

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) and Sanda Ilias. Case 08–CB–010487

June 10, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 17, 2012, Administrative Law Judge John T. Clark issued the attached supplemental decision on remand.¹ The Respondents, Communications Workers of America (CWA) and Communications Workers of America, Local 4309 (CWA Local 4309), filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondents filed a reply brief. The Charging Party filed exceptions and a supporting brief, the Respondents filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.³

The issue presented is whether the Respondents violated their duty of fair representation by requiring employees they represent who are not union members and who seek objector status under *Communications Workers v. Beck*⁴ to assert their objection on an annual basis. We agree with the judge's finding that the Respondents' annual renewal requirement is arbitrary and, therefore, violates Section 8(b)(1)(A) of the Act. We further find that the judge recommended the appropriate remedial relief.

¹ On January 9, 2009, Administrative Law Judge Wallace H. Nations issued a decision in this proceeding. By unpublished Order issued on October 26, 2011, the Board remanded this case for further consideration in light of *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062 (2010), petition for review dismissed No. 10-1297, 2010 WL 4340436 (D.C. Cir. 2010), and *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB 1320 (2011), rev. dismissed and order vacated as moot sub nom. *Gally v. NLRB*, 487 Fed. Appx. 661 (2d Cir. 2012). Judge Nations retired prior to the Board's remand.

² Chairman Pearce, who is a member of the present panel, has recused himself and took no part in the consideration of this case.

The Charging Party contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument for the reasons stated in *Bloomington's, Inc.*, 359 NLRB 1003 (2013).

³ We have modified the judge's recommended Order to conform to the Board's standard remedial language.

⁴ 487 U.S. 735 (1988).

Facts

Charging Party Sanda Ilias is employed by AT&T Midwest and represented by Respondent CWA Local 4309. Respondent CWA is primarily responsible for formulating and administering the system used by Respondent Local 4309 and all subordinate bodies of the CWA to satisfy their *Beck* obligations.

The Respondents administer that system on an annual basis, July 1 to June 30. They require that would-be or current *Beck* objectors assert that status annually, during the month of May; individuals who fail to do so are not treated as objectors during the upcoming yearly cycle, and, as a result, are charged full dues and fees. The Respondents mail a copy of their *Beck* policies, including the annual renewal requirement, to all employees they newly represent and to any represented employees who resign their membership and become agency fee payers. The policies are also published annually in the March/April edition of the CWA newsletter, which is sent to all employees represented by Respondent CWA or its subordinate bodies. Other than those mailings, the Respondents do not send renewal reminders to objectors.

On September 4, 2004, Charging Party Ilias sent a letter to Respondent CWA Local 4309 resigning her union membership and registering a *Beck* objection. Her objection letter did not request a continuing objection, and she failed to subsequently renew her objection annually. The Respondents have continued to charge Ilias full dues and fees.

Discussion

A.

In *L-3 Communications*, the Board determined that a union's maintenance of an annual renewal requirement for *Beck* objectors is unlawful unless the burden it imposes on employees is de minimis or the union demonstrates a legitimate justification for the requirement. *L-3 Communications*, 355 NLRB at 1064–1065; see *Colt's Mfg. Co.*, 356 NLRB 1320, 1322. The Respondents do not except to the judge's finding that the burden their policies impose on objectors is more than de minimis. Rather, they argue that the judge erred in rejecting their asserted justifications.

The Respondents assert that statistics from each objection period are forwarded by Respondent CWA to the affected individual local unions and regional vice presidents; the identification of pockets of *Beck* objections, they assert, assists the local unions in assessing how their performance is perceived by the employees they represent. We agree with the judge that the foregoing explanation fails to establish a legitimate justification for the Respondents' annual renewal requirement.

We recognize that the Respondents have a legitimate interest in addressing *Beck*-related dissent among the employees they represent.⁵ The Respondents did not show, however, that they have ever used the information identifying the location or number of *Beck* objectors as a basis for taking any action in this regard. The mere collection of data is not a sufficient justification for an annual renewal requirement.

Because the Respondents have failed to articulate a legitimate justification for the burden their annual renewal requirement imposes on potential objectors, we agree with the judge that the Respondents violated their duty of fair representation, and accordingly violated Section 8(b)(1)(A) of the Act, by maintaining the requirement.⁶

B.

The Charging Party and the Respondents except to the remedial relief set forth in the judge's decision. The Charging Party argues that the judge erred by failing to provide make-whole relief to her and to all other similarly situated *Beck* objectors represented by the Respondents. The Respondents, in turn, argue that the Board need not order them to rescind their unlawful policy and republish a revised lawful policy, because they have already done so. For the reasons that follow, we do not find merit in either exception and therefore adopt the remedy recommended by the judge.

