

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

WELLINGTON INDUSTRIES, INC.,

Respondent,

*-and-*

Case No. 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.

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**REPLY BRIEF OF RESPONDENT TO**  
**ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL**

**PLUNKETT COONEY**

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## INTRODUCTION

This Brief is submitted in Reply to the Answering Brief of Counsel for the Acting General Counsel. In her Answering Brief, Counsel for the Acting General Counsel attempted to refute the two exceptions filed by Respondent. However, Counsel for the Acting General Counsel has not successfully done so. Rather, Respondent's exceptions stand unrefuted and support its contention that the ALJ erred in his conclusion that Respondent violated Section 8(a)(5) in refusing to allow John Zimmick to assist Local One at the Step 3 grievance proceeding for Anthony Williams on October 15, 2012 (actual date October 2, 2012). Further, that the ALJ erred in his conclusion that Respondent's defenses to the complaint allegations are frivolous. In fact, Respondent asserts that because of the errors of the ALJ, his conclusions cannot stand, Respondent's exceptions should be granted and the Complaint, Charge and Amended Charge in this matter should be dismissed.

## ARGUMENT

I. **The ALJ was in error in his determination in finding a violation of Section 8(a)(5) of the Act.**

Counsel for the Acting General Counsel relies on the continuing argument that she has made that this case only involves a determination by the certified collective bargaining representative of the employees in the bargaining unit, Independent Union Local One ("Local One") to select a bargaining representatives of its own choice. While in the typical case, this may be true; in this case, it is not for the reason that the Charging Party, UAW Local 174, continues to attempt to supplant and replace Local One as the bargaining representative of the employees. As stated in the brief to the Board and to the Court of Appeals for the District of Columbia Circuit in Wellington #1 (357 NLRB No. 135 (2011); No. 12-5250 (2012)), because of the actions of the Charging Party, a question of representation does exist and accordingly, all of the actions by the Charging Party have not

been as a result of UAW Local 174 being the designated representative of Local One but rather is a continuation of the effort of the Charging Party to supplant and replace Local One.

Notwithstanding the fact that Counsel for the Acting General Counsel did not assert any issues regarding affiliation and the fact that the Complaint does not contain any allegations regarding affiliation, affiliation is still at the heart of this case as it was in the first two cases. (Wellington #1 and #2). As is noted in the first paragraph of the ALJ's Decision of March 21, 2013, Wellington #1 and #2 are being held in abeyance by the United States District Court of Appeals for the District of Columbia in light of its decision in *Noel Canning, a Division of Noel Canning Corporation v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

Counsel for the Acting General Counsel at page 11 of her Brief quotes from the decision of the ALJ that a union has a right to choose whomever it wishes to represent it for purposes of collective bargaining and grievance adjustment. While this may be true in the typical case, in this case it is not true because of the underlying concerted effort by UAW Local 174 to supplant and replace Local One as the certified collective bargaining representative of the employees in the bargaining unit.

This case is not like any of those cited by Counsel for the Acting General Counsel. This case is unique in that it is a continued repetition by UAW Local 174 in its ongoing effort to supplant and replace Local One. Therefore, contrary to the assertion of Counsel for the Acting General Counsel and to the decision of the ALJ, the ultimate decision in Wellington #1 does impact this case and also impacts Wellington #2.

Like building blocks, this case rests upon the foundation set in Wellington #1 concerning the efforts of the Charging Party. It is UAW Local 174 and not Local One that filed the Unfair Labor Practice Charge and then the Amended Unfair Labor Practice Charge. It is the representative of UAW Local 174, John Zimmick, President of that Local,

who made the assertion in the Charge that he was at Respondent's to attend the Step 3 grievance meeting at the behest of the president of Local One. In fact that was not a true assertion, notwithstanding his declaration in the ULP form and accordingly, Mr. Zimmick was compelled to file an amended charge. This is just further proof of the ongoing effort by UAW Local 174 to supplant and replace Independent Union Local One.

