UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

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| 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' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REOPEN OR SUPPLEMENT THE RECORD**

## INTRODUCTION

On October 15, 2012 Respondents filed a Motion to Reopen or Supplement the Record. Charging party has now submitted her Opposition to Respondents' Motion. Charging party offers no authority to support her position. Instead, she simply offers several brief arguments.

First, she asserts that Respondents should not be permitted to reopen or supplement the record because they did not seek to do so at the time of remand. Second, charging party asserts that Respondents should not be allowed to supplement the record because she limited her exceptions to only those issues that were part of the record at the time of the hearing. Finally, charging party argues that any evidence of what occurred after the hearing should not be made part of the record because it is irrelevant to the issue

of whether Respondents violated the Act in 2006.

Respondents will now turn to a discussion of each of these arguments. Suffice it to say that these arguments have no merit.

## LAW AND ARGUMENT

### I. THERE WAS NO REALISTIC WAY FOR RESPONDENTS TO REOPEN OR SUPPLEMENT THE RECORD AT THE TIME OF REMAND.

The Board remanded this case to the Administrative Law Judge ("ALJ") on October 26, 2011. As the ALJ noted, the "Board's remand order only specifies that the parties be permitted to file supplemental briefs. It does not direct a reopening of the trial and the parties agreed that a reopening was not necessary." (Supplemental Decision, p. 2, lines 37 – 39) Given this background it is not at all surprising that the parties all agreed with the ALJ that the record should not be reopened on remand. (ALJ's Supplemental Decision, 2, lines 37 – 39)

Consequently, there was no realistic way for Respondents to have reopened the record while the case was before the ALJ on remand. Respondents did the next best thing. They discussed the change they made in their *Beck* policy after the Board decided *International Ass'n of Machinists, Local 2777 (L-3 Communications)* 355 NLRB 1062 (2010) and attached the relevant documents to their Brief. Respondents did so being mindful that the new policy and the documents in question had already been placed before the Board by Respondents and charging party in a series of letters they submitted to the Board prior to remand.

Respondent should not now be precluded from putting the complete facts before the Board. Nor should the Board be precluded from having all the facts before it when it issues a decision in this case.

## II. CHARGING PARTY WILL NOT BE PREJUDICED IF THE RECORD IS SUPPLEMENTED AS RESPONDENTS REQUEST.

Soon after the Board decided *L-3 Communications*, the Union modified its *Beck* objector policy to comply with the Board's decision. Well before the remand order was issued, while this case was pending before the Board, both charging party and Respondents submitted letters to the Board, along with the documents defining the Union's change in policy. Thus, the new policy was placed before the Board before it remanded the case to the ALJ. Both charging party and Respondents also discussed the Union's new policy in their Briefs to the ALJ on remand. (See charging party's Brief at p. 2[1]; See Respondents' Brief at p. 5 and p. 3 and the Exhibits attached thereto at pp. A-1 to A-11.)

Charging party surely cannot claim at this point in time that she was unaware that CWA changed its policy to comply with *L-3 Communications*. Nor could charging party claim that she did not know that Respondents discussed this change in their Brief to the ALJ on Remand. In fact, charging party herself discussed this change in her Brief to the ALJ on remand.

It was also clear from the Supplemental Decision that ALJ Clark rejected Respondents' efforts to persuade him to consider the Union's new policy. (Supplemental Decision, p. 2, lines 32 – 39) It certainly should have been no surprise to charging party that Respondents might very well take exception to Judge Clark's ruling in this regard. Charging party has also shown that she is quite capable of presumptively addressing

[1] In charging party's Brief to the ALJ on Remand, she noted that CWA's revised *Beck* policy was not part of the record, yet she chose to discuss the issue "preemptively". (Charging party's Brief to ALJ p. 2, fn. 2) Now, months later, charging party seems to be suggesting that she would be prejudiced if the Board were now made aware of the Union's new policy. Having previously discussed this issue in a letter to the Board and in her Brief to the ALJ, charging party was obviously aware of the changed policy. It makes no sense then that charging party would be prejudiced by having this issue made known to and squarely addressed by the Board.

issues that she believes Respondents will raise, even if she believes that those issues are not properly part of the case. (Charging party's Brief to the ALJ on remand p. 2, fn. 2.) Nonetheless, she chose not to discuss the Union's new policy in her exceptions. That choice on her part should not preclude the Union from placing a thorough and complete evidentiary record before the Board.

Finally, even though she may have chosen to limit her exceptions to those matters Judge Clark decided to include in the record, charging party will certainly be able to respond to the Union's arguments about its new policy in any Answering Brief she may choose to file in response to the Union's Exceptions. For all of these reasons charging party's current concern about supplementing the record, appears to be little more than crocodile tears.

**III. CWA'S CHANGED POLICY IS RELEVANT TO THE ISSUE OF REMEDY.**

This controversy between charging party and Respondents actually commenced back in 2004 when charging party filed her first charge challenging Respondents' *Beck* policy. (Case no. 8-CB-10252) That case was settled informally. Respondents fully complied with the terms of the settlement agreement. (See Joint Exhibit 1, Stipulations 1 and 2 in this case.)

Charging party then filed her initial charge in the instant case in January of 2006. Four and a half years later the Board decided *L-3 Communications.* The Board's decision represented a significant change in the legal landscape for CWA regarding its *Beck* policy. Shortly thereafter, CWA modified its *Beck* policy to comply with *L-3 Communications*. It would be a matter of simple fairness and factual accuracy to include the Union's changed policy as part of the record before the Board. For the Board to

decide this case with blinders to the true facts, would serve no legitimate interest.

Charging party claims that evidence of the Union's new policy is not relevant to whether the Union violated the Act in 2006. Assuming *arguendo* that she is correct in that regard does not mean the new policy is not relevant to the question of what remedy should be imposed in this case. In *L-3 Communications* the Board made it quite clear that in a situation like this one, when a Union has operated for many years within the framework of the existing legal landscape and that landscape suddenly changes, the relief to be awarded for allegedly violating that new landscape should be prospective only.

By turning a blind eye to CWA's new policy, Judge Clark ordered the Union to change its old policy in the very same way it had already voluntarily changed it, some two years earlier. The relief Judge Clark ordered was unnecessary and, more importantly, clearly went well beyond the prospective only mandate of *L-3 Communications*. The evidence of the Union's changed *Beck* policy is relevant to the question of remedy. The record should be supplemented to include the proffered evidence.

## CONCLUSION

For all of the foregoing reasons, as well as those discussed in Respondents' Motion to Reopen or Supplement the Record, Respondents respectfully urge the Board to grant Respondents' motion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 24th day of October 2012, this Reply Brief 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 Reply Brief via email at their below listed email addresses:

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