

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

C&G DISTRIBUTING COMPANY, INC.,  
Respondent,

Case No. 8-CA-91304

and

TRUCK DRIVERS, WAREHOUSEMEN & HELPERS,  
LOCAL NO. 908, AFFILIATED WITH THE INT'L  
BROTHERHOOD OF TEAMSTERS,  
Charging Party,

and

JERRY SPRAGUE,  
Intervenor.

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**INTERVENOR'S BRIEF IN SUPPORT OF EXCEPTIONS**

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	2
I.    Facts.....	2
II.   Complaint Allegations .....	5
III.  The Decision of the Administrative Law Judge .....	5
EXCEPTIONS.....	7
I.    The ALJ’s Erred by Basing His Decision on Conduct That Supposedly Occurred Outside of the Time Frame Relevant to the Complaint (Exceptions 1-3, 20-23). .....	7
II.   The ALJ Erred by Holding It Unlawful for C&G Not to Deprive Sprague of Pay and a Company Vehicle Because He Attended a NLRB Hearing (Exceptions 4-7, 12-15, 20-23). .....	9
III.  It Was Not Illegal for C&G to Inform Sprague of His Right to Deauthorize under the NLRA (Exceptions 16-19, 20-23).....	15
IV.   The Board’s Ministerial Aid Standard Is Inconsistent With §§ 7, 8(a)(1) and 8(c) of the Act and Is Unconstitutional (Exceptions 8-11, 20-23).....	18
V.    The ALJ Erred by Dismissing Sprague’s Petitions (Exceptions 20-23).....	24
CONCLUSION.....	27
CERTIFICATE OF SERVICE.....	28

## TABLE OF AUTHORITIES

CASES	Page
<i>Amer-Cal Industries</i> , 274 NLRB 1046 (1985) .....	19,20
<i>Armored Transport</i> , 339 NLRB 374 (2003) .....	19
<i>Baltimore Sun Co. v. NLRB</i> , 257 F.3d 419 (4th Cir. 2001).....	14
<i>Bridgestone/Firestone, Inc.</i> , 335 NLRB 941 (2001) .....	16
<i>Chamber of Commerce v. Brown</i> , 554 U.S. 60 (2008).....	18,21,22
<i>Eastern States Optical Co.</i> , 275 NLRB 371 (1985) .....	12,15,25
<i>Ernst Home Centers</i> , 308 NLRB 848 (1992) .....	16
<i>Exxel/Atmos, Inc. v. NLRB</i> , 147 F.3d 972 (D.C. Cir. 1998).....	12,15,16,21
<i>General Electric Co.</i> , 230 NLRB 683 (1977) .....	13
<i>KONO-TV-Mission Telecasting</i> , 163 NLRB 1005 (1967) .....	12,25
<i>Lee Lumber &amp; Building Material Corp.</i> , 306 NLRB 408 (1992) .....	12,15,17
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53 (1966).....	19

## TABLE OF AUTHORITIES

CASES	Page
<i>Longchamps, Inc.</i> , 205 NLRB 1025 (1973) .....	14,16,21
<i>McClatchy Newspapers</i> , 337 NLRB 1161 (2002) .....	16
<i>Mickey’s Linen &amp; Towel Supply</i> , 349 NLRB 790 (2007) .....	19
<i>Molders Local 125 (Blackhawk Tanning)</i> , 178 NLRB 208 (1969), enforced 442 F.2d 92 (7th Cir. 1971) .....	10
<i>NLRB v. Industrial Union of Marine &amp; Shipbuilding Workers of America</i> , 391 U.S. 418 (1968).....	10
<i>NLRB v. Lenkurt Electric Co.</i> , 438 F.2d 1102 (9th Cir. 1971).....	23
<i>NLRB v. Pratt &amp; Whitney Air Craft Division</i> , 789 F.2d 121 (2d Cir. 1986) .....	23
<i>Noel Canning v. NLRB</i> , No. 12-1153, slip op. (D.C. Cir. Jan. 25, 2013).....	27
<i>Pic Way Shoe Mart</i> , 308 NLRB 84 (1992) .....	7
<i>Rexart Color &amp; Chemical Co., Inc.</i> , 246 NLRB 240 (1979) .....	13
<i>SFO Goodnite Inn</i> , 357 NLRB No. 16 (2011), enf’d 700 F.3d 1 (D.C. Cir. 2012).....	25

TABLE OF AUTHORITIES

CASES	Page
<i>Southwire Co. v. NLRB</i> , 383 F.2d 235 (5th Cir. 1967).....	23
<i>Tecumseh Corrugated Box Co.</i> , 333 NLRB 1 (2001) .....	14,16,21
<i>The Levy Co.</i> , 351 NLRB 1237 (2007) .....	17
<i>Vic Koenig Chevrolet, Inc. v. NLRB</i> , 126 F.3d 947 (7th Cir. 1997).....	12,20
<i>Washington Street Brass &amp; Iron Foundry</i> , 268 NLRB 338 (1983) .....	12,13,16
<i>Wire Products Manufacturing Corp.</i> , 326 NLRB 625 (1998) .....	19
CONSTITUTION, STATUTES, REGULATIONS	
U.S. CONST. amend I.....	17,18
National Labor Relations Act, 29 U.S.C. § 157.....	<i>passim</i>
29 U.S.C. § 158.....	<i>passim</i>
29 U.S.C. § 159.....	<i>passim</i>
76 Fed. Reg. 54,006.....	2,24

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Intervenor Jerry Sprague and at least 30% of his fellow employees exercised their legal right under §§ 7 and 9 of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. §§ 157 & 159, to petition to both decertify and deauthorize Teamsters Local 908. In this action, the General Counsel seeks to suppress the employees’ exercise of their rights on the most trivial grounds—because their employer, C&G Distributing Company (1) did not deprive Sprague of wages and use of a company vehicle when he attended a NLRB hearing and (2) because a C&G consultant informed Sprague of his right to deauthorize. The Administrative Law Judge, in his recommended decision of April 24, 2013 at JD-29-13 (“ALJD”), actually found merit to these allegations.

