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

WELLINGTON INDUSTRIES, INC.,

Respondent,

-and- Case No. 7-CA-061568

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.

EXCEPTIONS BRIEF OF RESPONDENT, WELLINGTON INDUSTRIES, INC.

PLUNKETT COONEY

Stanley C. Moore, III (P23358)
Attorney(s) for Respondent
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4011
(248) 910-4040 (facsimile)
smoore@plunkettcooney.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

U.S. SUPREME COURT

U.S. DISTRICT COURT

NATIONAL LABOR RELATIONS BOARD

STATUTES

STATEMENT OF THE CASE

The Complaint alleges that Independent Union Local One sought to have John Zimmick, the president of UAW Local 174 (hereinafter "UAW"), act as the designated representative for Independent Union Local One. This case is an extension of the case involving the issue of affiliation (Case 7-CA-53182), (hereinafter referred to as the "Prior Case"). However, this case also addresses the issue of whether the Respondent was compelled to provide information to the UAW and/or meet with Mr. Zimmick as a representative of Independent Union Local One. Respondent contends that the arguments it made in the Exceptions filed with the Board clearly demonstrate that, notwithstanding the ALJ's decision in the Prior Case, Respondent does not have to recognize and deal with the UAW as a representative of Respondent's employees in the bargaining unit.[1]

Respondent submits that under the facts of this case, there has been no designation by Independent Union Local One of Mr. Zimmick as Independent Union Local One's servicing representative. And, even if there were such a designation, same would be a mere ruse to cover up the attempted change in the employees' certified bargaining representative from Independent Union Local One to UAW Local 174. Accordingly, the Respondent submits there has been no violation of the Act, and the Charge and Amended Complaint should be dismissed.

Independent Union Local One purportedly "affiliated" with UAW Local 174 on August 8, 2010. Independent Union Local One and the Respondent have been parties

[1] This is true notwithstanding the Board's Decision and Order of December 9, 2011 (357 NLRB No. 135) affirming the ALJ's rulings, findings and conclusions and adopting his recommended Order. It is also noted that Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018.

to a collective bargaining agreement for at least 20 years. Respondent refused to recognize the UAW as a representative of its employees in the bargaining unit since the certified representative of the employees is Independent Union Local One. Introduced in this case by Counsel for the Acting General Counsel were the Exhibits from the hearing in the Prior Case.[2] Please see the Certification of Representative of Independent Union Local One as the representative of the employees as the result of an election wherein the employees chose Independent Union Local One and not the UAW as their representative (*Prior Case Exhibit GC 5*). On August 18, 2010, the Respondent received from its employees a Petition objecting to the purported affiliation vote (*Prior Case Exhibit R-16*). Since the time of the decision in the Prior Case through July 12, 2011 in the instant case, Independent Union Local One has not provided written documentation to the Respondent asserting that John Zimmick, president of UAW Local 174, is the designated representative for Independent Union Local One. This fact was testified to by Mark Roggero, who served as president of Independent Union Local One:

> **Q.** Okay. Sir, up through your letter that you signed on July 12, 2011, designated General Counsel Exhibit 7, had you as President of the Independent Union Local One given any written document to the Company designating John Zimmick as Independent Union Local One's servicing representative?
>
> **A.** From myself personally?
>
> **Q.** Yes.
>
> **A.** No.
>
> (Tr. P. 34, L.4-11)[3]

[2] References to "Prior Case Exhibits" refer to Exhibits in Case No. 7-CA-53182.

[3] References to the hearing transcript shall be designated as follows: (Tr. P. (page), L. (lines)).

Accordingly, Respondent asserts that it was within its rights to not meet with the president of UAW Local 174 and to not provide information to the UAW, which is a stranger to the parties' collective bargaining agreement and which union does not represent Respondent's employees.

The case was tried before the Administrative Law Judge ("ALJ") on December 5, 2011. The ALJ issued his Decision on January 9, 2012. He found that the affiliation was proper and that Respondent violated Section 8(a)(5) of the Act by refusing to provide information to and by refusing to allow UAW Local 174 President John Zimmick to participate in grievance meetings. The Respondent takes exception to the ALJ's Decision.

