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

WELLINGTON INDUSTRIES, INC.

Respondent

and **CASE 07-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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND BRIEF IN SUPPORT THEREOF

Now comes Counsel for the Acting General Counsel, Mary Beth Foy, and pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, files the following Cross-Exception to the Decision of the Administrative Law Judge Arthur J. Amchan (JD-02-12), in the above matter, which issued on January 9, 2012.

CROSS-EXCEPTION

1. Exception is taken to the basis of the ALJ's conclusion, at page 3, lines 40-43, of his Decision, that "Respondent violated Section 8(a)(5) in refusing to provide information to Local Union One (sic) through John Zimmick and refusing to allow John Zimmick to assist Local One in grievance proceedings including the Shane Cook grievance, because Independent Local Union One (sic) is validly affiliated with Local 174 of the UAW."

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTION

SUMMARY OF THE CASE

Respondent manufactures stampings for the automotive industry at its plant in Belleville, Michigan. Respondent has recognized Independent Union Local One (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. Mark Roggero has been the president of Local One for the past three years. The current collective bargaining agreement between Respondent and Local One is effective from November 14, 2010, through November 14, 2013.

In about May 2010, Respondent and Local One commenced negotiations for a successor collective-bargaining agreement. On August 8, 2010, a meeting was held by Local One and a majority of the members in attendance voted in favor of Local One affiliating with Charging Party UAW Local 174 (UAW Local 174). Following the affiliation, Local One and Respondent continued to bargain for a successor agreement. At a negotiation session held on November 8, 2010, Local

One requested to bring UAW Local 174 president John Zimmick to the bargaining table to assist in bargaining on behalf of Local One. Respondent 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 the current collective bargaining agreement to conclude the negotiations. Respondent's conduct in conditioning continued bargaining with Local One upon the absence of UAW Local 174 president Zimmick from negotiations was found to be an unfair labor practice in violation of Section (8)(a)(5) and (1) of the Act.[1]

By letter dated July 12, 2011, from its president Roggero, co-signed by UAW Local 174 president Zimmick, Local One requested that Respondent furnish information regarding enforcement of the parties' negotiated attendance policy, and information related to job descriptions for certain unit job classifications. Despite its necessary and relevant request, Respondent unlawfully failed and refused to provide any of the information requested by Local One.

On about June 13, 2011, Local one requested that Charging Party president Zimmick attend a contractual step-three grievance hearing regarding discipline issued to a unit employee, Shane Cook. Since about mid-July, Respondent

[1] See***, Wellington Industries Inc***., 357 NLRB No. 135 (2011) (hereafter referenced as ***Wellington I***), issued by the Board on December 9, 2011, affirming Bench Decision and Certification of Administrative Law Judge Keltner W. Locke, issued on May 2, 1011.

unlawfully failed and refused to permit Zimmick, Local One's designated representative, to attend the grievance hearing.

The facts of this case are succinctly set forth in further detail by ALJ Amchan in his January 9, 2012, Decision.

CROSS-EXCEPTION

ALJ Amchan concluded that Respondent violated Section 8(a)(5) in refusing to provide information to Local One through Zimmick and refusing to allow Zimmick to assist Local One in grievance proceedings including the Shane Cook grievance, because Local One is validly affiliated with Charging Party Local 174 UAW. The ALJ reached this conclusion by finding that the affiliation between Local One and UAW Local 174 was valid, as found by the Board in ***Wellington I***. In this regard, the ALJ concluded that because the affiliation is valid, Respondent lawfully could not refuse to provide Local One information through Zimmick, or refuse to permit Zimmick from assisting Local One in any part of the grievance process.

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, General Counsel submits that the same conclusion must be reached regardless of whether there was a valid affiliation.

I. REGARDING 8(a)(5) REFUSAL TO FURNISH INFORMATION

By letter dated July 12, 2011,[2] Local One, the admitted Section 9(a) exclusive collective-bargaining representative of Respondent's unit employees, requested information from Respondent, including information regarding enforcement of the parties' negotiated attendance policy, and information regarding detailed job descriptions for certain unit job classifications. (TR-18-19; GC 1(l), 1(o), 7). Local One's July 12 request for information was made by its president Roggero, and co-signed by Charging Party president Zimmick, (TR-17-18, 35; GC 7). The July 12 request was mailed to Respondent by Charging Party president Zimmick because Local One lacked basic resources (e.g., its own office, computer, letterhead, etc.). (TR-23, 35).

