

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY WASHINGTON, D.C.

LITTLEJOHN ELECTRICAL SOLUTIONS
Employer

and

Case No. 16-CA-214170

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION NO. 20
Charging Party

EMPLOYER'S BRIEF IN REPLY TO EXCEPTION ANSWERS

On May 1, 2019, LES submitted Exceptions, along with a Brief in Support of Exceptions, (collectively, "Exceptions") to the Decision Administrative Law Judge Ringler ("ALJ") rendered on March 4, 2019. In addition to the GC's Cross-Exception, both the GC and IBEW submitted Answers on May 22, 2019. This Reply will show those answers unsuccessful at "closing the doors" LES "opened" and will offer additional support of LES' Exceptions. LES hereby offers this Reply Brief, to show the Board, as follows:

I. INTRODUCTION

First, to avoid any confusion, LES is "*pro se*," and without an attorney, or legal counsel of any kind. The accumulation of over \$30,000 in attorneys' fees within the first three months of this dispute made it obvious that, in order to see this through, LES needed a more affordable alternative. At that time, it sought professional assistance from Lyndsay Craddock, a Registered Nurse of 12 years, who, outside of teaching legal concepts at a local Nursing School, does not have any background in the legal profession. Ms. Craddock assisted during the hearing, proofread some communications among the parties, and created all legal documents LES submitted in this matter, to date. Clinton Kyle Littlejohn did not create any of the legal documents submitted by LES in this matter. Second, the GC's attack on LES' Exceptions, based on alleged formatting errors, went so far as to quote Section 102.46(b)(1) as grounds for the Board to dismiss them, entirely. All of Section 102.46 does explain the *entire* Exception phase, including Answers, Cross-Exceptions, and Replies. However, 102.46(b)(1) *only* contains deadline requirements for the Answering Briefs, and does not include anything about material format, which contradicts the GC's purported quote of this. The GC also quoted Section 102.46(c) as further encouragement of Board's to dismissal of LES' Exceptions. However, the GC misquoted this, as well, because neither the lowercase "c" subsection, nor the capital "C" subsection, state what the GC so confidently alleges. This is not accusing the GC of *intentionally* misleading the Board, but is to point out that even an attorney, with years of education and experience, can err, but making technicality errors in an attempt to convince the Board that a technicality flaws supersede the facts is surprising. Nowhere in Section 102.46 does it state that errors automatically invalidate any, much less *all*, of that party's Exceptions. LES poured hours of research into formulating its Exceptions correctly, and even used examples from previous NLRB cases, such as *G&E Real Estate Management Services, Inc. v. Patrick S. Thurman (Case 28-CA-178893)*, as guidance.

Furthermore, the Answers indicate that any imperfections did not alter them in a material way, because, clearly, the other parties understood them well enough to paraphrase them. However, LES apologizes for any errors, and assures the Board that they reflect “pro se” ignorance, and not the carelessness of the GC’s own mistakes. Third, the ALJ omitted credibility findings for most of the GC’s witnesses, including NECA Manager, Steve Corley, but he elaborated on insults to Mr. Littlejohn’s character. Mr. Watsky, on behalf of the IBEW, accused Mr. Littlejohn of lying to Mr. Corley when he recorded the January 24 “LMC” Meeting. Mr. Corley testified, more than once, that he specifically asked Mr. Littlejohn if he was recording the meeting, and that Mr. Littlejohn stated he was not (Tr. 263, 272, 273, LL. 4-12, 23-25, 10-13). However, the recording transcript (R Exh. 13) proved Mr. Corley was actually the one who lied about this, because, at no point, did anyone ask, or say anything, about recording the meeting. The ALJ requested that Mr. Littlejohn play the actual recording at the hearing; therefore, the record also confirms that Mr. Corley asked no such questions (Tr. 385, 386, LL. 22-25, 1-22). The GC also called LES’ former employee, Andrew Matos, to testify, and he, too, gave blatantly untrue testimony, multiple times. For example, he claimed LES decreased his pay by \$3 after he switched from 1099 to W-2 (Tr. 168, LL. 8-11). However, this does not make sense, because an employee cannot force the employer to do one or the other, and, during Mr. Littlejohn’s cross-examination, Mr. Matos even admitted this was not true (Tr. 173, LL. 5-23). The ALJ attacking Mr. Littlejohn’s credibility, but omitting unfavorable credibility determinations of witnesses for the GC, illustrates a skewed bias. Lastly, LES never tried to say, or even imply, that the LOA is directly invalid because of duress. Mr. Littlejohn was emotional, and, at times, even irrationally so, when he faced his second expulsion from the program, but, obviously, once emotions subsided, the IBEW and LES worked well together for quite some time after he signed the LOA (Tr. 163, 164, 165, LL. 3-25, 1-25, 1-6; GC Exh. 3). However, as this dispute unfolded, he acquired new information, which caused him to question things he had not previously questioned. One example being the possibility that the Union took advantage of his emotional state over school, and, in doing so, did not disclose all relevant information to him. Even Mr. Corley rated his emotional level a 10 out of 10, when the JATC met with him to discuss if they would let him continue in the program (Tr. 269, LL. 3-10). Therefore, it is logical that Mr. Littlejohn was even more distressed, when he signed the LOA, because the JATC meeting was a week later.