QUESTIONS INVOLVED

(1) *Did the ALJ err in his acceptance of the Board's affirmation of Administrative Law Judge Locke's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to negotiate with Local Union One if Zimmick was present at the collective bargaining sessions?*

Respondent submits that the ALJ did err and relies on its Exceptions and its Exceptions Brief.

(2) *Did the ALJ err in his acceptance of the Board's determination in a footnote wherein the Board noted it had already reviewed the validity of the affiliation and declined to reconsider it?*

Respondent submits that the ALJ did err and relies on its Exceptions and its Exceptions Brief.

(3) *Did the ALJ err in his determination that the Board's February 11, 2011 Order dismissing the RM Petition and its December 9, 2011 Decision are dispositive of the instant case?*

Respondent submits that the ALJ did err and relies on its Exceptions and its Exceptions Brief.

(4) *Did the ALJ err in his determination that the Board had already considered the validity of the affiliation, found it valid, and has declined to consider this issue?*

Respondent submits that the ALJ did err and relies on its Exceptions and its Exceptions Brief.

(5) *Did the ALJ err in his conclusion that the Respondent violated Section 8(a)(5) in refusing to provide information to Local Union One, through John Zimmick, and refusing to allow John Zimmick to assist in grievance proceedings, including the Shane Cook grievance, because Independent Union Local One is validly affiliated with Local 174 of the UAW?*

Respondent submits that the ALJ did err and relies on its Exceptions and its Exceptions Brief.

SUMMARY OF ARGUMENT

The Respondent contends that there has been a substantial and dramatic change in the pre- and post-affiliation union representative; that there has not been a continuity of representation; and that a question of representation was created based upon the purported affiliation vote. In fact, UAW Local 174 is attempting to supplant and replace Independent Union Local One as the employees' bargaining representative. This is demonstrated by the evidence in this case, as will be discussed in this Brief. Accordingly, the Respondent asserts that it was appropriate for it to refuse to allow Mr. Zimmick to attend grievance meetings and for the Respondent to refuse to provide information to the UAW.

ARGUMENT

Exception 1

The Respondent takes exception to the ALJ's acceptance of the Board's affirmation of Administrative Law Judge Locke's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to negotiate with Local Union One if Zimmick was present at the collective bargaining sessions, 357 NLRB No. 137 (*ALJ Decision at page 2, lines 40-42*). The Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018. Further, Respondent relies on its argument set forth in relation to Exception 5 to support this Exception.

Exception 2

The Respondent takes exception to the ALJ's acceptance of the Board's determination in a footnote wherein the Board noted it had already reviewed the validity of the affiliation and declined to reconsider it (*ALJ Decision at page 2, lines 42-44*). The Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018. Further, Respondent relies on its argument set forth in relation to Exception 5 to support this Exception.

Exception 3

The Respondent takes exception to the ALJ's determination that the Board's February 11, 2011 Order dismissing the RM Petition and its December 9, 2011 Decision are dispositive of the instant case (*ALJ Decision, page 3, lines 36-37*). The

Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018. Further, Respondent relies on its argument set forth in relation to Exception 5 to support this Exception.

Exception 4

The Respondent takes exception to the ALJ's determination that the Board has already considered the validity of the affiliation, found it valid, and has declined to reconsider this issue (*ALJ Decision, page 3, lines 37-38*). The Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018. Further, Respondent relies on its argument set forth in relation to Exception 5 to support this Exception.

Exception 5

The Respondent takes exception to the ALJ's conclusion that the Respondent violated Section 8(a)(5) in refusing to provide information to Local Union One, through John Zimmick, and refusing to allow John Zimmick to assist in grievance proceedings, including the Shane Cook grievance, because Independent Union Local One is validly affiliated with Local 174 of the UAW (*ALJ Decision, page 3, lines 40-44*). The Respondent has sought review of the Board's Decision and Order. In that regard, Respondent has filed a Petition for Review with the United States Circuit Court for the District of Columbia, Case No. 12-1018. Further, Respondent asserts and relies on the following to support its stated Exceptions:

I. The UAW is Not the Employees' Representative

The contract between Respondent and Independent Union Local One was introduced as *Exhibit GC 10*. A review of that document will show that the Respondent recognizes Independent Union Local One, but the contract has no reference whatsoever to the UAW or its Local 174. It is Independent Union Local One that has been certified as the representative of the employees (*Prior Case Exhibit GC 5*). If the Respondent were to recognize the UAW, it would be recognizing a minority union in that the UAW has not established its majority representative status of the employees in the bargaining unit. It has long been held that an employer violates the Act if it recognizes a union that does not have the support of a majority of the employees in the bargaining unit. *Ladies' Garment Workers (ILGWU) (Bernhard-Altmann Tex. Corp.) v. NLRB*, 366 U.S. 731 (1961). Also, an employer may only bargain or deal with a union that is its employees' statutory bargaining representative. *Nevada Security Innovations, Ltd.*, 341 NLRB 953 (2004).

