UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 34, AFL-CIO,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Cases 13-CB-18961
13-CB-18962

and

JOHN LUGO, An Individual.

BRIEF OF RESPONDENTS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 34 AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IN OPPOSITION TO THE CHARGING PARTY'S EXCEPTIONS

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March 6, 2009

John Lugo, the Charging Party in the instant case, has taken exception to Administrative Law Judge William C. Kocol's decision on three grounds. For the reasons stated below, Respondents International Brotherhood of Electrical Workers, AFL-CIO, and IBEW Local 34 respectfully submit that the Board should reject all three of the Charging Party's exceptions.

I. The ALJ Was Correct in Analyzing the Case under the Duty of Fair Representation[1]

The Complaint in this case alleges that by requiring fee payers to renew their objections annually, the Unions "failed to represent employees for reasons that are unfair, arbitrary, invidious, and breached the fiduciary duties they owe to the employees they represent." GC Exh. 1(e) ¶ V(d).[2] In his opening argument, counsel for the General Counsel underscored the legal underpinning of his case, asserting that "[t]here is no reasonable basis . . . under the duty of fair representation [for] placing th[e] burden [of renewing objections] on employees." TR:10. Judge Kocol therefore correctly understood that the sole legal issue before him was whether the "Respondents breached their duty of fair representation by requiring annual

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[1] As demonstrated in Respondents' Brief in Support of Exceptions ("U Br."), the ALJ erred in the manner in which he applied the duty of fair representation to the facts in this case. He was correct, however, in identifying the duty of fair representation as the proper basis for analysis and, as demonstrated in this section, in refusing to apply the legal theory advanced by the Charging Party.

[2] References in this brief will be as follows: the General Counsel's exhibits will be referred to as "GC Exh.[#]"; Joint Exhibits as "Jt.Exh.[#]"; the transcript of the October 27, 2008 hearing as "TR:[page number]"; the December 19, 2008 Decision of the Administrative Law Judge as "ALJD at [page:line(s)]"; the Charging Party's Brief in Support of his Exceptions to the Decision of the Administrative Law Judge as "CP Br. at [page]"; and the Respondents' Brief in support of their exceptions as "U Br. at [page]."

renewal of *Beck* objections," and that he was constrained from applying the alternative theory posited by the Charging Party, *i.e.*, whether the requirement constituted a *per se* violation of Section 8(a)(1), under *Pattern Makers v. NLRB,* 473 U.S. 95 (1985). ALJD at 4:9-25.

The Charging Party has taken exception to the Judge's decision to treat this case as arising under the duty of fair representation, arguing that neither the Complaint nor applicable law required him to do so. The Charging Party is incorrect on both counts.

A. The ALJ was Bound by the General Counsel's Theory of the Case

Section 3(d) of the Act grants the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuances of complaints . . . , and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). The Board has long understood this provision to vest the General Counsel with sole and unreviewable authority to determine the nature of the allegations to place before the Board and the legal theories to advance. Thus, "it is well-established that the General Counsel's theory of the case is controlling," and that neither the charging party nor the ALJ can "enlarge upon or change the General Counsel's theory." *Zurn/NEPCO,* 329 NLRB 484 (1999), *citing Kimtruss Corp.,* 305 NLRB 710, 711 (1991); *see also Penntech Papers, Inc.,* 263 NLRB 264 (1982), *enf'd,* 706 F.2d 18 (1st Cir.), *cert. denied,* 464 U.S. 892 (1983); *Winn Dixie Stores,* 224 NLRB 1418, 1420 (1976), *enf'd* 575 F.2d 1107 (5th Cir.), *cert. denied,* 439

U.S. 985 (1978) (ALJ may only amend the complaint when General Counsel seeks or consents to amendment).

The Board's decision in *Church Homes,* 343 NLRB 1301 (2004), is particularly instructive on this point. The complaint in *Church Homes* alleged that the respondent had violated Sections 8(a)(1) and (3) by hiring permanent replacements with a discriminatory motive. The General Counsel's legal theory required him to prove that the company had an "independent unlawful purpose" in hiring the replacement workers. The charging party instead argued that hiring the replacements was "inherently destructive" of the rights of the striking workers. In seeking the Board's consideration of its legal theory, the charging party denied that it was "enlarg[ing] upon, or alter[ing] the allegations in the complaint," since it was not seeking to place any new factual allegations before the Board. Instead, the charging party argued it was simply asserting a different legal standard for evaluating the Respondent's conduct – exactly Mr. Lugo's position here. 343 NLRB at 1325.

