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 GENERAL COUNSEL'S ANSWERING BRIEF

Theodore E. Meckler, District 4 Counsel
Communications Workers of America
20525 Center Ridge Road, Room 700
Cleveland, Ohio 44116
Phone: (440) 333-6363
FAX: (440) 333-1491
Email: tmeckler@cwa-union.org

ATTORNEY FOR RESPONDENTS, CWA AND CWA LOCAL 4309

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RESPONDENTS' RESPONSE TO GENERAL COUNSEL'S STATEMENT OF THE CASE.

General Counsel states correctly in its Answering Brief that "the Judge noted that the relevant analysis in these cases is to consider the relative burden and impact the annual renewal requirement places on objectors as compared to a union's purported justification for maintaining this rule." (p. 4, General Counsel's Answering Brief ["G. C. Brief"]). General Counsel continues by stating "The Judge turned to the merits of the case and concluded that the reasons advanced by Respondents for justifying the rule pales in comparison with the burden placed on objectors. The Judge further concluded that the Respondent lacked a legitimate business justification for the rule and thus the renewal requirement was arbitrary and a violation of Section 8(b)(1)(A) of the Act." (p. 4, G. C. Brief).

What General Counsel fails to note, however, is that the ALJ never articulated the extent of any burden imposed upon Charging Party, Sanda Ilias (hereinafter, "Ilias") by CWA's challenged practice. The ALJ could simply not make the critical evidentiary determination with which he was charged, i.e. balancing the burden imposed on objectors against the justifications offered by the Union, without weighing and determining the extent of that burden.[1] One half of the scale was missing. His failure to make this determination was clear error.

RESPONDENTS' RESPONSE TO GENERAL COUNSEL'S STATEMENT OF THE FACTS.

General Counsel contends that CWA's Administrator of its Office of Special Programs, Helen Gibson ("Gibson") conceded on cross examination that CWA does not send out individual reminder letters to Beck objectors. (G. C. Brief, p. 7) That assertion only tells part of the story. It fails to take note of Gibson's testimony that CWA provides an annual notice to all bargaining

[1] Later in its Brief General Counsel characterized the burden of objectors as "relatively small". (G. C. Brief, p. 15) But the ALJ never decided whether that burden was large, small, insignificant, or otherwise. He simply made no finding as to the extent of this burden.

unit members contained in the *CWA News*, reminding them of the need to submit an annual objection during the upcoming window period if they desire to be an objector. This notice is sent out shortly before the next window period begins. (TR 63, ln. 21 to TR 66 ln. 4; TR 87, lns. 16 to 24) As Gibson aptly noted out, this notice serves the purpose of reminding objectors to send in their objections for the coming year. (TR 69, lns. 16-24) Ilias also failed to read the "individual letter" sent with her rebate check which also reminded her of the need to object. (TR 72, ln. 9 to TR 74, ln. 23, Respondents' Exhibit no. 1, Joint Exhibit no. 1, para. 1-2) Whether that reminder notice is contained in the *CWA News* or "an individual letter" should make no difference for the purposes of this case.

General Counsel also states as fact that Ilias is not currently receiving the *CWA News*. (G. C. Brief, p. 6) It is true that Ilias so testified. (TR 47, ln. 25 to TR 48, ln. 1) However, her testimony on that subject is suspect. Even when she acknowledged receiving the *CWA News*, she testified that she did not read it. She considered it to be "junk mail" and did not believe it pertained to her once she resigned. (TR 17, ln. 19 to TR 18, ln. 15) Gibson testified, in direct contradiction that Ilias was sent a copy of the *CWA News* on a regular basis. (TR 88, lns. 6-9) The ALJ never resolved this factual dispute.

Finally, General Counsel contends that employees who are covered under the Railway Labor Act ("RLA") are not required to renew their objector status. (G. C. Brief, p. 7) This assertion is not accurate. RLA objectors are obligated to renew annually. However, if they indicate that they wish their objection to be continuing, CWA honors that request. (TR 92, lns. 17-20) It is also important to note that the RLA bargaining unit is a much smaller unit and, hence much easier to work with. In addition, CWA has different legal requirements to consider for its RLA bargaining unit than it does for its NLRA units. (TR 107, lns. 10 to 25) The ALJ's

decision, were it to become Board law, would treat all objectors as continuing, whether they specifically sought that status or not. That is a significant departure from CWA's practice as to its RLA bargaining unit members. Nor is it mandated by the Act.

