UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
(Trimas Corporation d/b/a Cequent Towing Products)
and Case 25-CB-8891

DOUGLAS RICHARDS,
An Individual

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
(Chemtura Corporation)
and Case 25-CB-9253
(formerly Case 6-CB-11544)

RONALD R. ECHEGARAY,
An Individual
and Case 25-CB-9254
(formerly Case 6-CB-11545)

DAVID M. YOST,
An Individual.
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RESPONDENT USW'S BRIEF IN OPPOSITION TO CHARGING PARTIES DAVID YOST, RONALD ECHEGARAY AND DOUGLAS RICHARDS' RECONSIDERATION MOTION

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BRIEF OPPOSING CHARGING PARTIES' RECONISDERATION MOTION

On August 16, 2011, the Board reversed the administrative law judge and held that USW violated the National Labor Relations Act by requiring *Beck* objectors to annually renew their objector's status. *USW (Cequent Towing Products)*, 357 NLRB No. 48 (2011). While the USW does not concede that the Board correctly decided the issue, there is, in any event, no basis for Charging Parties' motion for reconsideration, which relates to the remedies. In addition to directing the USW to remedy any alleged violations suffered by the Charging Parties, the Board's remedy included prospective nationwide relief. Specifically, the Board directed that the USW must cease and desist from requiring "nonmember employees, who are covered by a collective-bargaining agreement containing a union security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis under the Union's existing annual renewal procedure." The Board also ordered the USW to take the following affirmative action:

> (a) Rescind the existing requirement that objecting nonmember employees renew their objection on an annual basis.
>
> (b) Notify nonmember employees who are subject to a union-security clause that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the Respondent's magazine.
>
> (c) Recognize Ronald R. Echegaray, David M. Yost and Douglas Richards as continuing objectors and continue to recognize their objector status until any revoke his objection or the Respondent implements a lawful annual renewal requirement, whichever occurs earlier.

While any individualized concerns that Charging Parties Echegaray, Yost, and Richards may have possessed are encompassed by the Board's remedy, they nevertheless seek a "nation-wide complete nationwide retrospective remedy" dating back either six months prior to the first ULP charge being filed, or in the alternative, from August 27, 2010, the date *Machinists Local*

Lodge 2777 (L-3 Communications), 355 NLRB No. 174 (2010) was issued. There is no basis either for Charging Parties' extraordinary request or their misleading complaint that the Board failed to consider their Exception No. 4 concerning the scope of the remedy. *See* Charging Parties' Motion For Reconsideration and Memorandum in Support at 2 (complaining that "the Board utterly failed to address Charging Parties' Exception No. 4 or the need for a nationwide 'similarly situated' remedy").

As explained below, Charging Parties' motion for reconsideration as to the remedy fails to present "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

First, the remedy imposed in the USW case is not an abuse of discretion based on the violation found. Section 10(c) of the Act vests in the Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898-899 (1984). "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938).[1]

[1]Section 10(c) of the Act states in part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act…"

In other words, the Board has broad discretion to craft an appropriate remedy based on the facts of each case. *Excel Case Ready*, 334 NLRB 4, 5 (2001). This broad discretion allows the Board to fashion "a just remedy" to fit the circumstances of each case it confronts. *Maramont Corp*., 317 NLRB 1035, 1037 (1995). Charging Parties do not show that the Board abused its discretion or that the remedy is inadequate as to them. The hiring hall and other select cases cited by Charging Parties at pages 4 and 5 of their pleading do not show that the remedy in this case was an abuse of discretion or error.

Second, as this case involves a dispute concerning the USW's annual renewal requirement, the prospective remedy imposed is supported by *Machinists Local Lodge 2777 (L-3 Communications),* 355 NLRB No. 174 (08/27/2010), another case involving another union's utilization of an annual renewal requirement. *L-3 Communications* found the Machinist's annual requirement unlawful but the Board did not adopt a *per se* rule concerning such provisions. Rather, the Board emphasized that it would evaluate such requirements on a case-by-case basis to determine "whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors." *Id*., slip op. at 1.

L-3 Communications rejected a retrospective nationwide remedy, which had been asserted by the charging parties in that case, because past federal court precedents upheld the "annual renewal" policy; the Board was implementing a "new" rule in contravention of those prior precedents; and that the union could not be faulted for failing to anticipate this "new" Board policy. The Board stated:

> Although we concluded above that the "legal landscape" was not relevant to whether a breach of the duty of fair representation occurred in this case, it is relevant to our choice of remedy. In light of consistent court approval of the requirement under the Act, the lack of any contrary indication by the Board, and the General Counsel's previous advice approving the requirement, the Unions could reasonably have believed that the requirement was lawful.
> *Id*., slip op. at 9 (footnote omitted).

USW should not be treated differently just because the Board's ruling was issued after *L-3 Communications*. Charging Parties argue, in essence, that the USW should have known it was going to lose after *L-3 Communications*. But that argument is specious. The Board announced a new case-by-case rule, not a *per se* rule like that sought by the Charging Parties. In addition, USW was the only union to have prevailed before an ALJ. Thus, the USW reasonably believed that the reasoning set forth in the ALJD here could have been squared with *L-3 Communications*.

Moreover, between the August 27, 2010 *L-3 Communications* decision and the August 16, 2011 *USW (Cequent Towing Products)* decision, the Board issued two decisions applying its case-by-case analysis, one upholding annual renewal requirement, the other finding it unlawful. *Auto Workers Local 376 (Colt's Mfg. Co.*), 356 NLRB No. 164 (05/27/2011) applied the standard announced in *L-3 Communications*, and found that the unions' annual *Beck* renewal requirement was lawful because the unions there had taken steps to significantly minimize the burden the requirement imposed on objectors. However, in *IBEW Local 34*, 357 NLRB No. 45 (08/10/2011), the Board held that another annual renewal requirement was unlawful, reasoning: "We agree with the judge that Local 34 violated its duty of fair representation and Section 8(b)(1)(A) of the Act by maintaining and enforcing a requirement that nonmember employees represented by the Union renew annually their objections filed under *Communications Workers of America v. Beck*. In this respect, we find that the case is governed by *L-3 Communications*, 355 NLRB No. 174 (2010), which was issued after the judge's decision."

Given the fact that it had received a favorable ALJD, and particularly in light of the fact that the Board had not articulated any bright line rules in its prior cases, it was reasonable for USW to believe its annual renewal rule might be found lawful or to other otherwise wait for the Board to review the ALJ decision. Consequently, Charging Parties' motion for reconsideration as to the remedy fails to present "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. The relief granted to the three Charging Parties is adequate and ordering prospective nationwide relief is well within the Board's discretion and consistent with the law regarding whether the Board will retroactively apply a new rule.

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On September 12, 2011 I e-filed the foregoing Respondent brief to:

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