Martinez, Union Secretary Treasurer Ortiz contacted the Company on Tuesday, November 14, and requested that the Company terminate Lopez's employment. (A 114; A 5, 13, SA 2.) In accordance with this request, on the very same day, Company General Foreman Randy Espinoza "walked [Lopez] off the job," explaining to Lopez that he (Espinoza) was acting on "strict orders from [Union Secretary Treasurer] Ortiz" to "walk [Lopez] off the job because of [Lopez's] union dues." (A 114; A 27.)

On Thursday, November 16, Lopez paid the remaining \$215.<sup>5</sup> (*Id.*) Lopez was thereafter reinstated to his job. (A 114; SA 9.) As of the hearing herein, Lopez was an employee of the Company and a member of the Union in good standing. (A 114; A 18.)

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<sup>5</sup> In summarizing Lopez's credited testimony, the judge erroneously referred to the Thursday on which Lopez made this second payment as "November 15, 2006." (A 116-17.) Elsewhere, however, the judge correctly noted that the Thursday in question was November 16, 2006. (A 113-14, 116; A 23-25.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Union: 1) violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by creating the impression that it was seeking Lopez's discharge on November 1, 2006; and 2) violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by requesting and causing Lopez's discharge on November 14, 2006. (A 109, 117-18.) The Board adopted the judge's findings that, on both of the dates in question, the Union unlawfully proceeded against Lopez for delinquency under a contractual union-security clause, without first giving Lopez an adequate explanation of the delinquency, and a reasonable opportunity to correct it. (A 117-18.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 109.) Affirmatively, the Board's Order requires the Union to: notify the Company and Lopez that the Union withdraws and rescinds its request for Lopez's discharge, and that the Union has no objection to Lopez's reinstatement; make Lopez whole for lost earnings and other benefits; remove from the Union's files, and ask that the Company remove from its files, any reference to the unlawful discharge of Lopez, and notify Lopez that this has been done and that the discharge will not be used against him in any way; and post a remedial notice. (*Id.*)

## SUMMARY OF ARGUMENT

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) authorizes unions and employers to enter into “union-security” agreements, which require employees to maintain union membership as a condition of employment. Such agreements, however, are strictly regulated. Employees can only be required to maintain membership to the extent of paying uniform initiation fees and periodic dues. Moreover, before a union may enforce a union-security agreement against an employee who is delinquent in his financial membership obligations, the union must give the employee adequate notice of his delinquency, and an opportunity to pay down the delinquency. Under well-settled law, the notice given to the employee must “include[] a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount.” *Teamsters Local 122*, 203 NLRB 1041, 1042 (1973), *enforced mem.* 502 F.2d 1160 (1st Cir. 1974). Where a union enforces a union-security agreement to secure an employee’s discharge, without first meeting these requirements of fair dealing, it violates Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. §158(b)(1)(A) and (2)).

In the present case, substantial evidence supports the Board’s findings that the Union unlawfully took action against Lopez for a dues delinquency, without first meeting its duty of fair dealing. The Board reasonably found that the Union

violated Section 8(b)(1)(A) of the Act by suggesting to Lopez on November 1 that it could secure his discharge for failure to pay dues, when in fact it could not lawfully have done so at that time: as of November 1, the Union had not given Lopez the necessary notice as to how his dues delinquency was calculated, nor had the Union given Lopez any opportunity to pay what it asserted he owed. Similarly, the Board reasonably found that the Union violated Section 8(b)(1)(A) and (2) of the Act on November 14, by requesting and causing Lopez's discharge for dues delinquency, again without informing him of the method used to calculate his delinquency or giving him an opportunity to pay what he assertedly owed.

The Union argues that it did, in fact, give Lopez notice of his dues delinquency, and an opportunity to cure it, before taking the above actions against him. In making this argument, the Union relies primarily on an October 12 delinquency letter that it mailed to Lopez. The Board, however, found that Lopez credibly denied receiving this letter. Notwithstanding the Board's resultant finding that the letter was not received, the Union argues that a finding of actual notice is required under the common-law "mailbox rule." This argument is plainly inconsistent with federal caselaw applying the mailbox rule, including the caselaw of this Court. Therefore, the Union's attempt to rely on the October 12 letter to show that it satisfied its duty of fair dealing fails, as does its other arguments. Accordingly, the Board's Order is entitled to enforcement.