In *L-3 Communications*, the Board declined to impose the make-whole remedy that a *Beck* violation would otherwise entail. The Board reasoned that, particularly in light of the consistent prior approval by the courts of an annual renewal requirement, it would be unfair to require a union whose case was pending when *L-3 Communications* was issued to do more than rescind its unlawful annual renewal requirement and give notice of the rescission to nonmember employees it represents and/or publish a lawful revised policy. *L-3 Communications*, 355

⁵ As the Board has previously observed, a system that allows continuing objections—rather than requiring annual renewal—does not prevent a union from seeking to persuade objectors, through noncoercive means, to change their minds and become members of the union. *L-3 Communications*, 355 NLRB at 1066.

⁶ The Charging Party, whose unfair labor practice charge was sustained, nevertheless argues that the judge erred by applying the duty of fair representation standard to evaluate the Respondents' conduct. The Charging Party asserts that the judge should have applied a statutory and constitutional standard. The Board in *L-3 Communications* confirmed the applicability of the duty of fair representation standard rather than a statutory standard, and the Board has previously rejected applying a constitutional standard because of the absence of state action. See *L-3 Communications*, 355 NLRB at 1064; *California Saw & Knife Works*, 320 NLRB 224, 228 (1995), *enfd.* sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied* sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

NLRB at 1069; see also *Steel Workers (Cequent Towing Products)*, 357 NLRB 516, 519 (2011), review dismissed sub nom. *Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012); *Electrical Workers Local 34*, 357 NLRB No. 45, slip op. at 4 (2011). Because the present case was pending at the time *L-3 Communications* was issued, we similarly reject the Charging Party's request for a make-whole remedy.⁷

The Respondents contend that, because they announced the rescission of their unlawful policy in the March/April 2011 edition of the CWA newsletter, it would be inappropriate to order them to rescind their unlawful policy and republish a revised lawful policy. To that end, on October 15, 2012, while this case was pending at the Board upon exceptions to the judge's supplemental decision, the Respondents filed a Motion to Reopen the Record to document these asserted changes.⁸

The Board's usual practice is to defer such questions to the compliance stage of the proceedings. See, e.g., *Bell-*

⁷ Even if retroactive relief were available, the Board extends remedies to individuals not named in the complaint only when the General Counsel has proven unlawful conduct against a defined and easily identifiable class of similarly situated employees. See *California Saw & Knife Works*, supra, 320 NLRB at 254. No such class exists here because it is impossible to determine whether employees who failed to renew their objections intended a continuing objection or simply changed their minds about remaining objectors. See *Electrical Workers Local 357 (Newtron Heat Trace)*, 343 NLRB 1486, 1488 (2004) (declining to award make-whole relief to unnamed discriminatees where the determination would depend primarily on "a putative discriminatee's state of mind"), review dismissed sub nom. *Ciekliniski v. NLRB*, 224 Fed. Appx. 727 (9th Cir.), *cert. denied* 552 U.S. 951 (2007).

The Board has ordered unions to recognize the continuing objector status of charging parties whose requests for that status were rejected pursuant to unlawful annual renewal requirements. See *Steel Workers (Cequent Towing Products)*, supra at 519; *L-3 Communications*, supra at 1069. Such a remedy is unnecessary here because the Charging Party did not request a continuing objection. Accordingly, and absent make-whole relief, it is unnecessary to decide whether the Respondents unlawfully enforced the annual renewal requirement as to Charging Party Ilias.

⁸ On October 22, 2012, the Charging Party filed an opposition to the motion, and the Respondents filed a reply on October 24, 2012. On January 7, 2013, the Acting General Counsel filed an opposition to the Respondents' motions to reopen. On January 8, 2013, the Respondents filed a Motion to Strike the Acting General Counsel's opposition, the Acting General Counsel filed a response on January 9, 2013, and the Respondents filed a reply on January 10, 2013. On February 26, 2013, the Board, by order of its Associate Executive Secretary, denied the Respondent's Motion to Strike.