II. SUPPLEMENTAL INFORMATION FOR EXCEPTIONS

LES included abbreviated versions, with their corresponding numbers, of the questions LES presented in the Brief in Support of its Exceptions, but omitted those numbers for which it provided no additional information. Numbers 6 and 7, regarding Mr. Frentrup and Mr. Cepeda’s credibility, are combined for efficiency.

1. If the ALJ made appropriate jurisdictional findings, as the IBEW did not exhaust the grievance and arbitration process...to which the ALJ even referred...(Tr. p. 64, lines 1-17):

In San Juan Batista Medical Center, 356 NLRB at 737, the Board found it appropriate to defer a dispute to the CBA’s grievance and arbitration procedure when “resolution of the dispute primarily requires interpretation of the collective-bargaining agreement.” Originally, this dispute started because the IBEW and LES differed on how the CBA (GC Exh. 6) defined proper application of the “Referral Procedure” versus the “48 Hour Clause,” and “Article I” of the CBA includes the IBEW’s grievance and arbitration process. Initially, the ALJ did not allow Mr. Littlejohn to ask questions surrounding the grievance and arbitration procedure, stating that the IBEW’s failure to utilize it was

irrelevant (Tr. 63, 64, 230, 231, LL. 8-25, 1-17, 22-25, 1-4). The GC later submitted evidence that the IBEW initiated a grievance after the “LMC” meeting (GC Exh. 15), and Mr. Frentrup, accused LES of failing to “process this grievance pursuant to his responsibilities under the CBA” (Tr. 248, LL. 16-18). However, Mr. Corley, who helped arrange the “LMC” meeting, testified LES was cooperative and kept the “lines of communication” open (Tr. 270, 271, LL. 17-25, 1-8). Mr. Frentrup specifically discussed the grievance process (Tr. 249, LL. 13-16), and asserted that the IBEW filed charges according to the method “spelled out in the [CBA] that’s at [their] disposal,” (Tr. 250, LL. 13-22). Regardless of LES’ cooperation, the IBEW opted to circumvent the tedious grievance steps, including the last resort of arbitration, by getting any information it wanted through filing charges.

2. *If the ALJ erred in basing any portion of this Decision on the CBA...the only document bearing Mr. Littlejohn’s...written acknowledgment...is the LOA (Tr. 38, LL. 6-11; GC Exh. 2; & GC Exh. 6):*

The GC indicated it is insignificant that the IBEW neglected to give Mr. Littlejohn the LOA for inspection before February 23, 2017, the date of its execution (Tr. 47, 52, LL. 17-23, 17-22). However, it was significant enough for the GC to be the one who brought it up when questioning Adrian Cepeda, the IBEW Officer who drafted the contract, until his answer was an unexpected admission of a failure to do so, perhaps. LES contends that the significance of this is as a reflection of how the IBEW “does business,” because failing to offer the LOA, a one-page document, beforehand, makes it unlikely that the Union offered the 50-page CBA (GC Exh. 6). In fact, the evidence and testimony consistently supported that LES did not receive the CBA until months after the LOA’s execution (Tr. 131, 132, 298, 299, 328, 372, LL. 19-25, 1-4, 1-21, 2-12, 5-15, 1-13; R Exh. 2; R Exh. 3). IBEW Officer, Cesar Martinez, attached it to an email in October 2017, and even testified that, to the best of his knowledge, this email was the first time Mr. Littlejohn ever received the CBA (Tr. 286, 296, LL. 5-12, 6-15). The other parties attempted to remedy this flaw in their case through various tactics, such as declaring theories as factual without providing anything from the record to prove them. LES implores the Board to scrutinize any such assertions, and dispose of any that fail to offer testimony or evidence from the hearing to support it, such as repeated inferences that various events mean Mr. Littlejohn “was well aware” of the CBA. Logically, if the record contained an iota of support, then providing at least one *specific* reference would be the most effective, efficient, and respectful way to make these claims anything other than what they are, unfounded. In fact, anything accompanied by reasons of why Mr. Littlejohn “knew,” but without any actual support for the reasoning, implies a desperate attempt to excuse the IBEW’s neglect. One such statement made without any offering of support is that Mr. Littlejohn’s participation in the JATC’s program proves that he “must have known” about the CBA. First, and foremost, JATC Director, Kim Allen, testified that the second year curriculum included education about the CBA. Well, page 19 of the JATC Program’s manual (GC Exh. 5) lists the curriculum for each year, but not one of the years includes anything about the CBA, which proves Mr. Allen’s testimony about this was false. According to Mr. Allen, the JATC spent 5-10 minutes discussing the CBA’s history (Tr. 98, 99, LL. 5-9, 1-8) and its referral process, which he also admitted was different than IBEW’s “Referral Procedure” (Tr. 97, LL. 15-19). Steve Corley, who testified on behalf of NECA, further differentiated the two by clarifying that the JATC used a “work assignment” system, which is not the same as a “referral,” under the “Referral Procedure” (Tr. 256, LL. 7-11). Additionally, Mr. Littlejohn’s second year was in 2013, meaning the CBA allegedly discussed expired prior to February 23, 2017, the date on the LOA (GC Exh. 2). Furthermore, assuming Mr. Allen

