

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA AND ITS
LOCAL LODGE No. 376,

and

GEORGE H. GALLY

CASE NOS. 34-CB-2631
AND 34-CB-2632

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (NEW
YORK UNIVERSITY),

and

SOLO J. DOWUONA-HAMMOND, An
Individual

CASE No. 34-CB-3025
(formerly 2-CB-20730)

**CHARGING PARTY GEORGE H. GALLY'S AND SOLO J. DOWUONA-HAMMOND'S
SUPPLEMENTAL BRIEF IN RESPONSE TO BOARD DECISION IN
MACHINISTS LOCAL LODGE 2777 (L-3 COMMUNICATIONS), 355 NLRB No. 174 (2010)**

Charging Parties George H. Gally and Solo J. Dowuona-Hammond hereby submit their Supplemental Brief in Response to the Board Decision in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010), as follows:

I. INTRODUCTION

This matter has now been pending for more than seven years. This case was initiated by the filing of unfair labor practice charges by George H. Gally and Solo J. Dowuona-Hammond in

2003 and 2006, respectively. Charging Parties will not clutter up the Record by restating a procedural history set forth in all of the parties' briefing, including in their Brief in Support of Their Exceptions to the Decision of the Administrative Law Judge, pages 3-6.

The Brief is filed in response to the Board's Order dated 20 October 2010, which directed — in response to Respondents' unopposed Motion for Leave to File Supplemental Brief in Light of *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010) — the filing of briefs by not later than 3 November 2010. Respondents' later sought, and were granted, an extension of time in which to file to not later than 17 November 2010.

II. ARGUMENT

The sole issue before the Board is the legality of Respondents' "annual renewal" policy, alleged by the General Counsel to be a violation of the Act. GC Exs. 1(m), ¶ 13 & 1(x).

In *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010), the Board struck down a similar policy, finding that requiring annual renewal of objections under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), is arbitrary, and therefore violates the union's duty of fair representation ("DFR") under the facts of the case. *L-3 Communications*, 355 NLRB No. 174 *3:

A union's actions are considered arbitrary under the duty of fair representation "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Assn. v. O'Neill*, supra, 499 U.S. at 67, quoting *Ford Motor Co. v. Huffman*, supra, 345 U.S. at 338. The wide range of reasonableness affords the union the discretion to account for the conflicting interests of the employees it represents. *Humphrey v. Moore*, supra, 375 U.S. at 349– 350. In applying the arbitrary standard here, we accordingly consider the balance between the competing interests: the legitimacy of the union's asserted

justifications for its procedures and the extent to which they burden employees' assertion of a *Beck* objection. See *Abrams v. Communications Workers*, 59 F.3d 1373, 1381 (1995) (finding annual renewal requirement not "unduly burdensome"); *Shea v. Machinists*, supra, 154 F.3d at 515 (union's justification for annual renewal requirement weighed against the burden it imposes).

Id. at *3 The Board's decision in *L-3 Communications* therefore, by its terms, requires a case-by-case balancing analysis between the "legitimacy" of the union's purported justifications, and the burden that they impose.¹

The Board first discussed the fact that "the annual renewal requirement poses some burden ... on potential objectors." *Id.* While declaring it "a modest one," the Board nevertheless held that it must consider not only the burden imposed upon the employees, but also the fact that, "While the simple mailing of an objection poses a minimal burden, remembering to do so is also a burden and, further, the failure to remember engenders a burden of more import in this case — loss of the opportunity to object for 11 months (until the renewal period recurs)." *Id.* at 4.

Applying this analysis, the Board considered and rejected the "three justifications" put forth by the union in that case:

the requirement ensures that the Unions have valid addresses in order to supply objectors with required financial information; it provides employees an opportunity to change their mind about objecting; and it is reasonable in light of favorable court decisions and the absence of a contrary Board ruling.

