UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, (Trimas Corp. d/b/a/ Cequent Towing Products) — Case No. 25-CB-8891

and

Douglas Richards, an Individual

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, (Chemtura Corp.) — Case No. 25-CB-9253 (formerly Case 6-CB-11544)

and — Case No. 25-CB-9254 (formerly Case 6-CB-11545)

Ronald Echegaray, an Individual

and

David M. Yost, an Individual

CHARGING PARTIES' REPLY BRIEF IN SUPPORT OF THEIR EXCEPTIONS

Glenn M. Taubman, Esq.
Attorney for Charging Parties
Ronald Echegaray and David Yost

William L. Messenger, Esq.
Attorney for Charging Party Douglas Richards

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Cases ***Page***

Statutes and Other Authorities

Miscellaneous

Pursuant to NLRB Rules and Regulations Section 102.46(h), Charging Parties Douglas Richards, Ronald Echegaray and David Yost jointly file this Reply Brief in support of their Exceptions.

POINT 1: WITHOUT REFERENCE TO THE DUTY OF FAIR REPRESENTATION, THE BOARD MUST DECIDE WHETHER THE USW HAS THE LAWFUL, SUBSTANTIVE AUTHORITY UNDER SECTIONS 7 AND 8 OF THE NLRA TO TRANSFORM AN EMPLOYEE FROM A BECK OBJECTOR INTO A NON-OBJECTOR AGAINST HIS WILL.

The USW has no statutory right to control whether, when, and for how long an employee may exercise his Section 7 right to refrain from supporting the USW. Pattern Makers v. NLRB, 473 U.S. 95 (1985) (employees have a statutory right to resign their union membership at will and without union restriction); CWA v. Beck, 487 U.S. 735 (1988) (employees have a statutory right to refrain from supporting union political and non-representational activities). The Charging Parties' right to refrain from supporting political and ideological activities they find abhorrent is not a benefit bestowed by the grace of the USW, to be restricted or negated at the whim of the union. Instead, it is a statutory right that belongs solely to employees under Sections 7 and 8 of the Act. Just as the union has no statutory authority to restrict resignations under Pattern Makers, it has no statutory authority to restrict or hamper the invocation of Beck objections.

In opposition, the USW argues that the case must be decided on duty of fair representation ("DFR") grounds, and that the General Counsel did not argue a statutory violation theory. (USW Answering Brief at 10-11 & 21-23). These assertions are

erroneous.

First, the Board must decide the statutory issue because if the union's conduct violates the Act itself, it cannot be consistent with the DFR. Adopting a facially unlawful "annual renewal" policy is not within the "wide range of reasonableness" allegedly accorded to the USW under the DFR. ALPA v. O'Neill, 499 U.S. 65 (1991).

Second, because the General Counsel's Answering Brief inexplicably argues both sides of the case, in complete derogation of his prosecutorial function, it is unclear exactly what "theory of the case" he is propounding. In an identical case challenging the Machinists union's "annual renewal" policy, one ALJ described such prosecutorial dithering as surprising and unhelpful.

> The General Counsel, while setting forth arguments pro and con on the annual renewal, essentially takes no position, leaving it for the Board to decide and therefore is of no assistance to me in deciding this case, whereas you would expect the General Counsel to be the first person to tell me why something is unlawful.

L-3 Communications Vertex Aerospace, Case No. 15-CB-5169, JD(ATL)-02-08 (Jan. 9, 2008), Transcript at 120, Appendix to Bench Decision at 12, lines 30-40.

Third, it is unnecessary to speculate about the General Counsel's theory of the case because the Complaint, in fact, alleges a direct violation of Sections 7 and 8 of the Act as a result of the USW's "annual renewal" policy. (Amended Complaint at 6, ¶ 14). This allegation in the Complaint is more than sufficient to raise the issue espoused by the Charging Parties – that the union has no statutory power under Sections 7 and 8 to limit the scope and duration of their Beck objections.

POINT 2: **THE "ANNUAL RENEWAL" POLICY IS ARBITRARY, DISCRIMINATORY AND IN BAD FAITH, AND THE USW HAS NO REASONABLE OR JUSTIFIABLE DEFENSE.**

The USW's responses in its Answering Brief concerning the "arbitrary, discriminatory and bad faith" prongs of the DFR are anemic at best.

ARBITRARY: The USW claims that its "annual renewal" system is not arbitrary, but the union's scheme to tie the "renewal date" to each individual employee's hire date is particularly arbitrary. Why not make the renewal date each employee's birthday or wedding anniversary? Indeed, by giving each employee a separate and obscure renewal date, the union seeks to divide the employees and atomize those who would cooperate and spread the word about the right to resign and become a Beck objector.