As the Board discussed in *Nevada Security*, a union cannot transfer its representational responsibility to another union which is not the certified representative of the employees under the guise of simply enlisting the aid of an agent or servicing representative. 341 NLRB at 955. In so holding, the Board discussed its decision in *Goad Co.*, 333 NLRB 667 (2001). Respondent submits that Mr. Zimmick is not the designated representative/agent of Independent Union Local One but, rather, is the president of UAW Local 174, the union seeking to supplant and replace Independent Union Local One.

In this case, the Respondent was thwarted by the Board itself in the dismissal of its RM Petition (*Prior Case Exhibit R-19*) filed to test which union had the support of a majority of the bargaining unit employees. Further, the employees themselves were thwarted by the Board from having the opportunity to determine which union represented them with the dismissal of a Decertification Petition (*Prior Case Exhibit R-20*). Frankly, the Board cannot have it both ways. It cannot deny the Respondent and its employees the opportunity to learn definitively, through an election, which union represents the employees, nor can the employees be denied the opportunity to express their views as to which union is going to represent them. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). If that is, in fact, the Board's position here, it is then acting hypocritically when it states that elections are *the preferred method* to determine whether a union represents a majority of employees in a bargaining unit. *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717 (2001).

II. It is the UAW, not Independent Union Local One, Seeking Information

It must be noted that the Charge in this matter was brought by the UAW and not by Independent Union Local One. The Charge itself clearly shows that it was filed on behalf of the UAW, and it is the UAW that is listed as the Charging Party in the Amended Complaint. It is submitted that the UAW has no standing to bring a Charge against the Respondent because there is no legal obligation for the Respondent to recognize the UAW. Again, the UAW is not seeking to function as a servicing representative, but is instead demanding that it be treated as the certified representative of the employees in the bargaining unit, which it clearly is not.

Accordingly, Respondent was within its rights to not provide information to the UAW and to not meet with Mr. Zimmick.

The key Exhibits in this case are *GC 3, 4, 5* and *6.* All four of those documents are letters from the UAW to the Respondent demanding information regarding attendance records and possible skilled trades information concerning Respondent's employees. Because the UAW is a stranger to the contract and does not represent the employees in the bargaining unit, the Respondent is not required to provide the information sought by the UAW. The fact that it was the UAW and not Independent Union Local One seeking the information is demonstrated by a review of all four Exhibits. The first two letters requesting attendance information (*Exhibits GC 3* and *4*) refer to "the Union." It can be seen by reading those letters that the only union referred to is UAW Local 174. There is no reference whatsoever in the letters to Independent Union Local One.

Further, when reviewing *Exhibits GC 5* and *6*, it is readily apparent that the demand was being made on behalf of the UAW alone and not on behalf of Independent Union Local One. Specifically, in both letters, Mr. Zimmick stated as follows:

> The following information is vital so that **the UAW** can better represent **its membership** and provide all services available to them. (*Emphasis added.*)

It is clear from this language that it is the UAW and not Independent Union Local One that has sought this information. Mr. Zimmick's own words demonstrate what is really going on in this matter. That is, the UAW is looking to assert itself as the bargaining representative of the employees in the bargaining unit and is not merely acting in the role of a "designated representative."

UAW Local 174 continues to attempt to supplant and replace Independent Union Local One as the representative of Respondent's employees and not just function as a representative for Independent Union Local One. The UAW's letters *(Exhibits GC 3, 4, 5* and *6*) show that this is the real intent of the UAW. Frankly, those letters follow in line with the UAW's initial demand of August 9, 2010 to be recognized as the employees' union representative.[4] Mr. Zimmick wrote: "On behalf of the unit and Local 174, **the UAW hereby demands recognition**. (*Emphasis added.*) *Prior Case Exhibit R-13*. These are not the words or actions of a mere servicing representative. Rather, they the words and actions of a union that believes it has replaced Independent Union Local One as the representative of the Respondent's employees.

