

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

**REPLY BRIEF OF RESPONDENTS, COMMUNICATIONS WORKERS OF AMERICA
AND COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4309, IN RESPONSE
TO CHARGING PARTY'S ANSWERING BRIEF**

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RESPONDENTS' RESPONSE TO CHARGING PARTY'S "INTRODUCTION AND STATEMENT OF FACTS."

In this section of her Answering Brief Charging Party Sanda Ilias ("Ilias" or "Charging Party") presents a misleading factual picture to the Board. Ilias claims that once the Union received her September, 2004 objection letter it became "fully aware" that she was objecting to paying full dues, forever. (Charging Party's Answering Brief, p. 1) Ilias makes no reference to the record because there is nothing in the record to support this assertion.

Instead, the record reveals that CWA maintained the same annual renewal policy from at least 2000 (i.e. eight years before the first ALJ hearing) until 2010, shortly after *L-3 Communications*¹ was decided. (GC Exhibit 3: TR 65, lns. 3-8; Respondents' Board Exhibits 2-4 attached to first Motion to Reopen or Supplement) During that time frame, all bargaining unit members, including Ilias, were notified in writing of the CWA's annual renewal requirement. (TR 63, ln. 1 to TR 64, ln. 17) Ilias' September, 2004 letter mentioned nothing about wanting her objection to last from year to year. (General Counsel Exhibit 6) There was no reason for CWA to know that Ilias' meant her objection to last forever. Consistent with her letter and the Union's policy that was in effect at the time, CWA provided her with a dues rebate for the 2004-2005 objector year (July 1, 2004 to June 30, 2005). (Joint Exhibit 1, para. 2; TR 21, lns. 6-24)

Charging Party next claims that despite this "full awareness" the Union continued to take full dues from her wages. Contrary to that assertion, the record reveals that on January 11, 2006, Charging Party sent her next objector letter. Soon thereafter she received a rebate check covering the 2005-2006 objector year (July 1, 2005 to June 30, 2006.) (Respondents' Exhibit 1; TR 72, ln. 20 to TR 73, ln. 7.) Thus, she paid only financial core dues from, July 1, 2004 through June 30,

¹ *International Ass'n of Machinists, Local 2777 (L-3 Communications)*, 355 NLRB 1062 (2010).

2006. She submitted no further notice of objector status and as such, was sent no further dues rebates through the time of the hearing. (TR 74, lns. 15-18)

Throughout her Brief Ilias speaks of the annual renewal requirement in the present sense, apparently trying to convey the misconception that it is still in existence. Charging Party is well aware that CWA voluntarily changed its policy to eliminate the annual renewal requirement soon after the Board issued its decision in *L-3 Communications*. (Respondents' Board Exhibits 2-4, attached to Respondents' first Motion to Reopen or Supplement the Record.)

During all the relevant years CWA provided notice of its *Beck*² policy to all bargaining unit employees, when they began their employment and continuously thereafter on an annual basis. The policy was always printed in the March/April edition of the *CWA News* which was sent to all bargaining unit members. (TR 63, ln. 16 – to TR 64, ln. 14; General Counsel Exhibit 3) Ilias claimed that she only sporadically received this notice, even though her address did not change during the relevant years. (TR 106, lns. 4-20)³ The Union was not obligated to guarantee that she received each newsletter, but only to make a good faith effort to implement a reasonable policy aimed at notifying bargaining unit members of their *Beck* rights. *California Saw & Knife Works*, 320 NLRB 224 (1995). This the Union surely did.

With their rebate check *Beck* objectors were sent a letter detailing the basis for the union's financial calculation. The letter also included a reminder of the need to submit an objection for the upcoming year. (Respondents' Exhibit no. 1) Ilias would have received such a letter along with her rebate checks she received for the 2004-2005 and 2005-2006 objector years. (Joint Exhibit no. 1, paragraphs 1 – 2; TR 72 ln. 20 to TR 74, ln. 4)

² *Communications Workers of America v. Beck*, 487 U.S. 735(1988).

³ Charging Party also admitted that she did not bother to read these notices even when she received them. (TR 18, lns. 8 – 16) So any claimed lack of notice falls on her, not the Union.

LAW AND 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.

Charging party acknowledges that *Abrams v Communications Workers of America*, 59 F3d 1373 (DC Cir 1995) upheld CWA's annual renewal policy. She argues that several other more recent court decisions, to which CWA was not a party, should have persuaded CWA that its policy was unlawful, i.e. *Shea v. International Ass'n of Machinists*, 154 F 3d 508 (5th Cir. 1998); *Lutz v. International Ass'n of Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000); and *Seidemann v. Bowen*, 499 F.3d 119 (2nd Cir. 2007).