The specific items of information requested in Local One's July 12 letter were set forth in separate letters dated May 26, June 3, June 8, and June 16, sent by Zimmick and copied to Roggero, all of which were attached to the July 12 letter. (TR-18-21; GC 3, 4, 5, 6).

[2] All dates referred to hereafter are in 2011, unless otherwise stated.

The May 26 and June 3 letters specifically requested attendance records for all unit employees from November 15, 2010, to present; all discipline regarding a violation of the attendance policy from November 15, 2010, to present; all paid absent days for all current bargaining members from November 15, 2010, to present; and all leaves of absences granted and denied by Respondent with reasons for such grants/denials. (GC 3, 4). Local One requested this information based on its concerns about the manner in which Respondent was allowing employees to take time off and because Local One was concerned that Respondent was improperly disciplining employees regarding sick leave. (TR-20). This information was also useful in connection with a grievance filed by Local One in May 2011 concerning the attendance policy. (TR-31). Since this information was initially requested by Local One on July 12, it has also become necessary in order for Local One to process a grievance[3] concerning discipline issued to an employee regarding use of sick leave. (TR-20-21).

The June 3 and June 16 letters specifically requested complete detailed job descriptions of the following job classifications: tool and die repair; electrician; weld tech; millwright; transfer tech operator; program operator die setter; mig welder; and tig welder. (GC 5, 6). Local One requested this information in order to determine which unit employees would be eligible to obtain UAW journeyman

[3] This grievance was filed by Local One in August 2011.

cards[4], and to ensure that the unit employees possessing the classifications listed were being paid under the proper pay scale. (TR-21-22). Since this information was requested by Local One on July 12, it has also become necessary in order for Local One to process a grievance concerning an employee pay disparity in the transfer tech classification. (TR-22, 34).

Local One enlisted the services of Zimmick in requesting the above information based on Roggero's discussions with Zimmick regarding what information was needed. (TR-18-22; 35). Admittedly, Respondent did not provide any of the information requested by Local One on July 12, nor did it provide any response to Local One's July 12 letter. (TR-22; GC 9 – see stipulation no. 11).

While the ALJ found Respondent violated Section 8(a)(5) by refusing to furnish the above requested information to Local One, he made such finding based on the affiliation between Local One and UAW Local 174, and failed to find that Respondent violated Section 8(a)(5) by refusing to furnish the information to Local One, as requested by Local One, regardless of any affiliation.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its

[4] Rogerro testified that in April, he hand-delivered a letter to Respondent human resources director Gary Sievert requesting Respondent to permit Charging Party representatives to walk-through the plant. Respondent denied the requested plant access and, as a result, Local One requested the job description information contained in its July 12 letter. (TR-21-22).

employees." An employer has the duty to supply requested information to a union which is the collective-bargaining representative of employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities, including contract negotiations and administration. ***A-1 Door & Building Solutions***, 356 NLRB No. 76, slip op. at 2 (2011); ***New Surfside Nursing Home***, 322 NLRB 531, 534 (1996). The standard for determining relevance of requested information is a liberal one, and it is necessary only to establish a probability that desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. See, ***NLRB v. Acme Industrial Co***., 385 U.S. 432, 437 (1967); ***NLRB v. Truitt Mfg. Co***., 351 U.S. 149, 151-154 (1956).

Information pertaining to employees within the bargaining unit is presumptively relevant to a union's representational duties, including that necessary to decide whether to proceed with a grievance. Employee personnel information, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant. Bargaining representatives are not required to make a specific showing of the relevance of requested information unless the employer has rebutted the presumption. Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. ***Ralphs Grocery, Co***., 352 NLRB 128, 134

(2008), reaffirmed and incorporated by reference, 355 NLRB No. 210 (2010); ***Disneyland Park***, 350 NLRB 1256, 1257 (2007) ("Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the respondent must provide the information.").