The ALJ’s conclusion turns the Act on its head. Far from being unlawful, C&G’s conduct is *favored* under the Act. The Board encourages full access to its procedures so that employees can exercise their rights. C&G’s decision to not punish

Sprague with lost wages and benefits because he had to attend a NLRB hearing was only laudatory conduct. The Board also deems it beneficial that employees learn of their legal rights under the NLRA so that they may exercise them. *See, e.g.*, 76 Fed. Reg. 54,006 (Aug. 30, 2011). C&G informing Sprague of his legal right to deauthorize is a type of lawful speech that Congress sought to encourage under NLRA § 8(c), 29 U.S.C. § 158 (c). For these reasons and those discussed below, the ALJ's decision should not be adopted and the Complaint dismissed in its entirety.

## STATEMENT OF THE CASE

### I. Facts

All but one of the material facts in this case are set forth in the Answer to the Complaint and a Stipulation of Facts signed by all parties (J. 1). C&G is an employer that operates a beer wholesaling business in Lima, Ohio. Answer, ¶ 2. Its warehousemen and drivers, to include employee Jerry Sprague, are exclusively represented by Teamsters Local 908.

On April 3, 2012, Sprague filed a petition to decertify the Teamsters in Case No. 8-RD-77965. Stip., ¶ 2. “On August 10, 2012, Sprague attended a representation hearing in [that case] at the NLRB Regional Office in Cleveland, Ohio,” *id.* at ¶ 4, “in his capacity as the decertification petitioner,” *id.* at ¶ 5(b).

Sprague was paid his regular wages on August 10, 2012, *id.* at ¶ 3, and used a “company vehicle to travel to and from Lima, Ohio to Cleveland, Ohio . . . to attend [the] representation hearing.” *Id.* at ¶ 6. C&G “maintained a policy and/or practice

permitting bargaining unit employees to use company vehicles for non-work related purposes that are of a personal nature.” *Id.* at ¶ 8.

Approximately one month later, “[i]n about early September 2012, the exact date unknown, Sprague called [C&G’s] agent and Labor Relations Consultant William Wheeler.” *Id.* at ¶ 9(a). “During the telephone conversation . . . Sprague asked Wheeler if there was anything else he could do if the NLRB did not let Sprague proceed to a decertification election.” *Id.* at ¶ 9(b). “Wheeler told Sprague that he could file a de-authorization petition” and “explained to Sprague the procedures to file a de-authorization petition.” *Id.* After one failed attempt in which Sprague used the wrong form, *id.* at ¶ 10, “[o]n October 4, 2012, Sprague filed a de-authorization petition in Case 8-UD-90639.” *Id.* at ¶ 11.

The only material fact not established in the Answer or Stipulation is the reason why Sprague used a company vehicle to attend the representation hearing. The uncontroverted testimony at the hearing is that Sprague asked his manager, Bryan Holliday, and Human Resources Director J.R. Guagenti, for permission to use a company vehicle during the week of August 10, 2012, because his car was experiencing mechanical difficulties. *See* Tr. 99-101, 121-23.

Sprague: “I did use it [the vehicle] a few other days in that week. Like I said, the clutch went out in my car like a week or two previous to the fact of me having to go to that meeting.”

General Counsel: “So you told Mr. Guagenti the reason that you needed the use of that car was for—because your personal vehicle broke down.”

Sprague: “Yeah.”

Judge Fine: “So you used it to go to the hearing and a couple of other days that week?”

Sprague: “I—yeah, I’ve used it—that’s not the only time I ever used a Company vehicle. I’ve used a Company vehicle several times. Everybody in the place has.”

*Id.* at. 100-01; *see also id.* at 99 (Sprague testifying that “[t]he Company [had] let me borrow a vehicle because mine was broken down.”); *id.* at 121-23 (similar).

Indeed, Sprague ultimately had to get rid of his car because it “wasn’t worth fixing,” and from August 2012 to at least the date of the hearing, borrowed vehicles from others, such as his mother and brother. *Id.* at 122-23.

The testimony at the hearing also supported the parties’ stipulation that C&G had a longstanding practice of liberally allowing employees to use company vehicles for personal purposes. *See* Stip. ¶ 8.<sup>1</sup> Warehouse manager Bryan Holliday testified that in the past two years 15-20 bargaining unit employees used a company vehicle for personal use. Tr. 253-54. As there are approximately 25 employees in the unit,<sup>2</sup> this constitutes most of the employees. Holliday further testified that the company places no mileage restrictions on the use of its vehicles, *id.* at 254, and employees have used those vehicles for extended periods of time when theirs were broken down, *id.* at 254-55. C&G’s practice of letting employees use company trucks is

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<sup>1</sup> *See, e.g.*, Tr. 100-01 (Sprague testifying that “I’ve used a Company vehicle several times. Everybody in the place has.”); Tr. 137-44 (Sprague providing examples of employees using vehicles for personal use); Tr. 232-34 (employee Keith Paul testifying that twice annually he uses a company vehicle to move concessionary equipment).