Counsel for the Acting General Counsel relies upon *Exhibit GC 7* to say that as of July 12, 2011, Independent Union Local One was demanding the information. A reading of that letter, signed by both Mr. Roggero and Mr. Zimmick, does not show a request from Independent Union Local One. Again, the letter is on the letterhead of UAW Local 174. It merely makes reference to "The Union," not to Independent Union Local One. It references information being provided to Mr. Zimmick, but not as a result of him being a representative for Independent Union Local One. Counsel for the Acting General Counsel argues that because the letter was signed by Mr. Roggero as president of "Union Local One," that it was a request from Independent Union Local One to provide the information to Mr. Zimmick and to allow him to represent the members of Independent Union Local One. However, a reading of the letter shows that Mr. Roggero was not holding himself out as president of Independent Union Local One, the certified representative of the employees of the bargaining unit, but rather as

[4] This letter was sent the day after the purported affiliation on August 8, 2010.

"President Union Local One." Respondent submits that there is no such entity as "Union Local One."

Counsel for the Acting General Counsel also relies on the testimony of Mr. Roggero that the references in *Exhibits GC 3, 4, 5, 6* and *7*, when referring to "the Union," mean Independent Union Local One (Tr. P. 18, L. 14-23). However, in his testimony, Mr. Roggero made it clear that "the Union" is the UAW. He stated as follows:

> **Q**. Now, referring you to General Counsel's Exhibits 5 and 6, the June 8th, 2011 and June 16th, 2011 letters attached to, which you've testified were attached to the July 12th information request, which requests information related to job descriptions, what was the purpose of you requesting that information on July 12th?
>
> **A**. We had needed that information to determine if the skilled trades, semi-skilled and skilled trades, would be able to get a journeyman's card, and we needed that information to make that determination because they would not allow the UAW to do a walk-through.
>
> **Q**. And explain how that request came about?
>
> **A**. There was individuals that had asked about acquiring a journeyman's card. **We had gone to the Union** seeking that information. **The Union had generated a letter**, I believe it was in April, requesting that they do a walk-through, and I had hand-delivered a letter to the Company requesting to do that. (*Emphasis added.*)

What Mr. Roggero is really stating is that he was not asking for the aid of an agent (Mr. Zimmick as a servicing representative) but, rather, was transferring representational rights to the UAW as "the Union." This is simply not permissible, even under the guise of a purported affiliation. *Goad Co.*, 333 NLRB 667 (2001); *Nevada Security Innovations, Ltd.*, 341 NLRB 953 (2004). The testimony of Mr. Roggero clearly shows he considers "the Union" to be UAW Local 174.

Finally, Counsel for the Acting General Counsel argues that Independent Union Local One had no letterhead or postage and, therefore, it was appropriate for UAW

Local 174 to use its stationery and stamps to request information on behalf of Independent Union Local One. However, Mr. Roggero testified that, to his knowledge, Independent Union Local One has never had letterhead or postage, but that in the past, prior to July 12th, he had hand-delivered written documents to the Respondent's HR Director requesting information (Tr. P. 36, L. 10-13). The letterhead issue is a mere sham trying to cover up the fact that UAW Local 174 is attempting to supplant and replace Independent Union Local One.

This Charge and the Amended Complaint are not about the failure of the Respondent to acknowledge Mr. Zimmick as the designated representative of Independent Union Local One but, rather, have at their core the fact that the post-affiliation union is so substantially different that a question of representation does, in fact, exist. What we have in this case is the UAW supplanting itself, or at least attempting to supplant itself, for the certified representative of the employees, Independent Union Local One. Under these facts and circumstances, the Respondent is not obligated to recognize nor provide information regarding employees in the bargaining unit to an entity that is neither the certified representative of the employees nor the designated agent of a union (Independent Union Local One) that does represent the employees in the bargaining unit. In its decision in *NLRB v. Financial Institution Employees of America Local 1182* (*Seattle First*), 475 U.S. 192 (1986), the Supreme Court stated: "If the changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation and the Board may then conduct a representation election …." 475 U.S. at 206.

