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	

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC AND COMMUNICATIONS WORKERS OF AMERICA LOCAL 4309 AND BRIEF IN SUPPORT

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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EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENTS CWA AND CWA LOCAL 4309

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondents, Communications Workers of America, AFL-CIO, CLC ("CWA") and CWA Local 4309 take exception to the Supplemental Decision of Administrative Law Judge ("ALJ") John T. Clark issued in this case on September 17, 2012 as follows:

1. Respondents take exception to the ALJ's failure to factually distinguish *International Ass'n of Machinists (L-3 Communications),* 355 NLRB 1062 (2010) where the objector expressly sought a continuing objection, from this case where the charging party did not seek to have her objection continue from year to year, and included language in her notice from which the Union could reasonably infer that she wanted her objection to last only one year, unless renewed. (Supplemental Decision, 10, lines 18-32)

2. Respondents take exception to the ALJ's imposition of a retroactive remedy against Respondents by ordering them to change their *Beck* policy to comply with the Board's decision in *L-3 Communications,* when in fact they had already changed their *Beck* policy to comply with *L-3 Communications*. (Supplemental Decision, 11, lines 32-36; 12, lines 1-2)

3. Respondents take exception to the ALJ's conclusion that the legal landscape in effect at the time of the annual renewal policy did not provide a legitimate rationale for the Union's maintenance of its former policy. (Supplemental Decision, 10, lines 1-12)

4. Respondents take exception to the ALJ's finding that the Union's need to maintain accurate addresses for objectors was not a rational business justification for the former annual renewal requirement. (Supplemental Decision, 8, lines 39-40)

5. Respondents take exception to the ALJ's finding that the need to avoid the added administrative burden associated with having to carefully parse each objector letter to determine whether the objector wanted the objection to continue from year to year, was not a rational business justification for the former annual renewal requirement. (Supplemental Decision, 9, lines 4-7)

6. Respondents take exception to the ALJ's finding that the benefit of being able to ascertain the perceptions of bargaining unit members in evaluating the Union's recent performance, was not a rational business justification for the former annual renewal requirement. (Supplemental Decision, 9, lines 44-45)

The grounds for the above exceptions are explained in the brief that follows.

BRIEF IN SUPPORT OF EXCEPTIONS

STATEMENT OF THE FACTS AND OF THE CASE

Acting on a charge filed on January 17, 2006 by charging party, Sanda Ilias ("Ilias" or "charging party") and an amended charge filed on January 30, 2006, the NLRB General Counsel issued the original complaint in this case on about May 30, 2008. (Exhibits 1 (a), (c), and (e) of the formal documents.) Respondents, Communications Workers of America ("CWA") and CWA, Local 4309 ("Local 4309") (jointly "Respondents" or "the Union"), filed an answer on about June 27, 2008. (Exhibit 1 (g) of the formal documents.) General Counsel filed an amended complaint on about August 21, 2008. (Exhibit 1 (h) of the formal documents.) Respondents filed an answer to the amended complaint on September 15, 2008. (Exhibit 1 (j) of the formal documents.)

The amended complaint alleged that Respondents committed an unfair labor practice, violating Section 8 (b) (1) (A) of the Act, by maintaining and enforcing a rule that requires *Beck [Communications Workers of America v. Beck*, 487 U.S. 735(1988)] objectors to annually renew their objection to paying full dues and that Ilias did not renew her objection for the 2005 to 2006 "objector" year or at any time after she resigned her union membership on September 24, 2004. (paragraphs 6 (D), 7 (A) and 7 (B) of the amended complaint, Exhibit 1 (h) of the formal documents.)

At all relevant times charging party was employed as a customer service representative. by AT&T or its predecessors in Cleveland, Ohio. She began working for AT&T's predecessor, Ameritech in 1997. (TR 13, line 22 to TR 14, line 4; TR 15, lines 9-19.) In about 2000 or 2001, Ameritech was acquired by SBC which also later acquired AT&T and then changed its name to AT&T. (TR 14, lines 5-18.) In September 2002, Ilias left her employment with SBC. She was

rehired by SBC after approximately one year. Since then her employment was continuous. (TR 14, line 19 to TR 15, line 8.)