On October 29, 2012, the Respondents filed a second Motion to Reopen the Record to show that on October 15, 2012, they sent a check to the Charging Party for the difference, plus interest, between the amount of agency fees she paid and the reduced amounts paid by *Beck* objectors during the same time period. On November 8, 2012, the Charging Party filed an opposition to the motion, and the Respondents filed a reply on November 9, 2012. We deny the Respondents' motion because make-whole relief is inapposite here; the evidence proffered by the Charging Party is therefore irrelevant.

south Telecommunications, Inc., 346 NLRB 637, 637 (2006) (leaving to compliance the effect of alleged modifications to an unlawful policy); *Douglas Autotech*, Case 07–CA–051428, 2011 WL 6936385 at *2 fn. 5 (Dec. 30, 2011) (leaving to compliance the effect of the parties’ posthearing negotiations on the respondent’s reinstatement and make-whole obligations). We accordingly deny the Respondents’ Motion to Reopen the Record, without prejudice to the Respondents’ ability to raise in the compliance proceedings all questions concerning the effect, if any, of the Respondents’ asserted policy revision on their remedial obligations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Communications Workers of America, Washington, D.C., and Communications Workers of America, Local 4309, Cleveland, Ohio, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, post at its union office in Cleveland, Ohio, copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents’ authorized representative, shall be posted by the Respondent Local 4309 and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent Local 4309 customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent Local 4309 to ensure that the notices are not altered, defaced, or covered by any other material.”

2. Substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 8 signed copies of the notice in sufficient number for physical and/or electronic posting by the Employer, AT&T Teleholdings, Inc. d/b/a AT&T Midwest and the Ohio Bell Telephone Company, if willing, in all places or in the same manner as notices to employees are customarily posted.”

Susan Fernandez, Esq., for the Acting General Counsel.
Theodore E. Meckler, Esq., of Cleveland, Ohio, for the Respondent.
John C. Scully, Esq. (National Right to Work Legal Defense

Foundation), of Springfield, Virginia, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. Pursuant to a charge filed by Sanda Ilias, the Charging Party, on January 17, 2006, and an amended charge filed by her on January 30, 2006, an amended complaint and notice of hearing was issued by the Regional Director for Region 8 of the National Labor Relations Board (the Board), on August 21, 2008. The amended complaint alleges that Communications Workers of America, and Communications Workers of America, Local 4309 (individually referred to as Respondent CWA; Respondent Local 4309, and collectively as Respondents), have been engaging in unfair labor practices in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by informing employees subject to a union-security provision that in order to become and remain a *Beck* objector, nonmember bargaining unit employees must renew their objections annually during the month of May, thereby violating the employees Section 7 rights and Section 8(b)(1)(A) of the Act. The Respondent denies any violation of the Act.

This case was tried in Cleveland, Ohio, on October 27, 2008, before Administrative Law Judge Wallace H. Nations. Judge Nations issued his decision on January 9, 2009. On October 26, 2011, the Board remanded this case to the chief administrative law judge to reassign it to another administrative law judge because of Judge Nations’ retirement. On October 27, 2011, Chief Administrative Law Judge Robert A. Giannasi reassigned this case to me pursuant to the Board’s remand. The parties’ subsequent attempt to settle this matter was unsuccessful.

The remand directs that I consider this case in light of *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062 (2010), and *Auto Workers Local 376 (Colt’s Mfg. Co.)*, 356 NLRB 1320 (2011). The remand permits the parties to file supplemental briefs and further orders that I prepare and serve on the parties a supplemental decision setting forth findings of fact, conclusions of law, and a recommended Order.

On the entire record and after considering the briefs and supplemental briefs filed by counsel for the Acting General Counsel, the Respondents, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

AT&T Teleholdings, Inc. d/b/a AT & T Midwest a Delaware corporation and The Ohio Bell Telephone Company, an Ohio corporation (the Employer), with an office and place of business in Cleveland, Ohio, has been engaged in providing communications services. Annually, the Employer, in conducting its business operations, derives gross revenues in excess of \$100,000. Additionally, the Employer, in conducting its business operations at its Cleveland, Ohio facility, purchases and receives products, goods and materials valued in excess of \$5000 directly from points located outside the State of Ohio. The Respondent admits, and I find that the Employer has at all material times been engaged in commerce within the meaning

of Section 2(2), (6), and (7) of the Act. The Respondents also admit that they have been labor organizations within the meaning of Section 2(5) of the Act.

II. THE PROCEDURAL MATTER

On May 9, 2011, the Respondent's counsel filed a letter with the Board's Executive Secretary urging consideration of actions taken by the Respondents in light of the Board's decision in *Machinists Local 2777 (L-3 Communications)*, above. There is no response from the Executive Secretary's Office in the formal file.