was even the person who taught this 5-10 minute lesson, he still was not a party to the LOA, nor was he even present at its signing. Regardless of all this, learning about something in one context does not substitute receiving it in a very different context. Mr. Frentrup even admitted he did not know if the CBA was present when they signed the LOA (Tr. 220, 221, LL. 25, 1-10). Mr. Cepeda was the only person who met with Mr. Littlejohn beforehand, and Mr. Frentrup admitted that he had no idea what they discussed before he stepped in, signed it, and left (Tr. 196, 197, LL. 19-25, 1-2). The ALJ asked Mr. Cepeda if he discussed any elements of the CBA with Mr. Littlejohn during that time, and Mr. Cepeda stated he did not (Tr. 66, LL. 8-18). Mr. Frentrup further stated that he *still* did not know who filled in the LOA template blanks (Tr. 83, 195, LL. 23-25, 19-21). In fact, Mr. Cepeda drafted the only LOA Mr. Littlejohn ever signed (Tr. 83, LL. 20-22), which covered “Inside” work (GC Exh. 2). At the time, LES only did residential work, both inside and outside of houses. Over the next few months, though, LES gradually transitioned to performing work inside and outside of commercial, as well as industrial, buildings (Tr. 160, 171, 172, LL. 3-6, 23-25, 1-5). The space for entering the “type” of work it covers references a footnote (#2), which lists options for the “type” (Inside, Outside Utility, Outside Commercial, Residential, etc.), and states that each “type” requires a new LOA. However, nowhere, does it define them, and each time Mr. Littlejohn started to ask a witness about the definitions, the ALJ interrupted him, said it was irrelevant, and, at one point, added he “would bet [his] house” that the “Inside” CBA “spelled out” its scope (Tr. 82, 83, 84, 85, LL. 9-15, 4-19, 1-25, 1-16). However, the ALJ erred in this assumption, because, later, Mr. Frentrup testified that, “[The IBEW does not] spell it out...in any scope” (Tr. 244, 245, 246, LL. 12-25, 1-25, 1-7). In fact, neither Mr. Cepeda, who drafted the LOA, nor Mr. Frentrup, the only other party to the LOA, could define, or even locate, the definition of “Inside” work (Tr. 83, 84, LL. 23-25, 1-12). An agreement between parties hardly matters if they do not even know when they do whatever it is they agreed to do. The most shocking illustration of this was during Mr. Littlejohn’s testimony. The IBEW’s attorney asked questions, and tried to define “Inside” in one of them. He was unsuccessful, and even *stipulated* that this agreement lacked more than the scope of “Inside,” it lacked a “meeting of the minds,” as provided here:

Q. But you started your own work in '16. Correct?

A. Residential.

Q. And that is inside work under the CBA. True?

A. No.

Q. And --

A. The LOA states that it's a separate one.

Q. It doesn't say anything -- it says, inside, and you clearly don't know what the CBA means, do you?

A. What does inside mean?

Q. You certainly don't know what it means, do you?

A. No. I have no idea.

(Tr. 160, LL. 3-13)

Ambiguous terms, such as those just described, will fail to establish a “meeting of the minds.” Under this doctrine, parties must disclose all essential terms of an agreement *before* the contract’s execution. For example, the *T.O. Stanley Boot Co. v. Bank of El Paso* ruling stated, “Mutual assent, concerning material, essential terms, is a prerequisite to formation of a binding, enforceable contract” (847 S.W.2d 218, 221, Tex. 1992). Later, in *Weynand v. Weynand*, “An enforceable contract requires mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract (990 S.W.2d 843, 846, Tex. App.- Dallas 1999). Both of those were long after *Finley v.*

