

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

WELLINGTON INDUSTRIES, INC.

Respondent

and

CASE 07-CA-091271

**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**

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 or Charging Party), the Regional Director for the Seventh Region of the National Labor Relations Board issued a Complaint on December 17, 2012, in the above case against Respondent, Wellington Industries, Inc. A hearing was conducted in this matter in Detroit, Michigan on February 13, 2013, before Administrative Law Judge Arthur J. Amchan. Thereafter, ALJ Amchan issued a Decision (or ALJD) on March 21, 2013, including Findings of Fact, Remedy, Order, and notice provisions. ALJ Amchan 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 refusing to permit UAW Local 174 president John Zimmick (Zimmick) to assist Local One in grievance proceedings, thereby depriving Local One of its right, as the exclusive collective-bargaining representative of the unit employees, to choose its own bargaining agents.

SUMMARY OF THE CASE

Respondent manufactures stampings for the automotive industry at its plant in Belleville, Michigan. 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. Corbett Crider (Crider) has been the president of Local One since December 2011, preceded by Mark Rogerro (Rogerro) for three years. Jerry McGraw (McGraw) has been a second shift steward for Local One since December 2008. 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. 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 Charging Party 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 Charging Party 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

Thereafter, on about June 13, 2011, Local One requested that Zimmick, as its designated representative, attend a contractual step-three grievance hearing regarding discipline issued to a unit employee. About a week later, Respondent responded that it would not meet if Zimmick attended the grievance meeting. Local One and Respondent met on the grievance, without the addition of Zimmick. Respondent's conduct in refusing to permit Zimmick as Local One's designated representative to attend the grievance hearing was found to be an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act because it deprived Local One of its right, as the exclusive collective-bargaining representative of the Unit, to choose its bargaining representatives.²

Again, on about October 2, 2012, in the instant matter, Local One requested that Zimmick, as its designated representative, attend a contractual step-three grievance hearing that day regarding discipline issued to another unit employee. On the same date, Respondent responded that it would not meet if Zimmick attended the grievance hearing and refused to permit Zimmick to attend. Local

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

² See, *Wellington Industries, Inc.*, 358 NLRB No. 90 (2012) (*Wellington #2*), issued by the Board on July 30, 2012, affirming Decision of Administrative Law Judge Arthur J. Amchan, issued on January 9, 2012. *Wellington #2* also affirmed ALJ Amchan's decision that Respondent violated Section 8(a)(5) and (1) of by failing and refusing to furnish information requested by Local One.

One and Respondent met on the grievance, without the addition of Zimmick. Since about October 2, 2012, Respondent unlawfully failed and refused to permit Zimmick, Local One's designated representative, to attend the grievance hearing, thereby depriving Local One of its right, as the exclusive collective-bargaining representative of the unit employees, to choose its own bargaining agents.

The facts of this case are succinctly set forth in further detail by ALJ Amchan in his March 21, 2013 Decision.

JURISDICTIONAL ISSUE

Respondent states that it is in the awkward position of having to file its exceptions with the Board at a time when the composition of the Board is under challenge given the determination of the United States Court of Appeals for the District of Columbia Circuit in *Noel Canning v. NLRB*, 705 F.3d 490, (2013). Respondent states that the filing of its Exceptions in the instant matter is not to be considered acquiescence to the Board's jurisdiction in this matter.

In response, Counsel for the Acting General Counsel notes that the Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and, on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intends to file a petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit's decision.

Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”

Accordingly, Counsel for the Acting General Counsel respectfully requests that the Board reject any argument asserted by Respondent that the Board lacks jurisdiction to consider the instant matter.

ARGUMENT

Regarding Respondent’s two stated exceptions to the ALJD, Counsel for the Acting General Counsel answers each and urges the Board to find:

I. ALJ AMCHAN CORRECTLY FOUND THAT RESPONDENT VIOLATED THE ACT BY REFUSING TO ALLOW CHARGING PARTY'S PRESIDENT, JOHN ZIMMICK, TO ATTEND THE OCTOBER 2, 2012, GRIEVANCE MEETING.

As in its *Wellington #1* and *#2* exceptions, Respondent's first exception herein pertains to its attack on the adjudicative findings regarding the validity of the affiliation between Local One and UAW Local 174.

As in *Wellington #1* and *#2*, Respondent's basis for contending that it was appropriate to refuse to allow UAW Local 174 president Zimmick to attend a grievance meeting in order to assist Local One, is related to the affiliation between Local One and UAW Local 174; specifically, 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. Respondent again argues that the Charging Party is attempting to supplant and replace Local One as the employees' bargaining representative. However, Acting General Counsel submits that these affiliation issues were thoroughly addressed by ALJ Locke in *Wellington #1*, whose findings and conclusions were affirmed by the *Wellington #1* Board, as well as by ALJ Amchan in *Wellington #2*.

