

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS (IBEW), LOCAL  
UNION NO. 34, AFL-CIO, CLC  
(Respondents),

and

Case No. 13-CB-18961

Case No. 13-CB-18962

JOHN LUGO  
(Charging Party).

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**CHARGING PARTY'S MOTION FOR RECONSIDERATION  
AND BRIEF IN SUPPORT**

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Pursuant to §102.48(d)(1) and (2) of the Rules and Regulations, Charging Party John Lugo files this Motion For Reconsideration and Brief in Support following the Board's decision in *Lugo (International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO and International Brotherhood of Electrical Workers, AFL-CIO)*("Lugo") 357 NLRB No. 45 (August 10, 2011).

## **I. INTRODUCTION**

In its recently issued *Lugo* decision, the Board had to consider the Administrative Law Judge's decision and Charging Party's exceptions thereto. Charging Party excepted to: 1) the ALJ's decision to analyze the union's illegal action as a breach of the duty of fair representation when the action is properly analyzed as a violation of employees' Section 7 rights; 2) the ALJ's dismissal of the international union from the complaint; and 3) the ALJ's denial to enforce a "make whole" remedy on the Respondent Unions for other discriminatees of the unions' illegal policy.

The Board upheld the ALJ's ruling concerning the proper standard of analysis. The Board overruled the ALJ's dismissal of the International Union from the Complaint. The Board failed, however, to even address Charging Party's third exception relating to the extension of a "make whole" remedy to Charging Party and all similarly situated *Beck* objectors subject to the Union's illegal policy.

Charging Party Lugo now files the present Motion for Reconsideration to reiterate his Exception No. 3 concerning the remedies in this case. That Exception stated:

Charging party excepts to the Administrative Law Judge's decision in that it denied a "make whole" remedy to other discriminatees of the union's illegal policy on the grounds that no evidence was presented that full dues had been

unlawfully collected from other *Beck* objectors.

In contrast to its ruling on the merits which correctly struck down the IBEW's nationwide annual renewal policy, the Board utterly failed to address Charging Party's Exception No. 3 or the need for a nationwide "similarly situated" remedy. Although the Board issued an order requiring the union to expunge the illegal policy prospectively, the only employee to receive a retrospective remedy in this case is the named Charging Party. The entire nationwide class of similarly situated discriminatees – many of whom also had their continuing objections disregarded by the IBEW – are ignored by the Board's decision. The Board's own decision cited testimony of an official of IBEW which referred to many such similarly-situated employees: "My experience, and I've spoken with a lot of people because they call in ask how to do the process..." *Lugo* at slip op. p. 2.<sup>1</sup>

For the following reasons, Charging Party specifically moves the Board to reconsider its failure to address Exception No. 3 concerning the need for nationwide "similarly situated" make whole remedies; and Charging Party hereby asks the Board, on reconsideration, to order such nationwide similarly situated "make whole" remedies for the other employees besides the Charging Party.<sup>2</sup>

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<sup>1</sup> The undesigned attorney knows of at least one other IBEW-represented employee to have been snared by the Respondent IBEW's illegal mandatory annual renewal of *Beck* objection policy. *See, Tanudra (IBEW)*, Case No. 37-CB-2031, filed June 29, 2010.

<sup>2</sup> In *Badertscher v. NLRB*, No. 10-72182 (9th Cir.) (June 28, 2011), the Ninth Circuit dismissed a petition for review of a Board decision on the grounds that, by failing to file a motion for reconsideration to the Board, the petitioner had failed to properly preserve the issue on appeal. The Ninth Circuit adopted the Board's argument and held that the remedial issue was waived because "the Board did not decide the merits of her claim and [the Petitioner] did not seek reconsideration before the Board."

The Board's argument and the Ninth Circuit's decision in *Badertscher* do not provide

## II. ARGUMENT

In his Exception No. 3, Charging Party Lugo excepted to the Administrative Law Judge's decision and asked the Board to order a nationwide "make whole" remedy to all other similarly situated discriminatees of the union's illegal policy. In its decision, 357 NLRB No. 45, the Board simply ignored this Exception, and ordered no affirmative retrospective relief for the Charging Party or any other similarly-situated employee. The Board should reconsider that part of its decision and impose a similar remedy – a nationwide "make whole" remedy – on the IBEW in favor of **all** individual employees injured by the illegal "annual renewal" policy.

It is well-established Board practice that remedies can be extended beyond the narrow confines of Complaint. *See, e.g., UFCW Local 648*, 347 NLRB No. 83 (2006); *Teamsters Local 299 (Hilltop Services, Inc.)*, 346 NLRB No. 32 (2006); *UFCW Local 951 (Meijer, Inc.)*, 336 NLRB 730, 739 & n.51 (1999) (providing remedies to employees whose rights were violated at "the beginning of the 6-month period preceding the filing and service of the charge"). Indeed, the Board has long recognized that where a widespread pattern of unlawful activity has taken place in a §§8(b)(1)A or 8(b)(2) context, the appropriate relief should include a remedy for the named discriminatees and all other individuals "similarly situated." *Ironworkers Local 433*, 298 NLRB 35 (1990); *Plumbers Local 198 v. NLRB*, 747 F.2d 326 (6th Cir. 1985) (upholding broad relief against union that had unlawfully operated a hiring hall, in spite of the admitted difficulty in

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sufficient guidance on what decisions or elements of decisions by the Board must be made the subject of a motion for reconsideration in order to properly preserve them on appeal. In light of the procedural ruling in *Badertscher* and out of an abundance of caution under Section 10(e) of the Act, the Charging Party decided to file this Motion so that the Board will have the opportunity to reconsider the part of its decision that failed to even mention Exception No. 3 or rule on the need for nationwide "similarly situated" remedies in this case.

locating all of the discriminatees).