Hundley established, “To constitute a contract, the minds of the parties must meet with respect to the subject matter of the agreement, and as to all of its essential terms; and their assent must *comprehend* the *whole* proposition (252 S.W.2d 958, 962, Tex. Civ. App.-Dallas 1952, no writ). Based on the nature of these allegations, clearly the CBA held all “essential terms” that the IBEW intended to introduce into its agreement with LES when they executed the LOA, which it did not disclose until months *after* its execution. The GC failed to prove otherwise, and, thus, failed to establish a “meeting of the minds” ever occurred. Furthermore, it is unfathomable that an individual doing the work to start a small business would *knowingly* give up all rights regarding the operation of it, and the GC failed to demonstrate Mr. Littlejohn knowingly gave LES’ to NECA (Tr. 129, 130, LL. 7-25, 1). In addition to this, Mr. Corley did not attend the LOA signing, and did not recall speaking with Mr. Littlejohn even after he signed the LOA. He stated that, at some point, the NECA operations manager *probably* contacted LES and outlined the monthly “benefits” (Tr. 128, LL. 1-18). “Meeting of the minds” means that *all* parties must assent to the same thing, in the same sense, at the same time (*Finley*, 252 S.W.2d at 962; *Solis v. Evins*, 951 S.W.2d 44, 49 Tex. App.-Corpus Christi 1997, no writ). The IBEW’s attempt to make this a three party contract fails, because it is unconscionable, and also because the LOA, CBA, and the record, itself, clearly, and consistently, prove that no one from NECA was present at the execution of the LOA, just like no one from LES was present at the execution of the CBA (Tr. 234, LL. 14-23). As such, neither contract involved all *alleged* parties assenting to anything at the same time.

Additionally, a material omission, especially where there exists a duty to speak, constitutes a misrepresentation when entering the contract. More specifically, a party fails to disclose a material fact within the knowledge of that party when it knows that the other party is likely ignorant of the fact, and does not have an equal opportunity to discover the truth, especially if the party intends to induce the other party to take some action by concealing the fact. The other party suffers injury when acting without knowledge of the undisclosed fact (*Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1373, Utah 1980; & *New Process Steel Corp. v. Steel Corp.*, 703 S.W.2d 434, Tex. App.-Houston, 1st Dist., 1985). The LOA was the IBEW’s contract, and Mr. Frentrup had extensive experience through LOA signings with “more than a dozen” contractors (Tr. 231, LL. 6-9), these facts obliged him to ensure full disclosure of every detail in this agreement, especially considering the other party was an electrician, who had absolutely zero prior experience signing an LOA. The bottom line is that the IBEW rushed to exploit an opportunity, and, in doing so, neglected to establish a legitimate contract. For example, most people are familiar with common contracts (i.e. mortgage, car loan, lease, rental, etc.), and most people know that all parties either initial or sign every page, which is an easy way to demonstrate the terms disclosed in the contract. Keenly, the IBEW chose to omit this simple practice. The IBEW’s numerous attacks against Mr. Littlejohn’s character make this omission all the more suspicious, because, by the third or fourth failed agreement, successful businesses, without ulterior motives, either refuse to make another agreement, or, at least, proceed with increased due diligence.

3. If the ALJ erred in...Mr. Littlejohn’s desire to avoid repaying the SLA...(Tr. 30, LL 21-24):

In addition to the support in the Exceptions, Mr. Watsky asked Mr. Allen what happened when the JATC expelled apprentices for working with a non-Union employer, and Mr. Allen stated that the JATC enforced the SLA requirement that they pay the \$12,500. Then, Mr. Watsky directly asked, “... did you have any conversations with [Mr. Littlejohn] about that fact?” Mr. Allen’s answer to this was, “Not that I recall.” (Tr. 107, 108, LL. 19-25, 1-5). This

blatantly contradicts the ALJ's statement that Mr. Allen, "...told Littlejohn that the JATC intended to expel him and require him to repay \$12,500," and, thus, negates the ALJ's conclusion that this shows Mr. Littlejohn signed the LOA to avoid paying \$12,500. Curiously, the GC's Answer repeats this erroneous inference, but only references the Decision (JD slip op. at 4), omitting any support from Mr. Allen's actual testimony. In fact, after scouring the record, LES' position is that the GC omitted reference to the actual record because no one testified to having any such conversation with Mr. Littlejohn, nor did Mr. Littlejohn "admit" this was a factor when he signed the LOA. Frankly, offering only the item in question as support for an argument to uphold that very same item implies a failure to find actual support in the record, and, realistically, it is no different than answering a question with a question.

