

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

COMMUNICATIONS WORKERS OF AMERICA
AND COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 4309 (AT&T TELEHOLDINGS, INC., D/B/A
AT&T MIDWEST AND THE OHIO BELL TELEPHONE
COMPANY-Employer)

and

CASE NO. 8-CB-10487

SANDA ILIAS,

An Individual

**REPLY BRIEF OF RESPONDENTS, COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, CLC AND COMMUNICATIONS WORKERS OF AMERICA LOCAL 4309 IN
RESPONSE TO CHARGING PARTY'S ANSWERING BRIEF**

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**RESPONDENTS' RESPONSE TO CHARGING PARTY'S STATEMENT OF THE
FACTS.**

Charging Party, Sanda Ilias (“Ilias”) asserts that the Union was “fully aware” that she objected to paying full dues based on her September, 2004 objection letter. (Charging Party’s Brief, p. 1) Nothing in the record supports this assertion. Given that CWA’s annual renewal practice has been in existence since shortly after Beck was decided, and Ilias never renewed her 2004 objection, it is fair to assume that CWA would have been unaware that Ilias’ objection was meant to last forever.¹

LAW AND ARGUMENT

I. Beck Cases are Determined Under the Duty of Fair Representation Standard.

Ilias’ first heading asserts that CWA violated the duty of fair representation (“DFR”). The next four (4) pages of her Brief argue that the DFR is irrelevant. According to Ilias this case should be decided on some absolutist notion of statutory interpretation. While Ilias cites to several cases, none stand for the proposition she puts forth.

As a threshold matter, Ilias’ belated attempt to raise this issue with the Board is barred. While Ilias urged the ALJ to adopt this view, she did not file exceptions to his failure to do so and, thus, waived the right to urge this view on the Board. Jack LaLanne Management Corp., 218 NLRB 900, 914, fn. 20 (1975); Sec. 102.46 (g), Rules and Regulations of the NLRB.

On the merits of Ilias’ argument, the short response is that Board precedent, federal court precedent, General Counsel’s Brief, and ALJ Nations’ decision, all make it clear that Beck

¹ Charging Party makes additional assertions of fact that are not fully supported by the record. (Charging Party’s Answering Brief, p. 2) These same assertions are discussed in Respondents’ Reply Brief in response to General Counsel’s Answering Brief. (See pp. 2 to 3.) In the interest of brevity, they are incorporated by reference herein.

objector cases are to be decided under a DFR analysis.² See e.g. California Saw & Knife Works, 320 NLRB 224 (1995); Abrams v. Communications Workers of America, 59 F.3d 1373 (D.C. Cir. 1995); and Price v. International Union, UAW, 722 F. Supp. 933 (D. Conn. 1989).

The DFR standard is the analytical framework by which a Union's Beck related conduct is evaluated to determine whether or not the Act has been violated. There is neither any justification, nor any legal support for the absolutist statutory interpretation proposed by Ilias. For all of these reasons the Board should not depart from clear past precedent and, instead, should decide this case based on the DFR standard.

II. CWA'S CHALLENGED PRACTICE DOES NOT AMOUNT TO A BREACH OF THE DUTY OF FAIR REPRESENTATION.

A. Respondents' Challenged Practice Does Not Discriminate Against Objectors.

Ilias argues that CWA's challenged practice discriminates against objectors and, thus, violates the DFR. The first problem with this argument is that the ALJ's decision was premised solely upon the arbitrary prong of the DFR. (ALJD, p. 13, Ins. 1-2) There is no finding of discrimination in the ALJ's decision. If Ilias took issue with that conclusion, she was obligated to file exceptions challenging it. She did not. As such, she waived her right to raise this issue. Jack LaLanne, supra; Sec. 102.46 (g), Rules and Regulations of the NLRB.

In addition, the record contains no "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 301 (1971). Only "invidious 'discrimination'" is "prohibited by the duty of fair representation." Air Line Pilots v. O'Neill, 499 U.S. 65, 81 (1991). There was no evidence of invidious discrimination in this case.

