

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

**RESPONDENTS' MOTION TO REOPEN OR SUPPLEMENT THE RECORD
AND RECEIVE FURTHER EVIDENCE**

Now come Respondents, Communications Workers of America (“CWA”) and CWA Local 4309, and hereby move the Board, to reopen or supplement the record and receive further evidence in this case. The evidence that Respondents seek to be received are Exhibits 1 to 4 which are attached hereto. The reasons for this motion are made clear in the attached Brief and the attached Exhibits, all of which are incorporated by reference herein. This motion is being made pursuant to § 102.48 (b) of the Board’s Rules and Regulations (29 CFR § 102.48 (b)).

Respectfully submitted,

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PROCEDURAL HISTORY

General Counsel filed an amended complaint on August 21, 2008 alleging that Respondents, CWA and CWA Local 4309, committed an unfair labor practice, violating Section 8 (b) (1) (A) of the Act, by having maintained and published a rule that required *Beck*¹ objectors, including the Charging Party (Sanda Ilias), to renew their objections to paying full dues on an annual basis. (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.)

A hearing was held before the Honorable Administrative Law Judge Wallace Nations on October 27, 2008. On January 9, 2009 Judge Nations issued his decision,

¹ *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

finding that Respondents violated Section 8 (b). Judge Nations ordered Respondents to rescind their annual renewal requirement and to make charging party whole.

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 No. 174 (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 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.

On January 24, 2011, while this case was on the Board's docket, Raymond J. LaJeunesse Jr., Vice President and Legal Director of the National Right to Work Legal Defense Foundation, Inc., sent a letter to the Board citing various decisions and urging the Board to quickly resolve this case and several others. (Respondents' Board Exhibit 1, attached hereto) The National Right to Work Legal Defense Foundation, Inc. represents Charging Party in this case.

On February 11, 2011 Counsel for Respondents, responded to Mr. LaJeunesse Jr.'s letter with a letter to the Board. In this letter Respondents informed the Board that CWA had changed its policy and included copies of the old policy and the new policy

that CWA adopted shortly after *L-3 Communications* was decided. (Respondents' Board Exhibit 2 being the letter, including A being the old policy and Exhibit B being the new policy, all of which are attached hereto.)

On April 13, 2011, John Scully, Counsel for Charging Party wrote to the Board indicating that CWA's spring 2011 newsletter, sent to all bargaining unit employees, included the old policy, not the new policy. (Respondents' Board Exhibit 3 being the letter, and Exhibit C being the newsletter notice, both of which are attached hereto) On May 9, 2011 Counsel for Respondents wrote to the Board acknowledging that Mr. Scully's assertions were accurate. Respondents explained that the printing company inadvertently printed the old policy rather than the new one in the newsletter.

After discovering this error CWA took quick action to address it by sending notices of its revised policy to all private sector agency fee payers, including the Charging Party in this case. On May 9, 2011, Respondents wrote again to the Board in response to Mr. Scully's letter, explaining the error that had occurred and how it had been rectified. Respondents included an affidavit from Helen Gibson, Administrator of Special Programs for CWA, the version of the old policy erroneously printed in its newsletter, and the clarifying notice sent to all private sector agency fee payers. (Respondents' Board Exhibit 4 being the letter, with the unmarked affidavit, and Exhibits A, B and C, being the three notices, all of which are attached hereto.) All of these documents were sent to the Board and counsel for all parties.

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 remanded to Chief

Administrative Law Judge Robert Giannasi, so that he might assign it to another Administrative Law Judge. Chief Judge Giannasi then assigned the case to Administrative Law Judge John T. Clark.

According to the Board's remand order Judge Clark was to prepare a supplemental decision on this case 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. (Judge Clark's Supplemental Decision, p. 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 Affidavit, and the three policy statements. (Those documents are attached hereto as Respondents' Board Exhibit 4.)