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. Nor does the remand order permit the admission of additional evidence. Accordingly, I will only consider only those matters that are consistent with the Board's remand order. See *Brown & Root Power & Mfg.*, 351 NLRB 168, 189 (2007) (citing *Monark Boat Co.*, 276 NLRB 1143, 1143 fn. 3 (1985), *enfd.* 800 F.2d 191 (8th Cir. 1986).

III. ALLEGED UNFAIR LABOR PRACTICE

A. The Stipulations

At the beginning of the trial the parties offered the following stipulations as Joint Exhibit 1:

1. This stipulation (paragraph no. 1) is being entered simply to provide background information for the hearing in this case: Charging Party, Sanda Ilias (Ilias) filed a previous unfair labor practice charge against Respondents CWA (CWA) and CWA Local 4309 (Local 4309) on December 13, 2004, which charge was assigned Case No. 8-CB-10252. Thereafter, the charge was amended on January 18, 2005 and February 8, 2005. Among other allegations, Ilias alleged that after she resigned from membership and objected to paying full dues on about September 30, 2004, the Respondents continued to charge her full dues and did not provide her with the information that is owed a Beck objector, including a breakdown of representational and non-representational expenditures.
2. This stipulation (paragraph no. 2) is being entered simply to provide background information for the hearing in this case: On July 27, 2005 Frederick J. Calatrello, Regional Director, Region 8, approved the terms of a bilateral informal settlement agreement in Case No. 8-CB-10252. Respondents fully complied with the terms of the settlement agreement. In so doing they provided Ilias with post-objection information including a breakdown of representational and non-representational expenditures and a check in the amount of \$136.85, reimbursing Ilias for non-representational expenditures for the 2004-2005 fiscal objector years.
3. CWA's objector year begins on July 1 and ends on June 30 of the following year.
4. CWA is primarily responsible for formulating and administering Respondent's Beck policy and practices. These policy and practices apply to all bargaining unit members represented by Local 4309 as well as all other CWA Locals.
5. For all years relevant to this proceeding, CWA annually

publishes a notice describing its Beck policy in the March/April edition of the *CWA News*, a newsletter that is routinely sent to bargaining unit employees nationwide. The notice of its Beck policy, as published in the *CWA News*, has remained unchanged since at least 2004, when the charge was filed in Case No. 8-CB-10252.

6. CWA provides Beck objectors with an advance reduction, reimbursing the objector for non-representational expenditures during the objector year in which the objection is made.

7. Brenda Mallory (Mallory) held the position of President of Local 4309 from at least as early as December 1, 2002 to December 1, 2005. Pam Wynn (Wynn) is currently the Local President and has held that position since December 1, 2005. When they held (or in Wynn's case continues to hold) the office of President, both Mallory and Wynn were agents of Local 4309 within the meaning of Section 2(13) of the National Labor Relations Act (the Act).

B. Factual Background

The CWA represent about 400,000 private sector employees, approximately 1500 of which are Beck objectors. Respondent Local 4309 represent about 700 employees at the AT&T facilities involved in this case. CWA is primarily responsible for formulating and administering the Respondent's Beck policy and practices. These policy and practices apply to all bargaining unit members represented by Local 4309 as well as all other CWA Locals. "Beck" refers to *Communications Workers v. Beck*, 487 U.S. 735 (1988). Helen Gibson is CWA's administrator of special programs. One of the special programs that she is responsible for is the procedures for Beck objectors and agency fee payers.

Gibson testified that the CWA's Beck policy requires that Beck objectors renew their objections on an annual basis. The CWA objector year begins July 1 and ends June 30 of the following year. In order for an objector to receive an advanced refund of their dues for the entire objector year the objector must file their objection during May of each year.

Gibson testified that in order to notify new employees and members who have resigned and have become agency fee payers Respondent CWA mails each employee a pamphlet entitled, "Your rights with respect to union representation, union security agreements and agency fee objections." Respondent CWA also publishes a notice describing its Beck policy annually in the March/April edition of the *CWA News*, a newsletter that is routinely sent to bargaining unit employees nationwide. The published notice has remained unchanged since 2004, when Charging Party Ilias resigned and objected to paying full dues. Gibson also testified regarding some exceptions to the policy. CWA will accept objections received in April, objections post-marked June 1, and objections filed by new hires. Individual reminders are not sent to current Beck objectors.

Gibson also testified that of the 400,000 private sector represented employees 13,000 are agency fee payers and about 1500 are agency fee objectors. (Tr. 101.) Gibson estimated that she receives between 1800 to 2000 letters a year requesting objector status. (Tr. 76.) She was unaware of the breakdown between new and renewing objectors. By far the majority of the

letters arrive during the May window period. Only *Beck* objectors have the nonrepresentational portion of their fee in lieu of dues refunded to them and only they must renew their status annually. Aside from the foregoing exceptions, CWA's *Beck* policy requires that *Beck* objectors renew their objector status annually during the month of May. Failure to do so results in the employee not being classified as an objector for the next year and being charged full dues for that year.