In *Wellington #1*, Acting General Counsel’s Complaint alleged that about August 8, 2010, Local One validly affiliated with UAW Local 174, and ALJ Locke and the Board so found. The *Wellington #1* Board further found, as argued by the Acting General Counsel, that the ALJ Locke’s conclusions and findings as to the affiliation of Local One and UAW Local 174 was 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 *Wellington #1* Board noted that, regardless of affiliation, “[l]ongstanding precedent establishes that employers and unions have the right to choose whomever they wish to represent them in formal labor negotiations.” *Wellington #1*, supra at fn. 1 (citations omitted).

In *Wellington #2*, the Acting General Counsel’s Amended Complaint, alleging that Respondent violated Section 8(a)(5) and (1) by refusing to permit Zimmick, as Local One’s designated representative, to attend a step three grievance hearing, made no reference to the affiliation between Local One and UAW Local 174. Although ALJ Amchan found that Respondent violated Section 8(a)(5) in refusing to allow Zimmick to assist Local One in grievance proceedings because Local One is validly affiliated with Local 174, the *Wellington #2* Board, in affirming ALJ Amchan’s finding of a violation, made it clear, in referencing the *Wellington #1* Board, that it is “unnecessary to pass on the judge’s finding that

[Local One] is validly affiliated with UAW Local 174.” *Wellington #2*, supra at fn. 2 (citations omitted).

In the instant matter, as in *Wellington #2*, Acting General Counsel’s Complaint does not contain any allegation regarding affiliation. (GC 1(e)).³ As repeatedly asserted by Counsel for the Acting General Counsel to Respondent’s exceptions in *Wellington #1* and *#2*, as well as herein, as related to the affiliation issue raised by Respondent’s exception, it is not necessary for the Board to consider such exception in order to affirm ALJ Amchan’s finding that Respondent violated Section 8(a)(5) and (1) in this matter. Rather, Counsel for the Acting General Counsel urges the Board to follow its decisions in *Wellington #1* and *#2* in finding a Section 8(a)(5) violation based on longstanding Board precedent establishing that employees, unions, and employers alike have the right to select representatives of their choice for collective bargaining and grievance adjustment and are obligated to deal with each other’s chosen representatives absent extraordinary circumstances, when the presence of a particular representative makes collective bargaining impossible or futile. *United Parcel Service*, 330 NLRB 1020, 1020 (2000); *Fitzsimons Manufacturing Company*, 251 NLRB 375, 379 (1980); *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). *Fitzsimons*, and *General Electric*, supra, were recently cited in *Palm Court*

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.

Nursing Home, 341 NLRB 813, 819 (2004) and *Atrium at Princeton*, 353 NLRB 540, 566 (2008).

It is undisputed that about October 2, 2012, Local One president Crider made a request to Respondent's Human Resources Director, Gary Sievert (Sievert) that Charging Party president Zimmick attend a contractual step three grievance hearing regarding unit employee Tony Williams' termination. (TR-50-51). It is further undisputed that on October 2, Sievert told Crider that if Zimmick insisted on being present at the hearing, at Local One's request, then he (Sievert) would cancel the hearing, thereby failing and refusing to permit Zimmick, Local One's designated representative, to attend this grievance hearing. (TR-50-51). 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.

Indeed, as stated by ALJ Amchan in his Decision herein,

[t]his case is indistinguishable from the last one. Board law is crystal clear that employees, unions and employers have the right to select whomever they choose to represent them for purposes of collective bargaining and grievance adjustment. Conversely, the other parties must deal with the other's chosen representative except in extraordinary circumstances not present in this case, *United Parcel Service*, [supra]. See, ALJ Amchan March 21, 2013 Decision at page 4.

In unequivocally rejecting Respondent's "patently frivolous" argument that there is no violation in the instant matter based on its legitimate refusal to recognize the affiliation of Local One with UAW Local 174, ALJ Amchan correctly found that Local One "has a right to be represented by John Zimmick **regardless of whether or not Local One's affiliation with UAW Local 174 is valid**, *United Parcel Service*, supra." See, ALJ Amchan March 21, 2013 Decision at page 4 (emphasis added).