When she returned to work in 2003, Ilias was a member of the Union. (TR 15, lines 20-25.) By letter dated September 30, 2004, she resigned her membership and also gave notice of her intent to become a *Beck* objector. (TR 16, lines 1-20; G.C. Exhibit 6.) Her letter did not indicate that she wanted her objection be treated as continuing. In fact, as will be discussed, *infra* her letter included language from which the Union could reasonably conclude that she did not want her objection to be a continuing one.

A hearing was held before ALJ Wallace H. Nations on October 27, 2008. After the hearing Judge Nations found that "the reasons for the rule advanced by Respondents pale with the burden placed on objectors…" He went on to hold "that such reasons are not a legitimate business justification for the rule." (Initial Decision 12, line 51; through 13, line 1.) In addition, he concluded that Respondents' "renewal requirement is arbitrary, unlawful, and in violation of Section 8 (b) (1) (A) of the Act." (Initial Decision 12, line 51; through 13, line 2.)

Respondents filed timely exceptions to Judge Nations' decision bringing the matter before the Board. While this case was pending, the Board released two decisions addressing the underlying issue in this case, i.e. whether a union's annual renewal policy violated the Act. *International Ass'n of Machinists, Local 2777 (L-3 Communications),* 355 NLRB 1062 (2010), *(*hereinafter, *"L-3 Communications"*) and *International Union, United Auto Worker (Colt's Mfg),* 356 NLRB No. 164 (2011), (hereinafter "*Colt's Mfg.").* In *L-3 Communications* the Board found that the union's policy at issue in that case violated the Act. In *Colt's Mfg.* the Board found that the union's policy at issue in that case did not violate the Act. Soon after the Board issued its decision in *L-3 Communications,* CWA changed its *Beck* policy to be in full

compliance with *L-3 Communications.* The old policy required that objections be renewed on an annual basis. The new policy allowed for objections to be on a continuing basis. (See Respondents' Motion to Reopen or Supplement the Record and Respondents' Board Exhibits attached thereto. That motion is being filed contemporaneously with these Exceptions.)

On October 26, 2011, the Board issued an order remanding this case to the Administrative Law Judge for further consideration in light of *L-3 Communications* and *Colt's Mfg.* Since Judge Nations had retired, the case was assigned to Administrative Law Judge John T. Clark by Chief Administrative Law Judge Robert Giannasi.

According to the Board's remand order Judge Clark was to prepare a supplemental decision after consideration of the briefs submitted by all the parties. All parties agreed with Judge Clark that the Board's remand order offered no basis to reopen the evidentiary record at that juncture. (Supplemental Decision, 2, lines 37-39) All parties then briefed the issues on remand. Respondents' Brief attached a copy of its Counsel's May 9th letter to Board, along with Helen Gibson's ("Gibson") Affidavit, and the three policy statements. Gibson was the Administrator of CWA's Office of Special Programs.

On September 17, 2012 Judge Clark issued his Supplemental Decision and this matter was transferred to the Board. In a triumph of form over substance. Judge Clark refused to consider the fact that the Union had already changed its policy in light of *L-3 Communications*. (Supplemental Decision, at 2, line 40) Consequently, the Supplemental Decision completely ignored this fact. Respondents now file these exceptions to the Supplemental Decision.

QUESTIONS PRESENTED

1. Whether a Union acts so far outside the wide range of reasonableness so as to be deemed irrational, when a *Beck* objector who does not express a desire for her objection to continue from year to year, is treated as an objector for one year, until she renews her objection. (This question relates to Exception no.1.)

2. Whether a Union acts so far outside the wide range of reasonableness so to be deemed irrational when a *Beck* objector's notice, which can reasonably be interpreted as seeking an objection for only one year unless renewed, is treated as an objection for one year, until renewed. (This question relates to Exception no.1.)

3. Whether a Union which had already changed its *Beck* policy to comply with the teachings of *L-3 Communications* should have been retroactively ordered to change its *Beck* policy to comply with *L-3 Communications.* (This question relates to Exception no. 2.)

4. Whether a Union's prudent reliance on past authoritative legal opinions is a reasonable justification for having continued its annual renewal policy. (This question relates to Exception no. 3.)

5. Whether a Union's former policy of having *Beck* objectors annually renew their objection can fairly be characterized as so far outside the wide range of reasonableness as to be deemed irrational, in light of the legal landscape at the time, which included three (3) authoritative

decisions in cases in which the Union was a party, all of which determined that its annual renewal policy was lawful. (This question relates to Exception no. 3.)

