

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

WELLINGTON INDUSTRIES, INC.

Respondent

and

CASE 7-CA-53182

**LOCAL 174, INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO**

Charging Party

and

INDEPENDENT UNION LOCAL ONE

Party to the Contract

**ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL
COUNSEL TO EXCEPTIONS OF RESPONDENT, WELLINGTON
INDUSTRIES, INC.**

INTRODUCTION

Pursuant to a charge filed by Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (hereafter UAW Local 174), the Regional Director for the Seventh Region of the National Labor Relations Board issued a Complaint and Notice of Hearing on December 22, 2010 in the above case against Respondent Wellington Industries, Inc. A hearing was conducted in this matter in Detroit, Michigan on February 7, 2011 before Administrative Law Judge Keltner W. Locke. Thereafter, ALJ Locke issued a bench decision on February 10, and a Bench Decision and Certification on May 2, including conclusions of law, remedy, Order, and notice provisions. ALJ Locke found that Respondent engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

Specifically, the Complaint alleges and the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by conditioning collective bargaining with Independent Union Local One (Local One), the exclusive bargaining representative of an appropriate unit of Respondent's employees, upon the absence of an individual (UAW Local 174 president John Zimmick) from negotiations, thereby depriving the exclusive bargaining representative of the right to choose its own bargaining agents. The Complaint also alleges and the ALJ found that about August 8, 2010, Local One affiliated with UAW Local 174.

SUMMARY OF THE CASE

Respondent has recognized Local One as the exclusive representative of its bargaining unit employees for at least 20 years, and this recognition has been embodied in successive collective-bargaining agreements. In about May 2010, Respondent and Local One commenced negotiations for a successor collective-bargaining agreement to replace the 2005-2009 collective-bargaining agreement that was amended and extended by agreement of the parties to November 14, 2010. There were six individuals on the Local One bargaining committee, including five unit employees¹ and Local One counsel Robert Fetter. There were three individuals on Respondent's bargaining committee, including Gary Sievert, Human Resources Director; Blaise Flack, Chief Financial Officer; and Stanley Moore, Respondent Counsel. About this same time, representatives of UAW Local 174 passed out organizing leaflets to employees in Respondent's parking lot. Thereafter, in late May to early June, representatives of Local One and UAW Local 174 met to discuss Local One's operations and possible affiliation with UAW Local 174. About June 13, a Local One membership meeting was held to discuss ongoing contract negotiations, during which the subject of affiliation was raised and a member proposed that Local One affiliate with UAW Local 174. As a result of that meeting, Local One representatives posted notices informing employees about a meeting to be held on August 8. On August 8, a meeting was

¹ Mark Roggero; unit chairman; Jerry McGraw, vice president/secretary-treasurer; Gary Gignac, midnight shift representative; Andy Burd, second shift representative; and Leon Blankenship, first shift representative.

held by Local One and a majority of the members in attendance voted in favor of Local One affiliating with UAW Local 174.²

Following the affiliation vote, Local One and Respondent continued to bargain for a successor agreement. At a negotiation session held on November 8, 2010, Local One, by its counsel, Robert Fetter, requested to bring UAW Local 174 president John Zimmick to the bargaining table to assist in bargaining on behalf of Local One. Respondent, by its counsel, Stanley Moore, responded that it would not bargain if Zimmick attended bargaining. Local One and Respondent continued to bargain, without the addition of Zimmick, and entered into a new collective-bargaining agreement to conclude the negotiations, effective from November 14, 2010 to November 14, 2013.

The facts of this case are succinctly set forth in further detail by ALJ Locke (ALJ) in his May 2, 2011, Bench Decision and Certification.

Respondent states eight exceptions, seven of which (exceptions one through seven) are related to the ALJ's finding that there was a valid affiliation of Local One and UAW Local 174. General Counsel's Complaint alleges at paragraph 11 that about August 8, 2010, Local One affiliated with UAW Local 174, and the

² There were 38 members in attendance at the meeting; 30 voted in favor of affiliation, six voted against affiliation, and two did not vote.