A different union, the IAM, declares November to be the time for all employees to object. See California Saw & Knife Works, 320 NLRB 224 (1995); L-3 Commc'ns Vertex Aerospace, Case No. 15-CB-5169, JD (ATL)-02-08 (Jan. 9, 2008). While that scheme is also illegal for the same reasons argued herein, at least objecting nonmembers of the IAM can coordinate their efforts and remind each other that the time to object has arrived. (This coordination, fully protected by Section 7, has led the IAM to try to ban "petition" objections, something that the Board struck down as a violation of employee Section 7 rights. California Saw & Knife Works, 320 NLRB at 235-37). Here, the USW's procedure is even worse, as it effectively bans all "petition" objections by atomizing the opposition and making it impossible for nonmember objectors to share

information or coordinate their efforts.

Thus, the USW acts in an arbitrary manner by purposefully selecting a renewal date that differs for each employee and makes it harder for them to coordinate their objections or remind each other of the renewal deadlines. See e.g., UAW Local 449 (National Metalcrafters), 285 NLRB 1189 (1987), enforced in pertinent part sub nom., UAW v. NLRB, 865 F.2d 791, 796-97 (6th Cir. 1989) (union rules limiting resignations "restrain and coerce the members in the exercise of their right to abstain from union membership and collective activity. . . . [T]hese restrictions serve no legitimate purpose; they only make it difficult for a member to exercise the right to withdraw from the union."); Sheet Metal Workers Local 18 (Rohde Bros.), 298 NLRB 50, 54 (1990) ("Respondent [unions] elevate[ ] form over substance and complicate[ ] resignation procedures to the frustration of statutory rights of employees").

Finally, the fact that the General Counsel never previously chose to attack the annual renewal policy, and may have even written a Memorandum approving it, provides no cover for the USW. See Kysor/Cadillac, 307 NLRB 598, 602 n.4 (1992) (General Counsel memoranda have no precedential value and are not binding); Fun Striders, Inc., 250 NLRB 520, n.1 (1980).

DISCRIMINATORY: The USW's Answering Brief is particularly feeble concerning the discriminatory nature of the "annual renewal" requirement. (USW Answering Brief at 19-20).

For example, the USW's citation to Raley's, 348 NLRB 382, 519 (2006), about comparing "apples to apples," is highly inapposite. The ALJ's discussion in Raley's was about an *employer* providing discriminatory access to a favored union, not about a union's creation of hurdles placed in the path of one class of employees, Beck objectors.

Similarly, the USW's citation to the Labor Management Reporting and Disclosure Act and Section 302(c)(5) of the Labor Management Relations Act does not answer the question posed by the Charging Parties' Brief: "If 'annual renewal' is so beneficial for Beck objectors because it gives them the opportunity to change their minds, why doesn't the USW also require it for union members and for those who sign dues check off authorizations?"

The USW does not deny that it could require its members to annually renew their memberships and its automatic dues payors to annually renew their dues deduction authorizations, so they too would have the opportunity to "change their minds." The USW chooses not to do so, however, because it has a pecuniary interest in keeping the employees as members, and the dues dollars flowing. It chooses to burden the path only of Beck objectors, because they are the union's litigation opponents and are exercising statutory rights under Sections 7 and 8 of the Act that the union opposes. But these burdens are the epitome of unlawful discrimination, as they are based solely upon the employee's choice to support or oppose the union's political and nonrepresentational agenda. See generally American Postal Workers Union, 328 NLRB 281 (1999) (union

discriminates in its representation and grievance processing function when it takes an employee's membership status into account); OCAW Local 5-114 (Colgate-Palmolive Co.), 295 NLRB 742 (1989) (same).

BAD FAITH: The annual renewal policy is in bad faith precisely because it seeks to atomize employees and make it impossible for them to coordinate their opposition to the union's political and ideological activities under Beck. A union acts in "bad faith," in violation of its duty of fair representation, if it puts the union's self-interests before those of the employees it has a duty to exclusively represent. See Aguinaga v. United Food & Commercial Workers Union, 993 F.2d 1463, 1471 (10th Cir. 1993). Here, the USW is placing its pecuniary self-interest in obtaining monies for nonrepresentational activities before the rights and interests of nonmembers to refrain from paying for those activities. The union is burdening the nonmembers' exercise of their Section 7 rights for the sole purpose of dissuading them from exercising those rights and options. This is the epitome of an action taken in bad faith by an exclusive representative.