Id. Specifically, as to the first justification, the Board rightly noted the "alternative means" possessed by a union for obtaining valid addresses, primarily because — as the monopoly bargaining representative of the employees — it possesses "a right to obtain the addresses of all unit employees from their employer." *Id.* **citing**, *River Oak Center for Children*, 345 NLRB

¹ The Board reversed the administrative law judge's finding that the policy also was discriminatory. 355 NLRB No. 174 at *6-8.

1335, 1335 (2005) (“It is well established that the addresses ... of bargaining unit employees are presumptively relevant for purposes of collective bargaining and must be furnished upon request of the bargaining representative”). The Board rejected the second stated objective of its policy — to “provide employees an opportunity to change their mind about objecting” — even more promptly, noting that “The ability of objectors to change their position is not meaningfully advanced by an annual renewal requirement, however,” and “find[ing] no rational relationship between the legitimate interest in permitting employees to change their minds and requiring annual renewal of expressly continuing objections in this case.” *Id.* at *5 (footnote omitted). Likewise, the third cited rationale for the policy — “favorable court decisions and the absence of a contrary Board ruling” — was rejected by the Board. *Id.*

In light of the justifications for their policy offered by Respondents in this case, faithful application of *L-3 Communications* mandates an identical outcome. Indeed, the two justifications offered by Respondents here are remarkably similar to those offered to — and rejected by — the Board in *L-3 Communications*.

The first justification is more of a caricature of Charging Parties’ argument and the default rule mandated in *L-3 Communications* than a serious legal argument: an “alternative *ad hoc* practice” “according each of the many objection letters its own varying effective period based on the Union’s interpretation of each objection letter’s intent with regard to the effective period,” is declared “highly impractical.” Brief in Support of Respondents’ Exceptions at 14. Of course, that is not what Respondents advocate at all. Moreover, the Board rejected a similar argument in *L-3 Communications*:

Before the judge, the Unions also argued that an annual renewal requirement relieved them of the burden of construing the intentions of rank-and-file employees and, additionally, of keeping track of the differing periods during which employees might wish their objection to continue. But even a system that requires annual renewal leaves a union having to determine the intentions of employees based on possibly ambiguous, written instructions, *i.e.*, asking did the employee wish to object or not? Moreover, unions can minimize this burden by giving employees clear instructions concerning what they need to say to object and, alternatively, to make a continuing objection.

355 NLRB No. 174 at *6 (footnote omitted).

The second justification argued by Respondents is a virtual mirror-image of the third justification offered in *L-3 Communications*, and rejected by the Board: that the “factual and legal landscape” permit such a policy. Brief in Support of Respondents’ Exceptions at 16-20.

There, the Board rejected the very precedent upon which Respondents here rely, and held that:

While we evaluate the Unions’ conduct “in light of the factual and legal landscape at the time of the union’s actions,” **prior nonbinding precedent is not a substitute for a valid union rationale for the annual renewal requirement.** Acceptance of the alternative construction of the relevance of the “legal landscape” advanced by the Union would freeze duty-of-fair-representation jurisprudence and prevent its evolution in light of changing circumstances and developing views of desirable Federal labor policy.

355 NLRB No. 174 at *5-6 (emphasis added).

III. CONCLUSION

For the reasons stated herein, the Board should proceed with adjudication of this case. Faithful application of its decision in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010), requires that it fully affirm the Decision and Order of Administrative Law Judge Joel P. Biblowitz except as to remedies. For the reasons stated in Charging Parties’

Exceptions, Respondents should be ordered to provide a complete nationwide and appropriately retrospective remedy, commensurate with the nationwide scope of Respondent UAW's violations.

DATED: 22 November 2010

Respectfully submitted,

/s/ W. James Young

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **CHARGING PARTY GEORGE H. GALLY'S AND SOLO J. DOWUONA-HAMMOND'S SUPPLEMENTAL BRIEF IN RESPONSE TO BOARD DECISION IN *MACHINISTS LOCAL LODGE 2777 (L-3 COMMUNICATIONS)*, 355 NLRB No. 174 (2010)** were deposited in the United States Mail, first class postage prepaid, addressed to:

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