² While Ilias now apparently is asserting that the DFR has nothing to do with this case, in her amended charge of January 30, 2006, she alleged a DFR violation.

Ilias claims that CWA has admitted that Railway Labor Act (“RLA”) employees are “not subject to its onerous annual renewal policy.” (Charging Party’s Brief, p. 8) (CWA’s treatment of its RLA bargaining unit is discussed in Respondents’ Reply Brief in response to General Counsel’s Answering Brief, pp. 2 to 3 and incorporated by reference herein.)

Nor can the need to send one short notice per year, shortly after being sent a reminder be fairly characterized as “onerous” when viewed through any realistic lens. The ALJ did not find the burden on objectors to be onerous. That is solely Ilias’ concoction. In fact, the ALJ never made any finding as to the extent of the burden imposed on Ilias or any other objector as a result of the annual renewal practice.

B. In Light of the Factual and Legal Landscape at the Time of the Union’s Challenged Conduct, Respondents’ Annual Renewal Practice was Well Within the Allowable Range of Reasonableness.

In White v. Communications Workers of America, 370 F.3d 346 (3rd Cir. 2004), the precise issue before the Court was whether CWA’s challenged practice, referred to by the Court as the “Opt-Out Procedure”, constituted state action. If it did, the First Amendment standard would apply. Otherwise, the DFR standard would apply.³ In order to reach a decision on this issue the Court carefully reviewed CWA’s annual renewal practice. While White did not directly state that CWA’s opt out procedure did not violate the DFR, it certainly gave reasonable comfort to CWA about the continuing lawfulness of its practice.⁴

Charging Party also tries to negate the import of Communications Workers of America, Local 9403 (Pacific Bell), 322 NLRB 142 (1996). It is apparent from the decision that both the

³ The Court also noted that RLA cases were inapposite because of the First Amendment test they employed. White, at 353.

⁴ It should also be noted that when evaluating a Union’s conduct in this context of the DFR, a Union need not necessarily be correct in its analysis, it only need act within a wide range of reasonableness. Stevens v. Moore Bus. Forms, 18 F.3d 1443 (2nd Cir. 1994); Nida v. Plant Protection Ass’n Nat’l, 7 F.3d 522 (6th Cir. 1993). As long as its conduct is not fully irrational or arbitrary and it is not carried out on a discriminatory or bad faith basis, it meets the legal responsibility imposed upon it by the DFR.

ALJ and the Board reviewed CWA's Beck procedures, including its annual renewal practice, with a fine toothed comb, before approving a detailed settlement agreement between CWA and General Counsel. Id., at 142, 156, 157. If either the ALJ or the Board had reservations about CWA's annual renewal practice, they would not have approved this settlement. Pacific Bell provided additional comfort to CWA about the continuing lawfulness of its practice.

Ilias acknowledges that Abrams specifically approved CWA's annual renewal practice. She seeks to minimize Abrams' import because it was a federal Circuit Court decision, not a Board decision. Of course, there has yet to be a Board decision on this issue making Abrams an even more authoritative decision on this subject than would otherwise be the case. Abrams is particularly authoritative because unlike the cases relied on by Ilias, it was decided under the DFR standard and it specifically approved CWA's challenged practice.

Ilias now argues that Abrams "makes little sense" because objectors satisfy their burden by making their objection known once. Undoubtedly, this is an argument that Ilias' counsel unsuccessfully made to the Abrams Court. It was rejected by the Court and should be rejected by the Board.

Ilias also claims that the legal landscape has shifted given the relatively recent four (4) ALJ decisions on this subject, including this case. Of course, three (3) of those decisions are currently pending before the Board. The only case that was not appealed provides almost no insight into the sort of reasons that may or may not serve as legitimate justifications for an annual renewal policy. Of course, it was an ALJ decision, not a Board decision.