6. Whether a Union's former annual renewal policy, which closely tracks the General Counsel's Published *Beck* Guidelines, amounts to a breach of the duty of fair representation. (This question relates to Exception no. 3.)

7. Whether the benefit a Union receives from its former annual renewal policy in terms of maintaining accurate addresses of objectors was a reasonable justification for continuing that policy. (This question relates to Exception no. 4.)

8. Whether the added administrative burden required to carefully parse each objectors' notice to determine whether that objector wishes to continue in that status from year to year, was a reasonable justification for continuing the annual renewal policy. (This question relates to Exception no. 5.)

9. Whether the benefit a Union received from its former annual renewal requirement, which helped the Union ascertain how its recent performance was being perceived by members, was a reasonable justification for continuing that policy. (This question relates to Exception no. 6.)

ARGUMENT

I. THE ALJ ERRED BY FAILING TO DISTINGUISH *L-3 COMMUNICATIONS,* WHERE THE OBJECTOR EXPRESSLY SOUGHT A CONTINUING OBJECTION, FROM THIS CASE WHERE CHARGING PARTY DID NOT SPECIFY THAT SHE WAS SEEKING A CONTINUING OBJECTION, AND EVEN SUGGESTED THAT SHE WANTED HER OBJECTION TO LAST FOR ONLY ONE YEAR.

In *L-3 Communications)* the Board decided the underlying issue in this case, i.e. whether a union commits an unfair labor practice by requiring *Beck* objectors to annually renew their objection. The Board majority held that the IAM's annual renewal policy at issue in that case violated the Act. Chairman Pearce, who was then Member Pearce, dissented from that holding. The Board majority, as well as Chairman Pearce, also made it clear that the appropriateness of a union's *Beck* procedures must be considered on a case by case basis.

In *L-3 Communications* the Board noted that the duty of fair representation does not require unions to assume that a nonmember desires an objection to be continuing if, after being given clear instructions concerning how to express a continuing objection, the employee does not do so. *Id.,* at 1067. In this case the charging party did not indicate a desire that her objection be treated as continuing. In fact, as will be discussed, this charging party included language in her notice which the union could reasonably read as indicating that she did not want her objection to be a continuing one.

It is also clear that the union did not give her instructions on how to express a continuing objection because it did not have a policy which recognized continuing objections. Of course, at the time in question the legal landscape within which the union was operating specifically authorized CWA's annual notice requirement. The legal landscape on this issue included *Abrams*

v. Communications Workers, 59 F.3d 1373 (D.C. Cir. 1995)[1], and a plethora of Supreme Court decisions on which it was premised.

Abrams involved the same CWA policy that was at issue in this case. Under that policy the *Beck* objector had to affirmatively object each year. *Abrams*, at 1376. Continuing objections were not recognized. The *Abrams* Court found that CWA's annual renewal requirement was lawful, because "dissent is not to be presumed -- it must affirmatively be made known to the Union by the dissenting party". *Id*., at 1382 citing *Machinists v Street,* 367 U.S. 740, 774 (1961); see also *Chicago Teachers Union Local 1 v. Hudson*, 475 U. S. 292, 306 fn. 16 (1986); *Abood v Detroit Board of Education*, 431 U.S. 209, 238 (1977); and *Railway Clerks v. Allen,* 373 U.S. 113, 119 (1963).

In *L-3 Communications* the Board addressed this proposition, distinguishing *Abrams* and rejecting application of its rationale because the charging party "not only made his objection known, but expressly stated that he wished it to be a continuing one." *Id*., at 1067.[2] By contrast, in this case charging party did not expressly inform the union that she wished her objection to continue from year to year. Her September 30, 2004 notice to the union not only said nothing about wanting her objection to continue, but also affirmatively cited *Abrams*. (General Counsel Exhibit 6) A fair reading of charging party's citation of *Abrams,* was that she was acquiescing in the union's annual renewal policy, which *Abrams* specifically approved. Thus, it was reasonable for the Union to conclude that she did not want her objection to continue from year to year. This case is clearly distinguishable from *L-3 Communications* in that regard.

[1] Since CWA was the Defendant in *Abrams,* that decision naturally informed its conduct in a much more direct and specific fashion than had it not been a party.

[2] In two subsequent cases where the Board majority found a violation of the Act, the charging parties also expressly stated in writing that they wanted their objections to be on a continuing basis. *International Brotherhood of Electrical Workers, Local Union No. 34, AFL–CIO (Lugo),* 357 NLRB No. 45 (2011); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Trimas Corporation)* 357 NLRB No. 48 (2011).