<sup>2</sup> *See* Decision and Direction of Election in 8-RD-077965, at \*1 (Stipulation of Facts, Ex. B) (J.Ex. 1) (finding “approximately 25 employees in the unit”).

informal: “[employees] come up and they say, Bryan, can I use the truck for moving wood, moving my house, a friend, car broke down, anything like. And as long as we have a vehicle, we usually just let them borrow it.” *Id.* at 254. Employees “could go, basically, wherever they want. We don’t limit no miles, we don’t write them down what they left with or what they come back with.” *Id.* at 255.

## **II. Complaint Allegations**

The Complaint alleges that C&G violated § 8(a)(1) of the Act by engaging in two specific actions. First, that “[o]n or about August 10, 2012, Respondent provided more than ministerial assistance to employees with the filing and processing of the decertification petition by paying the wages of and providing the use of a company vehicle to . . . [Sprague] in order to attend the representation hearing.” Compl., ¶ 8. Second, that “[i]n or around August and September 2012, the exact dates unknown, Respondent, by its agent William P. Wheeler, solicited employees to pursue rescission of a union security clause by providing advice and assistance to employee Jerry Sprague with regard to the filing of a decertification petition,” and that by these acts, C&G “provided more than ministerial assistance to its employee Jerry Sprague in seeking rescission of a union security clause.” *Id.* at ¶ 9.

## **III. The Decision of the Administrative Law Judge**

Notwithstanding the narrowness of the Complaint, which focuses exclusively on two events that occurred in August and September 2012, the ALJ based his opinion on conduct that supposedly occurred well before then. The ALJ found that sometime shortly after Sprague filed his decertification petition on February 14, a

C&G supervisor provided Sprague with Wheeler's phone number. (ALJD 12 lns. 17-29; ALJD 14 lns. 34-36). Without any evidence, the ALJ speculated that Sprague did not request this information from C&G. (*Id.*). From that speculation, and without direct testimony regarding the actual content Sprague and Wheeler's conversations in February and April 2012, the ALJ further speculated that these conversations amounted to a conspiracy in which C&G "was orchestrating the timing of the petition's filed by Sprague to coincide with its bargaining strategy, with its ultimate purpose to dislodge the Union." (ALJD 13 lns. 5-10).

Based on this speculation regarding conduct that supposedly occurred months before the dates relevant to the Complaint, the ALJ found that C&G's allowing Sprague to use work time and a company vehicle to attend a NLRB hearing in August 2012 violated § 8(a)(1) because it was part of C&G's ostensible "pattern . . . [of] unlawfully insinuating itself into and promoting the decertification process." (ALJD 14, ln 34-35; *see also* ALJD 14, ln. 34–ALJD 15, ln. 16). Similarly, the ALJ held it unlawful under § 8(a)(1) that Sprague learned of his right to decertification from Wheeler because this information was provided to him as "part of a pattern of support and interference" that predated the communication at issue. (ALJD 16, lns. 10-29). Based on these findings, the ALJ held that both Sprague's decertification and deauthorization petitions were tainted and should be dismissed. (ALJD 20).

## EXCEPTIONS

### I. The ALJ's Erred by Basing His Decision on Conduct That Supposedly Occurred Outside of the Time Frame Relevant to the Complaint (Exceptions 1-3, 20-23).

The ALJ's decision cannot be adopted because he strayed far beyond the narrow confines of the Complaint. The Complaint alleges only that two very specific events that occurred in August and September 2012 violate the Act. Compl., ¶¶ 8-9. Yet, the ALJ based his decision on speculation about conduct that supposedly occurred in February 2012. Specifically, the ALJ found that because Sprague supposedly did not request to be introduced to Wheeler in February, all conduct that followed thereafter—even if lawful on its own—was somehow tainted as fruit of a poisonous tree. For example, consider the ALJ's conclusion with respect to ¶ 9 of the Complaint, where he reasons that while Wheeler answering Sprague's question is not itself unlawful, it became unlawful because of past events:

At first blush, it appears that Sprague called Wheeler and solicited his advice to which Wheeler merely responded, bringing about arguments that Wheeler's remarks were neutral speech protected by Section 8(c) of the Act. This is particularly so since Sprague testified that Respondent did not provide him any assistance in preparing the de-authorization petition, or soliciting employee signatures for it. On the other hand, I have concluded that J.R. Guagenti introduced Wheeler to Sprague in an unsolicited effort to support Sprague's efforts to decertify the Union. See, *Pic Way Shoe Mart*, 308 NLRB 84 (1992). Thereafter, Respondent's agent Wheeler, through multiple phone calls, provided Sprague free advice concerning the decertification process. Thus, Sprague was operating arm and arm with Respondent in his efforts to decertify the Union culminating in Respondent providing transportation and paying Sprague to attend the August 10 representation hearing. When, following the hearing, Wheeler continued to advise Sprague and informed him of the idea of a de-authorization petition, I have concluded Wheeler's suggestion was part of a pattern of support and interference, as opposed to a mere response to solicited advice.

(ALJD 16 lns. 13-26). This reasoning is untenable for a host of reasons.