By letter dated July 12, 2011, Local One, the admitted Section 9(a) exclusive collective-bargaining representative of the unit employees, requested information from Respondent, including information regarding enforcement of the parties' negotiated attendance policy, and information regarding detailed job descriptions for certain unit job classifications. (TR-18-19, GC 1(l), 1(o), 7). Local One's request for information regarding enforcement of the parties' negotiated attendance policy was based on its concerns about the manner in which Respondent was allowing employees to take time off. Additionally, Local One was concerned that Respondent was improperly disciplining employees regarding sick leave. (TR-20). This information was also useful in connection with a grievance filed by Local One in May 2011 concerning the attendance policy. (TR-31). Since Local One's July 12 request, this information requested has also become necessary in order for Local One to process a grievance concerning discipline issued to an employee regarding use of sick leave. (TR-20-21). Local One requested information regarding detailed job descriptions for certain unit job classifications in order to determine which unit employees would be eligible to obtain UAW journeyman cards, and to ensure that employees possessing the listed

classifications were being paid under the proper pay scale. (TR-21-22). Since Local One's July 12 request, this information requested has also become necessary in order for Local One to process a grievance concerning an employee pay disparity in the transfer tech classification. (TR-22, 34).

The information requested by Local One on July 12 clearly meets the Board's standards cited above as being relevant and reasonably necessary to Local One's performance of its responsibilities as collective-bargaining representative of the unit employees. Additionally, the information requested regarding job descriptions for certain unit job classifications is presumptively relevant information that should have been provided to Local One, upon its request, without any further demonstration of relevance.

That Local One's July 12 letter requesting information was also signed and mailed by Zimmick does not render it the Charging Party's, rather than Local One's request. Rather, Local One was clear in its July 12 letter that "the Union", i.e, Local One, was requesting the information. (TR-18, GC 7). Additionally, that requests for information were previously made by Charging Party president Zimmick, at the request of Local One, in letters dated May 26, June 3, June 8, and June 16, do not affect Local One's July 12 information request, or in any way render the July 12 request by Local One defective. (TR-20-22).

Admittedly, Respondent did not provide any of the information requested by Local One on July 12, nor did it provide any response to the letter, including requesting clarification from Local One as to the relevance or necessity of the information requested. See, ***Pacific Physicians Services, Inc.***, 315 NLRB 108 fn. 4 (1994); ***Streicher Mobile Fueling, Inc.***, 340 NLRB 994, 996 (2003) (A party that receives an ambiguous or overbroad information request must seek clarification or comply to the extent that the request encompasses necessary and relevant information.)

Based on the above, Counsel for the Acting General Counsel respectfully submits that the ALJ erred in failing to find that not only did Respondent violate Section 8(a)(5) in refusing to provide information to Local One through Zimmick, because of the valid affiliation between Local One and UAW Local 174, Respondent also violated Section 8(a)(5) by refusing to provide information to Local One, as the requestor of the information on July 12. Counsel for the Acting General Counsel submits that this conclusion must be reached regardless of any affiliation.

II. 8(a)(5) REFUSAL TO PERMIT DESIGNATED REPRESENTATIVE TO ATTEND GRIEVANCE HEARING

On May 31, Local One filed a grievance on behalf of unit employee Shane Cook regarding discipline issued to Cook by Respondent relating to damaged

equipment. (TR-23; GC 11). The filing of the grievance constituted step one of the parties' grievance procedure. (TR-24; GC 10). On June 3, Respondent denied the grievance at step two of the grievance procedure. (TR-24, 28; GC 10, 12). The grievance proceeded to step three of the grievance procedure, which calls for a meeting to be held between Local One and Respondent before an employee council. (TR-24; GC 10). Step three employee council meetings/grievance hearings are generally held within about two weeks following step two denials by Respondent. (TR-32). The employee council is comprised of three individuals: one seniority member from the bargaining unit selected by Local One; one management official selected by Respondent; and one seniority member selected by mutual agreement of Local One and Respondent. (TR-24-25, 30-31; GC 10).