Respondent again submits that Zimmick is not the designated representative / agent of Local One but, rather is the president of UAW Local 174, and as such is seeking to supplant and replace Local One. In this regard, as it identically argued in *Wellington #1 and #2*, when Local One attempted to have UAW Local 174 president Zimmick participate in contract negotiations and at a grievance meeting identical to the grievance meeting in question in the instant

matter, Respondent again argues in the instant matter that by attempting to have Zimmick participate in grievance meetings, UAW Local 174 has substituted for Local One. As noted above, while it is not necessary for the Board to consider such exception in order to affirm ALJ Amchan's finding that Respondent violated Section 8(a)(5) and (1) in this matter, Counsel for the Acting General Counsel will respond, as it did in *Wellington #1* and *#2*, to Respondent's exception related to the affiliation issue, as follows.

As noted, the *Wellington #1* Board affirmed ALJ Locke's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to negotiate with Local One if Charging Party president Zimmick was present at the collective bargaining sessions. ALJ Locke reached his conclusion by finding that the affiliation between Local One and Local 174 UAW was valid and a substantial continuity existed between Local One and UAW Local 174. In this regard, ALJ Locke concluded, and the Board affirmed: since affiliation, the nature of the certified bargaining representative remains essentially the same and there has been a continuity of local union officers; the presence of a UAW Local 174 official on the Union's negotiating team does not rise to the level of being a *de facto* change in the Union's identity; and because the affiliation was valid, Respondent lawfully could not condition further bargaining on exclusion of the UAW Local 174 president from Local One's bargaining committee. See, *Wellington #1*, supra, slip op. at 3-6. In his *Wellington #2* Decision, ALJ Amchan correctly noted the

Board's findings in this regard, and found that the same was true concerning Zimmick's presence at grievance meetings in order to assist Local One. See, *Wellington #2*, supra, slip op. at 6.

Again in the instant matter, the record is devoid of evidence that in enlisting the aid of UAW Local 174 president Zimmick at grievance meetings, 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*. Rather, the record evidence demonstrates, as testified to by Local One president Crider and steward McGraw, that on October 2, 2012, Local One was merely seeking assistance in grievance proceedings from president Zimmick, a union agent who is skilled in grievance processing. (TR-22, 41).

In its exception, Respondent also argues that a review of the original and amended charges in the instant matter, demonstrating that both were signed and filed by UAW Local 174, warrants dismissal of the Amended Complaint, on this basis alone, "given the unwarranted conduct of UAW Local 174 in attempting to

usurp the position of Local One as the certified collective bargaining representative of the employees in the bargaining unit.” However, the *Wellington #2* Board rejected Respondent’s argument therein that UAW Local 174 was without standing to file the charge therein, noting that under the Board’s Rules and Regulations Sec. 102.9, “[a]n unfair labor practice charge may be filed by ‘any person,’” which includes a labor organization. *Wellington #2*, supra at fn. 2 (citations omitted).

II. ALJ AMCHAN CORRECTLY FOUND THAT RESPONDENT’S DEFENSE WAS FRIVOLOUS, AND NOT DEBATABLE, AND RECOMMENDED AN ORDER REQUIRING RESPONDENT TO PAY THE BOARD’S AND LOCAL ONE’S COSTS AND EXPENSES INCURRED BY THEM IN THE INVESTIGATION, PREPARATION, PRESENTATION AND CONDUCT OF THIS CASE.

In its second exception, Respondent contends that the awarding of costs and expenses by ALJ Amchan is inappropriate in this case. In this regard, Respondent argues that because the Charging Party’s amended charge deleted “the reference as to the reason why Mr. Zimmick was at [Respondent’s] premises as it related to Mr. Crider, ... and given the necessary credibility resolutions between the testimony of Mr. Sievert and the testimony of Mr. Crider and Mr. McGraw, it is clear that Respondent’s defense in this matter is not frivolous but, at worst, debatable,” and there is no basis for any order awarding costs and expenses in the instant matter.

With respect to reimbursement for litigation expenses, the Board has articulated certain standards in determining the appropriateness of the requested reimbursement. In *Tiidee Products*, 194 NLRB 1234, 1236-1237 (1972), enfd. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. denied 421 U.S. 991 (1975), the Board found reimbursement to both the Board and the union for expenses incurred in the investigation, preparation, presentation, and conduct of cases necessary to discourage future frivolous litigation and to effectuate policies of the Act and to serve public interest. In its later decision in *Heck's, Inc.*, 215 NLRB 765 (1974), the Board clarified that reimbursement of a charging party's litigation expenses will be ordered only where the defenses raised by the respondent are “frivolous” rather than “debatable.” The Board explained that a respondent's defenses will be considered debatable if they turn on credibility, reasoning that parties should not be discouraged from seeking access to Board processes “where the credibility of witnesses leave an unfair labor practice issue in doubt.” Ibid at 768. Thus, under the Board's existing precedent, the Board has primarily continued to provide a reimbursement remedy only in cases involving frivolous defenses and in cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. See, *Texas Super Foods*, 303 NLRB 209, 220 (1991) (Board affirmed administrative law judge award of reimbursement of litigation costs finding frivolous the employer's continued defense of preelection conduct previously found objectionable); *Wellman's Industries*, 248 NLRB 325 (1980) (Board ordered reimbursement for litigation costs where respondent's defense to a refusal

to bargain allegation by contending that it had no duty to bargain because the employees did not have the opportunity to vote on a union merger found frivolous because the respondent' refusal to bargain had prevented the employees from being covered by a collective bargaining agreement, which was necessary for eligibility to vote on the merger.)