*First*, there is no is no evidence in the record to support the premise that J.R. Guagenti's provision of Wheeler's number to Sprague was unsolicited by Sprague. The ALJ based his finding on the fact that "neither Guagenti nor J.R. Sprague testified Sprague asked for this assistance or for Wheeler's number." (ALJD 12 lns. 23-26). Thus, the factual finding that undergirds the ALJ's entire opinion is based on an *absence* of testimony. Given that the linchpin of the ALJ's opinion is unsupported by evidence, it must be rejected.

*Second*, the ALJ ventured far beyond the four walls of the Complaint. The Complaint does *not* allege that C&G violated the Act by ostensibly giving Sprague Wheeler's number in February 2012 or that any of their conversations between February and April were wrongful. The Complaint also does not allege that the totality of C&G's conduct between February and September amounted to unlawful assistance. Instead, the Complaint narrowly alleges that it was unlawful for C&G to: (1) allow Sprague to use company time and a vehicle to attend an NLRB hearing on August 10 and (2) for Wheeler to inform Sprague of his deauthorization rights in early September. Compl., ¶¶ 8-9. It is for this reason that neither Respondent nor Intervenor offered testimony regarding conversations and events that occurred between February and April—they were irrelevant to the Complaint. For the ALJ to base his conclusions on a finding that C&G's conduct in February and April was wrongful went far beyond the confines of the Complaint, and must be rejected for that reason.

*Finally*, C&G's conduct in February and April 2012 was lawful. Even if J.R. Guagenti's provision of Wheeler's number to Sprague after he filed a decertification petition was unsolicited by Sprague, that conduct would not violate the Act. There is nothing in the record to suggest that Sprague's handful of conversations with Wheeler between February and April were in any way coercive or otherwise unlawful. Given that C&G's conduct in the first half of 2012 was lawful, it could not transform C&G's otherwise lawful conduct in August and September 2012 into violations of the Act.

In other words, the ALJ's rationale is akin to finding that nothing plus nothing equals something. Not one of Sprague's interactions with C&G was unlawful under the Act. The ALJ's finding that lawful conduct transformed other lawful conduct into a violation of the Act is irrational and must be rejected.

## **II. The ALJ Erred by Holding It Unlawful for C&G Not to Deprive Sprague of Pay and a Company Vehicle Because He Attended an NLRB Hearing (Exceptions 4-7, 12-15, 20-23).**

The ALJ's finding that C&G violated the Act because it allowed Sprague to use a company vehicle to attend an NLRB hearing, and did not dock his wages because he attended that hearing, is reversible error because this conduct: (1) was not assistance; (2) did not interfere with employees' exercise of their § 7 rights, (3) is permissible under the similar circumstance of when an employee appears as a witness at a Board hearing, and (4) involves substantially less material support than the Board permits in support of certification or recognition.

*First*, it is inaccurate to label C&G's actions as "assistance" because Sprague would have been paid wages on August 10 and been using a company vehicle irrespective of the NLRB hearing. Thus, C&G did not "assist" Sprague because it did not provide him with anything he otherwise would not have received but for the exercise of his right to decertify under NLRA §§ 7 and 9(c).

In other words, to find a violation here requires accepting the proposition that C&G was legally obligated to *penalize* Sprague for attending a NLRB hearing by stripping him of wages that he would otherwise earn and a company vehicle that he could otherwise use. Nothing in the Act requires such an outlandish result. In fact, it would run contrary to the Board's policy of ensuring open access to its procedures to facilitate employee exercise of their NLRA rights. *Cf. NLRB v. Indus. Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) (recognized an "overriding public interest . . . [in] unimpeded access to the Board" because a "proceeding by the Board is not to adjudicate private rights but to effectuate a public policy"); *Molders Local 125 (Blackhawk Tanning)*, 178 NLRB 208, 209 (1969), *enforced* 442 F.2d 92 (7th Cir. 1971) (generally unlawful for employers to penalize employees for pursuing decertification petitions). While an employer may have no legal obligation to pay its employees for their time at NLRB proceedings, it makes no sense for the Board to require that employers *not* pay employees their wages when they attend such proceedings.

The ALJ ignored these points, and concluded that C&G violated the Act because its motive for allowing Sprague to use a vehicle on August 10 was to

support his decertification petition. (ALJD 15 fn. 25). Even if true, this would not establish a violation of the Act as a matter of law for the reasons stated below. In any event, this proposition is also factually untrue. Sprague repeatedly testified without contradiction that he approached C&G and asked to use a vehicle because his was broken. (Tr. 99-101, 121-23). The employer did not approach him. C&G let him borrow a vehicle throughout the week pursuant to its long established, informal practice of allowing employees to borrow company vehicles if one was available. (Stip. ¶ 8; *see also* Tr. 253-54).

The ALJ's notion that C&G would not have provided Sprague with a vehicle to drive to the NLRB hearing because it had some sort of "local use" limitation on using its vehicles is both baseless and illogical. (ALJD 15 fn. 25). It is baseless because there is no evidence that such a policy exists. In fact, Holiday testified without contradiction that employees "could go, basically, wherever they want. We don't limit no miles, we don't write them down what they left with or what they come back with." (Tr., at 255). The ALJ's conclusion is also illogical because he wrongfully assumed that correlation proves causation—i.e., that because employees usually borrowed vehicles for local drives, it follows that C&G limits use of its vehicles to local drives (ALJD 15 fn. 25). The premise does not support the conclusion. For example, if most employees go to a lunch at a particular restaurant, that does not prove that they are prohibited from having lunch elsewhere. Similarly here, that most employees happened to borrow C&G vehicles for local drives does not prove that the company had a policy prohibiting longer drives.