In similar circumstances, addressing a similar nationwide policy, such a remedy is precisely what was ordered by ALJ Marcionese in *Machinists Lodge 2777*, JD(ATL)-02-08 (January 9, 2008), at page 2:15-19:

To the extent that Respondent Unions have charged and collected from the Charging Party, and any other objecting nonmembers, fees in excess of those required for representational activities as a result of a nonmember failing to renew his or her objection, the Respondent should be required to reimburse the nonmember, with interest, for any excess fees collected since the 2004 objection period.

JD(ATL)-02-08 at page 2:15-19 (footnote omitted). The Board disagreed, however, and overturned ALJ Marcionese's nationwide remedy in *IAM Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010). The Board's rationale for denying the nationwide remedy was that some past federal court precedents upheld the annual renewal policy; that the Board was implementing a "new" rule in contravention of those prior precedents; and that the IAM union could not be faulted for failing to anticipate this "new" Board policy.

In light of consistent court approval of the requirement under the Act, the lack of any contrary indication by the Board, and the General Counsel's previous advice approving the [annual renewal] requirement, the unions could reasonably have believed that the requirement was lawful.

355 NLRB No. 174 at slip op. p. 8 (footnote omitted).

But here, the IBEW has been on clear and definite notice of the Board's "new" policy since at least August 27, 2010, when the *IAM Local Lodge 2777 (L-3 Communications)* decision was issued. Thus, even if the IBEW and other labor unions were entitled to a "free pass" on the remedial issue back in August 2010, why are they still entitled to that "free pass" one year later, in August 2011? After all, it has been obvious since August 2010 that the IBEW's "annual

renewal” policy was illegal under the principles established in *IAM Local Lodge 2777 (L-3Communications)*, as the Board essentially held in this very case, 357 NLRB No. 45. Indeed, the result in this case should be contrasted with the result in *UAW Local 376 (Colt’s Mfg. Co)*, 356 NLRB No. 164 (2011), where the Board upheld the UAW’s annual renewal requirement because it contained many added safeguards for employee rights that the IBEW’s policy clearly lacked.

In order to return all discriminatees to the position that they would have been in “but for” the IBEW’s unlawful policies, the union must be required to accept as objectors all those who objected in the past and who were illegally “flipped” from objector to non-objector status (at least since August 2010). The union must also be required to reimburse all dues extracted for nonrepresentational purposes from those “flipped” employees, reaching back to at least August 2010 (if not to the statutory 6-month period preceding the filing and service of the first ULP charge).

IBEW was solely responsible for enacting and applying the annual renewal policy to all its locals on a nationwide basis. Moreover, IBEW likely receives, each year, many *Beck* objections from around the nation. *See* testimony of IBEW official, *Lugo* at slip op. p. 2. As such, a nationwide remedy is required for all of those employees and others similarly situated, at least going back to August 2010.

There is clear precedent for such a nationwide remedy. In *California Saw and Knife Works*, 320 NLRB 224 (1995), the IAM established and administered its *Beck* policy for all of its local lodges, although in “most cases, the Local Lodges are the entities that are certified as the exclusive representatives.” 320 NLRB at 230. In a motion to amend the Board’s original findings, the IAM argued that it should not be held liable for its locals’ failure to notify newly

hired employees of their *Beck* rights when the locals first sought to require those employees to pay dues. The Board rejected that argument in its Supplemental Decision:

It is reasonable to hold the IAM, as architect of its *Beck* policy, liable for what the record indicates is the absence of any guidelines to its locals concerning the notification of newly hired employees. In fact, the record reveals that the IAM has not established any mechanisms for even intermittent monitoring of the locals' performance of the delegated function [of giving new-hire notice]. . . . [T]he IAM may be deemed in compliance if it has instituted procedures ensuring that notice of *Beck* rights is given to new hires by the lodges to which the obligation has been delegated.

*California Saw & Knife Works*, 321 NLRB 731, 731 (1996).

By the same logic, a national union such as IBEW must be held liable for establishing an objection procedure for itself and its locals when the procedure includes an annual objection requirement. Moreover, in order to return employees to the position that they would have been in “but for” the IBEW’s unlawful policies, the union must reimburse all dues that it collected for nonrepresentational purposes from employees across the nation, since the Section 10(b) period (or at least from August, 2010), whose *Beck* objections were not honored because of the “annual renewal” policy, or whose status was changed from objector to non-objector as a result of the policy.

### **III. CONCLUSION**

The Board should reconsider the remedial portion of its decision, and should order a complete nationwide retrospective remedy commensurate with the nationwide scope of the IBEW’s violations, to be effective at least from August 2010 when *IAM (L-3 Communications)* was decided, or from the beginning of the Section 10(b) period.

Dated this 24th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2011, a true and correct copy of the foregoing Motion for Reconsideration and Brief in Support was sent via Email and U.S. mail, first class postage prepaid, addressed to:

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