POINT 3: IN ANY CONTEXT BESIDES "LABOR LAW," THE UNION'S ARGUMENTS WOULD BE CONSIDERED A JOKE AND AN AFFRONT TO CONSUMER PROTECTION AND INDIVIDUAL RIGHTS AND AUTONOMY.

Imagine the outcry from unions, Naderites and "consumer groups" if Bank of America or Chase Bank enforced a rule that even after a consumer closes his account and becomes a non-customer, he could be dunned for fees if he did not "annually renew" his non-customer status. Congress would be up in arms and legislation would be swiftly

passed to stop this obscene, predatory and abusive practice that relies on human inertia to squeeze money from hapless consumers.

This is precisely what the USW is doing here: relying upon "human inertia" to discourage and lessen objections in order to enrich itself. Indeed, numerous studies in the fields of psychology and behavioral economics confirm the power of human inertia: since deviating from the status quo requires action, people often irrationally refrain from choosing options that are of objective benefit to them. Craig Lambert, The Marketplace of Perceptions, Harvard Magazine, March-April 2006, pp. 49-50, *available at* http://www.harvardmagazine.com/on-line/030640.html.

For example, many workers fail to "opt in" to their employer's 401(k) retirement plan even though they are being offered, in essence, "free money." The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement, Employment Benefit Research Institute, Issue Brief #283, July 2005, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_07-20054.pdf. Former U.S. Treasury Secretary (and now Obama czar) Lawrence Summers recognized this fact of life, and stated: "We pushed very hard for companies to choose opt-out [automatic enrollment] 401(k)s rather than opt-in [self-enrollment] 401(k)s. In classical economics, it doesn't matter. But large amounts of empirical evidence show that defaults *do* matter, that people are inertial, and whatever the baseline settings are, they tend to persist." The Marketplace of Perceptions, Harvard Magazine, March-April 2006, pp. 49-50.

For similar reasons, Congress recently passed the "Pension Protection Act of 2006," which resets the default to encourage employers to automatically enroll employees in 401(k) plans, unless they affirmatively opt out. See Pension Protection Act of 2006, 26 U.S.C.A. § 401 (P.L. 109-279, approved Aug. 17, 2006); Department of Labor "Proposed Regulation Relating to Default Investment Alternatives Under Participant Directed Individual Account Plans," 71 Federal Register 187 (Sept. 27, 2006), 29 CFR pt. 2550 at 56806.

Here, the USW chooses to harness the power of human inertia (and perhaps forgetfulness) to burden an entire class of nonmember objectors and line its pockets. As if this conduct is not bad enough in general, it is particularly egregious in this case given the fact that these Charging Parties took the extra step of notifying the union that their objections are to be considered "permanent and continuing in nature." (General Counsel Ex. 2, Attachments C & D; Charging Parties Ex. 1). The union has no excuse for rejecting these "permanent and continuing" objections, all the while hoping that "inertia" will, in the future, cause the employees to forget their objections. See generally Davenport v. Washington Educ. Ass'n., 551 U. S. 177, 183-86 (2007) (the obligation on a nonmember to affirmatively "dissent" in order to pay reduced dues cannot be twisted to provide the union with a right to make the objector pay more than necessary); Lutz v. Machinists, 121 F. Supp. 2d 498 (E.D. Va. 2000); Seidemann v. Bowen, 499 F.3d 119 (2d Cir. 2007); Shea v. Machinists, 154 F.3d 508 (5th Cir. 1998).

CONCLUSION

The ALJ's Decision should be reversed in its entirety. The General Counsel's Complaint should be sustained, and the USW's annual renewal policy declared unlawful. A nationwide expungement, notification, and reimbursement remedy must be ordered, commensurate with the nationwide scope of the USW's violations.

Respectfully submitted,

/s/ Glenn M. Taubman

_____

Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
Attorney for Charging Parties David Yost and
Ronald Echegaray

/s/ William L. Messenger

_____

William L. Messenger, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
Attorney for Charging Party Douglas Richards

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief was electronically filed via the NLRB website. A copy of the foregoing was also electronically filed with Region 25, and was sent via e-mail to Patricia McGruder, Counsel for the General Counsel (Patricia.McGruder@nlrb.gov) and to John Adam, Counsel for the USW, (JGA@martensice.com) this 29th day of October, 2009.

/s/ Glenn M. Taubman

_____

Glenn M. Taubman