ALJ so found. However, Counsel for the Acting General Counsel submits that the ALJ's conclusions and findings as to the affiliation of Local One and UAW Local 174 were not crucial to his finding regarding the gravamen of the Complaint, that Respondent violated Section 8(a)(5) and (1) by conditioning continued bargaining with Local One upon the absence of an individual designated by Local One to be one of its negotiating representatives. In this regard, the Complaint specifically averred at paragraph 16, consistent with Board law, that Respondent's conduct, in conditioning continued bargaining with Local One upon the absence of UAW Local 174 president John Zimmick, constitutes an unlawful refusal to bargain with Local One, **regardless of whether Local One and UAW Local 174 are affiliated** (GC-1(e), emphasis added).³ Thus, while Counsel for the Acting General Counsel will respond to Respondent's exceptions one through seven concerning the affiliation issue, as set forth below, it is not necessary for the Board to consider such exceptions in order to affirm the ALJ's finding that Respondent violated Section 8(a)(5) and (1) in this matter.

³ References to the General Counsel Exhibits, Respondent Exhibits, and the Transcript are referred to as GC, R, and TR, respectively. TR__ refers to a specific page of the trial transcript.

ARGUMENT

I. THE ALJ CORRECTLY REJECTED RESPONDENT'S ARGUMENT THAT ALTHOUGH LOCAL ONE HAD NO OBLIGATION TO ALLOW ITS MEMBERS TO VOTE ON AFFILIATION, ONCE IT UNDERTOOK TO HAVE SUCH A VOTE, IT ASSUMED AN OBLIGATION TO CONDUCT THE AFFILIATION VOTE WITH DUE PROCESS.

Respondent takes exception to the ALJ's finding that Respondent had no basis to refuse to recognize UAW Local 174 because of the manner in which the affiliation vote was conducted. However, relying on *Raymond F. Kravis Center for the Performing Arts (Kravis)*, 351 NLRB 143 (2007), the ALJ properly did not consider whether the instant affiliation satisfied due process standards.

In *Kravis*, the Board overruled its prior law, abandoning its due process requirement for union affiliations in light of the Supreme Court's decision in *NLRB v. Financial Institution Employees (Seattle-First)*, 475 U.S. 192 (1986). While acknowledging that *Kravis* and *Seattle-First* state that Local One did not need to have an affiliation vote, Respondent argues that once it undertook to do so, Local One owed a duty to all the employees in the bargaining unit to inform them, clearly and succinctly, and in a timely manner, that a vote was going to take place and that it was up to the employees to decide whether they wished to be affiliated with UAW Local 174.

Despite there being no requirement that a merger or affiliation be conducted with adequate due process, General Counsel presented evidence at the hearing regarding the steps that Local One undertook to sufficiently notify its members of the August 8 meeting during which an affiliation vote took place. (GC-24-27, TR-53-56). In this regard, Local One chairman Mark Roggero testified that a member proposed affiliation with UAW Local 174 at a membership meeting held on June 13, but that proposal was put on hold so that the entire membership could be notified and given the opportunity to vote regarding possible affiliation. (TR-52-53). Thereafter, Roggero posted two notices on August 2 announcing a meeting to be held on August 8 at UAW Local 174 to discuss collective bargaining for the upcoming new contract. (GC-24-25, TR-53-54). One of these notices specifically noted that the August 8 meeting would include a discussion regarding the benefits of affiliating with UAW Local 174. (GC-24). On August 7, Local One representative Jerry McGraw posted two additional notices for the August 8 meeting specifically urging members to attend the meeting to participate in the ballot proposal to affiliate with UAW Local 174 (GC-26-27, TR-55-56). Additionally, General Counsel presented evidence that a secret ballot affiliation vote was conducted in a sterile atmosphere. (GC-28, TR-57-59).