The federal cases relied on by Ilias all suffer from at least one fatal defect. They were decided under the First Amendment rather than the DFR standard. All of the federal cases on this issue decided under the DFR standard have resulted in Union victories. On the basis of this

legal landscape, it was certainly reasonable for CWA to conclude that its annual renewal practice was lawful.

III. A UNION’S PRACTICE, WHICH CLOSELY TRACKS THE GENERAL COUNSEL’S PUBLISHED BECK GUIDELINES, AND BEST FURTHERS THE BASIC STATUTORY INTERESTS OF EMPLOYEES AND THE UNION, DOES NOT AMOUNT TO A BREACH OF THE DUTY OF FAIR REPRESENTATION.

Ilias disputes this proposition on several fronts. First, she complains that CWA has cited two (2) Board cases in which annual renewal practices were not the issue. This is a little like the pot calling the kettle black, since Ilias’ Brief is filled with cases that are not even remotely on point.

Next, she asserts that ALJ Biblowitz rejected the above proposition in International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local Union #376, (Colt’s Manufacturing Co.), JD (NY)-06-08, 2008 WL 609698 (March 3, 2008). This assertion is not accurate. The UAW offered G.C. 88-14 as one of its three (3) business justifications for maintaining its policy. Deeming that particular Memorandum to have been issued too long ago, the ALJ found the UAW’s reliance on it to be inadequate. *Id.*, at p. 6. No mention was made of the unbroken chain of G.C. Memorandums on this subject. The ALJ also noted, as does Ilias, that a G.C. Memorandum is not binding law.⁵ CWA agrees. However, the unbroken chain of G.C. Memorandums are not offered as such. Instead, they reveal the legal landscape confronting CWA at the time of the challenged conduct.

Ilias goes on to challenge this proposition as “quick sand”, because CWA chooses to annually notify all bargaining unit members of their Beck rights, though Ilias asserts this practice is not mandated by law. Somehow Ilias tries to turn this conscientious practice which CWA has

⁵ By the same token, none of the authorities on this subject relied upon by Charging Party are binding on the Board.

followed for many years into a negative. It is nonsensical to assert that because CWA may be doing more than the law requires it is acting arbitrarily.

IV. WITHOUT DECIDING THE EXTENT OF THE BURDEN IMPOSED ON OBJECTORS AS A RESULT OF THE UNION'S CHALLENGED PRACTICE, THERE WAS NO WAY FOR THE ALJ TO BALANCE THE UNION'S JUSTIFICATIONS FOR MAINTAINING ITS PRACTICE AGAINST THE BURDEN ON OBJECTORS.

Ilias makes much of the allegedly “onerous” burden imposed on her by having to send in a form letter to the Union once a year. She fails to recognize the key point CWA makes, i.e. that the ALJ never made any finding as to the extent of the burden on Ilias or any other objector.

Ilias also claims that the annual notice to objectors is ineffective because it is “buried” in a newspaper. The record evidence reveals that the issue of the newspaper containing the notice conspicuously flags it on the front page with the reader being directed to the page where the notice is found. (TR 64, Ins. 9-17) Of course, whether the notice is “buried” as Ilias argues, or prominently featured as the evidence suggests, Ilias admitted that she never bothered to read the paper anyhow.

V. THE ALJ'S RELIANCE ON CWA'S TREATMENT OF ITS RLA COVERED OBJECTORS AS A BASIS FOR REJECTING ITS JUSTIFICATIONS FOR MAINTAINING ITS CHALLENGED PRACTICE FOR NLRA COVERED OBJECTORS WAS MISPLACED.

Even assuming *arguendo* that the evidence about CWA's treatment of its RLA covered employees was relevant to this case, the legal and numerical situation with respect to these employees is obviously far different, thereby warranting different treatment. (See discussion at p. 3 of Respondents' Reply Brief in Response to General Counsel which is incorporated by reference.)