*Second*, C&G’s decision not to deprive Sprague of wages and use of a company vehicle because he had to participate in a NLRB hearing did not “interfere with, restrain, or coerce” his exercise of his § 7 rights under § 8(a)(1). The Board has stated that an employer violates the Act if it provides more than “ministerial aid” to employees in the signing or filing of a decertification petition. *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). However, it has also stated that “an employer does *not* violate the Act by rendering what has been termed ‘ministerial aid,’ [if] its actions . . . occur in a ‘situational context free of coercive conduct.’” *Id.* (quotations omitted). “[T]he essential inquiry is whether ‘the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.’” *Id.* (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)). In other words, when determining whether employer actions constitute more than ministerial aid with decertification, “the ultimate question is whether the particular employer activity at issue had ‘the tendency...to interfere with the free exercise of the rights guaranteed to employees under the Act,’ taking into account the setting in which that activity occurred.” *Washington Street Brass & Iron Foundry*, 268 NLRB 338, 339 (1983) (quotation omitted); *see also Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409 (1992) (similar); *Vic Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947, 949-50 (7th Cir. 1997) (ministerial aid only prohibited to the extent it interferes with employee free choice); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) (similar). This result is dictated by the fact that

§ 8(a)(1) does not prohibit employer aid to employees, but only prohibits conduct that “interfere[s] with, restrain[s], or coerce[s] employee rights.”

Here, C&G did not interfere with or coerce any employees’ exercise of their § 7 rights. Indeed, to find a violation here requires accepting that C&G coerced or interfered with *Sprague’s* exercise of his § 7 rights by not docking his wages and not depriving him of a vehicle when he attended the NLRB hearing. The notion that Sprague is somehow a victim of C&G’s conduct is untenable. Consequently, no violation of § 8(a)(1) has occurred. *Cf. Washington Street Foundry*, 268 NLRB, 338 (1983) (lawful for employer to allow employee to take a day off to file decertification petition); *General Electric Co.*, 230 NLRB 683, 684-86 (1977) (lawful for employer to pay employees their wages for day they testified at a NLRB hearing).

*Third*, the Board has long held it lawful for an employer to pay employees their regular wages if they must attend an NLRB hearing as a witness. *See, e.g., General Electric Co.*, 230 NLRB 683, 684-687 (1977); *Rexart Color & Chemical Co., Inc.*, 246 NLRB 240, 255 (1979). Accordingly, it follows under this precedent that was not unlawful for C&G to pay Sprague his wages because he had to attend the August 10 hearing as the petitioner in the decertification case.

The ALJ misses the point of this precedent by holding it distinguishable because Sprague did not attend the hearing as a witness, but in his status as a petitioner. (ALJD 18). This is a distinction without a difference. If it is lawful for an employer to not dock an employees’ wages when that employee attends an NLRB as a witness, there is no reason why the same policy does not apply when the employee

attends an NLRB hearing as a petitioner. In either case, the employee had to attend an NLRB proceeding and the Board should not require that employers penalize employees when they do so.

*Finally*, the Board has permitted employers to grant employees and unions far greater use of company property in support of certification and recognition than the use at issue here. For example, in *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 6-7 (2001), the Board held it lawful for an employer to permit non-employee union organizers to use company-paid time and company property to collect signatures on authorization cards. Similarly, in *Longchamps Inc.*, 205 NLRB 1025 (1973), the Board approved a holding that “the use of company time and property does not, per se, establish unlawful employer support” of an organizing campaign. *Id.* at 1031. The actions of C&G, by merely allowing one employee to use company time and a company vehicle to attend a NLRB hearing pales in comparison to the type of employer support the Board finds lawful in organizing campaigns, and thus does not violate § 8(a)(1).

The ALJ’s contention that greater employer support is permitted in support of unionization than in opposition to it (ALJD 10 fn. 21) is incompatible with the fact that § 7 of the Act “guards with equal jealousy employees’ selection of the union of their choice and their decision not to be represented at all.” *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). Indeed, to say that whether conduct “interferes” with employee § 7 rights under § 8(a)(1) depends on whether that conduct supports certification or decertification is a nonsensical interpretation of

§ 8(a)(1)'s language. If anything, the NLRA permits *less* employer support to unions because the Act makes it unlawful for an employer to “support” a “labor organization,” 29 U.S.C. § 158(a)(2), while it contains no corresponding prohibition on employer “support” to individual employees. The ALJ’s decision to find a violation of § 8(a)(1) because Sprague supports decertification, and not certification of a union, is reversible error.

### **III. It Was Not Illegal for C&G to Inform Sprague of His Right to Deauthorize under the NLRA (Exceptions 16-23).**

Section 9(e)(1) of the NLRA gives employees the right to deauthorize a union and free themselves from financially supporting it as a condition of their employment. Yet, the ALJ found it illegal under § 8(a)(1) for Wheeler to inform Sprague that he possessed this right in response to his question about his options. This finding is incompatible with both §§ 8(a)(1) and 8(c).

*First*, the test to determine if employer speech that encourages decertification violates § 8(a)(1) is: may “the employer’s statements ... reasonably be said to have tended to interfere with employees' exercise of their § 7 rights?” *Lee Lumber*, 306 NLRB at 409; *see also Eastern States Optical*, 275 NLRB at 372; *Exxel/Atmos*, 147 F.3d at 975. This burden cannot be satisfied here because Wheeler certainly did not “interfere” with Sprague’s exercise of his deauthorization rights by informing him about the existence of those rights. Accordingly, the plain language of § 8(a)(1) has not been violated here.