Judge Clark recognized that charging party did not make a request for a continuing objection. However, he found that key factual distinction to be of no consequence based upon the following synopsis from *L-3 Communications,* at 1069:

> [A]bsent a more compelling rationale or other procedures that minimize the burden of annual objection not present in this case, a union violates its duty of fair representation if it declines to honor nonmember employees' express, written statement to the union that they object on a continuing basis to supporting union activities not related to collective bargaining and contract administration. If a union provides a written explanation of the consequences of submitting a simple objection in contrast to a continuing objection, the union does not violate its duty by honoring simple objections for only 1 year. In addition, a union need not honor requests to object for periods of time other than 1 year and continuously. (Supplemental Decision, 10, lines 18-32)

With all due respect, the language Judge Clark relied on does not support the conclusion he reached that CWA violated its duty of fair representation. In this case there was no "express, written statement" indicating that charging party objected "on a continuing basis." The Board did not hold that a union operating within the confines of the pre *L-3 Communications* legal landscape, especially this union which had its policy specifically approved by *Abrams*, violates its duty of fair representation when it does not provide a written explanation of the consequences of submitting a simple objection, in contrast to a continuing one. Further, in this case unlike *L-3 Communications*, not only did charging party not express a desire for a continuing objection, but her notice to the union could fairly be read to be saying that consistent with *Abrams* she was only seeking to have her objection continue for one year. In the words of the *L-3* Board CWA did not violate its duty by honoring charging party's simple objection for only 1 year.

Because of these vastly different facts this case is clearly distinguishable from *L-3 Communications.* The ALJ's failure to factually distinguish this case was erroneous and must be overturned.

II. THE ALJ ERRED BY IMPOSING A RETROACTIVE REMEDY ON RESPONDENTS, ALTHOUGH THEY HAD ALREADY ELIMINATED THE ANNUAL RENEWAL REQUIREMENT PRIOR TO THE TIME THE ORDER TO RESCIND IT WAS ISSUED.

Soon after the Board's decision in *L-3 Communications* was issued, CWA changed its *Beck* objector policy to comply with *L-3 Communications.* The new policy no longer mandates annual objections. It also clearly allows for objections to continue from year to year without the need for the objector to take any further action. (See Board Exhibits 2 and 4 attached to Respondents' Motion to Re-open or Supplement Record filed contemporaneously with these Exceptions.)

In *L-3 Communications* the Board declined to take remedial action on a retroactive basis. The Board concluded that while 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." *L-3 Communications*, at 1069. The Board went on to note that due to "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.* Accordingly, the Board declined to give retroactive application to its ruling. *Id.* Subsequent Board decisions have held to that same view as to remedy. *International Brotherhood of Electrical Workers, Local Union No. 34, AFL–CIO (Lugo), supra*; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Trimas Corporation), supra.*

In this case CWA changed its policy to comply with *L-3 Communications* by specifically authorizing continuing objections for objectors before the Board remanded this matter to the ALJ

and well before the ALJ issued his Supplemental Decision. If the remedy to be imposed were to be prospective only, there would be no need to order CWA to change its policy to comply with *L-3 Communications,* since it had already done so on its own. Nonetheless, the ALJ issued an order requiring Respondents, *inter alia,* to "cease and desist from requiring 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" and "to rescind the requirement that objecting nonmember employees renew their objections on an annual basis." (Supplemental Decision, 11, lines 32-36, 12, lines 1-2) The language of the order in this case was nearly identical to the order in *L-3 Communications. Id.,* at 1069.

The union in *L-3 Communications* had obviously not yet changed its policy to comply with the decision when that decision was handed down. So in issuing its order the Board was acting only prospectively. In this case the change in policy had already occurred before the ALJ's order was issued. If the order were to be prospective only, there would be no need to order the union to do what it had already done. Ironically, the ALJ recognized that *L-3 Communications* limited the remedy to prospective relief only. This lead him to correctly conclude that any make-whole remedy or any relief extending beyond this one charging party would be retroactive and contrary to the teachings of *L-3 Communications*. However, he failed to apply this lesson to the policy itself ,which had already been changed by the union. In essence, the ALJ's Supplemental Decision punished CWA for its behavior in not waiting to be ordered to comply with *L-3 Communications*, and instead being proactive and changing the policy itself, once the Board issued its decision in that case. One would certainly think it would not be advantageous for the Board to discourage that sort of "good citizen" conduct.