## ARGUMENT

**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE UNION VIOLATED THE ACT BY FAILING TO GIVE EMPLOYEE LOPEZ ADEQUATE NOTICE OF, AND AN OPPORTUNITY TO CURE, HIS DELINQUENCY UNDER THE CONTRACTUAL UNION-SECURITY PROVISION BEFORE PUTTING HIM IN APPREHENSION THAT HE WOULD BE DISCHARGED, AND BEFORE ACTUALLY REQUESTING AND CAUSING HIS DISCHARGE, BASED ON THE DELINQUENCY**

### A. Applicable Principles and Standard of Review

1. **Unions and employers have a limited statutory right to compel union membership as a condition of employment; for a union, this compulsory power comes with a correlative duty to deal fairly with subject employees**

Section 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) authorizes an employer to “mak[e] an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .” *See Radio Officers’ Union of Commercial Telegraphers Union, A.F.L. v. NLRB*, 347 U.S. 17, 40 (1954) (noting that the proviso to Section 8(a)(3) of the Act “authorizes employers to enter into certain union security contracts”). However, such “union-security” agreements are “strictly regulated.” *Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99 v. NLRB*, 61 F.3d 41, 43 (D.C. Cir. 1995). By the express terms of the Act, a labor organization benefiting from a union-security agreement must be the lawfully designated collective-bargaining representative of the employees covered by that agreement. 29 U.S.C. § 158(a)(3). Moreover, the burden of “membership” imposed by a

union-security agreement can entail nothing more than the payment of uniform initiation fees and periodic dues to the bargaining representative. *Id.* See also *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (“Under the second proviso to [Section] 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues.”).

Apart from these express limitations on union-security arrangements, the Board interprets Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) to include a duty of fair dealing:<sup>6</sup>

The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees.

*NLRB v. Hotel, Motel & Club Employees’ Union, Local 568*, 320 F.2d 254, 258 (3d Cir. 1963). The duty of fair dealing requires, at minimum, that the union “inform the employee of his obligations [under a union-security agreement] in

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<sup>6</sup> See *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001, 1003 (1991) (observing that, even where express requirements of the Act are met, union’s enforcement of a union-security agreement “might still run afoul of the Act” if union fails to meet fiduciary duty to represented employees). See also *Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43 (“The Board has consistently affirmed that a union seeking to enforce a union security clause has a fiduciary duty to deal fairly with the employee affected.”) (internal citations omitted).

order that the employee may take whatever action is necessary to protect his job tenure.” *Id.*

**2. Before proceeding against an employee under a contractual union-security provision, fairness demands that the union give the employee notice of his union-security obligations, and a reasonable opportunity to fulfill those obligations**

When an employee who is subject to a union-security agreement fails to meet his financial membership obligations, “[the] union security [agreement] gives the union the formidable power to compel [the] employee’s discharge from current employment . . . .” *Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43. Before the union may exercise this power, however, fair dealing requires that the union give the employee “actual and clear notice” of the precise amount he owes, the method used to calculate that amount, and the deadline for payment. *NLRB v. Local 1445, United Food & Commercial Workers Int’l Union, AFL-CIO*, 647 F.2d 214, 217 (1st Cir. 1981). *Accord Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43; *Western Publishing Co.*, 263 NLRB 1110, 1111-12 (1982); *Teamsters Local 122*, 203 NLRB 1041, 1042 (1973), *enforced mem.* 502 F.2d 1160 (1st Cir. 1974). The union must also inform the employee “that failure to pay will result in discharge.” *Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43. *Accord Western Publishing Co.*, 263 NLRB at 1112. It is well settled that the union’s duty to provide specific notice of the above matters

involves a concomitant obligation to give the employee a reasonable opportunity to pay what is indicated as due. *See, e.g., Operating Engineers, Local 542C (Ransome Lift)*, 303 NLRB at 1005; *Teamsters Local 122*, 203 NLRB at 1042.