Upon receiving a timely objection letter it is read by a CWA clerical employee. According to Gibson, the employee is looking for key words or phrases, i.e., "object," "objector," "pay reduced dues," or "don't want to pay for politics," in order to determine that the sender wants to be an objector. If there are no key words or phrases present then Gibson reads the letter to see if she can ascertain the writer's intent. She always errs "on the side of it being a letter of objection." (Tr. 77.)

C. Respondent CWA's Justifications for its Annual Renewal Requirement

Gibson claims that Respondent CWA must use an annual objection renewal because the employees who read the objection letters do not have sufficient judgment to make the distinction between a "continuing" objector and a "regular" objector. According to Gibson, allowing for continuing objectors would slow down the process and require Respondent CWA to use individuals with a higher skill level. (Tr. 78–79, 114.)

Gibson also notes that Respondent CWA has acted in reliance on court decisions, a Board decision, and General Counsel memorandum, in maintaining its annual renewal requirements. (Tr. 80–82.)

Gibson also testified that part of the reason for requiring annual renewal is to keep the address list for the objectors up to date. Although the employer provides the current addresses to Respondent CWA there is a 4- to 6-week lag time. Gibson stressed that it was important to have the correct address because *Beck* objectors had to be notified of their right to object. Respondent CWA was also required to send *Beck* objectors a rebate check as well as the calculations used to determine the amount of the check. (Tr. 84, 113–114.)

The Respondents also claim that the annual renewal is used also as a barometer to indicate locals that have employees who are unhappy with their union representation. After Respondent CWA receives the objector letters, that information is forwarded to the appropriate local and regional officers to address the cause of the problem. (Tr. 84–85, 99.)

D. The Charging Party's Experience with the Respondent's *Beck* Policy and Practices

Charging Party Sanda Ilias is employed by AT&T at its Cleveland, Ohio facility. She was hired in 1997 as a full-time customer service representative, and she has remained in that position for most of her employment. She was a member of Respondent CWA Local 4309 from 2003 until September 4, 2004. On that date, she sent a letter to Respondent CWA Local 4309 resigning her membership and objecting to paying dues for nonrepresentational purposes. Ilias pays her dues through automatic checkoff. Respondent CWA Local 4309 continued to collect full union dues and Ilias filed an unfair labor practice

charge. That case was settled on July 27, 2005, as the result of a bilateral informal settlement agreement. Ilias received \$136.85 for nonrepresentational expenditures for the 2004–2005 objector years as a result of the settlement. In addition to the refund, the Respondents provided her with a breakdown of representational and nonrepresentational expenditures for the 2004–2005 objector years.

Respondent CWA does not recognize any bargaining unit employees in Local 4309 as *Beck* objectors. Consequently, Ilias is still paying dues of \$30.13, the full amount, every 2 weeks.

Ilias stated that she is no longer receiving the *CWA News*. She did testify that she received copies of the *CWA News* after May 2004, but they were not read and thus she was unaware of Respondent CWA's annual renewal requirement. Ilias also said that when her objection for the 2004–2005 year was about to expire in May 2005 she did not receive any notification from either of the Respondents that she needed to renew her *Beck* objection for the 2005–2006 year.

Ilias was uncertain as to whether she had renewed her objection for the 2005–2006 *Beck* objector years. She testified that after she received a second check in April 2006 from Respondent CWA, for \$159.34, she thought it was for her original objection. That was the last refund she received. She has not received an advance dues refund check for the objector years 2006–2007 or 2007–2008. Gibson testified that the April 2006 check was sent in response to an objection letter Ilias sent dated January 11, 2006. That letter was not entered into evidence. The amended charge filed with the Board on January 30, 2006, clearly references the Respondent's policy that nonmembers must file annual objections. (GC Exh. 1(c) at 2.) Similarly, the letter signed by Gibson and containing a check for \$159.34, makes clear that the Respondent's policy requires that all objections for subsequent July through June periods be in writing and mailed in time to arrive during the preceding May. (R. Exh. 1.)

E. Respondents' 10(b) Defense

In their posthearing brief to Judge Nations that the Respondents argue that the Charging Party knew of the Respondents' annual renewal practice more than 6 months before filling the charge in this case. In an attempt to prove that contention, the Respondents attached several documents of factual material to their brief. On December 12, 2008, the counsel for the General Counsel filed a motion to strike the attachments as well as all factual assertions and legal arguments based on them because they were not placed in evidence during the hearing. Judge Nations granted the motion in full and concluded that without the alleged evidence the Respondent's 10(b) argument must fail.

