

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

C & G DISTRIBUTING COMPANY, INC.	:	
	:	
Respondent	:	
	:	
and	:	Case No. 8-CA-91304
	:	
TRUCK DRIVERS, WAREHOUSEMEN AND	:	
HELPERS, LOCAL NO. 908	:	
AFFILIATED WITH THE INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS	:	
	:	
Charging Party	:	
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**RESPONDENT C & G DISTRIBUTING COMPANY, INC.’S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE FINE’S DECISION  
AND BRIEF IN SUPPORT**

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Ronald L. Mason  
Aaron T. Tulencik  
Mason Law Firm Co., L.P.A.  
425 Metro Place North, Suite 620  
Dublin, Ohio 43017  
[rmason@maslawfirm.com](mailto:rmason@maslawfirm.com)  
[atulencik@maslawfirm.com](mailto:atulencik@maslawfirm.com)

*Counsel for Respondent,  
C & G Distributing Company, Inc*

Rudra Choudhury, Attorney  
National Labor Relations Board, Region 8  
Anthony J. Celebreeze Federal Building  
1240 E. Ninth Street, Room 1695  
Cleveland, OH 44199-2086  
[Rudra.Choudhury@nlrb.gov](mailto:Rudra.Choudhury@nlrb.gov)

*Counsel for the General Counsel*

William L. Messenger  
National Right to Work  
Legal Defense Foundation  
8001 Braddock Rd., Suite 600  
Springfield, VA 22160  
[wlm@nrtw.org](mailto:wlm@nrtw.org)

*Counsel for Intervenor*

Julie Ford, Esq.  
Doll Jansen Ford & Rakay  
111 W. First St., Suite 1100  
Dayton, OH 45402-1156  
[jford@djflawfirm.com](mailto:jford@djflawfirm.com)

*Counsel for Charging Party*

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**RESPONDENT'S EXCEPTIONS TO  
ADMINISTRATIVE JUDGE FINE'S DECISION**

**Exception I** – Judge Fine erred in finding Respondent committed unfair labor practices directly tied to the decertification process and provided more than ministerial aid to Intervenor Jerry Sprague's petition efforts and, therefore, violated section 8(a)(1) of the act as judge fine went beyond the scope of the complaint and expanded the General Counsel's theory of the case. Accordingly, Judge Fine inappropriately made unfair labor practice findings that were not fully and fairly litigated, and, as such violated respondent's due process rights.

**Exception II** – Judge Fine erred in finding Jerry Sprague, William Wheeler and Respondent conspired to file the April 3, 2012 decertification petition because it is beyond the scope of the complaint, expands the general counsel's narrow theory of the case and is nothing more than conjecture wholly unsupported by the record evidence elicited during the one day hearing.

**Exception III** – Judge Fine was biased and had predetermined his own theory of the case.

## **I. STATEMENT OF THE CASE**

On December 28, 2012 the Regional Director for Region 8 issued a Complaint and Notice of Hearing (“Complaint”) alleging violations of § 8(a)(1) the National Labor Relations Act (“Act”). This matter was heard by Administrative Law Judge Fine (“Judge Fine”) in Findlay, Ohio on February 20, 2013 pursuant to the Complaint referenced above. The Complaint alleged only that C & G Distributing Company, Inc. (“C & G,” “Respondent” or “Company”) violated § 8(a)(1) of the National Labor Relations Act (“the Act”) when C & G engaged in the following limited acts:

8. On or about August 10, 2012, Respondent provided more than ministerial assistance to employees with the filing and processing of a decertification petition by paying the wages of and providing the use of a company vehicle to its employee and the petitioner, Jerry Sprague, in order to attend the representation proceeding in Case 8-RD-89588.<sup>1</sup>

9. (A) In or around August and September 2012, the exact dates being unknown, Respondent, by its agent William P. Wheeler, solicited employees to pursue the rescission of a union security clause by providing advice and assistance to employee Jerry Sprague with regard to the filing of a de-authorization petition.