A union normally is not privileged to invoke the sanctions of a union-security agreement against a dues-delinquent employee, unless the union has complied with the requirements of fair dealing as defined above.<sup>7</sup> As the Board explained over 40 years ago:

where the protection of an individual employee's right to continued employment is to be balanced against the statutorily restricted right of a union to enforce a union-security agreement requiring membership as a condition of employment, a union must show that it has dealt fairly with the employee and given him clear notice of what is required of him. Absent such a demonstration, the individual's rights must be held paramount and protected.

*Local 545, Operating Engineers*, 161 NLRB 1114, 1121 (1966) (finding that union was not privileged to request discharge of employee where union had failed to give

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<sup>7</sup> A union is held to a less rigorous standard of fair dealing only where it is pursuing a dues-delinquent employee who has “willfully and deliberately sought to evade his union-security obligations.” *Western Publishing*, 263 NLRB at 1113. Although the Union argued, in the proceedings below, that Lopez was just such a “recalcitrant” (A 117) employee, the Board rejected this argument as unpersuasive (A 117-18). In its opening brief to this Court, the Union does not challenge the Board's disposition of this issue or otherwise renew the argument that Lopez was a recalcitrant employee. The Union has accordingly waived the argument that a lower standard of fair dealing should apply in this case based on Lopez's recalcitrance. *See Public Service Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n.3 (10th Cir. 2003) (finding that company waived an issue by, among other things, failing to raise it in opening brief to the Court).

employee clear notice as to which membership obligations he had to meet as a condition of continued employment).

**3. It is unlawful for a union to impose a requirement of union membership, except in fair enforcement of a valid union-security provision**

Section 7 of the Act (29 U.S.C. §157) guarantees to employees the right to “form, join, or assist labor organizations,” and also the right to “refrain from any or all such activities.” Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) implements this guarantee by making it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7.”

Although Section 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) authorizes some limited interference with employees’ Section 7 right to refrain from union membership, this authorization, as indicated above, is strictly regulated. Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) operates as an additional check on union conduct under union-security agreements, specifying that it is an unfair labor practice for a union to “cause or attempt to cause an employer to discriminate against an employee” based on the employee’s lack of union membership, unless the employee has failed “to tender the periodic dues and the initiation fees uniformly required as a condition of . . . membership.”

Applying these statutory provisions, the Board and courts have consistently found that a union violates Section 8(b)(1)(A) and (2) of the Act by enforcing a union-security provision without first fulfilling the fiduciary obligations described above. *See, e.g., Int'l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43-44; *Hotel, Motel & Club Employees' Union, Local 568*, 320 F.2d at 255-56, 258; *Western Publishing Co.*, 263 NLRB at 1112-13; *Teamsters Local 122*, 203 NLRB at 1041-42.

**4. The Board's findings are entitled to deference if supported by substantial evidence**

This Court has stated that it “will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole.” *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) (internal citation omitted). “Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court must canvass “the whole record” to determine whether such substantial evidence exists. *Universal Camera*, 340 U.S. at 488. In that process, however, the Court may not displace the Board’s choice between fairly conflicting views of the evidence, even if “an appellate panel may have decided the matter differently.” *Interstate Builders*, 351 F.3d at 1028 (internal citation omitted).

In reviewing an administrative law judge's determinations regarding the credibility of witnesses at an unfair-labor-practice hearing, this Court has stated, "[We] do not sit as a super trial examiner, and we do not weigh the credibility of one witness against another, nor do we search for contradictory inferences."

*Osteopathic Hosp. Founders Ass'n v. NLRB*, 618 F.2d 633, 636 (10th Cir. 1980).

The Court accordingly does not substitute its judgment on the credibility of witnesses for that of the judge, absent "extraordinary circumstances."