In each underlying unfair labor practice matter (*Wellington #1 and #2*), Respondent asserted, without success, that Respondent has no obligation to meet with Zimmick, or any other representative of the Charging Party, for the reason that Respondent has challenged the purported affiliation between the Charging Party and Local One as being inappropriate and improper. As noted above, the *Wellington #1 and #2* Boards made it clear that, based on longstanding Board precedent establishing that employers and unions have the right to choose whomever they wish to represent them in labor negotiations matters, it was unnecessary to consider the affiliation between the Charging Party and Local One in deciding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit Zimmick to attend a bargaining session on behalf of Local One. Despite these Board rulings against Respondent regarding this defense in *Wellington #1 and #2*, Respondent asserts the same frivolous defense again in the instant matter.

The instant case involves the issue of whether Respondent has raised debatable or frivolous defenses. Respondent has raised the same defense in the

Wellington #1 and *#2*, which has been found by the Board to have no merit, and continues to assert the same frivolous defense and violate the Act in this regard. There has been no dispute by Respondent in any of these matters that it has refused to permit Zimmick to attend collective bargaining matters at the request of Local One. In his Decision, ALJ Amchan made no credibility determinations adverse to Respondent in finding a violation. Thus, there is no basis for Respondent to contend that its defense in this matter is debatable. That the Charging Party's amended charge deleted a reference to Local One president Crider is meaningless. The amended charge merely states the basis for the Complaint that issued and the violation alleged therein.⁴ (GC 1(c)). Amending charges prior to complaint issuance to comport with the complaint violations to be alleged is a common and routine practice before the Board. Accordingly, the Acting General Counsel's burden is to present evidence to support the alleged violation. ALJ Amchan correctly found "no legitimate argument to be made in support of [Respondent's] position that it has refused to allow [Local One] to select John Zimmick to represent it solely on the basis [of] his status as President of UAW Local 174." See, ALJ Amchan March 21, 2013 Decision at page 4. Acting General Counsel contends that ALJ Amchan's Order recommending reimbursement of costs and expenses incurred in the investigation, preparation, and conduct of this case before the Board and the courts was appropriate based on

⁴ Respondent fails to note that the amended charge likewise deletes reference to Local One steward Jerry McGraw as well.

Respondent's assertion, without any success, of the same frivolous defenses in the instant case as well as all of the underlying cases, and under the Board's rulings in *Heck's, Inc.*, supra, and other Board cases cited.

Additionally, Respondent argues that there is no basis upon which to make a determination regarding the payment of costs and expenses to the Board and/or Local One given that *Wellington #1* and *#2* are pending before the D.C. Circuit Court of Appeals, and both of which are being held in abeyance per the D.C. Circuit Court's decision in *Noel Canning*, supra. However, Respondent's argument is clearly contrary to the Board decisions cited above in this section in which the Board found that reimbursement of costs and expenses was appropriate to discourage future frivolous litigation and to effectuate policies of the Act and to serve public interest.

Finally, Respondent's argument that litigation expenses are not warranted because the complaint seeks reimbursement of costs and expenses to the Board and Local One, when the Charging Party herein is Local 174, is without merit. There is no relevance that the instant charge, as well as any of the underlying charges in *Wellington #1* and *#2*, was filed by the Charging Party rather than Local One, given that these charges have clearly been on behalf of Local One, the admitted exclusive Section 9(a) representative of the Unit, all along.

CONCLUSION

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

Respectfully submitted this 2nd day of May, 2013.

/s/ Mary Beth Foy

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**AFFIDAVIT OF SERVICE OF ANSWERING BRIEF OF COUNSEL FOR THE ACTING
GENERAL COUNSEL TO EXCEPTIONS OF RESPONDENT**

I, the undersigned employee of the National Labor Relations Board, state under oath that on May 2, 2013, I served the above-entitled document(s) by e-mail transmission on Respondent and Charging Party counsels at the following e-mail addresses:

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May 2, 2013
Date

Mary Beth Foy
Name

/s/ Mary Beth Foy
Signature