Respondent argues that the notice of the affiliation vote provided by Local One was not sufficient and requests that the Board carve out an exception to

Kravis that due process standards should apply in affiliation cases where less than sufficient notice has been given. Counsel for the Acting General Counsel submits that Respondent's argument is preposterous. Under Respondent's theory, the *Kravis* finding that no due process is required for union affiliations would only apply in affiliation situations where no notice is provided at all, or no affiliation vote is even conducted. As stated by the ALJ, to accept Respondent's argument – that Local One's decision to have an affiliation vote allows an inquiry into the way the vote was conducted - would be to ignore the Supreme Court's reasoning in *Seattle-First*. Counsel for the Acting General Counsel submits that the ALJ properly rejected Respondent's argument that it had a basis to refuse to recognize UAW Local 174, as the affiliate of Local One, because of the manner in which the affiliation vote was conducted.

II. THE ALJ CORRECTLY CONCLUDED THAT A SUBSTANTIAL CONTINUITY BETWEEN THE INCUMBENT AND NEWLY AFFILIATED UNION EXISTS.

Respondent takes exception to the ALJ's conclusion that a substantial continuity exists between the incumbent union and newly affiliated union. However, based on the record evidence under Board law, the ALJ properly concluded that a substantial continuity exists and there were no changes resulting from the instant affiliation which were so significant as to alter the identity of the incumbent bargaining representative.

When there is a merger or affiliation, an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative. *Kravis*, supra at 147. This is the substantial continuity requirement. In determining whether there is a lack of continuity of representation after a merger or affiliation, the Board considers whether the merger or affiliation resulted in a change that is "sufficiently dramatic" to alter the union's identity. The Board said this may occur where the changes are so great that a new organization comes into being – one that should be required to establish its status as a bargaining rep through the same means that any labor organization is required to use in the first instance. *Kravis*, supra at 147-148, citing *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990) and *Western Commercial Transport, Inc.*, 288 NLRB 214, 217 (1988). Additionally, in assessing continuity, the Board considers the totality of the circumstances. Continuity is found where traces of the preexisting identity are maintained, and there is some degree of retained autonomy over day-to-day representational matters. *Mike Basil Chevrolet*, 331 NLRB 1044 (2000); *CPS Chemical Company, Inc.*, 324 NLRB 1018 (1997); *Sioux City Foundry*, 323 NLRB 1071, 1083 (1997), enfd. 154 F.3d 832 (8th Cir. 1998); *Sullivan Bros. Printers*, 317 NLRB 561, 563 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996).

Applying those principles to the instant case, the record contains overwhelming evidence of substantial continuity between Local One and its post-affiliation existence as a part of UAW Local 174. The affiliation agreement references: (1) waiver by Local 174 of all UAW initiation fees for Local One members; (2) continued leadership responsibilities by existing Local One officials; (3) continuity in the manner in which contract negotiations are conducted; (4) Local One by-laws remaining intact; and (5) Local One assets remaining in the exclusive control of Local One. (GC-12). As Rogerro testified: (1) all union dues have been suspended and members of Local One have not been required to pay any dues or initiation fees to Local 174 UAW; (2) unit employees have not executed dues check-off authorizations to Local 174 UAW; (3) the same Local One bargaining committee is in place since the affiliation; (4) the same Local One representatives continue to represent Unit employees in grievances with no involvement of the Local 174 UAW since the affiliation; and (5) there has been no change in Local One's day-to-day representation of Respondent's employees. (TR-30-33, 52). There can be no question that the affiliation of Local One with Local 174 did not result in changes so significant as to alter the identity of Local One and raise a question concerning representation of the Unit employees.