4. *If the ALJ erred...sustaining...objection to LES' witness...or...negative statements about Mr. Littlejohn's character...(Tr. 23, LL. 2-21)...*

LES' subpoenaed Cole Carney, but was unable to leave mandatory Military orders. However, he did receive permission to participate in longdistance video testimony. LES addressed this issue at the first opportunity the ALJ allowed, and then repeatedly throughout the two-day hearing. The ALJ gave two reasons for denying this (Tr. 22, 23, 24, 315, 316, 317, LL. 1-24, 2-21, 14-25, 2-25, 2-25, 1-7). First, both he and the GC claimed no regional offices, within reasonable proximity, had the equipment necessary for this. Second, he was obliged to sustain the GC's objection to it. LES recently learned, and confirmed with the ALJ's "Bench Book" (Section 12-400), that every regional office has the equipment to take video testimony, and that allowing this was within the ALJ's sole discretion, regardless of the GC's objection. LES emphasizes addressing this in a way that allowed enough time for any necessary arrangements, but now views the reasons, given simultaneously by two NLRB officials, as misleading.

5. *If the ALJ erred in...the LOA being Mr. Littlejohn's idea...(Tr. 30, LL. 21-24)...(Tr. 35, LL. 5-10):*

As stated in the question presented, both opening statements, and, now, both Exception Answers, by opposing counsel stated that Mr. Littlejohn signing the LOA for LES was the Union's solution, regardless if it was magnanimous or cunning. However, LES will offer further support from the record here. In her own questions to Mr. Littlejohn, the GC indicated the JATC asked him to sign the LOA (Tr. 125, 126, LL. 25, 1-9). Mr. Frentrup stated the idea arose in a meeting held, for which Mr. Littlejohn was not present, prior to him signing the LOA (Tr. 194, 195, LL. 12-25, 1-14). Mr. Allen stated that, in a "regular committee meeting," and the committee decided he could only stay in the program if he signed the LOA (Tr. 106, LL. 11-24).

6. *If the ALJ erred in stating LES was not making the monthly "Benefits" payments:*

Mr. Frentrup testified that the purpose of "bonding" is to pay money owed to the IBEW's "benefits," in the event an employer does not make the payments (Tr. 198, LL. 17-24). However, he later admitted that the IBEW never cashed LES' bond to offset any alleged money owed to its "benefit funds," which supports LES' insistence the it does not owe any money to the IBEW, at all, and proves that the IBEW actually failed to mitigate its perceived damages (Tr. 217, LL. 2-6). In fact, the IBEW has not cashed it to this day. Furthermore, using phrases, such as "not making benefits payments" and "delinquent in payments," to describe a single incident of an accounting error causing a late payment is misleading. It implies LES neglected multiple payments, but even Mr. Frentrup testified that there were no problems between the IBEW and LES until the "end of 2017" (Tr. 198, 199, LL. 25, 1-10).

7. *If the ALJ erred in finding Mr. Frentrup & (8.) Mr. Cepeda's testimony credible:*

Mr. Frentrup gave false testimony numerous times. He stated that an “LMC” meeting never occurred (Tr. 249, LL. 6-10), but, later, LES’ recording of that meeting (Tr. 383, LL. 3-13), and the corresponding transcript (R Exh. 13), prove that Mr. Frentrup called it an “LMC” Meeting (Tr. 394, 395, LL. 21-25, 1-6). He also indicated that, at first, LES failed to meet (Tr. 249, LL. 12-16), but, after Mr. Littlejohn mentioned the January 24 meeting, Mr. Frentrup then testified LES failed to meet subsequent to that meeting (Tr. 249, LL. 17-20), even after he emailed Mr. Littlejohn a list of dates (Tr. 249, LL. 20-22). To be clear, LES does not have, nor did the GC ever offer, evidence of such an email. Furthermore, Mr. Frentrup claimed the first date offered was February 2, but seemed flustered when Mr. Littlejohn reminded him that the IBEW filed the charges on February 2 (Tr. 250, LL. 3-12). He denied any knowledge of the payroll audit LES received in April 2018 (Tr. 251, LL. 13-25), and added he lacked authority to initiate such. However, the CPA communication LES received (R Exh. 23) contradicts his testimony, and, makes it possible that he fraudulently obtained information. Lastly, LES’ Exceptions provided numerous examples regarding Mr. Cepeda’s credibility, such as his conflicting answers when the ALJ questioned him about the CBA, directly (Tr. 49, 50, LL. 1-7, 7-10 & 18-24). These inconsistencies are especially significant, because a primary factor in LES’ defense relates to when the IBEW actually provided the CBA.

