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' REPLY BRIEF IN RESPONSE TO ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS TO REOPEN OR SUPPLEMENT THE RECORD

INTRODUCTION

On or about October 15, 2012 Respondents filed their first Motion to Reopen or Supplement the Record with the Board. On or about October 29, 2012 Respondents filed their second Motion to Reopen or Supplement the Record. Charging party filed an Opposition Brief in response to each motion shortly after. Soon after, Respondents filed Reply Briefs in response to charging party's Opposition Briefs.

Acting General Counsel did not file an Opposition Brief at the time either motion was filed. However, on January 7, 2013 Acting General Counsel filed an Opposition Brief, opposing the relief sought in both motions. Respondents then filed a Motion to Strike that Opposition Brief, based on timeliness. On February 26, 2013, by direction of

the Board,[1] the Associate Executive Secretary issued an order denying Respondents' Motion to Strike. Respondents now submit this Reply Brief in Response to the Acting General Counsel's Opposition Brief.[2]

I. Respondents' First Motion to Reopen or Supplement the Record Should Be Granted.

Acting General Counsel argues that Respondents could have sought to supplement or reopen the record, at the time of remand, but did not do so. As such, Acting General Counsel asserts that Respondents should not now be permitted to supplement the record. Although not precisely articulated, it appears that Acting General Counsel contends that because Respondents made no formal request to the Administrative Law Judge Clark to supplement or reopen the record, they waived their right to do so forever. Acting General Counsel offers no authority to support this proposition. This argument is not well taken for several reasons.

First, it is premised on a misstatement of what is reflected in the record. Acting General Counsel asserts that Judge Clark "solicited the parties' position on the need to reopen the record" and it "was agreed that supplemental briefs would adequately address the remand issues." Acting General Counsel cites Judge Clark's Supplemental Decision, at p. 2, lns. 38 & 39 for this proposition. In fact, although not making such a request, Acting General Counsel is essentially seeking to supplement the record itself on this point. The referenced portion of Judge Clark's Supplemental Decision states:

The Board's remand order only specifies that the parties be permitted to

[1] Chairman Pearce recused himself and thus, did not participate in the consideration of the Motion to Strike.

[2] The Procedural Background of this case, other than that which is set forth above, has already been discussed in Respondents' prior filings on this subject, and thus, will not be repeated, herein. It is, however, incorporated by reference.

> file supplemental briefs. It does not direct a reopening of the trial and the parties agreed that a reopening was not necessary. Nor does the remand order permit the admission of additional evidence.

There is no indication here that Judge Clark solicited the parties' position on the need to supplement the record simply to accept exhibits. It speaks only of a possible complete reopening of the trial.[3] Nor does it indicate that the parties agreed that supplemental briefs alone would be sufficient. Instead, it notes that per the Board's order, the filing of supplemental briefs was all that was permitted. Acting General Counsel seeks to rewrite the Supplemental Decision to include findings that are not actually part of that decision.[4] In addition, Acting General Counsel simply ignores the fact that Respondents did try to put these exhibits before Judge Clark on remand in the only way they could.

Second, it would have made no sense for Respondent to have tried to formally supplement the record on remand. The Board's order was clear that on remand the parties were limited to filing supplemental briefs and the ALJ was limited to preparing a Supplemental Decision. There is no indication that the Board would countenance reopening the record before the ALJ on remand. The above referenced paragraph from Judge Clark's Supplemental Decision makes it clear that the Judge also read the Board's order as not permitting any additional evidence to be introduced before him. Respondents believe now, and believed then, that Judge Clark correctly interpreted the Board's remand order in that regard.

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[3] To reopen is a significantly broader concept than to supplement. To reopen something connotes beginning all over again. To supplement connotes merely adding something to that which already exists.

[4] Ironically, at this point in his opinion Judge Clark was indicating that he would not consider the correspondence exchanged with the Board prior to remand. These are the same exhibits that Respondents now formally seek to have included in the record. Respondents attached the referenced correspondence to their Brief to Judge Clark. Respondents clearly sought to bring these exhibits to Judge Clark's attention at the time of remand, however inartful they may have been in their attempt to do so.

The Board made its instructions clear in the remand order. Judge Clark and the parties were obligated to comply with those instructions. There was no realistic way for Respondents to have formally sought to supplement or reopen the record before Judge Clark on remand. The higher authority had already spoken on that subject.

Third, §102.48(b) of the Board's Rules and Regulations (29 CFR §102.48(b)) makes it clear that once Exceptions to the ALJ's decision have been timely and properly filed, the Board "may reopen the record and receive further evidence…" This rule would be pointless, if the fact that Respondents did not formally seek to supplement the record when the case was before Judge Clark, meant that they had waived their right to so do forever, and could never ask the Board to supplement the record when the case returned to the Board.

Fourth, the exhibits in question were not produced out of thin air, but represent direct communications by the parties with the Board. They were initiated by charging party, while this case was still pending before the Board, the first time. When these communications were sent to the Board, copies were also provided to all opposing parties.[5] Although they may not have been part of the actual trial record, they clearly are part of the broader record that was already before the Board before remand.

Acting General Counsel also contends that these exhibits are only relevant to the compliance proceedings in this case. That contention misconstrues both *International Ass'n of Machinists, Local 2777 (L-3 Communications)* 355 NLRB 1062 (2010) and the nature of where this case is procedurally, at present.