*McLane/Western v. NLRB*, 723 F.2d 1454, 1458 (10th Cir. 1983).

**B. The Board Properly Found that the Union's November 1 Letter, Purporting To Request Lopez's Discharge Under the Union-Security Provision, Violated Section 8(b)(1)(A) of the Act Because the Union had No Right To Enforce the Union-Security Provision as of that Date**

Substantial evidence fully supports the Board's finding (A 118) that the Union violated Section 8(b)(1)(A) of the Act by statements in its November 1, 2006 letter. In that letter, the Union stated that it was "requesting the dismissal of [] Lopez" based on "the collective bargaining agreement as it pertains to Union Membership." (A 112, 118; A 37.) As of November 1, however, the Union had not yet completed the antecedent steps necessary for enforcement of such a union-security provision. Therefore, the Board reasonably found (A 118) that "the Union had no proper right to seek Mr. Lopez's discharge," and its claim that it had such a right constituted unlawful coercion in violation of Section 8(b)(1)(A) of the Act.

Indeed, before handing the November 1 letter to Lopez, the Union utterly failed to meet its obligations of fair dealing as required by the Act. Thus, as the Board found, the Union had not explained to Lopez how his dues delinquency was calculated (A 117), set forth the “months for which dues were owed,”<sup>8</sup> nor provided Lopez “with any amount of time at all to pay his arrearages[,] reasonable or not” (A 118 n.7). Rather, the Union’s letter demanded “immediate” payment of \$415 while simultaneously requesting his dismissal. (A 112; A 37.)

Because the Union was derelict in its duty of fair dealing, it had no right to invoke the union-security provision against Lopez on November 1. Accordingly, as the Board found (A 118), the Union’s effort to compel Lopez’s union membership by putting him in apprehension of discharge constituted unauthorized

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<sup>8</sup> *Teamsters Local 122*, 203 NLRB 1041, 1042 (1973), *enforced mem.* 502 F.2d 1160 (1st Cir. 1974). The Union maintains, in its brief (Br. 14), that “[t]he only bright-line rule recognized by a court that the NLRB has established is that ‘at a minimum’ a union’s notice of an employee’s dues obligation must ‘explain to the employee that failure to pay will result in discharge.’” This is simply not true. In *NLRB v. Local 1445, United Food & Commercial Workers International Union*, 647 F.2d at 217, the First Circuit “expressly adopt[ed]” the Board rule that a union’s notice to an employee must include “the method for calculating the dues owed[] and the deadline for payment . . . .” Similarly, in *Int’l Bhd. of Elec. Workers, AFL-CIO, Local #99*, 61 F.3d at 43-44, the D.C. Circuit recited and applied a Board rule that a union’s notice must include, “a statement of the precise amount and months for which dues are owed,” as well as the “method used to compute this amount.”

and coercive interference with Lopez's Section 7 right to refrain from union membership, in violation of Section 8(b)(1)(A) of the Act.<sup>9</sup>

**C. The Board Properly Found that the Union's Successful November 14 Request for Lopez's Discharge Under the Union-Security Provision Violated Section 8(b)(1)(A) and (2) of the Act Because the Union had No Right To Enforce the Union-Security Provision as of That Date**

Substantial evidence equally supports the Board's finding (A 117-18) that the Union violated Section 8(b)(1)(A) and (2) of the Act by requesting and causing Lopez's discharge from the Company on November 14, 2006. As of November 14, the Union still had not made any attempt to explain to Lopez how his particular dues delinquency had been calculated. The Board thus reasonably found (A 117) that "the Union did not meet the fiduciary requirement that it provide the necessary explanation of the means of calculation of Mr. Lopez[']s arrearages beyond the naked sum set forth in the November 1, 2006 letter simply as owed."