Under the circumstances of this case the ALJ's imposition of a clearly retroactive remedy was erroneous and must be overturned.

III. WHEN THE ANNUAL RENEWAL REQUIREMENT WAS IN EFFECT IT RATIONALLY SERVED THE UNION'S LEGITIMATE INTERESTS AND WAS WELL SUPPORTED BY LEGAL PRECEDENT, AS SUCH THE ALJ ERRED BY FINDING THAT THE UNION'S FORMER POLICY WAS ARBITRARY, DISCRIMINATORY, OR IN BAD FAITH.

CWA's Special Programs Administrator (Helen Gibson), testified that one of CWA's key justifications for maintaining its annual renewal was the Union's good faith reliance on various authoritative legal determinations. (TR 80, line 12 to TR 82, line 20) Gibson specifically named three (3) cases where CWA's annual renewal practice was at issue. CWA's actions were guided by the results in these decisions, all of which stand for the proposition that the specific practice followed by CWA was lawful. *Abrams v. Communications Workers of America*, *supra*; *White v. Communications Workers of America*, 370 F.3d 346 (3rd Cir. 2004); and *Communications Workers Local 9403 (Pacific Bell)*, 322 NLRB 142 (1996)[3], affirmed in *Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997). (TR 80, line 15 to TR 82, line 12)

Virtually every other court to have considered this question under the NLRA had held that a Union does not breach the DFR under *Beck* by implementing an annual renewal procedure. *Price v. International Union, UAW*, 722 F. Supp. 933, 938 & n. 10 (D. Conn. 1989); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192 (D. Md. 1990), aff'd in part and rev'd in part on other grounds, 946 F.2d 283 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1992). CWA's reliance on this nearly universal approval of internal union procedures for *Beck* objectors which included an annual renewal requirement, was well founded.

[3] While the Board did not necessarily approve the annual renewal policies of all Unions in this case, it clearly informed CWA that its specific practices passed the Board's muster.

In addition, in several formal Memorandums, the Office of General Counsel consistently adhered to the position that it is not unlawful for a union to require nonmembers to renew their *Beck* objections each year. (G.C. 88-14 at p. 3; G.C. 92-5, at p. 4; G.C. 01-04, at p. 3) Further, in *California Saw & Knife Works*, 320 NLRB 224, 236 n. 62 (1995) the Board noted that the "requirement that *Beck* objections be registered annually is not alleged to be unlawful by the General Counsel" and "that courts have approved the annual objection requirement".

As Chairman Pearce noted in his dissent in *L-3 Communications,* "[p]erhaps the most compelling support for the conclusion that the Unions' actions were not irrational or arbitrary is the legal landscape in place at the time the Unions enforced the annual renewal requirement." *Id.,*at 1076. He specifically referenced authorities such as *Abrams* and the General Counsel's Memorandums.

The ALJ did not believe that CWA's reliance on these past authoritative opinions provided a valid justification for maintaining the annual renewal requirement because he found that reliance on cases to which the Board was not a party would not preclude the Board's independent judgment. (Supplemental Decision, 10, lines 1-12) With all due respect, the ALJ's conclusion is besides the point. First, the Board was a party to at least two of the above cited cases. Further, and more importantly, the question is not whether the Board is precluded from exercising its independent judgment on matters within its jurisdiction. Surely it has that authority. The question is whether the union's reliance on this vast weight of authority was an indication of arbitrary, discriminatory or bad faith behavior. It is hard to conceive of any reasonable argument in support of that proposition.

Finally, it must be noted that once the legal landscape changed with the issuance of the Board's decision in *L-3 Communications,* the Union changed its policy. This surely shows that

the Union's actions were guided and continue to be guided by its reasonable interpretation of the existing legal framework. Acting in such a prudent fashion cannot realistically be characterized as so far outside the wide range of reasonableness as to be deemed irrational. Yet this is the standard by which the Union's conduct must be evaluated in determining whether or not it violated its duty of fair representation. *Air Line Pilots v. O'Neill,* 499 U.S. 65 (1991).

The ALJ's determination was erroneous and must be overturned.