9. If the ALJ erred in ordering any back pay remedy:

Remedial determinations must effectuate policies of the Act (*Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); & *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 216 S.Ct. 398, 406, 13 L.Ed.2d 233 (1965)), and reviewing courts may interfere with those outside of the Board’s authority (*Jasmine Vineyards, Inc. v. Agric. Labor Relations Bd.* (1980) 113 Cal. App. 3d 968, 982). The Board’s authority includes remedial, but not punitive, orders (*Consolidated Edison Co. et al. v. NLRB* 305 U.S. 197, 235-36 (1938); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *International Assn. of Machinist, Tool and Die Makers Lodge No. 35 v. NLRB* (1940) 311 U.S. 72, 88; *H.J. Heinz Co. v. NLRB* 311 U.S. 514, 520-521 (1941); *Big Three Indus. Gas & Equip. Co.* 230 NLRB 392, 395 (1977), *enfd.* 579 F. 2d 304 (5th Cir. 1978); *Superior Farming Co. v. Agric. Labor Relations Bd.* (1984) 151 Cal. App. 3d 100, 123; *Circuit-Wise Inc.* 309 NLRB 905, 908 (1992); *Toering Electric Co.*, 351 NLRB No. 18, 2 (2007); *Boling v. Public Employee Relations Bd.* (2019) Cal. App. 2019)). Additionally, in *Internet Stevensville*, 350 NLRB No. 94 (2007), the Board determined that, if an employer did not damage a single individual, then no merit for “extraordinary” remedies existed, because back pay remedies must make an *employee* whole (*NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969); & *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)). In fact, *Toering Electric* (2007) not only followed the established standard regarding the NLRB’s remedial powers, but included that windfall orders are punitive, in nature; most significantly, though, it included that, if the allegedly affected individual was not an employee, then that person must, at least, be an applicant who genuinely sought employment. Furthermore, back pay is not merited for hypothetical employer actions or inactions see *Druwhit Metal Prods. Co.*, 153 NLRB 346, 59 L.R.R.M. 1359 (1965), if hypothetical people actually applied, then the employer would have discriminated against them; & *Ex-Cell-O Corp.*, 185 NLRB 107, 108 (1970) *rev’d sub nom UAW v. NLRB* 449 F. 2d 1046 (D.C. Cir 1971, NLRB awards based on hypothetical money employees might have earned, but for the employer’s failure to bargain, are inappropriate). Furthermore, NLRB back pay remedies are only for private individuals, not entities (*NLRB v. Killoren*, 122 F. 2d 609, 9 L.R.R.M. 584 (8th Cir.) *cert. denied*, 314 U.S. 696 (1941), *enfd.* 343 U.S. 962 (1951)). Remedies may only include exactly what will make the individual whole (*Freeman Decorating Co.*,

288 NLRB 1235 (1988)), see also *Sure-Tan, Inc. v. NLRB* 467 U.S. 900 (1984), a back pay remedy must be sufficiently tailored, to expunge only the actual, and not the speculative, consequences of the ULP. It is the GC's burden to produce allegedly affected individuals, as a prong of the prima facie case for back pay (NLRB v. *Mastro Plastics Corp.*, 354 F. 2d 170 L.R.R.M. 2578 (2d Cir. 1965); *St. George Warehouse, Inc.*, 351 NLRB No. 42, 1 (2007); *Ozark Hardwood Co.*, 119 NLRB 1130, 41 L.R.R.M. 1243 (1957), *enfd in part*, 282 F. 2d 1, 46 L.R.R.M. 2823 (8th Cir. 1960); *East Texas Steel Castings Co.*, 116 NLRB 1336, 38 L.R.R.M. 1470 (1956), *enfd*, 255 F. 2d 248, 42 L.R.R.M. 2109 (5th Cir. 1958); & NLRB v. *Brown & Root Inc.* 311 F. 2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963)). If the GC fails to produce allegedly affected individuals, then the Respondent and ALJ are unable to establish the details needed to determine if, or how much, is merited, nor can they determine appropriate deductions from the gross amount (NLRB v. *J.G. Boswell Co.*, 136 F. 2d 585, 12 L.R.R.M. 776 (9th Cir. 1943); NLRB v. *Royal Palm Ice Co.*, 201 F. 2d 667, 31 L.R.R.M. 2308 (5th Cir. 1953); & NLRB v. *Savoy Laundry, Inc.*, 327 F. 2d 370, 55 L.R.R.M. 2285 (2d Cir. 1964)). This is important, because the alleged discriminate has the burden to mitigate damages (*Clark v. Frank*, 960 F. 2d 1146, 1152 (2d Cir. 1992), especially in situations where the individual never suffered any loss of employment (*Atlantis Healthcare Group (P.R.) Inc.*, 356 NLRB No. 26 (2010); *Willamette Industries*, 341 NLRB 560, 564-565 (2004); *Quality House of Graphics* 336 NLRB 497, 516-517 (2001); *Ironton Publications* 313 NLRB 1208, 1208 n. 4 (1994); & *Consumers Asphalt Co.*, 295 NLRB 749, 752 (1989)). The only two witnesses ever employed with LES were Enoch Ramirez and Mr. Matos, both of whom LES employed under the "48 Hour Clause." The ALJ repeatedly stopped Mr. Littlejohn from asking them questions related to pay, benefits, employment separation, or anything else that may affect back pay calculations (Tr. 174, 175, 176, 184, LL. 19-25, 1-25, 1-2, 3-23). This is counterintuitive when, in various terms, even the ALJ's own prescribed method of back pay calculation repeatedly states it applies to "affected employees," such as *King Soopers, Inc* on JD slip op. at 9.