In addition, as of November 14, Lopez was making efforts to pay the amount that the Union claimed he owed, in accordance with the instructions of Union Office Manager Martinez, who had been identified to Lopez as the person he

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<sup>9</sup> The Union's claim (Br. 20-21) that the November 1 letter was not coercive, and therefore not a violation of Section 8(b)(1)(A) of the Act, hardly merits a response. Indeed, a union's conduct need not rise to the level of "physical violence," as the Union contends (Br. 20), to violate that section of the Act. Rather, conduct violates Section 8(b)(1)(A) of the Act so long as "it reasonably tends to have a coercive effect." *Operating Engineers, Local 13*, 313 NLRB 25, 33 (1993).

should contact to make payment arrangements. Indeed, by November 13, Lopez had paid nearly half of the total indicated in the November 1 letter, and was under instructions to pay the remainder within a matter of days, when the Union nevertheless requested his discharge.

In the circumstances, the Board reasonably found (A 117) that the Union's precipitate request for Lopez's discharge was inconsistent with the requirements of fair dealing: "[i]t is not reasonable for the Union to set a schedule for an employee to make required payments and then cause the discharge of that individual when he has met or is on schedule to meet the payment timetable given him." Based on the Union's failure to meet its fiduciary obligations in the above respects, the Board properly found that the Union was not privileged to request Lopez's discharge pursuant to the parties' union-security provision on November 14. *See Sheet Metal Workers Int'l Assn., Local No. 355 v. NLRB*, 716 F.2d 1249, 1254 (9th Cir. 1983); *Local 1445, United Food & Commercial Workers International Union*, 647 F.2d at 217; *Western Publishing*, 263 NLRB at 1111-12.

#### **D. The Union's Arguments Lack Merit**

The Union argues (Br. 6-17) that it lawfully took action against Lopez in November 2006, after Lopez failed to make any response to the Union's October 12 letter regarding his dues delinquency. In making this argument, the Union challenges the Board's factual finding (A 116) that Lopez never received the

October 12 letter. Specifically, the Union argues (Br. 9) that the Board’s finding of nonreceipt, in the face of evidence that the October 12 letter was properly mailed by the Union, “direct[ly] contradict[s] . . . the commonly accepted presumption in the United States that a letter placed in the U.S. mail reaches its destination.”

Under this presumption (known as the “mailbox rule”), the Union maintains (Br. 12), “[w]hen the ALJ found that the [October 12] letter was properly addressed and mailed . . . as a matter of law Mr. Lopez received it.”

The mailbox rule, however, requires no such finding “as a matter of law” that Lopez received the October 12 letter. As the Supreme Court explained in *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), the presumption that a mailed letter reaches its destination “is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the [Postal Service] will do their duty . . . .”<sup>10</sup> The presumption may be rebutted by evidence that the addressee did not receive the letter. *Witt v. Roadway Express*, 136 F.3d 1424, 1430 (10th Cir. 1998); *Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995); *In Re Yoder*, 758 F.2d 1114, 1118 (6th Cir. 1985) (citing 10 *Moore’s Federal Practice* § 301.04[2] (2d ed.) for the “general proposition that a presumption is

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<sup>10</sup> See also *Sorrentino v. Internal Revenue Service*, 383 F.3d 1187, 1190 (10th Cir. 2004) (observing that proof of mailing gives rise to a presumption “of fact” that the mailed item was received (internal citation omitted)).

rebutted upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact”).

Moreover, contrary to the Union’s contentions (Br. 12-13), a “mere denial” of receipt is sufficient evidence that the mailed item was not actually received, and accordingly such a denial may be relied upon to rebut the presumption of receipt. *See Witt*, 136 F.3d at 1430 (reversing district court holding that plaintiff failed to rebut presumption of receipt, where plaintiff provided affidavit denying receipt); *Nunley*, 52 F.3d at 796 (“Courts have formulated the presumption so as to hold it rebutted upon a specific factual denial of receipt” (internal citation omitted)); *In re Yoder*, 758 F.2d at 1118 (reversing district court holding that a “mere denial . . . is insufficient to rebut the presumption of receipt”).<sup>11</sup> In general, as this Court has observed, “evidence denying receipt creates a credibility issue that must be resolved by the trier of fact.” *Witt*, 136 F.3d at 1430 (citing *Rosenthal v. Walker*, 111 U.S. at 193-94).<sup>12</sup>

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<sup>11</sup> *Accord S. Frederick Sansone Co.*, 127 NLRB 1301, 1302 (1960) (finding that presumption of receipt “was overcome by the [addressee’s] unequivocal denial of receipt”).