VI. THE ALJ ERRED BY CONCLUDING THAT ALL BECK OBJECTORS MUST BE TREATED BY THE UNION AS CONTINUING FROM YEAR TO YEAR AS AN OBJECTOR WITHOUT REVIEWING THAT OBJECTION, OR EVEN

SPECIFICALLY ASKING THE UNION TO TREAT HIS/HER OBJECTION AS CONTINUING.

Contrary to Ilias' argument, CWA is not obscuring the difference between an objection and a challenge. This case is about objectors. It is not about challenges. In an RLA objector case, the Supreme Court found that dissent cannot be presumed, it must be affirmatively made known to the Union. International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961). That finding has been the basis for the approval of various Unions' annual renewal policies by the federal courts. Abrams, at 1382; Tierney v. City of Toledo, 824 F.2d 1497, 1506 (6th Cir. 1987); Kidwell v. Transportation Communications Int'l Union, 731 F. Supp. 192, 205 (D. Md. 1990). These federal courts all found that Street's admonition was applicable to annual renewal policies for objectors. CWA simply reiterates the position of these courts.

VII. THE DESIRE TO AVOID THE ADDED ADMINISTRATIVE BURDEN ASSOCIATED WITH HAVING TO CAREFULLY PARSE EACH OBJECTOR LETTER TO DETERMINE WHETHER OR NOT THAT OBJECTOR WAS SEEKING HIS/HER OBJECTION TO CONTINUE FROM YEAR TO YEAR JUSTIFIES THE UNION'S CONTINUED MAINTENANCE OF THE CHALLENGED PRACTICE.

Ilias asserts that the administrative burden that would be imposed on Respondents by the need to carefully scrutinize each objector letter to determine whether or not continuing objector status was sought, could be eliminated if all objectors were simply treated as continuing. (This issue is discussed more thoroughly in Respondents' Reply Brief to General Counsel's Answering Brief, at pp. 7-8, which discussion is incorporated by reference herein.)

VIII. THE BENEFIT THAT THE UNION ATTAINS IN TERMS OF MAINTAINING ACCURATE ADDRESSES FOR OBJECTORS JUSTIFIES THE UNION'S CONTINUED MAINTENANCE OF THE CHALLENGED PRACTICE.

Charging Party next asserts that Respondents' continuation of its practice, in part due to the benefit of obtaining current and accurate addresses is "spurious" and "nonsensical". Charging Party would rather trust the accuracy of the employer supplied information and the

“efficiency” of the Postal Service, to return those issues of the *CWA News* that are not received by the intended recipient and mark them as “bad addresses”. There are at least two (2) problems with Charging Party’s assertions. First, if a copy of the *CWA News* was returned by the Postal Service and marked as a “bad address”, CWA would not necessarily learn of the correct address.

Second, if Ilias’ testimony is to be believed, despite the fact that she was regularly sent a copy of the *CWA News*, she claimed to almost never have received it. (TR 17, ln. 19 to TR 18, ln. 7; TR 27, lns. 5 to 24; TR 47, ln. 25 to TR 48 ln. 1.) Yet, there was no evidence that CWA received notification of a non delivery or a bad address from the Postal Service. (TR 106, lns. 7 to 19)

CWA recognizes the real world reality that addresses supplied by the objectors are far more likely to be accurate and current than the somewhat dated addresses supplied by the Company. (TR 83, lns. 6 - 11) When it receives a different address directly from the objector in the annual renewal letter, CWA trusts that information received from the “horse’s mouth” over the more tenuous information received from the Company. It then changes the record address in its database. (TR 83, lns. 12-25) There is nothing unreasonable or unlawful about this practice.

Ilias argues that CWA’s concern about bad addresses is “mythical”. Yet, both Charging Party and General Counsel raise in their briefs Ilias’ assertion that she hardly ever received the *CWA News* as an alleged failure on the Union’s part to notify her of the need to review her objection. (Charging Party’s Brief, p. 2; General Counsel’s Brief, pp. 6, 12) The “myth” of CWA’s concern is belied by these assertions.