IV. THE UNION'S NEED TO MAINTAIN ACCURATE ADDRESSES FOR OBJECTORS WAS A RATIONAL BUSINESS JUSTIFICATION FOR THE FORMER ANNUAL RENEWAL REQUIREMENT.

One business justification for the Union's challenged former policy was that it assisted the Union in maintaining the best possible mailing addresses for its *Beck* objectors. The Union generally receives addresses for all bargaining unit members, including objectors, in an electronic format from the employer. (TR 82, line 18 to TR 83, line 2) Those electronic records are necessarily already four (4) to six (6) weeks dated when they are received. (TR 71, lines 2-18) In addition to being dated, they are not always accurate. (TR 83, lines 3-5) The ALJ found this justification did not provide a legitimate rationale for an annual renewal requirement. (Supplemental Decision, 8 , lines 39-40)

With all due respect his reasoning was off the mark. First, he questioned "why an electronically mailed computerized list would take 4-6 to arrive at its destination." (Supplemental Decision, 8 , lines 30-32) The union did not contend that the addresses were out of date due to the time it took to transmit the list electronically, but because the data that was collected and placed into the list was often 4-6 weeks behind real time. This lag time is realistic, given that the employee would have to take some affirmative action to provide a new address to the employer. This step would undoubtedly generate the greatest delays in the process. Once the

employee took that step the new address would have to be transmitted to the right place within the employer's large operation. It would then have to be duly entered into the Company's data base before being shared with the union. A time lag of 4-6 weeks is not unrealistic in such circumstances. Nor was any evidence offered to contradict the union's contention in this regard.

The ALJ also concluded that it was counterintuitive to suggest that objectors would not make every effort to make sure that the union had its correct address. (Supplemental Decision, 8, lines 36-39) That reasoning actually supports the union in this regard. The union contended that it could maintain better addresses by direct contact with the objectors, rather than depending solely on the information supplied to it by the employer. There was no evidence to show that objectors would be aware that the union's knowledge of their addresses was dependent upon information they supplied to the Company. That in fact would be counterintuitive. Objectors would be much more likely to think that direct contact with the union would obtain information about their addresses and any changes therein. For the union to have a correct address to be able to provide a dues rebate would only be important at the time of the year shortly after the annual objections needed to be renewed. So the very instinctthat the ALJ found not to be served by the annual renewal requirement , i.e. the desire for the rebate, would in fact have been served by it.

It was a much more prudent practice for the Union to obtain the most current and accurate addresses on an annual basis just before the beginning of each objector year. This meant obtaining such information directly from "the horse's mouth". Experience and common sense taught CWA that addresses obtained in that manner are most likely to be accurate. (TR 83, lines 6-11)

As Chairman Pearce noted in his dissent in *L-3 Communications,"*the Unions' reasonable assertion that the annuaal renewal requirement serves their legitimate interest in obtaining *Beck*

objectors' accurate addresses if far from irrational." *Id*., at 1075. He also pointed out that "the existence of a potential alternative in no way demonstrates that the Unions' preference for obtaining addresses from the employees themselves was arbitrary." *Ibid.* Similar logic should have been applied in this case.

This was perfectly valid business justification for the Union's continued maintainenance of its annual renewal practice. The ALJ's decision to the contrary should be overturned.

V. THE UNION'S NEED TO AVOID THE ADDED ADMINISTRATIVE BURDEN ASSOCIATED WITH HAVING TO CAREFULLY PARSE EACH OBJECTOR LETTER TO DETERMINE WHETHER THE OBJECTOR WANTED THE OBJECTION TO CONTINUE FROM YEAR TO YEAR, WAS A RATIONAL BUSINESS JUSTIFICATION FOR THE FORMER ANNUAL RENEWAL REQUIREMENT.

The Union does not carefully scrutinize and parse each word in every objector letter that it receives because it is not necessary to do so and because this practice would significantly increase its administrative burden. (TR 78, lines 3-8) At the present level of scrutiny a clerical employee is perfectly capable of reviewing the letters. (TR 78, lines 9-24)

If the Union had to carefully scrutinize each objector's notice to determine whether or not the objector was seeking to have his/her objection continue into perpetuity, its administrative burden would be significantly increased. The Union would be forced to hire an employee with a higher level of judgment than the clerk who currently reviews these letters. In addition to the added cost that would invariably be involved with such a personnel change, it also would take far more time to review these letters. (TR 78, line 25 to TR 79, line 22)

The ALJ paid little heed to the Union's uncontradicted testimony on this issue. (Supplemental Decision, 8, lines 43-47; 9 lines 1-7) Without any explanation, he rejected the Union's characterization of an administrative burden despite the fact that the only evidence on this subject supported the Union's contention that the former policy increased administrative

efficiency. As Chairman Pearce noted in dissent avoiding administrative inefficiencies is a "reasonable purpose and, therefore, hardly irrational." *L-3 Communications,* at 1076.