RESPONDENTS' RESPONSE TO GENERAL COUNSEL'S STATEMENT OF APPLICABLE LAW.

General Counsel correctly notes that the Board has not previously ruled on the policy question of whether or not Unions' annual renewal practices amount to a breach of the duty of fair representation ("DFR"). General Counsel asserts that there is a "split" in the federal courts on this issue. That is not quite accurate.

All the federal courts that have ruled on this issue by applying the duty of fair representation ("DFR") standard, have found the challenged practice lawful. At least two (2) of those courts also happened to be reviewing CWA's specific practice. Abrams v. CWA, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995); White v. Communications Workers of America, 370 F.3d 346 (3rd Cir. 2004). (See also Price v. International Union, UAW, 722 F. Supp. 933 (D. Conn. 1989).) On the other hand, all of the federal courts which found similar practices by other unions to be unlawful,[2] based their decisions on the much more stringent First Amendment standard.

The Board has already determined that the DFR standard is controlling in the Beck cases it decides. California Saw & Knife Works, 320 NLRB 224 (1995). At least one Circuit Court and one District Court found annual renewals to be lawful even under the First Amendment standard. Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987); Kidwell v. Transportation Communications Int'l Union, 731 F. Supp. 192, 205 (D. Md. 1990). Contrary to General Counsel's contention, there is not a split in the federal courts on the precise issue before the

[2] Seidemann v. Bowen, 499 F.3d 119 (2nd Cir. 2007); Shea v. International Ass'n of Machinists, 154 F.3d 508 (5th Cir. 1998); Lutz v. International Ass'n of Machinists, 121 F. Supp. 2d 498 (E.D. Va. 2000).

Board in this case. All the DFR decisions by federal courts have found in favor of the challenged practice.

RESPONDENTS' RESPONSE TO GENERAL COUNSEL'S ARGUMENTS AGAINST THE ANNUAL OBJECTION REQUIREMENTS.

In the first half of the Brief, General Counsel indicates that it will discuss the arguments in favor of finding that CWA's challenged practice is violative of the DFR, in that it allegedly places an unreasonable burden on objectors, without serving any legitimate interest. This according to General Counsel would make it arbitrary under the DFR standard. However, much like the ALJ, General Counsel never really discusses the extent of the burden placed on objectors or even whether it is unreasonable or not. Nor does General Counsel discuss the interests that may or may not be served by the challenged practice in this portion of the Brief. Instead, General Counsel discusses several cases that have previously addressed the issue of annual renewals for objectors.

1. The Three (3) Federal Court Decisions Relied on by General Counsel, Were Decided Based Upon a First Amendment Analysis and, as such, are Inapposite.

Initially, General Counsel cites three (3) federal court decisions rejecting annual renewal policies. Shea v. International Ass'n of Machinists, 154 F. 3d 508 (5th Cir. 1998; Seidemann v. Bowen, 499 F.3d 119 (2nd Cir. 2007); Lutz v. International Ass'n of Machinists, 121 F. Supp. 2d 498 (E.D. Va. 2000). None of these cases arose under the NLRA. Shea and Lutz were both RLA cases. Seidemann involved public employees.

While the analysis employed by the federal courts in RLA or public employee cases is often transferable to the analysis employed in an NLRA case, in this instance, this simply is not so. Objector cases involving public and RLA employees are decided under a First Amendment

analysis. Shea, *supra*, at 514-515. NLRA cases are decided under a DFR analysis.[3] California Saw Works, 320 NLRB 224 (1995).

Whether a case is analyzed under the First Amendment or the DFR standard is "not an inconsequential determination". Scrutiny under the First Amendment is significantly more rigorous and less deferential than DFR review. Lutz, *supra*, at 504-505. Under the First Amendment standard the objector procedure "must be carefully tailored to minimize the infringement on non members" constitutional rights. Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 (1986).

By contrast, under the DFR standard the Union violates the Act only if its actions are arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 191 (1967) There was no serious contention in this case, let alone evidence in the record, supporting the proposition that CWA's conduct was either discriminatory or in bad faith. The only prong of the three (3) part DFR test that was even alleged by General Counsel to have been violated was the arbitrariness prong. Under well established precedent a Union's conduct is arbitrary only if it is "so far outside of a 'wide range of reasonableness' that it is wholly irrational." Airline Pilots v. O'Neill, 499 U.S. 65 (1991). In addition, that conduct must be evaluated "in light of the factual and legal landscape at the time of the Union's action." *Id.*, at 67.