By way of example, the Board has repeatedly held that § 8(a)(1) is not violated when employers inform employees about their § 9 right to decertify. *See*

*Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) (no violation of § 8(a)(1) where employer, in response to employee’s question about how he could get out of the union, informed him of his decertification rights and provided language for a decertification petition); *Washington Street Foundry*, 268 NLRB at 338-39 (lawful for employer’s agent to inform employee how to properly fill out a showing of interest for decertification); *Ernst Home Ctrs.*, 308 NLRB 848, 848 (1992) (lawful for employer to provide sample petition language in response to an employee request); *cf. McClatchy Newspapers*, 337 NLRB 1161, 1164, 1178 (2002) (no violation of § 8(a)(1) where employee discussed his decertification efforts with his employer and a manager told him to “keep up the good work”). Given that an employer does not “violate[ ] § 8(a)(1) merely through statements informing employees of the decertification process,” *Exxel/Atmos*, 147 F.3d at 975, it follows that C&G did not violate § 8(a)(1) by telling Sprague about the deauthorization process.<sup>3</sup>

*Second*, NLRA § 8(c) precludes a finding that Wheeler’s conversation with Sprague is an unfair labor practice or evidence thereof. Section 8(c) provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). “It is clear that, under § 8(c), an

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<sup>3</sup> Moreover, the Board has often held that employers can engage in far more vigorous speech in favor of union certification or recognition without violating § 8(a)(1). *See, e.g., Tecumseh Corrugated Box*, 333 NLRB at 6-7; *Longchamps*, 205 NLRB at 1031. It was thereby inconsistent for the ALJ to conclude that merely informing employees of their right to deauthorization was illegal under the Act.

employer may lawfully furnish accurate information [regarding decertification], especially in response to employees' questions, if it does so without making threats or promises of benefits." *Lee Lumber*, 306 NLRB at 409.

Sprague was neither threatened nor promised a benefit when Wheeler informed him of his deauthorization rights in response to his question. Indeed, the ALJ never found that *anyone* was threatened or coerced under § 8(c) when Wheeler told Sprague about his right to deauthorize. Instead, the ALJ had this to say about the conversation at issue:

At first blush, it appears that Sprague called Wheeler and solicited his advice to which Wheeler merely responded, bringing about arguments that Wheeler's remarks were neutral speech protected by Section 8(c) of the Act. This is particularly so since Sprague testified that Respondent did not provide him any assistance in preparing the de-authorization petition, or soliciting employee signatures for it.

ALJD 16 lns. 13-26. For these reasons, Wheeler's communication with Sprague cannot constitute an unfair labor practice under § 8(c). *See Lee*, 306 NLRB 409-10 (accurate employer statements to employees that encourage decertification and inform employees how to decertify are protected by § 8(c)); *cf. The Levy Co.*, 351 NLRB 1237, 1239-40 (2007) (an employer accurately informing employees of consequences of decertification is protected by § 8(c)).

*Finally*, to find a violation here would violate the First Amendment rights of both C&G and Sprague to communicate with each other. The federal government, to include the NLRB, cannot prohibit private speech absent a compelling government interest. There is no compelling government interest in prohibiting employers from informing employees about their legal rights under federal law. Congress enacted

§ 8(c) as a prophylactic measure to ensure that the Board does not trammel upon such speech. *See Chamber of Commerce v. Brown*, 554 U.S. 60, 66-68 (2008). If the Board here were to act in excess of its statutory authority under § 8(c) and deem the speech between C&G and Sprague to be illegal under the Act, it will violate the First Amendment rights of both.

**IV. The Board’s Ministerial Aid Standard Is Inconsistent With §§ 7, 8(a)(1) and 8(c) of the Act and Is Unconstitutional (Exceptions 8-11, 20-23).**

If the Board accepts the ALJ’s conclusion that C&G’s conduct violates § 8(a)(1) of the Act because it amounts to more than “ministerial aid” with decertification, then this standard itself is facially invalid under the Act. Requiring employer neutrality with respect to decertification and deauthorization is incompatible with the Taft-Hartley Act, 61 Stat. 136 (1947), and First Amendment.

In *Brown*, the Supreme Court explained that the Taft Hartley Act was enacted, in part, to invalidate Board requirements that employers remain neutral in representational matters. 554 U.S. at 66-68. Under the Wagner Act, 49 Stat. 449 (1935), the Board “took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees.” *Id.* at 66. However, this restrictive standard both infringed on free speech under the First Amendment and “regulate[d] employer speech too restrictively in the eyes of Congress.” *Id.* at 66-67. In response, Congress passed the Taft-Hartley Act. *Id.* Among other things, it added to the NLRA the free speech provisions of § 8(c), which

“manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’” *Id.* (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)). Taft-Hartley also amended § 7 of the NLRA to provide employees with “the right to refrain from any or all” union activities. *Id.* This “amendment to § 7 calls attention to the right of employees to refuse to join unions,” and “implies an underlying right to receive information opposing unionization.” 554 U.S. at 68.