The ALJ also noted that if all objectors were treated as continuing it would also require less clerical help. (Supplemental Decision, 9 lines 5-7) With all due respect this approach misses the point. The Union is not required to assume that the objections are contiuing, since the burden is on the objector. It was well within the teachings of the above cited case law for the Union to have expected such an indication from the objector, before treating it as continuing.

The appropriate question should have been: what would be the effect on the Union if it treated objections as continuing from year to year when the objector specifically made such a request. The evidence is undisputed that in this context the administrative burden on the Union would be significantly increased because of the need to far more carefully scrutinize the objection letters to determine whether or not they sought such continuing treatment. (TR 78, line 1 to TR 79, line 22; TR 114, lines 13-18)

It is significant that the only objector notice in evidence in this case (G.C. Exhibit 6) does not include a request for continuing that status from year to year. As such, even if the Union's past policy of requiring annual renewals is deemed to have been inappropriate under the Act, there is no evidence that this charging party's rights were violated by CWA's former practice.

General Counsel failed to meet its burden of proving a violation of the Act in this case. The ALJ's decision to the contrary must be overturned.

VI. THE BENEFIT OF BEING ABLE TO ASCERTAIN THE PERCEPTIONS OF BARGAINING UNIT MEMBERS IN EVALUATING THE UNION'S RECENT PERFORMANCE, WAS A RATIONAL BUSINESS JUSTIFICATION FOR THE FORMER ANNUAL RENEWAL REQUIREMENT.

Another justification for having objectors annually renew their objections is that it provided a useful barometer of the Union's performance over the past year. Statistics from each

objector period are shared with various Union officials so they may have the benefit of that information. A significant influx in annual objections, particularly in a specific Local or a unique segment of the bargaining unit, may provide the Union and its officials with important insight into how the bargaining unit members assessed the Union's performance over the past year. (TR 84, line 12 to TR 85, line 3) An increase in objectors would be a clear indication that at least some bargaining unit members were not pleased with the Union's performance. By the same token, a significant decrease in the number of annual objections would tend to inform the Union that its performance over the past year has been deemed satisfactory, even by those bargaining unit members who are the most likely to be the Union's greatest critics.

The ALJ gave no credence to this justification because he found that Gibson agreed that the use of continuing objections would not interfere with this barometer effect. (Supplemental Decision, 9, lines 41-45) It is not clear where Gibson so testifed. More importantly, the ALJ's conclusion is counter intuitive. Continuing objections would, by definition, never have to be renewed. Thus, the Union would receive far less data from which to make judgments on how its performance was being perceived.

What is at issue is whether this justification offered by the Union is so inherently invalid and arbitrary that it proves the Union was committing a breach of its duty of fair representation. Evaluated under this proper standard, this justification is clearly valid. The annual renewals provide the Union with some rather inexpensive insight into how it was perceived to be performing by those bargaining unit members, who are most likely to have a predisposed negative view of the Union. This is valuable information to the Union for its continued institutional existence.

The ALJ's view also fails to take note of the fact that if the number of annual renewals were to decrease, this would also provide some 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 be unavailable to the Union. This sort of information is invaluable in assisting the Union to figure out what works best and try to conform its future practices accordingly. Eliminating the Union's ability to seek annual renewals would negate its ability to gain such insight. The end result would be detrimental to the Union as an institution and to the bargaining unit members it represents.

This insight into the Union's performance, provided by the Union's annual renewal practice, is yet another legitimate justification for maintaining that practice as presently constituted. The challenged practice does not violate the duty of fair representation. The ALJ's decision to the contrary must be overturned.

CONCLUSION

For all of the foregoing reasons, 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 15th day of October 2012, these Exceptions and attached Brief were electronically filed at the e-filing section of the Board's website. Counsel for the other parties to this proceeding were sent copies of this Motion via email at their below listed email addresses:

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

John Scully
Attorney for Charging Party
National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
Email: jcs@nrtw.org

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