Judge Nations also relied on the counsel for the General Counsel's assertion that Section 10(b) does not preclude a finding that the annual renewal requirement violates the Act. Judge Nations' notes that "[t]he Board has found that the continued maintenance of a rule is unlawful even though the rule was enacted outside the 10(b) period; if the rule is found to be unlawful on its face or is presumptively unlawful." Judge Nations cites *Control Services, Inc.*, 305 NLRB 435 fn. 2, 442 (1991),

enfd. mem. 961 F.2d 1568 (3d Cir. 1992) (continued maintenance of facially unlawful rule originally promulgated outside 10(b) period, not time-barred), as an example of this reasoning as applied to solicitation policies. Judge Nations also observed that the administrative law judge in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB 1320 (2011), also rejected the Unions' 10(b) defense. (Id., slip op. at 10.) Judge Nations did not have the benefit of the Board's decision in *Colt's Mfg. Co.*, where the Board noted that "the Unions' do not pursue that defense before the Board." (Id., slip op. at 1321 fn. 7.) It does not appear that the Respondents have pursued their 10(b) defense in their supplemental brief. In the interest of administrative finality, I am in complete agreement with Judge Nations' rejection of the Respondents' 10(b) defense and I adopt it as my own.

IV. ANALYSIS AND DISCUSSION

Pursuant to the Board's remand order, I will follow the principles set out in the Board's decision in *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062 (2010), as applied in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB 1320. In *Machinists Local 2777 (L-3 Communications)*, the Board found an annual renewal rule unlawful. In so doing the Board emphasized that they would evaluate such requirements on a case-by-case basis to determine "whether the Union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors." Id. at 1062.

L-3 Communications reaffirmed that the Board applies the duty-of-fair representation standard in *Beck* cases. (355 NLRB 1062). A union breaches that duty if its actions affecting employees whom it represents are "arbitrary, discriminatory, or in bad faith." Id. at 1063. An action is arbitrary, in turn, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Id., quoting *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991). As *L-3 Communications* and *Colt's Mfg.*, supra at 1063, illustrate, if the burden imposed on employees by an annual renewal requirement is more than de minimis, the Board evaluates a union's proffered justifications for the requirement considered in the context of the particular *Beck* procedures involved.

It is clear that the annual renewal requirement here, like that in *L-3 Communications*, and unlike that in *Colt's Mfg.*, imposes more than de minimis burden on objectors. In the instant case, as in *L-3 Communications*, an objector must remember to mail a statement of renewed objection to Respondent CWA each year during a designated 1-month period specified in the Respondent's procedure. In this case it is the month of May. Failure to send a timely renewal results in the loss of opportunity to receive a dues reduction for 11 months, until the renewal period recurs. Nor does the Respondent's *Beck* procedure in this case provide the objectors with multiple notices and a reminder of the annual renewal requirement, as does the *Beck* procedure in *Colt's Mfg.*

The Board also found that the fact that an objection could be filed at any time under the *Beck* procedure in *Colt's Mfg.*, was "[e]qually [as] important" as the notices and the remainder.

The absence of a fixed filing period greatly reduces the consequences of a failure to renew. Unlike the instant case and *L-3 Communications*, an employee subject to the annual renewal procedure set forth in *Colt's Mfg.*, could regain objector status by filing an objection as soon as the objector learned of the omission. Thus, an objector who acts promptly would only have to pay full dues for a brief period. Objectors who miss the filing during the limited window period in *L-3 Communications* and the Respondent's procedure are required to pay full dues for another 11 months. Moreover, under procedure used in *Colt's Mfg.*, an objector who fails to renew on time, promptly receives a remainder of the need to act in order to regain objector status. That procedure stands in stark contrast to a once-a-year notice published in the house magazine—the method used by the respondents in *L-3 Communications* and the Respondents in the instant case.

There is one aspect of the Respondents' objection procedure that appears to differ from that in *L-3 Communications*. After an objector files a timely objection or renewal, Respondent CWA provides the objector with an advance reduction, reimbursing the objector for nonrepresentational expenditures during the objector year in which the objection is made.

Based on the foregoing, I find that the Respondents have not implemented any procedures to minimize the burden imposed on *Beck* objectors similar to those in *Colt's Mfg.* Thus, it is necessary to weigh the Respondents' proffered justifications for the requirement. *Machinists Local 2777 (L-3 Communications)*, 355 NLRB at 1062.