These two (2) standards for determining whether a Union's practice is unlawful are so very different that the First Amendment cases have no useful application to this case. White v. Communications Workers of America, *supra*, at 353. (For a more thorough discussion of this

[3] In fact, the underlying rights of objectors derive from different Supreme Court cases depending upon which type of employee is involved. The rights of NLRA covered objectors derive from Communications Workers of America v. Beck, 487 U.S. 735 (1988). The rights of RLA covered objectors derive from International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Clerks v. Allen, 373 U.S. 113 (1963) and Ellis v. Railway Clerks, 466 U.S. 435 (1984). The rights of public employee objectors derive from Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) and Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

issue see Respondents' Exceptions and Brief in Support, pp. 22-24.) Consequently, the First Amendment cases cited by General Counsel fail to offer guidance in this case.

2. The Three (3) ALJ Decisions Relied on By General Counsel are Inapposite.

General Counsel next turns to the three (3) relatively recent ALJ decisions that have addressed this issue. General Truck Drivers Office, Food & Warehouse Union Local no. 952, (Albertson's Inc.; Ralph's Grocery), JD (SF)-30-06, (May 30, 2006); International Association of Machinists and Aerospace Workers, (L-3 Communications Vertex Aerospace LCC), JD (ATL)-02-08, (January 1, 2008); and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local Union #376, (Colt's Manufacturing Co.), JD (NY)-06-08, (March 3, 2008).[4] In each of these cases the ALJ found annual renewal policies to be unlawful. However, all three (3) cases are inapposite.

Albertson's Inc., *supra*, offers virtually no guidance since it includes no discussion whatsoever of the justifications offered by that union. A critical factual distinction between L-3 Communications Vertex Aerospace, LCC, *supra* and this case, is that the charging party in the former case submitted a request for objector status clearly indicating his desire to have his objection treated as continuing from year to year. *Id.*, at pp. 8, 21-22. There was no such evidence in this case. That fact alone makes L-3 Commuinications distinguishable.

The ALJ in Colt's Manufacturing Co., Inc., *supra*, did not specify whether he analyzed the case under the DFR standard or the First Amendment standard. However, he relied heavily on the three (3) aforementioned First Amendment cases, Shea, *supra*; Lutz, *supra*; and Seidemann, *supra*, certainly suggesting the First Amendment analysis. For this reason alone,

[4] None of these cases has yet to result in a Board decision, although Colt's Manufacturing and L-3 Communications Vertex Aerospace LCC are both pending before the Board.

Colt's Manufacturing is inapposite. (For a more thorough discussion of these cases, see pp. 24-29 of Respondents' Exceptions and Brief in Support.)

3. The Increased Administrative Burden That Would Be Imposed on the Union Were It Required to Eliminate Its Annual Renewal Practice is a Legitimate Justification for Continuing the Practice.

General Counsel next turns to the administrative burden imposed on CWA if it had to carefully parse each notice to determine whether or not it was intended as continuing. General Counsel asserts that the "salient point" in this regard is that the ALJ determined that the violation "lay in the unlawful maintenance of the rule itself." According to General Counsel, this means there would be no need to parse each objector letter.

General Counsel misses a key point here. A Union's practice requiring all objectors to annually renew their objection without any exceptions, is qualitatively different than a Union's practice of generally requiring objectors to annually renew their objections, while treating as continuing those objectors specifically seeking such treatment in their notice. The Union knows of no case, even under the stricter First Amendment standard, holding this latter practice to be unlawful. In fact, Shea, at 515, recognized it as lawful.

If CWA were to follow the practice approved by Shea, it would also be required to bear the additional administrative burden of having to carefully parse each objector notice. Since the law does not mandate otherwise, the choice of whether to treat all objectors or only those who specifically make such a request as continuing, is CWA's choice to make.[5] The fact that the latter approach would require an increased administrative burden is a legitimate consideration for CWA. Requiring CWA to treat all objectors as continuing is not an approach mandated by law. CWA should not be obligated to follow this all or nothing approach.

[5] This, after all, is CWA's practice with respect to its RLA bargaining unit members.