Additionally, in *Raymond A. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), the Board has stated:

> Moreover, the other prong of the Board's standard regarding union affiliations – that the employer's duty to recognize the union does not continue when the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union – remains intact. Thus, if it is determined that the postaffiliation union lacks substantial continuity with the preaffiliation union, a question concerning representation is thereby raised and the employer's obligation to recognize the union ceases. In such an instance, the due process prong of the Board's standard – requiring that union members vote on the affiliation – becomes irrelevant because a question concerning representation is raised regardless of such a vote. 351 NLRB at 147.

In the *Kravis Center* decision, when analyzing the Supreme Court's decision in *Seattle-First*, the Board stated:

> 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 "significantly dramatic" to alter the union's identity. *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990). 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 representative through the same means that any labor organization is required to use in the first instance." *Western Commercial Transport, Inc.*, 288 NLRB 241, 217 (1988). In assessing continuity, the Board considers the totality of the circumstances. *Mike Basil Chevrolet*, 331 NLRB 1044 (2000). 351 NLRB at 147-48.

We note the decision of the United States District Court for the Eastern District of California in the matter of *Garcia v. Sacramento Coca-Cola Bottling Co., Inc.*, 733 F. Supp. 2d 1201 (2010). That case involved a 10(j) injunction hearing. There is an extensive discussion by the court regarding "substantial continuity." Specifically, the court stated:

> In determining whether there is substantial continuity after an affiliation, the Board considers the totality of the circumstances, "eschewing the tendency toward a 'mechanistic approach' or the use of a 'strict checklist.'"

> *Mike Basil Chevrolet, Inc.*, 331 N.L.R.B. 1044, 1044 (2000) (quoting *Sullican Bros. Printers*, 317 N.L.R.B. 561, 563 (1995), *enf.* 99 F.3d 1217 (1st Cir. 1996)). Rather, the Board has held that "the critical question is whether the 'changes are so great that a new organization has come into being.'" *Id.* at 1044-45; *May Dep't Stores Co.*, 289 N.L.R.B. 661, 665 (1988) ("[T]he general test for determining whether the affiliation of a bargaining representative with another labor organization raised a question concerning representation is whether the affiliation produces a change that is sufficiently dramatic to alter the union's identity.") (emphasis in original) (internal quotations and citations omitted). 733 F. Supp at 1212.

Here, there is no substantial continuity pre- and post-affiliation. The facts in this case show a continuing effort by UAW Local 174 to supplant and replace Independent Union Local One; to, in effect, become "the Union."

CONCLUSION

Respondent submits the above Exceptions to the Decision of the Administrative Law Judge clearly show that he erred in his findings of fact, conclusions of law, and decision to sustain the unfair labor practice charge. The Respondent has not engaged in any conduct violating the Act. For these reasons, Respondent submits to the Board that the Administrative Law Judge erred in his Decision, that his Decision should be reversed, and that the Charge and Amended Complaint should be dismissed.

PLUNKETT COONEY

By: /s/ Stanley C. Moore, III

Stanley C. Moore, III (P23358)
Attorney(s) for Respondent
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4011
(248) 901-4040 (facsimile)
smoore@plunkettcooney.com

Dated: February 6, 2012

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

WELLINGTON INDUSTRIES, INC.,

Respondent,

-and- Case No. 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.

CERTIFICATION OF SERVICE

I hereby certify that on Monday, February 6, 2012, a copy of the foregoing *Exceptions Brief of Respondent, Wellington Industries, Inc.*, together with a copy of this *Certification of Service*, were served upon the following parties/attorney(s) of record by "E-Filing," electronic mail (where applicable), and/or regular U.S. mail at their stated business address(es).

Mary Beth Foy, Esq. Counsel for the Acting General Counsel National Labor Relations Board Region 7 477 Michigan Avenue, Room 300 Detroit, MI 48226 marybeth.foy@nlrb.gov	**Robert D. Fetter, Esq.** Counsel for the Charging Party Miller Cohen PLC 600 W. Lafayette Boulevard, Fl 4 Detroit, MI 48226 rfetter@millercohen.com

PLUNKETT COONEY

By: /s/ Stanley C. Moore, III
Stanley C. Moore, III (P23358)
Attorney(s) for Respondent
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4011
(248) 901-4040 (facsimile)
smoore@plunkettcooney.com

Open.18001.50776.11571510-1