The Board rejected this argument in *Church Homes*, noting that by asserting an alternative legal theory, the charging party was seeking impermissibly to "enlarge upon or change the General Counsel's theory of the case," in contravention to Section 3(d). *Id.* at 1326; *see also International Alliance of Theatrical Stage Employees Local 720,* 352 NLRB 1081, 1082 n.3 (2008) (Board refuses to "pass on the charging party's argument because it exceeds the scope of the General Counsel's theory of the case as alleged in the complaint and proffered at the hearing.") Judge

Kocol similarly and correctly rejected Mr. Lugo's inappropriate attempt to "enlarge upon [and] change" the General Counsel's theory in this case.

B. Established Board Law Requires Application of the Duty of Fair Representation in this Case

Faulting the ALJ for viewing himself as bound by the Complaint, Mr. Lugo asserts that the Board has yet to indicate what test to apply in evaluating the manner in which unions deal with employees' *Beck* rights. CP Br. at 5. As demonstrated above, this argument is irrelevant because it is the General Counsel who controls the theory of the litigation. This argument is also patently wrong because, as we set forth in our opening brief, the Board has made quite clear that the duty of fair representation is the proper standard to apply here. U Br. at 12-14.

In *California Saw & Knife Works,* 320 NLRB 224 (1995), *enf'd sub nom. Machinists v. NLRB,* 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Strang v. NLRB,* 525 U.S. 813 (1998), its seminal post-*Beck* decision, the Board thoroughly considered the legal framework for evaluating the vast array of substantive and procedural issues that confront unions when, pursuant to collectively-bargained union security clauses, they require nonmember employees to pay fees as a condition of employment, and concluded that it "must approach [these] case[s] under the analytic rubric of the duty of fair representation." 320 NLRB at 228.[3]

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[3] Contrary to the Charging Party's suggestions in his brief, *see, e.g.,* CP Br. at 5, the Board also expressly rejected the application of a constitutional standard to NLRA-based *Beck* rights. *Id.* at 228.

While the Board in *California Saw* did not expressly consider whether the *per se* rule of *Pattern Makers* applied in this context, it has since made quite explicit that the answer is "no." Thus, in finding in *Polymark Corp.*, 329 NLRB 9, 11-12 (1999), *rev'd in part on other grounds sub nom. Mohat v. NLRB,* 248 F.3d 1150 (6th Cir. 2001), that the union arbitrarily violated its duty of fair representation by applying its annual window period to individuals who resigned from membership after the open period expired, the Board declined to adopt Member Brame's view, as set forth in his partial dissent, that it should apply *Pattern Makers* in assessing the validity of this rule. 329 NLRB at 17 (Brame, dissenting and arguing that the union's conduct should be evaluated "in terms of its propensity to restrain or coerce employees, not in terms of whether the union's conduct ran afoul of the duty of fair representation . . . .") The majority instead held that *California Saw,* with its reliance on the duty of fair representation, "remains controlling precedent." *Polymark,* 329 NLRB at 12 n.10.[4]

As in *Church Homes, supra,* the Charging Party in the instant case is thus not only seeking to substitute his own view of the proper legal standard for that posited by the General Counsel; he is also promoting a legal standard the application of which would require overruling applicable Board precedent. Yet, "a

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[4] As demonstrated in the passage from *California Saw* the Charging Party sets forth in his brief, the Board had considered the same issue in that case and had similarly held that applying a window period to "employees who resign their union membership after the expiration of that period constitutes *arbitrary conduct violative of [the union's] duty of fair representation.*" CP Br. at 10-11, *quoting California Saw,* 320 NLRB at 236 (emphasis added).

decision whether to argue for overruling such precedent lies exclusively with the General Counsel." 343 NLRB at 1326.

In his brief supporting his exceptions, Mr. Lugo observes that the ALJ's "decision suggests that *had the law and the Complaint permitted him to do so*, he would have considered the issue under [*Pattern* Makers'] statutory standard." CP Br. at 6 (emphasis added). It is precisely because "the law and the Complaint" do *not* permit him to do so that the ALJ declined Mr. Lugo's invitation to apply the statutory standard. Judge Kocol was correct in making that judgment, and the Charging Party's first exception should therefore be rejected.

II. The ALJ Correctly Dismissed the Allegations Against the International

Judge Kocol found that there were no allegations in the Complaint, nor any evidence introduced during the trial, that the International represents any employees, and on that basis, he dismissed the International from the case. ALJD at 4:30-34. Mr. Lugo has taken exception to the judge's refusal to hold the International liable in this matter.

It is axiomatic that a union owes a duty of fair representation as the *quid pro quo* for its right to serve as an exclusive collective bargaining representative. As the Court explained in *Marquez v. Screen Actors Guild,* 525 U.S. 33, 44 (1998), "[w]hen a labor organization has been selected *as the exclusive representative* of the employees in a bargaining unit, it has a duty, implied from its status under § 9(a) of the NLRA *as the exclusive representative of the employees in the unit*, to represent all members fairly." (Emphasis added). *See also Vaca v. Sipes,* 386 U.S. 171, 177

(1967) ("The *exclusive agent's* statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.") (emphasis added); *Miranda Fuel,* 140 NLRB 181, 185 (1962), *enf. denied,* 326 F.2d 172 (2d Cir. 1963) (Section 7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their *exclusive bargaining agent* in matters affecting their employment.") (emphasis added).