Most of the justifications argued by the Respondents in defense of its requirement were rejected in *L-3 Communications*. The Respondents argue, as did the unions in *L-3 Communications*, that the annual renewal was the best way for the Respondents to obtain the current addresses of each objector. The employers electronically send Respondent CWA a monthly list of the dues paid by the employees along with the employees' addresses. Gibson testified that after she gets the list she verifies it with the Locals. She states that she checks with the Locals because the computerized list that comes from the employers takes 4 to 6 weeks to get to Respondent CWA's offices in the District of Columbia. The Respondent's counsel solicited the following testimony from Gibson regarding the lists provided by the employers:

Q. Have you come to learn that that's (the list) not always up-to-date and accurate?

A. That's correct.

Q. Okay. What have you found, from practice, is the most direct and accurate way of getting addresses, mailing addresses of bargaining unit members?

A. When we hear from them directly, with their home address on the letter or envelope. [Tr. 83.]

I do not find Gibson's generalized testimony persuasive. The Respondents adduced no evidence as to the frequency of returned mail that was sent to the wrong address because the objector failed to notify the Respondents of the correct address. The Respondents also did not explain why an address that was on an objection letter mailed in May would be considered more reliable than an address from an employer list compiled in June.

Nor did the Respondents offer any reason why an electronically mailed computerized list would take 4 to 6 weeks to arrive at its destination. In *L-3 Communications*, the Board noted that the respondents, “as the joint exclusive representative of all employees in the bargaining unit, have a right to obtain the addresses of all unit employees from their employer.” 355 NLRB 1064. (Citation omitted.) Moreover, “[a]n employer must respond to the information request in a timely manner.” E.g., *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2000). The justification also appears to be counterintuitive. A result of filing a timely *Beck* objection is to receive a rebate check in the mail. That said, it would appear that objectors would make certain that the Respondents had the correct address. Based on the foregoing, I find that this justification does not provide a legitimate rationale for the Respondent’s annual *Beck* renewal requirements. See 355 NLRB at 1062.

The Respondents also offer as a justification for their annual renewal requirement the fact that the Respondents would need to use employees with better judgment than the current employees who read the objection letters. Gibson claims this is necessary so that the employees are able to make the distinction between a “continuing” objector and a “regular” objector. Thus, according to Gibson, allowing for continuing objectors “would slow down the process” (Tr. 78), or “take more time” (Tr. 114), and require Respondent CWA to employ individuals with higher skill levels. To the extent that Respondents in their brief characterize this testimony as an “administrative burden” that would “significantly” increase the need to “far more carefully scrutinize the objection letters.” (R. Br. at 24.) I reject that characterization. I also note that Gibson admitted that if all objectors were viewed as continuing objectors it would require less clerical help. (Tr. 100.) Once again I find the evidence to support this justification to be general and unconvincing.

The Respondents have made no attempt to minimize the burden on employees by providing them with clear instructions concerning what they need to say to object and, alternatively, to make a continuing objection. As an example, the Board offers an annual notice presented to employees covered by the Railway Labor Act. The notice informs the employees that they had “the following choice: (1) they may follow the annual renewal procedure, or (2) they may indicate in their [objection] letter . . . that they want their objection to be treated as continuing in nature.” Id. at 1067 and fn. 28.

Gibson testified that the employees assigned to read the objection letters are trained to look for key words and phrases, such as “objector” and “pay reduced dues.” The Respondents offer no explanation why adding a few other key words or phrases such as “continue,” “continuing,” or “year-to-year,” would not enable the readers of the letters to determine the intentions of the employees.

It is also significant that in *L-3 Communications*, the Board made clear that:

Our holding today does not suggest that the Unions would have violated their duty of fair representation in this case if they had limited employees’ options to three: making no objection, making a simple objection (which would be understood as continuing until the next annual notice), and making

a continuing objection. The duty of fair representation does not require unions to honor objections for any period specified by a nonmember. Nor does the duty require that unions assume that a nonmember desires an objection to be continuing if, after being given clear instructions concerning how to express a continuing objection, the employee does not do so. [Id. at 1067. (Citation omitted.)]

In this case, the Charging Party never requested a continuing objection, nor did the Respondents ever make reference to a continuing objection. Moreover, Gibson acknowledged that Respondent CWA did not recognize continuing objections. (Tr. 91.) Based on the foregoing, I find that this justification does not provide a legitimate rationale for the Respondent’s annual *Beck* renewal requirements.

