UNITED STATES OF AMERICAal
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	

ANSWERING BRIEF TO THE EXCEPTIONS AND BRIEF OF CHARGING PARTY, FILED ON BEHALF OF RESPONDENTS, COMMUNICATIONS WORKERS OF AMERICA AND COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4309

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INTRODUCTION

On October 26, 2011, the Board issued an order remanding this case to an Administrative Law Judge ("ALJ") for further consideration in light of *International Ass'n of Machinists, Local 2777 (L-3 Communications),* 355 NLRB 1062 (2010), (hereinafter, "*L-3 Communications"*) and *International Union, United Auto Workers (Colt's Mfg.),* 356 NLRB No. 164 (2011), (hereinafter "*Colt's Mfg."*). Thereafter, this case was assigned to ALJ John T. Clark to render a Supplemental Decision, after consideration of the Briefs submitted by the parties. On September 17, 2012 Judge Clark issued his Supplemental Decision and this matter was transferred to the Board.

Timely Exceptions to ALJ Clark's Supplemental were filed by Respondents, Communications Workers of America, ("CWA") and Communications Workers of America, Local 4309 (jointly, "Respondents" or "the Union"). Timely Exceptions were also filed by Charging Party, Sanda Ilias, ("Charging Party"). No Exceptions were filed by General Counsel.

In her Exceptions, Charging Party identifies ten separate items to which she takes exception. However, the arguments on which her Exceptions are premised boil down to three propositions: 1) that CWA allegedly lacks the statutory authority to collect full membership dues from non members unless they affirmatively opt in; 2) that CWA allegedly cannot require any specific language to make an objection permanent; 3) that Charging Party and other non members allegedly should be awarded retroactive make whole relief.

This Answering Brief responds to Charging Party's Exceptions and her Brief in Support. As will be demonstrated herein, those Exceptions and the legal arguments on

which they are premised, are without merit and should be denied by the Board.

RESPONSE TO CHARGING PARTY'S "PRELIMINARY STATEMENT CONCERNING STATUS OF BOARD MEMBERS".

In her Brief, even before discussing her Exceptions, Charging Party raises a side issue labeled with the heading "preliminary statement concerning status of Board members". Charging Party alleges that Board members Block and Griffin ought to be "disqualified" from hearing or issuing rulings in this case, because their recess appointments by President Obama were unconstitutional. This meritless assertion, is not properly raised in the context of Exceptions, meant to challenge an ALJ's decision. It is also disrespectful of the Board members involved.

The issue of the legality of President Obama's recess appointments is currently pending before the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB*, case no. 12-1115. Charging Party's institutional legal representative[1] is participating in that case as an *amicus curiae* for the Petitioner.

The Board is a party in *Noel Canning* and has taken the position that the President properly exercised his constitutional power to fill vacancies "during the Recess of the Senate" by appointing the Board members in question. (Art. II, § 2, cl. 3 of the U.S. Constitution.) Charging Party's arguments over this issue have no place in Charging Party's Brief and Exceptions.[2] The resolution of that issue should be left for the D.C. Circuit Court of Appeals to decide.

[1] Charging Party is represented by John C. Scully, a staff attorney with the National Right to Work Legal Defense Foundation.

[2] Under § 102.46 (c) of the Board's Rules and Regulations, "any brief in support of exceptions shall contain no matter not included within the scope of exceptions…"

ARGUMENT AND LEGAL AUTHORITIES IN OPPOSITION TO CHARGING PARTY'S EXCEPTIONS.

I. § 8(a) (3) OF THE ACT DOES NOT PROHIBIT UNIONS FROM COLLECTING FULL MEMBERSHIP DUES FROM NON-MEMBERS WITHOUT THEM FIRST OPTING IN AND AFFIRMATIVELY AGREEING TO PAY SUCH DUES.

Charging Party argues that under the Act the Union has no statutory authority to collect full membership dues from bargaining unit members who are not Union members, unless they first opt in and affirmatively agree to pay such dues. Neither the Board nor the Supreme Court have ever so held. Charging Party premises her argument primarily on her reading of *Communications Workers of America v. Beck,* 487 U.S. 735 (1988).