None of the cited cases involved the NLRA. *Shea* and *Lutz* were both Railway Labor Act ("RLA") cases governed by *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), not *Beck*. *Seidemann* was a public employee case, governed by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), rather than *Beck*. Both RLA and public sector cases require application of the far stricter First Amendment standards, rather than the DFR standards that apply in the NLRA context. As such, they are readily distinguishable and inapposite. *California Saw Works, supra*, at 227; *White v. Communications Workers of America*, 370 F.3d 346, 353 (3rd Cir. 2004).

Even under the stricter First Amendment standard other courts saw it differently than those cases now cited by Charging Party. *Tierney v. City of Toledo*, 824 F. 2d 1497 (6th Cir. 1987) involved public employees and the stricter First Amendment standards. The court found the Union's annual renewal policy to be lawful. *Id.*, at 1506. *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. den. 503 U.S. 1005 (1992) was an RLA case

also decided under the stricter First Amendment standard. Even under this stricter standard, the *Kidwell* court approved of that Union's annual renewal policy.

Ilias also relies on several ALJ opinions decided between 2006 and 2008. Yet, she fails to point out that the Board did not resolve this issue until it decided *L-3 Communications*. She also fails to note that CWA also relied on two other cases, besides *Abrams*, in which it was also a party, both suggesting that its annual renewal policy did not violate the Act. *White v. Communications Workers of America, supra*; and *Communications Workers Local 9403 (Pacific Bell)*, 322 NLRB 142 (1996), affirmed in *Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997). (These cases are discussed in more detail in several of Respondents' earlier Briefs, including their Exceptions to the first ALJ's decision filed on February 20, 2009, which discussions are incorporated by reference herein.)

Charging Party also ignores CWA's reliance on several GC Memorandums on this subject approving annual renewal policies. (G.C. 88-14 at p. 3; G.C. 92-5, at p. 4; G.C. 01-04, at p. 3) The Board previously recognized General Counsel's position that an annual renewal requirement was lawful as well as several court decisions approving annual renewal requirements. *California Saw & Knife Works, supra*, at 236 n. 62 This legal landscape lead the Board to conclude that the Unions in *L-3 Communications* "could reasonably have believed that the requirement was lawful." *Id.*, at 1069. CWA had even more reason to hold such a belief since it was directly involved as a litigant in the above cited cases, where its policy had been approved.

Ilias also takes issue with Respondents' assertion that the citation of *Abrams* in her 2004 letter, indicated her acquiescence to the annual renewal requirement. She claims that the Union raised this argument for the first time in its current Exceptions to the ALJ's recent decision. That assertion is demonstrably incorrect.

Helen Gibson (“Gibson”), was CWA’s Administrator of the Office of Special Programs, and as such had authority for overseeing the administration of the Union’s *Beck* policy. (TR 10 lns 4 to16) This would have included ascertaining the meaning of any particular objector’s letter. Gibson made it clear in her testimony that she was quite familiar with *Abrams*. (TR 80 ln 14 to TR 82 ln 1) During the course of Gibson’s testimony the Union explained to ALJ Nations that *Abrams* affirmed its practice of requiring annual renewals. This very same acquiescence argument was raised in Respondents’ Brief to the first ALJ, at p. 22. Ilias is just wrong that it was raised for the first time in the current Exceptions.

Charging Party goes on to assert that the Union knew her objection was continuing from at least the time she filed her Board charge. Yet the record contains no letter from her that in any way suggests she wanted her objection to be treated as continuing. The only such letter in the record, by its citation to *Abrams* suggested just the opposite. Given the fact that the Union’s policy that was in effect at the time mandated annual renewals, as well as Charging Party’s failure to in any way specify in her objection letter that she wanted her objection to be continuing, it betrays all logic to suggest that the Union “knew” her objection was meant to be continuing.

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.

The Union changed its policy to comply with *L-3 Communications* soon after that decision was issued. It makes no sense to turn a blind eye to that fact simply because this change took place after the ALJ hearing. At the time of the hearing, it would have been impossible for the Union to conform its policy to the *L-3 Communications* decision, since it had yet to be issued. § 102.48 (b) of the Board’s Rules and Regulations allow for the record to be reopened.

Respondents have asked the Board to do just that. To turn a blind eye to reality, and order the Union to do something it has in fact already done, particularly in the context of the Board's determination in *L-3 Communications* that only prospective relief was warranted, makes absolutely no sense.

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.

Charging Party uses its Answering Brief to seek relief above and beyond that which the ALJ authorized. For example, she argues that the Union's policy was discriminatory, although neither ALJ made such a finding. If she objected to the ALJ's failure to make such a finding she should have raised that objection in her Exceptions. But she did not do so. Her Answering Brief is not the appropriate time or place to raise such an objection. Further, a finding that CWA discriminated against Charging Party would be wholly inconsistent with *L-3 Communications* where the Board found no discrimination under similar circumstances. *Id.*, at 1067-1069.