4. The Factual and Legal Landscape at the Time of the Challenged Conduct Certainly Suggested to the Union that Its Annual Renewal Practice was Lawful.

General Counsel also asserts that Respondents' "reliance" upon a "smorgasbord" of opinions or decisions is not a persuasive justification for maintaining its current practice. General Counsel cites Colt's Manufacturing which found the UAW's reliance on far less extensive authority to be insufficient to justify its practice. The authority relied upon by the UAW was limited to the original General Counsel Memorandum on Beck practices dating from 1988 (G.C. 88-14, (1988)) and the Congressional testimony of former General Counsel Arthur Rosenfeld about the Board's Beck practices.

There are several problems with this argument. First, the authorities which CWA has put forth in this case and which guided its actions, are far more extensive and persuasive than those relied upon by the UAW in Colt's Manufacturing. This includes two (2) federal court decisions and one Board decision in which CWA was a party. The very same practice now being challenged was involved in each. The challenged practice was not found to be unlawful. This is far different scenario than that which was present in Colt's Manufacting.

Second, the ALJ in Colt's Manufacturing found the two (2) prior pronouncements relied upon by the UAW did "not constitute Board law, and are not binding." Colt's Manufacturing, at p. 7. Of course, the same could be said for all the cases cited by all the parties in this case, with the exception of Communications Workers of America, Local 9403 (Pacific Bell), 322 NLRB 142 (1996) In that case the Board approved a settlement which, *inter alia*, acknowledged CWA's annual renewal practice.

Third, it is not important here which line of cases, is thought to be more persuasive. What is important is that under the DFR standard the Union's conduct must be evaluated based

on the "factual and legal landscape" existing at the time of the conduct.[6] Clearly, the cases to which CWA was a party, and to a lesser extent, the General Counsel's unbroken chain of memorandums, including G.C. 92-5 (1992), G.C. 01-04 (2001), and G.C. 88-14 (1988), as well as the cases approving similar practices of other unions, combine to make for a legal landscape from which it was fair for CWA to conclude that its practice was lawful. To attempt to slough off this legal landscape as a "smorgasbord of authoritative opinions and decisions"[7] misses this critical aspect of the DFR analysis.

5. Nothing in the Record Supports General Counsel's Personal Value Judgment Argument.

Finally, General Counsel asserts that an employee's decision to object is normally based on a "personal value judgment" that an employee does not wish to assist the Union in paying for non representational activities. According to General Counsel such value judgments are "probably" not based upon the Union's spending in a particular year or other factors that are likely to change. (G. C. Brief, p. 14) General Counsel's rather broad based psychological assessment is made without reference to any study, any expert testimony, any scholarly articles, or most importantly, without reference to any evidence of record in this case. It is all well and good for General Counsel to make creative arguments in a Brief. However, such arguments, which appear to have been pulled out of thin air, simply should not serve as a basis for the Board to render a landmark decision of great import to many unions throughout the nation in a case of first impression like this one.[8]

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[6] The landscape may not have been important to the Colt's Manufacturing ALJ since it appears from the cases he relied upon, that he decided the case under the First Amendment standard. In any event, he clearly did not articulate a DFR analysis where the factual and legal landscape is critical.

[7] Ironically, the office of General Counsel is itself one of the sources of this "smorgasbord".

[8] Since the last portion of General Counsel's "split personality" Brief essentially lays out the arguments in support of Respondents' position, Respondents will not address that portion of the Brief herein.

CONCLUSION

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

Respectfully submitted,

/s/ Theodore E. Meckler
Theodore E. Meckler, District 4 Counsel
Communications Workers of America
20525 Center Ridge Road, Room 700
Cleveland, Ohio 44116
Phone: (440) 333-6363
FAX: (440) 333-1491
Email: tmeckler@cwa-union.org

CERTIFICATE OF SERVICE

I certify that on the 27th day of March 2009, the Respondents' Reply Brief in Response to General Counsel'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.

John M. Phelan, Esq.
SBC
2000 West SBC Center Drive
Location 4H70
Hoffman Estates, IL 60196

Susan Fernandez
Counsel for the General Counsel
National Labor Relations Board
Region 8
1240 East 9th Street, Room 1695
Cleveland, Ohio 44199-2086

John Skully
Attorney for Charging Party
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160

/s/ Theodore E. Meckler
Theodore E. Meckler
CWA District 4 Counsel
Attorney for Respondents