III. THE ALJ CORRECTLY FOUND THAT THERE WAS NO ATTEMPT TO SUBSTITUTE THE CHARGING PARTY FOR LOCAL ONE.

Respondent takes exception to the ALJ's finding that there was no attempt to substitute UAW Local 174 for Local One. In this regard, Respondent argues that by attempting to have UAW Local 174 president Zimmick participate in contract negotiations, UAW Local 174 has substituted for Local One. However, as stated above, the record evidence supports the ALJ's finding that since affiliation, the nature of the certified bargaining representative remains essentially the same, and there has been a continuity of local union officers. As found by the ALJ, the presence of a UAW Local 174 official on Local One's negotiating team does not rise to the level of being a de facto change in the Local One's identity.

The record is devoid of evidence that in enlisting the aid of UAW Local 174 president Zimmick, Local One was in any way attempting to transfer authority to Local 174 to bargain on its behalf. This was the scenario in *Goad Company*, 333 NLRB 677 (2001), citing *Sherwood Ford Inc.*, 188 NLRB 131 (1971) where an incumbent local union did not simply enlist the aid of an agent, but transferred its representational responsibilities to another local union. The Board found that was akin to an outright substitution of representative, not just the association of expert aides. The instant case does not come close to the scenarios set forth in *Goad Company* or *Sherwood Ford*. The record evidence demonstrates, as

testified to by Rogerro, that on November 8, Local One was not attempting to delegate its collective bargaining responsibilities to UAW Local 174 or looking to substitute Local 174 as the representative of the unit employees. (TR-30). Rather, Local One was merely seeking assistance in collective bargaining from president Zimmick, a union agent who is skilled in dealing with companies similar to Respondent and has expertise regarding the competitive marketplace. (TR-29-30).

Respondent also argues that correspondence from president Zimmick to Respondent following the August 8 affiliation, referring to Local One as a “semiautonomous unit” of UAW Local 174 and referencing the collection of UAW dues, demonstrates the unions’ attempt to substitute UAW Local 174 for Local One. (R-13, 14). However, as noted by the ALJ, even though Local One is now a “semiautonomous unit” of UAW Local 174, that change did not extinguish Local One’s identity. Regarding collection of dues, as stated above, the record evidence demonstrates that members of Local One have not been required to pay any dues or initiation fees to Local 174 UAW, and unit employees have not executed check-off authorizations to send dues to Local 174 UAW. (TR-30-31).

Respondent also argues that correspondence exchanged between Local One counsel Robert Fetter and Respondent counsel Stanley Moore, related to parts of the underlying charge which were dismissed, demonstrates the unions’ attempt to substitute UAW Local 174 for Local One. (R-15, 18, 21). However, Counsel for

the Acting General Counsel submits that Fetter's arguably overzealous representation of his client is not relevant to a finding on the merits of affiliation. Rather, the totality of facts and circumstances surrounding this matter clearly warranted the ALJ's finding of a valid affiliation.

The ALJ was correct in giving no weight to Respondent Exhibits 13, 14, 15, 18, and 21 and finding that there was no attempt to substitute UAW Local 174 for Local One.

IV AND V. THE ALJ CORRECTLY CONCLUDED THAT THE INCREASE IN DUES AND FEES WAS NOT SUFFICIENTLY DRAMATIC TO ALTER THE UNION'S IDENTITY AND DO NOT RAISE A QUESTION CONCERNING REPRESENTATION IN THIS CASE.

Respondent takes exception to the ALJ's conclusion that the increases in union dues and fees is not "sufficiently dramatic" to alter Local One's identity and do not raise a question concerning representation in this case. Respondent argues that the unions' increased dues and fees for unit employees are sufficiently dramatic to alter Local One's identity and raise a question concerning representation.

However, as stated above, the record evidence demonstrates that members of Local One have not been required to pay any dues or fees to Local 174 UAW.

Respondent urges only that dues will eventually be higher and that the workforce is upset by the specter of a future increase. However, this is pure speculation.

Counsel for the Acting General Counsel is unaware of any cases that make conjecture about employees' reactions a factor in the continuity analysis.