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 aforementioned Exhibits as part of the record before him. (Judge Clark's Supplemental Decision, p. 2, line 40) Consequently, his decision ignored the fact that Respondents had significantly changed their *Beck* policy shortly after the Board's *L-3 Communications* decision was issued. Respondents are now filing exceptions to portions of Judge Clark's decision.

LAW AND ARGUMENT

I. Respondents' Request to Supplement the Record by Admitting the Proffered Exhibits is Fully Justified.

§ 102.48 (b) of the Board Rules provides that upon filing of exceptions the Board "may reopen the record and receive further evidence". In this case it Respondents' request to reopen or supplement the record is fully justified. The Exhibits Respondents

seek to have included in the record could not have been made a part of the record before Judge Nations, since they did not yet exist. It would have been impossible for Respondents to have changed their *Beck* policy to comply with the *L-3 Communications* decision even before that decision was issued. Respondents made their change in policy known to the Board and all the other parties, while this case was before the Board prior to being remanded, by submitting the changed policy and two letters explaining same to the Board. Charging Party also communicated to the Board on this issue in the same fashion.

The Board's remand order did not contemplate reopening the record. It only called for supplemental briefing and a supplement ALJ decision. (Judge Clark's Supplemental Decision, p. 2, lines 37-39) So there was no way for Respondents to formally supplement the record at that juncture. While the Exhibits in question had not been placed into the record at the hearing before Judge Nations they clearly are part of the factual record of this case as it continued to develop after Judge Nations issued his decision.

These Exhibits were all submitted to the Board prior to Judge Clark's decision. Both General Counsel and Charging Party had ample opportunity to address these Exhibits. Charging Party took advantage of that opportunity.

In their Supplemental Brief Respondents sought to have Judge Clark consider current Respondents' Board Exhibit 4. By refusing to consider these Exhibits and the story they told, Judge Clark, elevated form over substance, thereby ignoring facts that should have been considered in rendering a determination. This led to the anomaly of Judge Clark ordering Respondents to take actions with respect to their *Beck* policy which they had already taken. Judge Clark ordered Respondents to "rescind their requirement

that *Beck* objectors renew their objections on an annual basis”; “notify its existing *Beck* objectors 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.” (Supplemental Decision, p. 11, lines 16-22) In fact, Respondents had already taken all of these actions on their own once the Board handed down its decision in *L-3 Communications*, well before Judge Clark issued his decision.

The Board has granted requests to reopen the record to receive and/or supplement the record, when such requests were justified by the circumstances. *Edw. C. Levy Co.*, 351 N.L.R.B. 1237, 1238, fn 10 (2007) (the Board approved an Employer’s Motion to Supplement the Record with an arbitration award, which held that the Union’s grievances against the Employer were without merit); *Dean Transp. Inc.*, 350 N.L.R.B. 48, 50, fn 4 (2007) (Employer’s motion to Supplement the Record with various documents in order to ensure the existence of a complete record was granted by the ALJ, and the Board upheld the ALJ’s decision); *Aero Ambulance Serv., Inc.*, 349 N.L.R.B. 1314, 1319, fn 2 (2005) (the ALJ granted the Respondent Employer’s Motion to Supplement the Record with various documents in order to ensure the creation of a complete record, and the Board upheld the ALJ’s decision). The circumstances of this case certainly justify supplementing the record in the manner being requested.

If the proffered Exhibits are not considered by the Board when considering Respondents’ Exceptions, the Board will be rendering a decision in a factual vacuum, without having a realistic picture of the complete evidentiary landscape. Therefore, Respondents respectfully urge the Board, pursuant to Rule 102.48 (b), to reopen or

supplement the record by receiving the attached Exhibits into evidence and considering them when rendering its decision on Respondents' Exceptions.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully urge the Board to reopen or supplement the record to receive the attached Exhibits into evidence and to consider them when rendering its decision on Respondents' Exceptions.

Respectfully submitted,

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ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that on the 15th day of October 2012, this Motion was 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

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Attorney for Respondents

ATTACHMENTS

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and Exhibit B – Respondents revised statement of <i>Beck</i> policy, after <i>L-3 Communications</i> decision issued	A-10
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