§ 8(a) (3) permits an employer and a union to enter into an agreement requiring all bargaining unit employees to pay periodic union dues and initiation fees as a condition of employment, whether or not the employees wish to be union members. *Beck,* at 738. The question presented in *Beck* was whether § 8(a) (3) also permitted the union to expend the funds it collected on non-representational activities, over the objections of dues-paying nonmember employees, and if so, whether such expenditures violated the union's duty of fair representation or the objecting employees' First Amendment rights. *Id,* at 738

The appellate court had found that Plaintiffs stated a claim for relief under the First Amendment, but chose not rest its judgment Constitutional grounds. The appellate court concluded that union's actions violated § 8(a)(3). *Beck v. Communications Workers of America,* 776 F.2d 1187 (4th Cir. 1985), as noted by the Supreme Court in *Beck,* at 740. The *Beck* Supreme Court also analyzed the case as a matter of statutory interpretation, rather than on First Amendment grounds. The Court held that the statute only authorized

the exaction of those fees and dues that were necessary for "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Id*. at 762-763**;** citing *Ellis v. Railway Clerks,* 466 U.S. 435, 448 (1984). Accordingly, the Supreme Court affirmed the Fourth Circuit's decision. Although one might think otherwise from reading Charging Party's Brief, the *Beck* Supreme Court did not say that a union could collect full membership dues from non-members only if they first "opted in" and affirmatively agreed to pay such dues.

Charging Party admits that *Beck* makes it clear that a union can lawfully require a non-member bargaining unit employee to object to paying full dues before that employee's dues were reduced to financial core dues. (Charging Party's Exceptions and Brief in Support, at p. 10.) Nonetheless, apparently Charging Party believes her view of what the law ought to be is more authoritative than the Supreme Court's pronouncement of what the law actually is.

Underlying Charging Party's argument is her espoused belief that employees' rights to pay only "financial core" dues are "absolute statutory (and constitutional) rights and are not contingent upon whether the CWA violates its duty of fair representation." (Charging Party's Brief, at pp 8-9.) That may be Charging Party's view of what the law ought to be, but it is not a view shared by the Board. For seventeen years Board law has been clear. The legality of a union's *Beck* procedures are to be measured by the duty of fair representation. *California Saw & Knife Works,* 320 NLRB 224 (1995); enf'd. sub nom. *Machinists v. NLRB,* 133 F. 3d 1012 (7th Cir. 1998); cert. denied *sub nom. Strang v. NLRB, 525 U.S. 813 (1998);* see also *Office Employees Local 29 (Dameron Hospital Association),* 331 NLRB 48, fn. 1 (2000).

That long standing Board law was recently reaffirmed in *L-3 Communications,* at 1064. As the Board noted: "No court has ever questioned the Board's well-established approach and we see no reason to depart from that precedent today." *Ibid.* Charging Party's espoused view is akin to former member Schaumber's dissenting view in *L-3 Communications,* which was soundly rejected by the Board's majority. Simply put, it is not the law.

Charging Party also relies on *Knox v. Serv. Employees Int'l Union, Local 1000*, __U.S. __, 132 S. Ct. 2277, 2290-91 (2012) to urge the Board to overrule its past precedent and hold that this Charging Party and all non-member employees may only be held to pay full union dues if they opt in and affirmatively seek to pay full dues. *Knox* is clearly distinguishable from this case.

Like this case, *Beck* and *L-3 Communications* involved private sector employees. Thus, the union's policies were measured against the standards of the duty of fair representation. *Knox,* on the other hand involved public employees. Neither the Act, nor the duty of fair representation, which derives from the Act, were implicated. Consequently, that union's conduct was measured against the more stringent requirements of the First Amendment. In addition, *Knox* arose out of some extraordinary facts, the likes of which are not implicated in this case.

The Union in *Knox,* Serv. Employees Int'l Union, Local 1000 ("SEIU"), represented public employees in California. In June, 2005 SEIU sent out its annual *Hudson*[3] notice informing employees what the agency fee would be for the coming year. SEIU estimated that 56.35% of its total expenditures would be dedicated to

[3] With unions representing public employees, objector policies are governed by *Teachers v. Hudson,* 475 U.S. 292 (1986), rather than *Beck.*

representational activities. Non-member employees who objected within 30 days would only pay 56.35% of the total annual dues.

At this same time a hotly contested political debate was raging in California regarding state budget deficits and, in particular, the budgetary consequences of what was characterized as a high rate of compensation for public employees. A special election was called for by the Governor to decide ballot proposals directed against public employees and their unions. On July 30th, shortly after the 30 day *Hudson* objection period ended, SEIU publicly proposed creating an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" to help it achieve its political goals in the upcoming elections. On August 31st SEIU sent out a letter to the bargaining unit employees it represented, including both members and non-members, announcing that for a limited period of time their fees would be inceeased. The funds obtained were to be directed towards achieving SEIU's political objectives in the upcoming elections.

No provision was made for *Hudson* objections to be raised over this emergency assessment. The Court held that "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from non members without their affirmative consent." *Knox*, at 2296.