Finally, in this regard, Ilias argues that CWA should simply inform objectors of their responsibility to notify CWA of all address changes. This would hardly solve the inaccurate address problem. If CWA had a bad address, such notification would be fairly useless. Further,

the “burden” imposed on an objector by a policy requiring the objector to send a letter to the Union notifying it of any change of address, is very similar to the “burden” imposed on an objector by the current practice of having to send a letter to the Union once a year. In both cases the objector must simply address an envelope, enclose a letter, stick a stamp on the envelope, and mail it. In at least one respect the burden on the objector as a result of the annual renewal practice is less, since the objector is sent a reminder notice shortly before the objection is due. No reminder is provided to the objector whose address changes. Yet, this extremely limited burden is characterized by Ilias as “onerous”, a “road block”, and “harassing”. Charging Party cannot have it both ways. Either it is a significant burden to have to send a letter to the Union or it is not.

IX. THE BENEFIT THAT THE UNION ATTAINS IN TERMS OF ASCERTAINING HOW ITS RECENT PERFORMANCE WAS PERCEIVED BY BARGAINING UNIT MEMBERS JUSTIFIES THE UNION’S CONTINUED MAINTENANCE OF THE CHALLENGED PRACTICE.

Charging Party next turns to the benefit CWA derives from its annual renewal practice of being able to track the perception of the bargaining unit as to how the Union is performing. The Charging Party asserts that a better barometer of dissatisfaction would be how many new objections are received each year. The Charging Party’s view fails to take note of the fact that if the number of annual renewals were to decrease, this fact would provide positive feedback to the Union on its recent performance by those who are likely to be its harshest critics. That information could also be very valuable. If those objectors were instead all treated as perpetual objectors, this valuable insight would not be available to the Union.

The question in this case is not what might be the best way to ascertain how the Union’s performance is perceived by the bargaining unit members. Admittedly, there may be better ways

than maintaining the annual renewal practice. For example, detailed surveys on this subject, might be a better, albeit far more expensive method.

What is at issue is whether this justification⁶ offered by the Union has any merit or, instead, is so inherently invalid and arbitrary that it proves the Union is committing a breach of the DFR. Evaluated under this standard, this justification clearly has merit. The annual renewals provide the Union with some rather inexpensive insight, however imperfect it may be, as to how it is perceived to be performing by those bargaining unit members, who are most likely to have a predisposed negative view of the Union.⁷

CONCLUSION

For all of the foregoing reasons, as well as those contained in Repondents' other Briefs, the decision of the ALJ is clearly in error and must be overturned.

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⁶ After scoffing at this justification, Ilias simply jumps to the unsupported conclusion that “the sole reason for this policy is the Union’s pecuniary incentive to seize more of the non members’ money.” (Charging Party’s Brief, p. 10) This unsupported characterization reveals far more about the ideologically charged, anti-union attitude of Charging Party’s counsel, than it reveals about any improper motives on the part of CWA.

⁷ Davenport v. WEA, 127 S.Ct. 2372 (2008) is not relevant. It simply holds that a state statute that requires public employee unions to obtain the affirmative consent of non members before spending dues on political activities does not violate the First Amendment.

CERTIFICATE OF SERVICE

I certify that on the 27th day of March 2009, the Respondents' Reply Brief in Response to Charging Party's Answering Brief was electronically filed at the e-filing section of the Board's website. Counsel for the other parties to this proceeding listed below were notified via telephone that this document was being filed electronically and arrangements were made to timely transmit a copy of Respondents' Exceptions and Brief in Support by the means preferred by said counsel in compliance with § 102.114 (i) of the Board's Rules and Regulations. In addition to the e-filing, Respondents on this same day sent eight (8) hard copies of Respondents' Exceptions and Brief to the Board via regular U.S. mail.

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