In direct defiance of the Taft-Hartley amendments, the Board’s maintains legal standards that can be read to require “employer neutrality” with respect to decertification and deauthorization. *Id.* at 66. The Board has stated it illegal for employers to “actively encourage, promote, or assist employees in repudiating their collective bargaining representative,” *Amer-Cal Indus.*, 274 N.L.R.B. 1046, 1051 (1985), that “in determining whether an employer’s assistance is unlawful, the appropriate inquiry is ‘whether the Respondent’s conduct constitutes more than ministerial aid,’” *Mickey’s Linen & Towel Supply*, 349 NLRB 790, 791 (2007) (quotation omitted), and that “[o]ther than to provide general information about the process on the employees’ unsolicited inquiry, an employer has no legitimate role in the activity, either to instigate or to facilitate it,” *Armored Transport*, 339 NLRB 374, 377 (2003); *see also Wire Products Mfg. Corp.*, 326 N.L.R.B. 625, 640 (1998). These standards are facially invalid under the Taft-Hartley Act.

*First*, decertification and deauthorization are not evils that the Act seeks to suppress, but affirmative rights granted to employees by §§ 7 and 9 of the Act. Specifically, in the Taft-Hartley Act, Congress expressly provided employees with a

right to “refrain” from unionization in § 7 and a right to deauthorize in § 9(e)(1) of the Act. As such, the Board has a duty to facilitate employee exercise of these rights, and not frustrate them as it is doing with its ministerial aid standard.

*Second*, the ministerial aid standard is inconsistent with NLRA § 8(a)(1), because that statutory provision does not make it unlawful for employers to “assist” employees with exercising their § 7 rights, but only “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” 29 U.S.C. § 158(a)(1). It is nonsensical to say that an employer “interferes” with an employee’s exercise of their § 7 rights if it “encourage[s], promote[s], or assist[s] employees” in exercising their §§ 7 and 9 rights to decertification. *Amer-Cal Indus.*, 274 N.L.R.B. at 1051. This case proves the point. C&G allowed Sprague to use a company vehicle to attend an NLRB hearing and informed him of his right to deauthorization. This helpful conduct obviously did not “interfere with, restrain, or coerce” Sprague. Accordingly, it cannot violate § 8(a)(1).

In *Vic Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947 (7th Cir. 1997), Judge Posner, writing for the Seventh Circuit, criticized the Board’s ministerial aid standard for being inconsistent with § 8(a)(1). *Id.* at 949-50. In that case, “the Board argue[d] that the employer may provide only ‘ministerial’ assistance; anything more ‘taints’ the workers’ efforts fatally.” *Id.* at 949. “The employer . . . claim[ed] the right to provide the workers with any assistance that doesn’t interfere with their freedom of choice.” *Id.* The Seventh Circuit found that the cases “upheld on judicial review are ones in which the employer had been found to have interfered with the free

choice of the employees,” and decided to not “treat [the ministerial aid rule] as a rule of labor law.” *Id.* The D.C. Circuit did the same in *Excel Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 974-75 (D.C. Cir. 1998).

For these reasons, the Board must abandon its ministerial aid standard and return to the analysis required under § 8(a)(1). As the Supreme Court held in *Brown*, “Sections 8(a) and (b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so.” 554 U.S. at 66. In § 8(a)(1), Congress did not choose to make it illegal for employees to “assist” employers with exercising their § 7 rights.

*Third*, the onerous ministerial aid standard that governs conduct that facilitates decertification is inconsistent with the Board’s far more lax standards that govern conduct that facilitates certification or recognition. As discussed previously, the Board has often found it lawful under § 8(a)(1) for employers to assist campaigns for certification and recognition by providing employees and unions with free use of company time and property and by speaking in favor of unionization. *See, e.g., Tecumseh Corrugated Box*, 333 NLRB at 6-7; *Longchamps*, 205 NLRB at 1031. Yet, when it comes to decertification or deauthorization, anything more than ministerial assistance is verboten. This egregious double-standard is unsupportable given that §§ 7 and 9 of the NLRA equally protect the right to support or oppose unions. The double-standard is also incompatible with § 8(c) because an employer’s right to free speech under that section is not made dependent on whether it supports or opposes union representation.

*Fourth*, the ministerial aid standard is facially incompatible with § 8(c) of the Act because it encompasses speech that “contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Speech that encourages, promotes, or assists decertification does not inherently threaten employees with a reprisal or benefit. Indeed, the “ministerial aid” standard does not even evaluate whether a communication contains a “threat” or “promise of benefit” under § 8(c). Instead, by its terms, the standard measures and punishes speech based on its level of effectiveness—i.e., by whether the communication assists employees in exercising their §§ 7 and 9 rights to decertification.<sup>4</sup>

This case proves the point. When Wheeler answered Sprague’s question about his options if his decertification petition was dismissed by informing Sprague about his right to a deauthorization election, this communication obviously did not contain any “threat of reprisal or force or promise of benefit” to Sprague. It was accurate information about his legal rights. Yet, the ALJ held this speech illegal under the Board’s “ministerial aid” standard, in direct violation of NLRA § 8(c).

*Fifth*, the Board’s attempt to require employer neutrality with respect to decertification conflicts with the purposes of the Taft-Hartley. As the Supreme Court held in *Brown*, the employer neutrality that the Board required under the Wagner Act was deemed to “regulate employer speech too restrictively in the eyes of Congress.” 554 U.S. at 66-67. To eliminate this neutrality requirement, Congress amended § 7 to provide employees with a right to refrain from unionization and

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<sup>4</sup> An absurd consequence of this standard is that only unhelpful or ineffective speech regarding decertification is lawful.

enacted § 8(c) to guarantee employers a right to engage in free speech. *Id.* at 66-68. The Board's current policy of effectively requiring employer neutrality with respect to decertification and deauthorization flies in the face of Congressional intent.