10. If the ALJ erred in finding that LES ever...repudiated the CBA... began on February 27, 2017:

A simple "Google search" for the definition of "at least" produces infinite results, which all agree that, regarding a timeframe, it means "as much as, or more than, a number or amount. Similarly, doing the same with "within," consistently shows it means, "Occurring inside a particular period of time." The LOA states, "It shall remain in effect until terminated by [the Employer] giving written notice to [NECA] and [the IBEW] **at least** [150] days prior to the [expiration] of the applicable approved labor agreement." Mr. Littlejohn now understands that, in layman's terms, this means 150 days *before* the expiration of the current "CBA," which is November 30, 2019. In other words, the IBEW and NECA must receive written notification *no later than* July 4, 2019. Additionally, the LOA merely states this will terminate the agreement, not that the Employer must wait until the IBEW terminates it on the CBA's expiration date, a fact that even Mr. Frentrup admitted (Tr. 244, LL. 1-8). Furthermore, throughout the hearing, the IBEW repeatedly admitted to receiving written notices, from LES, communicating its desire to withdraw from the LOA (Tr. 210, 241, 243, 244, LL. 6-11, 5-17, 10-25, 1-8). LES submitted evidence of sending one in January 2018 and, after the IBEW did not acknowledge that one, LES sent another in May 2018 (R Exh. 16 & 27). Even Mr. Corley admitted that NECA received an email communicating LES' desire to terminate the LOA (Tr. 265, LL. 8-17). LES wishes to point out two things about Mr. Corley's testimony. First, while Mr. Corley did not state the date of that email notification, the fact that he disclosed it at the hearing, which occurred nearly a year before the 150 day deadline, implies timeliness.

Second, the GC's implication that an email is not a written notification is simply invalid. All of this proves that LES demonstrated effective severance of its prior relationships with both NECA and the IBEW.

Furthermore, Mr. Littlejohn only learned about the "48 Hour Clause" after the IBEW finally gave him the CBA in October. It states, "If...the Local Union is unable to refer applicants...within 48 hours from the time of receiving the Employer's request...the Employer shall be free to secure applicants *without using the Referral Procedure* but [they will be] 'temporary employees'." Section 5.07 further states that the Employer will replace these individuals, "as soon as registered applicants for employment in that classification are available..." Mr. Martinez, who sent multiple referrals to LES, testified he never had issues with LES about using the "hiring hall" (Tr. 286, LL. 19-25), which indicates LES followed the IBEW's instructions. Then, regardless of who is right and who is wrong, the back-and-forth over LES' bond implicitly means LES requested a referral in October (Tr. 115, 418, 419, 420, LL. 1-22, 8-25, 1-25, 1-20). In fact, LES made numerous follow-up requests before the first direct hire, which was in November (Tr. 180, 181, LL. 23-25, 1). Even Mr. Frentrup testified that the IBEW had no "problems" with LES until "right at the end of 2017," which supports this timeline (Tr. 198, 199, LL. 25, 1-10). The nature of these charges prove that, regardless of when or how, at some point, the Union realized LES switched from using the "hiring hall" to hiring directly. However, the IBEW never sent a single applicant; therefore, it failed to terminate the "48 Hour Clause," whether LES is obligated to the CBA, or not. To be clear, LES never employed Clay Carney, but he has occasionally contracted on LES' jobs (i.e. 1099); and, lastly, Mr. Littlejohn's testimony that LES hired outside of the "Referral Procedure" was not an admission of guilt, because, by its very definition, the "48 Hour Clause" is not part of the "Referral Procedure" (see CBA quote above & GC Exh. 6). **(#11 omitted)**

12. If the ALJ erred when entering "Conclusions of Law" ...another case...in close proximity to this one:

The patronizing response to this Exception is interesting, because, when the GC accused a party, with no legal education, of technicality errors, it merited the Board making a decision that directly affects that party's ability to earn a living. However, the seriousness of technicality issues changes, when such errors are made by legal professionals, who find this matter serious enough to pursue, but will have careers regardless of the outcome. LES contends that the GC cannot know what caused this error through any ethical means, be it a typo, case confusion, or some other cause. **(#13 omitted)**