Local One typically solicits five or six names from a grievant for its council representative selections. (TR-24). Accordingly, at the request of Roggero, grievant Cook provided a handwritten list of six names as possible selections to represent Local One on the employee council at the step three grievance hearing. (TR-25; GC 13). Rogerro copied Cook's handwritten list onto another piece of paper and added the title "Shane Cook Council" and the date of "6-13-11," in his own handwriting. (TR-26-27; GC 14). Additionally, Rogerro handwrote on this paper "John Zimmick also requests to be at this meeting." (TR-27; GC 14). Rogerro hand-delivered this paper to Respondent human resources director Sievert on June 13. (TR-27). Local One also reiterated its request for Zimmick's

presence at grievance hearings in its July 12 letter. (TR-30, GC 7). As stated, Respondent admittedly provided no response to Local One's July 12 letter. (TR-30, GC 9 – see stipulation no. 11).

Local One enlisted the services of Charging Party president Zimmick at the grievance hearing based on his expertise in the area of grievance processing. (TR-27). Local One was not requesting that Zimmick be on the employee council, rather, that Zimmick merely be present at the grievance hearing before the employee council. (TR-28). In the past, Sievert has likewise requested the presence of human resources assistant Roxanne Ball on behalf of Respondent at step three grievance hearings before the council, without objection by Local One. (TR-28).

About a week after Rogerro requested the presence of Zimmick at the grievance hearing, Sievert told Rogerro, without explanation, that Zimmick would not be permitted to be present. (TR-29). Respondent admits that about June 13, Local One requested Zimmick's presence at the step three grievance hearing regarding discipline issued to unit employee Cook, and that since about mid-July, it has failed and refused to permit Zimmick, Local One's designated representative, to attend the grievance hearing. (GC 1(l), 1(o)). As a result of Respondent's admitted refusal to permit Zimmick to attend the step three

grievance hearing, the Cook grievance remained pending since June 3 at step two. (TR-32).

While the ALJ found Respondent violated Section 8(a)(5) by refusing to allow UAW Local 174 president Zimmick to assist Local One in grievance proceedings including the Shane Cook grievance, he made such finding based on the affiliation between Local One and UAW Local 174, and failed to find that Respondent violated Section 8(a)(5) by depriving Local One of its right, as the exclusive collective-bargaining representative of the Unit, to choose its bargaining representatives, regardless of any affiliation.

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).

It is undisputed that about June 13, Local One requested that Charging Party president Zimmick attend a contractual step three grievance hearing regarding discipline issued to unit employee Shane Cook. (GC 1(l), 1(o)). It is further undisputed that since about mid-July 2011, Respondent has failed and refused to permit Zimmick, Local One's designated representative, to attend this grievance hearing. (GC 1(l), 1(o)). 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 exceptional cases, the conduct of the representative at issue was generally violent, threatening, or of a similar egregious nature, factors not present in the instant case. See, ***Fitzsimons Manufacturing Company***, supra at 379 (Board found employer did not violate Section 8(a)(5) in refusing to meet with designated union representative who previously physically assaulted employer representative during a grievance meeting). By Respondent's conduct, it has deprived Local One of its right, as the exclusive collective-bargaining representative of the unit employees, to choose its bargaining representatives. This conduct alone constitutes an unlawful refusal to bargain and warrants a finding of a Section 8(a)(5) and (1) violation.

Based on the above, Counsel for the Acting General Counsel respectfully submits that the ALJ erred in failing to find that not only did Respondent violate Section 8(a)(5) in refusing to allow Zimmick to assist Local One in grievance proceedings including the Shane Cook grievance, because of the valid affiliation

between Local One and UAW Local 174, Respondent also violated Section 8(a)(5) by depriving Local One of its right, as the exclusive collective-bargaining representative of the unit employees, to choose its bargaining representatives. Counsel for the Acting General Counsel submits that this conclusion must be reached regardless of any affiliation.

CONCLUSION

Counsel for the Acting General Counsel requests that the Board grant Counsel for the Acting General Counsel's cross-exception.

Respectfully submitted this 12th day of March, 2012.

/s/ Mary Beth Foy
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