Because the "duty of fair representation flows from the majority union's status as a statutorily recognized exclusive bargaining agent," *Wells v. Railway Conductors,* 442 F.2d 1176, 1179 (7th Cir 1971), international unions like the IBEW are routinely dismissed from fair representation suits when they are neither recognized collective bargaining agents nor parties to the applicable collective bargaining agreement. *See, e.g., Tongay v. Kroger Co.,* 860 F.2d 298, 299 (8th Cir. 1988); *Sine v. Local 992, Int'l Brotherhood of Teamsters,* 730 F.2d 964, 966 (4th Cir. 1984); *Baker v, Newspaper and Graphic Communications,* 628 F.2d 156, 165 (D.C. Cir. 1980) ("[T]he International was neither the bargaining representative nor a party to the collective bargaining agreement. Under these circumstances, there is no basis for impaling the International on the horns of the dilemma faced by the Local."); *Teamsters Local Union No. 30 v. Helms Exp., Inc.,* 591 F.2d 211, 217 (3d Cir.), *cert. denied,* 444 U.S. 837 (1979); *Sinyard v. Foote & Davies Div'n, McCall*

Corp., 577 F.2d 943, 947 (5th Cir. 1978); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 309 (6th Cir. 1975).

As Judge Kocol found, there is absolutely no evidence in this case that the International served as the § 9(a) representative for the charging party or any employees. Indeed, the evidence clearly shows that when working in Local 34's jurisdiction, Mr. Lugo worked under a collective bargaining agreement between the Local and the Central Illinois Chapter of the National Electrical Contractors ("NECA"), to which the International is not a party. Jt.Ex. 2. Mr. Lugo does not challenge the Judge's findings in this regard, nor point to any evidence that the International does, in fact, represent any employees in dealings with their employers. Instead, he argues that because the annual renewal requirement is part of a uniform program the International implemented to assist its local unions, it should be held "responsible." However, "exclusive representation," and not the mere assumption of some related responsibilities, "is a necessary prerequisite to a statutory duty to represent fairly." *Kuhn v. Letter Carriers,* 528 F.2d 767 (8th Cir. 1976).

In *Kuhn,* a local union agreed to assist a discharged member in his grievance, even though it was not his exclusive bargaining representative. When the union missed the deadline for filing an appeal, the member sued, alleging a breach of the duty of fair representation. The Eighth Circuit affirmed the dismissal of the claim against the local because, regardless of the responsibilities the union had voluntarily assumed on the employee's behalf, it was not his exclusive

representative and therefore owed him no duty of fair representation. *Accord, Wells v. Railway Conductors,* 442 F.2d 1176, 1179 (7th Cir. 1971) (union that was not the employee's exclusive representative but handled grievance owes no duty of fair representation). Other courts have similarly found that an international union that is not the exclusive representation does not incur fair representation obligations by participating in the collective bargaining process. *See, e.g., Walters v. Roadway Express, Inc.,* 400 F. Supp. 6, 14-16 (S.D. Miss. 1975), *rev'd on other grounds,* 557 F.2d 521 (5th Cir. 1977) (international union owed no duty of fair representation by merely participating in negotiations at which the local union was the exclusive bargaining agent); *Borg v. Greyhound, Inc.,* No. C-83-4827 RHS, 1984 WL 14332, *3 (N.D. Cal. 1984) (international owed no duty of fair representation even when its vice president assisted in negotiations and signed the collective bargaining agreement).

In short, in the absence of any evidence that the International acts as the exclusive bargaining representative of employees seeking to assert their rights under *Beck,* there is no basis for imposing a duty of fair representation on it. The ALJ therefore correctly dismissed the International from the Complaint, and the Charging Party's second exception should be rejected.[5]

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[5] While a party may be liable under the Act under "ordinary common law rules of agency," *California Saw,* 320 NLRB at 250 (internal citations omitted), there is no allegation of agency in the Complaint. Those principles are, moreover, completely inapposite here. The only possible basis for finding an agency relationship on the facts in this case would be if the *International* were viewed as the *Local's* agent, acting on its behalf in carrying out its fair representation obligations. This construct fails on two grounds. First, an agency relationship

III. The ALJ Correctly Limited the "Make Whole" Remedy

Mr. Lugo has taken exception to Judge Kocol's refusal to require Local 34 to refund to all individuals "injured" by the annual renewal policy any fees that the Local collected in excess of nonrepresentational costs, *i.e.*, "all employees whose status was changed from objectors to non-objector, whose *Beck* objections were not honored because they failed to reaffirm their objections under Respondents' unlawful 'annual renewal' policy, or whose *Beck* rights were not honored in any other way." CP Br. at 12, 13.