Indeed, far from prohibiting it, the Act *favors* speech that informs employees of their rights under the NLRA—which include rights to decertify and deauthorize—and that encourages or facilitates employee exercise of their legal rights.

The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

*Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967); *see also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (employer speech “aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions’ performance”); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) (“it is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right”). There is certainly no legitimate interest under the Act in keeping employees in the dark about their §§ 7 and 9 rights to decertify and deauthorization. Yet, that is precisely the purpose and effect of the Board's ministerial aid standard.

The Board's attempt to prevent employees from learning of their decertification and deauthorization rights is particularly hypocritical given that the agency recently issued a controversial rule entitled “Notification of Employee Rights under the National Labor Relations Act,” which requires almost all employers to

post notices in their workplaces informing employees of their rights under the NLRA. 76 Fed. Reg. 54,006 (Aug. 30, 2011). The Board’s justification for this unprecedented requirement is that “[f]or employees to fully exercise their NLRA rights . . . they must know that those rights exist and that the Board protects those rights,” and the Board “has reason to think that most do not.” *Id.* Yet, when it comes to decertification or deauthorization rights, the Board inconsistently seeks to keep employees ignorant of those rights lest they dare exercise them.

*Finally*, the ministerial aid standard is unconstitutional under the First Amendment to the United States Constitution. The NLRB cannot sanction private speech based on its content without a compelling government interest. There is no compelling government interest in prohibiting employers from engaging in non-threatening speech that assists, facilitates, encourages or promotes employee exercise of their legal right to decertification or deauthorization. Accordingly, the ministerial aid standard infringes both on employer’s right to engage in free speech, and employees’ rights to communicate with their employers, about their rights to decertification or deauthorization under the NLRA.

#### **V. The ALJ Erred by Dismissing Sprague’s Petitions (Exceptions 20-22).**

The ALJ erred in dismissing Sprague’s decertification and deauthorization petitions as a remedy for C&G’s ostensible unfair labor practices. *First*, it was wrongful to dismiss the decertification petition because the conduct at issue—C&G allowing Sprague to use company time and a company vehicle to attend the NLRB hearing—occurred more than 4 months (129 days) *after* the decertification petition

was filed on April 3, 2012. *See* Stip., ¶ 2, 4. This conduct thereby neither affected the validity of the showing of interest signed by more than 30% of employees for decertification nor the filing of the petition itself. Given that “the essential inquiry is whether ‘the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned,’” *Eastern States Optical*, 275 NLRB at 372 (quoting *KONO-TV*, 163 NLRB at 1006), C&G’s conduct could not possibly have tainted the decertification petition.

The ALJ’s reliance on *SFO Goodnite Inn*, 357 NLRB No. 16 (2011), enf’d 700 F.3d 1 (D.C. Cir. 2012) and related authorities (ALJD 18-20) is misplaced because the employer conduct in those cases happened *before* the petition was filed, and thereby could have effected employee support for a decertification election. Here, it is impossible to find that C&G allowing Sprague to use company time and a company vehicle to attend a hearing on August 10 affected employee support for a decertification petition that was filed four months earlier, on April 3.

*Second*, the ALJ erred by dismissing the deauthorization petition because the ALJ himself found that the “NLRB prepared the petition for him, and Board agents prepared all four petitions for him” and that “[Sprague] testified no one from management helped him to gather signatures for the petitions, and he collected all the signatures himself.” (ALJD 14, lns. 22-24; *see also* ALJD 7 lns. 3-10). Accordingly, it is clear that C&G’s conduct did not taint employee support for the deauthorization petition. The notion that employees should be prohibited from

exercising their right to deauthorize because their employer told one of them about the existence of their right is untenable.

*Finally*, it was wrongful for the ALJ to dismiss both petitions because it was contrary to the Act's purposes of protecting the right of employees to choose or reject unionization under §§ 7 and 9 of the Act. Sprague and at least 30% of his co-workers supported petitions seeking both to decertify and deauthorize the Teamsters. There is no allegation that C&G coerced any of its employees to support these petitions. The attorney for the General Counsel himself stated at the hearing that "it's not part of my case in chief and, therefore, it's irrelevant" that C&G did not involve itself in the collection of signatures for the petitions. Tr. 135-36. It is thereby undisputed that the employees' decision to seek both decertification and deauthorization was their free and untrammelled choice.

It would be gross injustice for the Board to suppress the legal right of Sprague and his co-workers to decertify and deauthorize the Teamsters under §§ 7 and 9 of the Act, and thus force them to accept unwanted union representation and pay union dues against their will, merely because C&G did not deprive Sprague of his wages and a company vehicle when he attended a NLRB hearing and because C&G informed Sprague of his right to deauthorize. No rational outside observer would deem such trivial allegations as an equitable justification for quashing the right of employees to vote on whether they want to support a union. The ALJ's dismissal of the petitions must be reversed.

## CONCLUSION

The ALJ's recommended decision should not be adopted and the complaint dismissed in its entirety.<sup>5</sup>

Submitted this 21st day of June 2013.

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<sup>5</sup> The Board, as currently constituted, lacks the lawful authority to rule upon these exceptions because Sharon Block and Richard Griffin are not lawfully-appointed members of the Board. *See, e.g., Noel Canning v. NLRB*, No. 12-1153, slip op. (D.C. Cir. Jan. 25, 2013).

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 21, 2013, an electronic original of the Intervenor's Exceptions and Brief in Support Thereof was transmitted to the Board via its electronic filing system and that copies of the foregoing were transmitted to the following individuals as follows:

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