Gibson testified that the use of the annual renewal provides “an excellent barometer of unhappiness.” The annual renewal “points out pockets of decent.” (Tr. 84.) Gibson also agreed that the use of continuing objections would not interfere in the functioning of the “barometer.” Accordingly, this justification does not provide a legitimate rationale for the Respondent’s annual *Beck* renewal requirements.

The Respondents here, as did the unions in *L-3 Communications*, contend that they were justified in relying on prior court and Board cases as well as GC Memorandum in maintaining the annual renewal requirement. Regarding the Respondents’ reliance on *California Saw & Knife Works*, 320 NLRB 224 (1995), the Board observed that the General Counsel’s choice not to argue that an annual renewal requirement was unlawful did not insulate such requirements from subsequent Board scrutiny. The Board went on to state that the court cases relied on by the Unions, to which the Board was not a party, did not preclude the Board’s independent assessment of the issue presented. The Board emphasized that it had the primary responsibility for establishing national labor policy. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (footnote omitted). The foregoing is fully applicable to the instant case and I therefore find that this justification does not provide a legitimate rationale for the Respondent’s annual *Beck* renewal requirement.

For all the foregoing reasons, I find that the Respondents have failed to establish a reasonable basis for the annual *Beck* requirement. Because the requirement is arbitrary, it violates the Respondents’ duty of fair representation and Section 8(b)(1)(A) of the Act.

Although in this case there was no request for a continuing objection the following synopsis is set forth in *L-3 Communications* and would be of guidance for the parties going forward:

[A]bsent a more compelling rationale or other procedures that minimize the burden of annual objection not present in this case, a union violates its duty of fair representation if it declines to honor nonmember employees’ express, written statement to the union that they object on a continuing basis to supporting union activities not related to collective bargaining and contract administration. If a union provides a written explanation of the consequences of submitting a simple objection in contrast to a continuing objection, the union does not violate its duty by honoring simple objections for only 1 year.

In addition, a union need not honor requests to object for periods of time other than 1 year and continuously.

L-3 Communications, supra at 1069.

In *L-3 Communications*, the Board granted prospective remedial reliefs because the unions could reasonable have believed that their requirement was lawful in light of court approval of the requirement. *Id.* at 1069. Thus, the Board ordered the unions to rescind their annual renewal requirement, but did not order make-whole relief, and directed the unions to recognize the charging party only—not all *Beck* objectors represented by the unions nationwide—as a continuing objector.

Accordingly, the counsel for the Acting General Counsel and the Charging Party’s request for a make-whole remedy is inconsistent with *L-3 Communications*, where the Board specifically declined to give retroactive application to its ruling. Similarly, the Charging Party’s request that remedial relief be extended to all nonmembers represented by the Respondents exceeds the limited prospective relief granted in *L-3 Communications*.

CONCLUSIONS OF LAW

1. AT&T Teleholdings, Inc. d/b/a/ AT&T Midwest and the Ohio Bell Telephone Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America and Communications Workers of America, Local 4309 are labor organizations within the meaning of Section 2(5) of the Act.

3. By requiring *Beck* objectors to renew their objections on an annual basis under the Respondents existing annual renewal procedure, the Respondents have violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order that the Respondents rescind their requirement that *Beck* objectors renew their objections on an annual basis. I shall also order that the Respondents notify its existing *Beck* objectors that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the Respondents’ magazine.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondents, Communications Workers of America and Communications Workers of America, Local 4309, Cleveland, Ohio, their officers, agents, and representatives, shall

1. Cease and desist from

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Requiring nonmember employees, who are 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.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the requirement that objecting nonmember employees renew their objection on an annual basis.

(b) Notify nonmember employees who are subject to a union-security clause, that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the *CWA News*.

(c) Within 14 days after service by the Region, post at its union office in Cleveland, Ohio, copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent Local 4309 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent Local 4309 customarily communicates with its employees and members by such means. Reasonable steps shall be taken by the Respondent Local 4309 to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by AT&T Teleholdings, Inc. d/b/a/ AT&T Midwest and the Ohio Bell Telephone Company, if willing, at all places or in the same manner as notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT require nonmember employees, who are 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.

WE WILL NOT in any like or related manner restrain or coerce

you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the requirement that objecting nonmember employees renew their objection on an annual basis.

WE WILL notify nonmember employees who are subject to a union-security clause, that the existing annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded, and publish a revised policy in the *CWA News*.

COMMUNICATIONS WORKERS OF AMERICA AND
COMMUNICATIONS WORKERS OF AMERICA, LOCAL
4309