Knox, is inapposite because it only applies to public sector unions. It also only applies when the union initiates a special assessment, outside of the regular dues structure. Neither of these factors are present in this case. Further, the extraordinary nature of the facts in Knox also makes it clearly distinguishable.[4] *Knox* should not serve

[4] The facts in *Knox* were compelling enough to convince Justices Sotomayor and Ginsburg that the way in which SEIU went about imposing its emergency assessment was clearly contrary to *Hudson's* constitutionally mandated procedures. *Knox*, at 2297. These two Justices, however, wrote separately, concurring in the judgment only. In unusually pointed language they strongly criticized the majority for

as a basis for the Board to depart from its carefully calibrated and well established precedent, by imposing a requirement on all unions to treat all of the non-members they represent as *Beck* objectors, paying only financial core dues, unless those non members choose to opt in and affirmatively ask to pay full dues, as Charging Party urges.

Neither *Beck* nor *Knox* mandate such a result. Existing Board law is clearly contrary to such a result. The parties in this case never litigated this issue. Neither General Counsel, nor Charging Party sought such relief at the time of the initial trial or in theeir Briefs to ALJ Nations that followed. Nor has General Counsel sought such relief now. It is only Charging Party who now seeks such relief for the first time.

For all of the above reasons Charging Party's current request for such relief should be denied. Her Exceptions, which are premised on obtaining such relief, are without merit and should be denied.

II. CWA'S REVISED *BECK* POLICY, ALLOWING EMPLOYEES TO EITHER MAKE NO OBJECTION, MAKE A SIMPLE OBJECTION LASTING ONE YEAR, OR MAKE A CONTINUING OBJECTION, DOES NOT VIOLATE THE DUTY OF FAIR REPRESENTATION.

Charging Party argues if the Board does not adopt its opt in approach, that as an alternative, it should mandate that CWA not be able to require any specific language to make an objection permanent. Once again Charging Party ignores clear Board precedent on point, and relies, instead on cases from the Board and the Courts, that address subjects different from the subject in this case. The approach Charging Party urges the Board to

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casting serious doubt on longstanding precedent by suggesting that the First Amendment requires an opt in procedure when a special assessment or dues increase is levied. They were especially critical of the majority because it took the action it did *sua sponte*, without even any adversarial presentation in the courts below or the Supreme Court. *Knox,* at 2299. That Justices Sotomayor and Ginsburg, had no difficulty finding SEIU's actions violated *Hudson*, yet at the same time were so sharply critical of the majority's decision, speaks volumes as to the extraordinary nature of the facts in *Knox.*

adopt has already been clearly rejected by the Board. There is no good reason for the Board to change its view and Charging Party offers none.

In *L-3 Communications,* the Board recognized the bedrock principle that dissent "is not to be presumed—it must be made known to the union by the dissenting party." *Id.*, at 1067; citing *Machinists v. Street,* 367 U.S. 740, 774 (1961). However, the Board found it hard to square that principle with the facts in *L-3 Communications,* where the Charging Party not only made his objection known to the union, he "expressly stated that he wished it to be a continuing objection." *L-3 Communications,* at 1067.

The Board noted that any objection must be honored for at least some period of time. It opined that it would be reasonable for a union to treat an objection, containing no express period of time, as continuing for only one year, if the union explained to the potential objectors the consequences of that type of objection. However, because that Charging Party expressly sought a continuing objection, the Board found the union could not reasonably treat the Charging Party's objection as lasting only one year. *Ibid.*

The Board also specifically noted it was not holding that a union violates its duty of fair representation if it limited employees to three options: making no objection, making a simple objection (to be treated as lasting only a year), and making a continuing objection. *Ibid.* In fact, CWA's revised policy does precisely that. It specifies that "Objections will be honored for one year unless the objection specifically states that it is continuing in nature. Continuing objections will be honored for as long as the agency fee payer remains in the bargaining unit." (See Respondents' Board Exhibit 4 and Exhibit 3, numbered para. 3, attached thereto, and found at pp. A-17 and A-27 of the attachments to the Union's Motion to Reopen or Supplement the Record, and both of which were sent to

the Board on 5/19/11 when this matter was previously before the Board.) As such, it does not violate the duty of fair representation.

Against this clear, on point recitation of the Board's position Charging Party offers a number of cases that do not address *Beck* objections at all, attempting to concoct an argument. First, she cites *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) where the Court determined that an employer did not commit an unfair labor practice when it barred non employee union organizers from its property. She also cites *Pattern Makers League of N. Am. v. NLRB*, 473 US 95 (1985) which upheld the Board's ruling that a union committed an unfair labor practice when it barred union members from resigning their membership during a strike. She goes on to cite two Board cases, *Electrical Workers, Local 66 (Houston Lighting & Power Co.)*, 262 NLRB 483 (1982) and *Sheet Metal Workers (Rohde Brothers)* 298 NLRB 50 (1990) both of which also dealt with union members who sought to resign their union membership.

