

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**COMMUNICATION WORKERS OF AMERICA
AND COMMUNICATION WORKERS OF AMERICA
LOCAL, 4309 (AT&T TELEHOLDINGS, INC. DBA
AT&T MIDWEST AND THE OHIO BELL TELEPHONE
COMPANY-Employer)**

and

Case No. 08-CB-010487

SANDA ILIAS, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION TO REOPEN
OR SUPPLEMENT THE RECORD AND RECEIVE FURTHER EVIDENCE**

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National Labor Relations Board
Region 8
1240 E. 9th Street, Room 1695
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Dated: January 7, 2013

On October 15, 2012, Respondent filed a Motion to Reopen the Record or Supplement the Record and Receive Further Evidence. On October 29, 2012, the Respondent filed a Second Motion to Reopen or Supplement the Record and Receive Further Evidence. Counsel for the Acting General Counsel opposes both motions to reopen or supplement the record to permit the Respondent to present additional evidence. The procedural history of this matter is summarized below.

I. PROCEDURAL BACKGROUND

This matter was originally heard by Judge Wallace Nations in Cleveland, Ohio on October 27, 2008 pursuant to an Amended Complaint and Notice of Hearing issued by the Regional Director for Region 8 on August 21, 2008.¹

On January 9, 2009 Judge Nations issued a decision finding that Communication Workers of America and Communication Workers of America, Local 4309 violated Section 8(b)(1)(A) of the Act as alleged in the amended complaint.² Specifically, Judge Nations found that Respondents violated the Act by requiring non-member bargaining unit employees to annually renew their *Beck* objections in order to maintain their objector status.³ Judge Nations' recommended order requires Respondents to: 1) rescind the annual renewal requirement; 2) notify existing *Beck* objectors in writing that they are not required to renew their objections yearly; 3) publish notice of this change in the next edition of CWA News that is mailed to members; 4) make Charging Party Sanda Ilias whole, including interest, for any fees she paid to Respondents for non-representational

¹ The Parties will be referred to as follows: Communications Workers of America will be referred to as Respondent CWA; the Communication Workers of America, Local 4309 will referred to as Respondent Local 4309 and at times both Unions will be referred to as Respondents. Sanda Ilias will be referred to as the Charging Party or Ilias.

² On January 9, 2009, pursuant to Section 102.45 of the Board's Rules and Regulations, the case was transferred to the Board.

³ *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

expenses since she first filed her *Beck* objection in September 2004 that have not already been refunded to her.

While the matter was pending before the Board, the Board issued its decisions in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010) and *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB No. 164 (2011). As a result, on October 26, 2011 the Board issued an Order Remanding Proceeding to Administrative Law Judge for further consideration in light of those Board decisions. As Judge Nations had retired, the Board remanded the proceeding to Chief Administrative Law Judge Robert A. Giannasi to designate another administrative law judge pursuant to Section 102.26 of the Board's Rules and Regulations.

In lieu of reopening the record to take further evidence, the parties submitted supplemental briefs to address the issues raised in the Board's remand. On September 17, 2012, Judge John T. Clark issued a Supplemental Decision finding that Respondent violated Section 8(b)(1)(A) of the Act by requiring *Beck* objectors to renew their objections on an annual basis pursuant to the Respondent's existing annual renewal procedure. ALJD pg 2, lns 10-13.

II RESPONDENT'S MOTIONS TO REOPEN

In its first motion to reopen the record, Respondent offers four exhibits that include letters that the Respondent and Charging Party submitted to the Board between January 24, 2011 and May 9, 2011. In addition to letters directed to Board Members or the Executive Secretary, Respondent's exhibits 2, 3, and 4 also include attachments of various CWA *Beck* notices and an affidavit from Respondent's Administrator of Special Programs, Helen Gibson. The affidavit is dated May 9, 2011. The Respondent asserts

that these exhibits complete the evidentiary picture (Respondent's October 15, 2012 motion, pg 8).

In support of its argument, Respondent relies on three Board decisions which do not apply to the present matter; these decisions do little to bolster Respondent's request to reopen the record. In Edw. C. Levy Co., 351 NLRB 1237, 1238, fn 10 (2007), the Board took administrative notice of an arbitration award. Dean Transportation, Inc., 350 NLRB, 48, 50, fn 4 (2007), involved supplementing the record with motions that had been omitted from the formal papers in the underlying hearing. In Aero Ambulance Service, Inc., 349 NLRB 1314, 1319, fn 2 (2005), the administrative law judge granted respondent's motion to supplement the record to include records upon which the Region's compliance officer made her backpay summary.

Respondent in the present case had an opportunity to argue that the record should be reopened at the time of the remand and chose not to do so. All of the evidence that Respondent seeks to admit in its first motion to reopen existed at the time of the October 26, 2011 remand. Judge Clark solicited the parties' position on the need to reopen the record. It was agreed that supplemental briefs would adequately address the remand issues (ALJD pg 2, lns 38, 39).

The fact that Respondent may not agree with Judge Clark's Supplemental Decision is not a basis to reopen the record. Respondent alludes to the fact (through the evidence it seeks to introduce) that it has already taken steps to comply with Judge Clark's order (Respondent's motion pgs 7 and 8). This is a matter for the compliance stage of the proceedings. Respondent also ignores the fact that the remedy ordered by the ALJ includes an NLRB notice posting.

On October 29, 2012, Respondent filed a second motion to reopen or supplement the record. This motion is also without merit. Respondent prematurely addresses a compliance issue involving the appropriateness of a make whole remedy. The Charging Party filed exceptions to Judge Clark's determination that a make whole remedy was not supported by Board law. Despite taking the position that a make whole remedy is not an appropriate remedy, Respondent seeks to introduce evidence that is has made the Charging Party whole by refunding a certain portion of her dues. Respondent's proffered evidence consists of a cover letter and a copy of a check made payable to the Charging Party. If the Board agrees with the Charging Party's exception and concludes that a make whole remedy is appropriate, the evidence that Respondent seeks to introduce goes to the issue of compliance. One possible compliance issue will be whether the Respondent, in fact, tendered the full and accurate sum owed the Charging Party.

III CONCLUSION

Inasmuch as Respondent's motions seek to offer evidence that speaks only to remedial issues, are submitted after they waived the offer of Judge Clark to reopen the record, and lack any legal support, Counsel for the General Counsel respectfully requests they be denied.

Dated at Cleveland, Ohio this 7th day of January, 2013

Respectfully submitted,

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PROOF OF SERVICE

Copies of the foregoing Brief were served on January 7, 2013 by electronic mail on Theodore E. Meckler, Esq., Communications Workers of America, 20505 Center Ridge Road, Room 700, Cleveland, Ohio 44116, Email: tmeckler@cwa-union.org and John Scully, Esq., National Right to Work Legal Defense Foundation, 8001 Braddock Road, Suite 600, Springfield, VA 22166, Email: jcs@nrtw.org.

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