14. If the ALJ erred...IBEW's CBA violations...irrelevant...(Tr. p. 63, line 5-p. 64, line 10):

The IBEW brought charges without "Clean Hands," by repeatedly violating its duty to people, its own agreements, and even the law, as described throughout LES' Exceptions and this Reply Brief. Additionally, when describing the Union's transgression at Gloria's, LES did not say, "...the Union knew that LES had a contract at...;" but, rather, that the record simply does not support that Mr. Cepeda and Mr. Martinez learned Gloria's was LES' jobsite only after entering it, along with ample support from the record. Even their testimony varied on when they learned it was LES' jobsite, but no one ever testified that it was *after* they left. As such, LES indicated that, whether it was before, or during, once they learned this, the obligation to leave and give LES proper notification before returning still existed (Tr. 72, LL. 11-25). The ALJ acknowledged, *and the GC stipulated*, that the Union did not notify LES before the entering its jobsite the *first* time (Tr. 300, 301, LL. 10-25, 1-15). Instead, they disregarded CBA Section 3.01 by interrogating employees. In fact, Mr. Littlejohn was at a different jobsite during this, but several employees were

uncomfortable enough to call him about it, which was only notification he received until much later, after the disruption was severe enough that LES shut down for that site for the day (Tr. 291, LL. 11-17). In defending this, the IBEW appears to imply that, as long as the offender did not know an action was wrong beforehand, then continuing to violate the rights of others is excusable. Furthermore, Mr. Martinez was very clear in his testimony about a subsequent violation at Continental Tire. He stated that an anonymous text directed them to the site, and they immediately went there, with the intent to enter it, and without giving LES appropriate notification. However, it was not two weeks after the first violation, as he testified, it was the day after a surprise “LMC” Meeting, and only three days after they trespassed at Gloria’s (Tr. 293, 294, 301, LL. 4-25, 1-4, 18-20). Lastly, as demonstrated by the recording, and its transcript, entered into the record at the hearing, during the “LMC” Meeting, only two days after the IBEW made the unannounced visit to Gloria’s Restaurant, Mr. Frentrup stated that Mr. Cepeda and Mr. Martinez saw LES’ ladders *prior to* entering the jobsite (Tr. 388, LL. 4-12 & R Exh. 13). In his testimony, Mr. Frentrup also admitted that the Union violates the CBA if it fails to give proper notification for jobsite visits, and LES respectfully reiterates that this happened *at least* twice in the days leading up to this dispute (Tr. 220, LL. 7-24). The Union also puts great effort into making its referral procedure appear nondiscriminatory and, thus, legal, but, Mr. Cepeda inadvertently exposed this charade when he testified that employees hired under the “48 Hour Clause” either join the Union, or lose their jobs (Tr. 54, LL. 7-18). This not only railroads Employers into complying with forced Unionism, but also creates a stealthy loophole for the Union to make hiring and firing determinations, in violation of Employers’ legal rights regarding autonomy of business operations, not to mention “Management’s Rights” outlined in CBA Section 2.01. Furthermore, after previously stating that, “...a recording is obviously better than testimony...,” (Tr. 362, LL. 6-8), the ALJ rejected R Exh. 29, the transcript of a recorded conversation between Mr. Littlejohn’s and the “hiring hall.” The ALJ added it to the “Rejected Exhibit File” (Tr. 417, LL. 20-21). On it, the IBEW repeatedly confirms that joining the Union is a requirement before the “hiring hall” will refer people to jobs. Both this recording and Mr. Cepeda’s testimony prove that, people often are the collateral damage of the IBEW’s own interests. Furthermore, the “hiring hall,” and thus entire “Referral Procedure,” violate current applicable laws and are legally unenforceable.

IV. CONCLUSION

The IBEW accused LES of having a “disregard of our nation’s labor laws,” but those labor laws touted in the IBEW’s Answer are to protect *people* working to support themselves and their families. Unions are entities that must focus on the people’s best interests, not their own. Unfortunately, the IBEW strayed from this purpose, which would inevitably lead this Union to misuse powers bestowed by the NLRA. Most unions properly use these powers by advocating for *all* employees and ensuring equal employment opportunities for all. However, IBEW chose its own path and now asks to the Board to reward it at LES’ expense. For all of the reasons given in both the Exceptions and this Reply Brief, LES stands by its request for the Board to reverse the ALJ’s Decision, in its entirety.

Respectfully,

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CERTIFICATE OF SERVICE

This is to certify that on this 5 day of June, 2019, a true and correct copy of the above and foregoing was served as follows:

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