Obviously, the Court's decision in *Lechmere* has nothing to do with this case. Likewise, the membership resignation cases, though a bit more related in subject matter, deal with a completely different situation calling for a completely different set of considerations. This different approach stems, at least in part, from the underlying difference between an objection and a resignation. Resignation connotes a permanent action, such as when one resigns or quits a job. Once someone quits a job that relationship is completely severed.

Objecting, on the other hand, is a much more transitory event. One who objects is not severing a relationship, but simply offering an expression of disapproval. Objecting does not connote any sort of permanence. Given the differences between objecting and

resigning it is not surprising that the Board has treated both acts differently. While Charging Party's attempt to use the resignation cases to concoct an argument about objecting is undoubtedly clever, it is also not well taken.

Finally, Charging Party alleges that to require a *Beck* objector to "employ specific language" or use "magic words" to make his/her objection a continuing one imposes "an onerous burden" on the employee. This argument is misplaced. Neither Judge Clark's Supplemental Decision, nor CWA's revised *Beck* policy, require the objector to use any magic words to convey to the union that he/she wants the objection to last continuously. The Judge's decision, CWA's policy, and the Board's decision in *L-3 Communications*, all used the word "continuing" to express a certain concept. However, none mandate that an objector must use that particular word to convey the sense that he/she wants the objection to continue from year to year. There are probably an infinite number of words and terms that could convey that same meaning. All the objector must do is make his/her intentions understood. Contrary to Charging Party's assertion, no magic words are required.

Further, Charging Party's argument that the need to convey that meaning is an "onerous burden" is both nonsensical and insulting to the employees CWA represents. An objector must submit an objection in writing. Asking that objector to, at the same time, also advise the union about the nature of the objection being sought, can hardly be characterized as onerous. The employees CWA represents are on the whole, hard working and knowledgeable people. To suggest that such a simple task, i.e. letting the union know they want the objection to continue, represents an onerous burden, is both insulting to their intelligence and absurd.

Charging Party seeks to have the Board to overturn its past pronouncements on this subject, wherein it properly determined that it is reasonable for a union to ask objectors, who wish their objections to continue from year to year, to make that desire known to the union. There is no legal support for Charging Party's effort to overturn Board precedent. Her Exceptions premised upon that effort are without merit and should be denied.

III. NEITHER THIS CHARGING PARTY, NOR OTHER NON-MEMBERS, SHOULD BE AWARDED RETROACTIVE MAKE WHOLE RELIEF.

Charging Party's last argument is that CWA should have been ordered to retroactively make her, as well as all other objectors[5], whole. She contends that the ALJ should have ordered restitution of all monies that would have been provided to those objectors, had they been treated as continuing objectors. Once again Charging Party simply ignores clear Board precedent on this issue.

In *L-3 Communications* the Board determined that the legal landscape, under which the Respondent, Machinists Union had been operating, was not relevant to the question of whether it breached its duty of fair representation. However, the Board took the contrary view when it came to the question of remedy, holding:

> 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…We accordingly, decline to give retroactive application to our ruling. *Id.*, at 1069.

The record in this case demonstrates that CWA was in a similar position in terms of the legal landscape. In fact, since CWA was a party to some of the past litigation

[5] Charging Party puts no time or geographic parameters whatsoever on this request. This request is without any justification or supportive authority and does not even appear to be a serious request. It is clearly beyond the pale.

ending in court approval, most notably *Abrams v. Communications Workers*, 59 F 3d 1373 (DC Cir. 1995), and had received specific approval of its *Beck* policy, there was even more of a basis for CWA to reasonably believe that its policy was lawful. Thus, in light of the clear holding in *L-3 Communications*, the relief in this case was properly limited to prospective only relief by ALJ Clark, as to restitution.

In addition, as noted in the attachments to Respondents Second Motion to Reopen or Supplement the Record, filed contemporaneously with this Brief, (i.e. Exhibits A and B), CWA has already made full restitution to the Charging Party, by causing a check to be sent to her covering the difference, plus interest, between the amount of agency fees she paid and the amount of agency fees paid by *Beck* objectors for the relevant period of time. Since she has already been made whole there is nothing more to be accomplished for her by way of restitution. This question has become moot. For all of the above reasons, Charging Party's argument is without merit. Her Exceptions premised on that argument, should be denied.

CONCLUSION

For the foregoing reasons, all of Charging Party's Exceptions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of October 2012, this Answering 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 Answering Brief via email at their below listed email addresses:

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