At any rate, a hike in future dues does not defeat continuity. *CPS Chemical Co.*, 324 NLRB 1018, 1022 (1997), 160 F.3d 150 (3rd Cir. 1998). It is reasonable to assume that employees who vote to affiliate and thereby attain stronger representation and better services expect that it will be more expensive. *Mike Basil Chevrolet, Inc.*, supra at 1045; *CPS Chemical Co.*, supra at 1022, 1024. As noted by the ALJ, Respondent has not cited a decision in which increases in dues and fees, comparable to those proposed in the instant case, raise a question concerning representation. The differences in dues structure between Local One and UAW Local 174 do not amount to such a significant change to alter Local One's identity and raise a question concerning representation, and the ALJ's conclusion in this regard should be affirmed.

VI. THE ALJ CORRECTLY CONCLUDED THAT THE EMPLOYEE PETITION (R-16) DID NOT CREATE A REASONABLE UNCERTAINTY AS TO WHETHER A MAJORITY OF UNIT EMPLOYEES CONTINUED TO SUPPORT LOCAL ONE.

Respondent takes exception to the ALJ's conclusion that the petition of the employees seeking an affiliation re-vote (R-16) did not create a reasonable uncertainty as to whether a majority of unit employees continued to support the exclusive bargaining representative. However, the ALJ correctly found that the

employees' petition sought a new affiliation vote, which is quite different from expressing dissatisfaction with the existing exclusive bargaining representative, and it would be mere speculation to attempt to infer a message other than the one actually stated on the petition itself. The ALJ correctly noted that the petition, therefore, related to an internal union matter and certainly did not create a reasonable uncertainty as to whether a majority of unit employees continued to support the exclusive bargaining representative.

Respondent argues that correspondence exchanged between Local One counsel Robert Fetter and Respondent counsel Stanley Moore, related to parts of the underlying charge which were dismissed, somehow warrant a finding that there was reasonable uncertainty by Respondent as to whether a majority of unit employees continued to support Local One as their exclusive bargaining representative. (R-15, 18, 21). However, as stated above, Fetter's arguably overzealous representation of his client is not relevant to a finding on the merits of affiliation. Rather, the totality of facts and circumstances surrounding this matter clearly warranted finding of a valid affiliation. The ALJ was correct in giving no weight to Respondent Exhibits 15, 18, and 21 and finding that the employee petition did not create a reasonable uncertainty as to whether a majority of unit employees continued to support Local One.

VII. THE ALJ CORRECTLY CONCLUDED THAT THE RECORD DOES NOT SUPPORT A CONCLUSION THAT A QUESTION CONCERNING REPRESENTATION EXISTED.

Respondent takes exception to the ALJ's conclusion that the record does not support a conclusion that a question concerning representation existed. In this regard, Respondent submits that a review of all of the information set forth in its Exceptions one through six clearly indicates that the record supports a conclusion that a question concerning representation does exist. In response, Counsel for the Acting General Counsel relies on its responses to Respondent's Exceptions one through six, as stated above.

Respondent specifically references bargaining guidelines and ground rules entered into by Respondent and Local One representatives, and argues that these documents support Respondent's position that it was justified in refusing to agree to continue negotiations on November 8 in the presence of UAW Local 174 president Zimmick and support a conclusion that a question concerning representation existed. (GC-9, 10). However, Counsel for the Acting General Counsel submits that neither the bargaining guidelines nor ground rules contain any restriction concerning who either party can bring to the bargaining table. Rather, these documents merely address the mechanics of bargaining between the parties. (GC-9, 10; TR-27-29).

Based on the record evidence and case law presented above, the ALJ's conclusion that the record does not support a conclusion that a question concerning representation existed should be affirmed.

VIII. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CONDITIONING CONTINUED COLLECTIVE BARGAINING WITH LOCAL ONE ON THE ABSENCE OF UAW LOCAL 174 PRESIDENT ZIMMICK FROM NEGOTIATIONS, THEREBY DEPRIVING THE EXCLUSIVE BARGAINING REPRESENTATIVE OF THE RIGHT TO CHOOSE ITS OWN BARGAINING AGENTS.