Soon after the Board issued its decision in *L-3 Communications*, CWA changed

[5] Initially, charging party wrote to the Board *ex parte.* That communication was properly rejected by the Board. Thereafter, charging party sent another communication and, this time, copied the opposing parties. This communication was accepted by the Board.

its *Beck* objector policy to comply with *L-3 Communications.* At the time of the first ALJ hearing (before Judge Nations), *L-3 Communications* had not yet been decided. The question presented in *L-3 Communications*, whether unions must allow for continuing objections, was at least an open question at the time.[6] Once *L-3 Communications* was decided, CWA changed its policy to comply. Continuing objections became specifically authorized. This new policy took effect before the Board remanded this case, and well before Judge Clark issued the Supplemental Decision.

CWA's new policy no longer mandates annual objections. It also clearly allows for objections to continue from year to year without the need for the objector to take any further action. The exhibits attached to Respondents' Motion to Re-open or Supplement the Record makes these facts clear. It surely would make for a more complete and accurate record before the Board, if these important facts were before it.

In *L-3 Communications* the Board declined to take remedial action on a retroactive basis. Subsequent Board decisions have held to that same view. *International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO (Lugo),* 357 NLRB No. 45 (2011); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, (Trimas Corporation),* 357 NLRB No. 48 (2011).

If the remedy to be imposed in this case were to be prospective only, there would be no need to order CWA to change its policy to comply with *L-3 Communications,* since it has already done so on its own initiative. Nonetheless, Judge Clark issued an order requiring Respondents, *inter alia*, to "cease and desist from requiring employees, who are

[6] In fact, Respondents contend that the weight of authority making up the legal landscape that existed prior to *L-3 Communications* suggested that Unions need not allow for continuing objections. (See Respondents' Exceptions.)

covered by a collective bargaining agreement containing a union-security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis" and "to rescind the requirement that objecting nonmember employees renew their objections on an annual basis." (Supplemental Decision, at p. 11, lns. 32-36; and p. 12, lns. 1-2)[7]

Like with any civil matter, in a contested unfair labor practice case, a determination first must be made on the question of liability. In the unfair labor practice context this means the decision maker must determine whether the charged party violated the Act. If a violation is found to have occurred, the decision maker must then determine what actions should be taken to remedy the violation that has been found.

It is only after both liability and remedy have been finally determined that compliance with that remedy becomes an issue. The compliance stage of an unfair labor practice case is where the Board or the Regional Office takes steps, either formally or informally, to ensure that the Respondents, in fact, comply with the remedy that the Board has decided to impose. In order to get to the compliance stage, there must first be a final decision on what the remedy ought to be. Acting General Counsel confuses these concepts and puts the cart before the horse.

In this case it is clear that both liability and remedy have yet to be finally determined. In *L-3 Communications* and its progeny, the Board has made it clear that the imposition of a retroactive remedy is not appropriate in a case like this. CWA's revised *Beck* policy is surely a relevant fact for the Board to consider when the Board is in a position to make a final determination as to what remedy ought to be imposed, if any.

[7] Ironically, elsewhere in his Supplemental Decision Judge Clark recognized that *L-3 Communications* limited the remedy he could impose to prospective relief only. (Supplemental Decision, at p. 10, lns. 41-43)

The fact that CWA's *Beck* policy has been changed and the nature of these changes, are not simply matters for a compliance proceeding. They are critical facts that the Board should have before it when deciding what remedy, if any, ought to be imposed. For these reasons the Respondents' first Motion to Supplement or Reopen the Record should be granted.

II. Respondents' Second Motion to Supplement or Reopen the Record Should Be Granted.

Acting General Counsel also asserts that the evidence referenced in the second Motion to Supplement or Reopen the Record "addresses a compliance issue involving the appropriateness of a make whole remedy." The exhibits in question reveal that CWA sent charging party a check for $1,159.10 on October 15, 2012, representing the difference between the agency fees she paid and the amount of agency fees paid by objectors. Interest on that amount was also included.

Acting General Counsel suggests that this evidence raises only a compliance issue, i.e. whether charging party received the correct amount of money. Acting General Counsel has once again put the cart before the horse. The Board has yet to decide whether any monetary remedy should be imposed. Judge Clark's Supplemental Decision finds that such a remedy would not be appropriate. (Supplemental Decision, at p. 10, lns. 41-43) Judge Clark's determination in that regard is consistent with a fair reading of *L-3 Communications* and its progeny.

Acting General Counsel correctly points out that charging party has taken exception to this finding by Judge Clark. That means whether or not any monetary remedy ought to be imposed, is still an open question in this case that the Board will

ultimately resolve.[8] Until that question has been resolved there can be no compliance proceedings to ensure that Respondents comply with an as yet non-existent Board determination on remedy.

This case is still at a stage where the question of whether a retroactive make whole remedy ought to be imposed at all. Surely, the fact that there may be no need to impose such a remedy, since Respondents have already provided such funds to charging party, is one relevant fact for the Board to have before it, if and when it does render a determination on this question. For these reasons Respondents' Second Motion to Supplement or Reopen the Record should be granted.

CONCLUSION

For all of the foregoing reasons, as well as those discussed in Respondents' first Motion to Reopen or Supplement the Record, Respondents' Reply Brief (to charging party) in Support of the first Motion to Reopen or Supplement the Record, Respondents' Second Motion to Reopen or Supplement the Record, and Respondents' Reply Brief (to charging party) in support of their second Motion to Reopen or Supplement the Record, all of which are incorporated by reference herein, Respondents respectfully urge the Board to grant both of Respondents' Motions to Reopen or Supplement the Record.

Respectfully submitted,

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[8] Suffice it to say that Respondents' view is that charging party's exception is not well taken. (See Respondents' Answering Brief, pp. 11-12.)

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ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that on the 4th day of March 2013, 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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