<sup>12</sup> *See also Nunley*, 52 F.3d at 796 (finding that where receipt is specifically denied by the addressee, “the judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing”).

In the present case, the administrative law judge made assessments of credibility as the trier of fact, in order to determine whether Lopez received the October 12 delinquency letter from the Union. The judge considered (A 112, 115) the testimony of union officials regarding the mailing of the October 12 letter. The judge also considered (A 112) Union Office Manager Martinez's inconsistent statement, in an investigative affidavit, that she faxed a set of delinquency letters to the Company on or around October 12, but did not mail any of them to individual employees. Finally, the judge considered (A 112, 115-16) Lopez's testimony that he never received the October 12 delinquency letter from the Union. After considering all of this testimonial evidence, as well as the legal requirement that an employee must receive "actual notice" of his dues-delinquency,<sup>13</sup> the judge credited Lopez's denial that he received the October 12 letter. (A 115-16.)

The Union's suggestion (Br. 12-13) that the judge should not have credited Lopez's "mere denial" is meritless. As indicated above, even under the mailbox rule, an addressee's testimony denying receipt of a letter is evidence of nonreceipt and may suffice to rebut the presumption of receipt. *See Witt*, 136 F.3d at 1430; *Nunley*, 52 F.3d at 796; *In re Yoder*, 758 F.2d at 1118; *S. Frederick Sansone Co.*, 127 NLRB at 1302. More importantly, under this Court's precedents, the finding

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<sup>13</sup> *See Local 1445, United Food & Commercial Workers Int'l Union*, 647 F.2d at 217.

of an administrative law judge that a witness credibly denied receipt of a letter, like any other credibility determination, cannot be reversed, absent a showing of “extraordinary circumstances.” *See McLane/Western*, 723 F.2d at 1458. The Union has made no showing of extraordinary circumstances, here, to justify reversing the judge’s determination that Lopez credibly denied receiving the October 12 letter.

In any event, even if Lopez had received the October 12 letter as the Union contends (Br. 6-17), that letter could not have satisfied the Union’s fiduciary obligation to give Lopez adequate notice of his dues delinquency. The October 12 letter was nearly identical to the November 1 letter discussed above. Like the November 1 letter, the October 12 letter was addressed to the Company and set forth a bare amount owed by Lopez, without any explanation as to how that amount was calculated. As the October 12 letter lacked this critical information, it could not have provided Lopez with legally adequate notice of his dues delinquency. *See Int’l Bhd. of Elec. Workers*, 61 F.3d at 43; *Local 1445, United Food & Commercial Workers*, 647 F. 2d at 217; *Teamsters Local 122*, 203 NLRB at 1042.

In a vain attempt to forestall this conclusion, the Union suggests (Br. 17) that Lopez could have figured out how his delinquency was calculated by referring back to the general information issued to him in July. It was not Lopez’s duty,

however, to “figure things out” in this way. Rather, it was the Union’s affirmative duty to inform him as to how his dues delinquency was calculated, including the dates on which the delinquency accrued. *See Western Publishing*, 263 NLRB at 1112-13 (finding that union’s fiduciary duty requires “positive action” and noting that it is not “onerous to require that a union meet minimum notice standards in a matter of such importance to employees” (internal citations omitted)).

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review and enforcing the Board's order in full.

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 578

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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\* Nos.: 08-9564,  
\* 08-9569  
\*  
\* Board No.:  
\* 27-CB-04935  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,735 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington D.C.  
this 23rd day of February 2009

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by [esubmission@ca.10.uscourts.gov](mailto:esubmission@ca.10.uscourts.gov) and first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail and a copy by e-mail upon the following counsel at the address listed below:

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Dated at Washington D.C.  
this 23rd day of February 2009