II. **Respondent's Defense is Not Frivolous.**

In its second exception, Respondent asserts that the ALJ was in error in determining that Respondent's defense was frivolous and not debatable. Clearly that is not the case. This fact is demonstrated by the very determination of the ALJ when he states on page 3 lines 42-44 and page 4, lines 1-3, that he credited the Respondent's HR Director, Gary Sievert, regarding his account of a conversation with Local One President, Corbett Crider. Counsel for the Acting General Counsel asserts in her answering brief, in conformity with the ALJ in his Decision, that because the credibility resolution are in favor of Respondent, its defense is frivolous. (Answering Brief, page 17; ALJ Decision, page 5, lines 26 – 27).

The ALJ specifically stated, "The following is Gary Sievert's account of his conversation with Crider, which I credit." This statement in and of itself shows that he ALJ was compelled to make credibility resolutions. He did make those credibility resolutions but unfortunately thereafter erred in determining that irrespective of crediting Mr. Sievert, he still found a violation by Respondent in not allowing Mr. Zimmick to participate in the Step 3 grievance meeting. Contrary to the assertion of the ALJ on page 5, lines 26-27, he need not make a credibility determination adverse to Respondent in order to find Respondent's defense debatable rather than frivolous. The ALJ relied on two decisions, *Kima-T.V.*, 324 NLRB 1148 (1997) and *Heck's Inc.*, 215 NLRB 765 (1974). It is submitted that a review of both of those decisions do not show that the credibility determinations need

to be adverse to Respondent in order to make the defense debatable. In fact, the credibility determinations were adverse to the witness brought forth by Counsel for the Acting General Counsel, Corbett Crider, the President of Local One, based upon the Unfair Labor Practice charge filed by UAW Local 174. Clearly, the one-sided determination made by the ALJ shows his error in determining that costs were appropriate in this matter.

Finally, the ALJ further shows the error of his determination when he states on page 5 of his decision, at lines 27-30:

“Respondent has refused to allow the Union to select John Zimmick to represent it solely on the basis of his status as President of UAW Local 174. There is no legitimate argument to be made in support of this position. Indeed, Respondent has failed to cite any such support.”

In fact, Respondent has repeatedly done so beginning with Wellington #1 where it challenged the affiliation. There is no evidence that has been brought forth by Counsel for the Acting General Counsel, by the Charging Party, nor by any representative of Local One, that but for the affiliation Local One would have selected John Zimmick to aid it in any bargaining or grievance administration. Rather, the record is replete throughout the three cases, that the only reason that Mr. Zimmick is seeking or has sought to be involved in any matters between Local One and the Respondent is to further the attempt of UAW Local 174 to supplant and replace Local One.

Accordingly, the ALJ's determination that Respondent's defense was patently frivolous is in error. Thereby, his determination that costs and expenses incurred by the Board and by Local One in the investigation, preparation, presentation and conduct of the case should be paid, is in error.

## CONCLUSION

It is submitted that given that UAW Local 174 continues to attempt to supplant and replace Independent Union Local One as the bargaining representatives of the employees in the bargaining unit, Respondent was appropriate in its actions in denying John Zimmick the opportunity to attend the October 2, 2012 grievance meeting. Further, notwithstanding the determination of the ALJ, the Respondent's defenses were not "frivolous". Therefore, the awarding of costs and expenses is not appropriate in these matters. For these reasons, Respondent submits to the Board that the ALJ erred in his Decision, that his Decision should be reversed, and that the Charge, the Amended Charge and the Complaint should be dismissed.

### **PLUNKETT COONEY**

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Dated: May 16, 2013

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**CERTIFICATION OF SERVICE**

I hereby certify that on Wednesday, May 16, 2013, a copy of the foregoing ***Reply Brief of Respondent to Answering Brief of Counsel for the Acting General Counsel***, 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).

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