In his decision, Judge Kocol rejected the Charging Party's request for a broad order requiring the Local to reimburse fees to all *Beck* objectors who did not renew their objections because there was no evidence that the Local had, in fact, actually collected full dues from anyone who failed to renew his or her objection, and in the

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"arises when . . . a 'principal' . . . manifests assent to . . . an 'agent' . . . that the agent *shall act on the principal's behalf* and *subject to the principal's control* . . . ." *Restatement of the Law of Agency 3d* § 1.01 (emphasis added). "The element most essential to the demonstration of any agency relationship is that of 'control,'" *Bass v. Boilermakers,* 567 F. Supp. 845, 847 n.1 (N.D.N.Y. 1983), *aff'd mem.* 742 F.2d 1446 (2d Cir. 1984) (internal citations omitted); *see also Restatement* § 1.01 comment *f*. There is absolutely no evidence in this case that, in administering the fee payers plan, the International acts under the Local's "control."

Second, viewing the International the Local's agent in administering the fee payer plan – even if there were a basis for doing so – would not to provide an independent basis for imposing liability on it since "[a]n agent is subject to . . . liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that *the agent owes to the third party*." *Id.* § 7.02. Because, as demonstrated, the International does not independently owe a duty of fair representation, its "misconduct" in this regard would not make *it* liable for a breach; it would simply create vicarious liability for the Local. *Id.* § 7.03.

absence of such a request from the General Counsel. ALJD at 5:51 – 6:8. The judge's decision in this regard was entirely correct.

"The National Labor Relations Act . . . is essentially remedial, authoriz[ing] the Board to provide relief for actual losses of parties to our proceedings or those found to be victims of unfair labor practices." *UFCW Local 951 (Meijer, Inc.),* 329 NLRB 730, 739 (1999). Along those lines, the Board will often require notice to be provided to a broader class "than the class for which make-whole relief is provided, consistent with the distinction normally made in Board practice between the obligation of an unfair labor practice violator to make whole victims of proven unfair labor practices and the violator's obligation to notify employees of the rights that were violated." *Teamsters Local 435 (Mercury Warehouse),* 327 NLRB 458, 461 n. 16 (1999).

In this case, there was no proof that anyone – *including* Mr. Lugo – suffered any "actual loss" as a result of the Local's maintenance of the annual renewal requirement;[6] nor were there any findings that there were other "victims" of the

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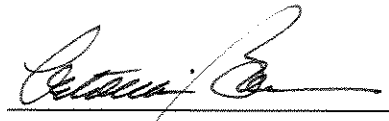
[6] In an attempt to demonstrate that he has suffered some harm from the annual renewal requirement, the Charging Party asserts in his brief that he was supposed to be given an identification number indicating his "status as an agency fee payer," but because "he was unable to obtain the necessary 'piece of paper' which would verify that he was an objector, . . . his job placement *could* have been affected." CP Br. at 3-4 (emphasis added). In fact, Mr. Lugo testified at the hearing that while he had purportedly been told that he needed a nonmember identification number (*not* something that would identify him as an objector), he had successfully obtained a referral to a job that, at the time of the hearing, he had held for over 6 months; that although he believed his lack of credentials had caused him to be referred under an inappropriate job classification, he was being paid at the proper wage rate; and that the only difficulty he had encountered was a 2-hour delay before being referred to the job. Tr:23-24. None of this has anything to do with the

Local's purported unfair labor practice. Indeed, there was no evidence that Local 34 has ever had any other objectors in its bargaining unit, much less applied the annual renewal policy to any such objectors. The ALJ was therefore entirely correct in refusing to impose a broad make-whole remedy, and the Charging Party's third exception should be rejected.

CONCLUSION

For the reasons stated, the Charging Party's exceptions should be rejected. Instead, as the Unions demonstrated in their brief supporting their exceptions, the Unions' exceptions should be granted, the ALJ's decision reversed and the allegations against Local 34 reversed.

Respectfully submitted,



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annual renewal requirement – a requirement with which, contrary to the suggestion in his brief (CP Br. at 4 n. 2), he had not yet had to comply at the time of the hearing. Tr: 21.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2009, copies of the foregoing Respondents' Response in Opposition to Charging Party's Exceptions were served by overnight delivery on:

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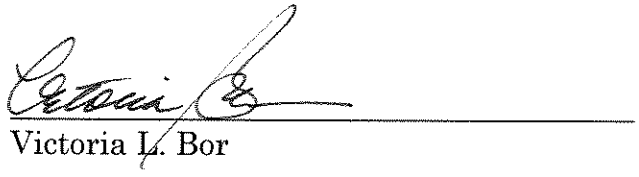

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