Charging Party also argues that the Union's purpose in having previously maintained an annual renewal requirement was "to make it difficult for employees to pay reduced union fees." (Charging Party's Brief, p 10) There is simply no support in the record for this conclusion. Nor did either ALJ make such a finding. Once again, Charging Party chooses to paint a distorted picture of her own reality, rather than relying on the record that is before the Board.

The Union has already sufficiently discussed the alleged arbitrariness of its former policy in its earlier briefs. Charging Party offers nothing really substantive or new on this issue. Thus, the Union rests on its prior arguments in this regard.

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

The question for the ALJ was whether the Union's need to maintain accurate addresses for objectors was a rational business justification for its former annual renewal requirement. The ALJ found that it was not. (Supplemental Decision, p. 8, Ins. 39-40) The Union has taken exception to that finding. Charging Party now seeks to convert that finding into a conclusion that the Union's policy was designed to serve its own self interest in limiting the number of objectors. The ALJ made no such finding. The record does not support such a conclusion. As to all other matters relating to this issue the Respondents rest on their prior Briefs.⁴

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.

Charging Party argues that there would be no administrative burden imposed on CWA if it treated all objectors as continuing. While she may want that treatment to be legally mandated it is not the law. According to the *L-3 Communications*, unions are only required to treat objections as continuing if the objector asks for such treatment. *Id.*, at 1069. Once again, Charging Party tries to stretch the law beyond its confines to suit her own purposes.

She goes on to assert that because CWA accepted continuing objections from employees it represents who were covered by the RLA, it should have been required to treat employees covered by the NLRA in the same fashion. Two points need to be made in response. First, as

⁴ Charging Party also asserts that if the Union had an incorrect address for an employee that employee would not have received the *CWA News* and would therefore be unaware of how to go about filing objections. (Charging Party's Brief, p. 11) Charging Party's own actions as identified in the record contradicts this assertion. She claimed never to have read the *CWA News*, either because she did not receive it or because she considered it to be junk mail and did not have time to read it. (TR 18 Ins. 8-16) Nevertheless, she was able to send in two objection letters and receive dues rebates in response thereto.

Charging Party is well aware, since *L-3 Communications* was decided CWA has, in fact, allowed for continuing objections from NLRA covered objectors, despite the added administrative burden it imposes. This is because the law now mandates that it do so.

Second, while it is true that the Union accepted continuing objections from RLA covered employees well before then, it did so because of the different case law that had developed with respect to those employees, which mandated such treatment. Further, the administrative burden caused by treating the RLA covered employees in that fashion, was far less significant than the burden caused by treating NLRA covered employees in that same manner. This is a function of simple mathematics. The number of NLRA employees CWA represents is huge, about 400,000. Whereas the number of RLA employees CWA represents is much smaller, and as such, is much easier to work with administratively. (TR 101, lns.14-15; TR 108 lns. 6-25)

Finally, with this issue as with others, Charging Party asserts that the law mandates that all objectors be treated as continuing, when the law does not require such treatment. She also conjures up what she claims are the Union's motives, i.e. maximizing the collection of as much money as possible. Those motives were not found to be present by the ALJ, nor were they established by any evidence in the record. Apparently they fit into the world view to which the Charging Party ascribes. They should have no place in the current briefing of these issues.

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.

The Union asserted that one of the legitimate business justifications for its former annual renewal policy was that it assisted it in assessing the level of satisfaction/dissatisfaction of the employees in the bargaining unit with the Union's recent performance. The ALJ disagreed. The

Union took exception to that finding. Charging Party now offers several assertions with respect to this issue.

She suggests that if CWA permitted continuing objections their existence would track dissatisfaction. While annual renewals could help to reveal current sentiment, continuing objections would not assist much in tracking current employee sentiment. Continuing objections would be more likely to reveal only past sentiment, given the likely inertia associated with not having to take any further action, albeit *de minimus*, for the objection to continue. As noted previously CWA has permitted continuing objections since *L-3 Communications* was decided.

Further, Charging Party once again ascribes motives and agendas to the Union that were neither found by the ALJ, nor supported by any record evidence. They should have no place in briefing these issues.

Finally, Charging Party argues that the Union should be required to eliminate the union security clauses from all its collective bargaining agreements. Evidently, this is Charging Party's ultimate goal in this case. That this view is diametrically opposed to labor relations law, as developed by the Board and the Courts over many years since the passage of the NLRA, seems to be of no consequence to Charging Party. This assertion should be given no credence whatsoever by the Board.

CONCLUSION

For all of the foregoing reasons, as well as those contained in Repondents' other Briefs, the decision of the ALJ is clearly in error and must be overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th day of November 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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