Respondent takes exception to the ALJ's conclusion that by conditioning continued bargaining with Local One on the absence of UAW Local 174 president Zimmick from negotiations, Respondent deprived the exclusive bargaining representative of the right to choose its own bargaining agents, and violated Section 8(a)(5) and (1) of the Act. The ALJ reached this conclusion by finding that the affiliation between Local One and UAW Local 174 was valid and a substantial continuity existed between Local One and UAW Local 174. In this regard, the ALJ concluded that because the affiliation is valid, Respondent lawfully could not condition further bargaining on exclusion of the UAW Local 174 president from Local One's bargaining committee. Counsel for the Acting General Counsel does not disagree with the ALJ's analysis and conclusion and requests that the Board affirm the ALJ's finding of an 8(a)(5) and (1) violation in this regard. However, Counsel for the Acting General Counsel submits that under

Board law the same conclusion is reached regardless of whether there was a valid affiliation.

It is undisputed that by Local One attorney Robert Fetter's November 5 e-mail to Respondent attorney Stanley Moore, Local One alerted Respondent that it desired to enlist the services of UAW Local 174 president Zimmick at the November 8 bargaining session. (GC-2). Respondent admits that at the November 8 bargaining session Fetter, on behalf of Local One, asked Moore, on behalf of Respondent, whether it was Respondent's position that if Zimmick attended bargaining, Respondent would not bargain, **and Moore answered YES.** (GC-3, 11, paras. 5-6). Local One had the right to enlist the services of president Zimmick in negotiations with Respondent and Respondent was not lawfully entitled to deprive Local One of its right to choose its bargaining agent and condition continued bargaining on Zimmick's absence from the bargaining table. Respondent's conduct on November 8 deprived Local One of its right, as exclusive collective bargaining representative of the Unit, to choose its own bargaining agents. This conduct alone constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act.

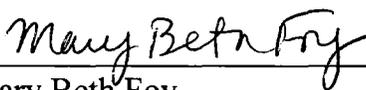
Board law regarding this issue is clear. Longstanding precedent establishes that employers and unions have the right to choose whomever they wish to represent them in formal labor negotiations and parties must deal with the chosen

representatives who appear at the bargaining table except in the rare circumstance when the presence of a particular representative makes collective bargaining impossible or futile. The two seminal cases are *Fitzsimons Manufacturing Company*, 251 NLRB 375, 379 (1980) and *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). Those cases were recently cited in *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004) and *Atrium at Princeton*, 353 NLRB 540, 566 (2008).

This case does not present an exceptional circumstance that would permit Respondent to refuse to deal with a particular union representative and continue bargaining. Rather, in those cases, the conduct at issue is generally violent, threatening, or of a similar egregious nature. See, *King Soopers, Inc.*, 338 NLRB 269, (2002); *Sahara Datsun, Inc.*, 278 NLRB 1044, 1046-1047 (1986), enfd. 811 F.2d 1217 (9th Cir. 1987); *Fitzsimons Manufacturing Company*, supra at 379-380. Thus, the above evidence alone warrants a finding of a Section 8(a)(5) and (1) violation.

CONCLUSION

For all of the above reasons, Counsel for the Acting General Counsel requests that the National Labor Relations Board affirm the Bench Decision and Certification of the Administrative Law Judge in finding that Respondent violated Section 8(a)(5) and (1) of the Act, and grant all of the relief recommended by him.

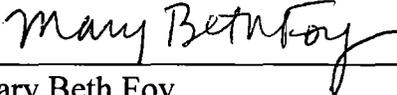


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I certify that on the 14th day of June, 2011, I e-mailed copies of Counsel for the Acting General Counsel's Answering Brief to Exceptions of Respondent, Wellington Industries, Inc. to the following parties of record:

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