(B) By the acts set forth in paragraph 9(A), Respondent, by its agent William P. Wheeler, provided more than ministerial assistance to its employee Jerry Sprague in seeking the rescission of a union security clause.

Notwithstanding, Judge Fine went beyond the scope of the Complaint and expanded the General Counsel’s theory of the case by using February and April phone conversations between William P. Wheeler (“Wheeler”) and Jerry Sprague (“Sprague”) in order to find that C & G committed unfair labor practices directly tied to the decertification process. Decision p. 20. In doing so, Judge Fine determined that the petitions filed by Sprague were tainted. *Id.* However, neither the General Counsel’s theory of the case or its Complaint alleged that any of Respondent’s Acts prior to August 2012 were unlawful. Moreover, the General Counsel did not

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<sup>1</sup> The Case number listed in the Complaint is 8-RD-89588. That is not correct as that is the petition Sprague filed on September 20, 2012. (Jt. Ex. 1, ¶¶ 3, 10 & Ex. A and C attached thereto.)

argue in its post-hearing brief that the petitions were tainted nor did it cite *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012).

Based upon the General Counsel's theory of the case and the explicitly narrow scope of its Complaint, *SFO Good-Nite Inn, LLC* is inapposite to the record evidence elicited during the hearing because the General Counsel maintained that C & G's unlawful actions took place *after* the filing of the decertification petition. Additionally, as *SFO Good-Nite* expressly states, the *Hearst* factors apply when an employer has engaged in unfair labor practices directly related to a decertification effort such as, "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of the petition seeking to decertify the bargaining unit representative." The General Counsel made no such allegations in its Complaint, during the hearing or in its post hearing brief. Hence, Judge Fine could not argue *SFO Good-Nite* without going well beyond the scope of the Complaint and greatly expanding the General Counsel's theory of the case.

It is clear that Judge Fine had predetermined his own theory of the case and, in doing so, exhibited his inherent bias towards those employees exercising their Section 7 rights not to form, join or assist labor organizations. The only way Judge Fine could find that the August and September 2012 allegations set forth in the Complaint were § 8(a)(1) violations was to fabricate an elaborate scheme between Wheeler, Sprague and Respondent that was put into action in February 2012. In doing so, Judge Fine crossed a clear, unmistakable line by assuming facts not in evidence so as to justify his findings that the Respondent's conduct in August and September 2012 were violations of the Act.

On April 6, 2012 the charging party filed a charge against Respondent, alleging among other things, that since February 2012 C & G has assisted and encouraged employees to file

decertification petitions seeking the removal of the union as their collective bargaining representative. Region 8 investigated the allegations and the charge was subsequently withdrawn. On October 15, 2012 the charging party filed the unfair labor practice charge that is at issue in this matter. The charge alleged, among other things, that “since on or about April 2012, C & G has coerced employees in the exercise of their Section 7 rights by, among other things, providing assistance in the filing and presentation of decertification and de-authorization petitions and providing false information to employees in a captive audience meeting regarding the de-authorization petition.” See, (General Counsel’s [“G.C.”] Ex. 1(a).) The Region conducted an investigation and the charge was later amended on December 21, 2012. (G.C. Ex. 1(c).) The allegations in the amended charge read as follows:

On or about August 10, 2012, the Employer provided unlawful assistance to employees with filing and processing a decertification petition by its payment of wages and use of a company vehicle to its employee Jerry Sprague in order to attend the representation proceeding in Case 8-RD-89588.

Since about August or September 2012, the exact date unknown, the Employer, by its agent and Labor Relations Consultant William Wheeler provided unlawful assistance to employees in promoting the filing of a deauthorization petition.

Id.

The General Counsel investigated the charge, knew the content and rationale behind the February and April conversations and subsequently decided not to issue a Complaint with respect to those conversations but simply the alleged unlawful acts to August and September of 2012. Rather than limit his ruling to the scope of the Complaint, the General Counsel’s theory of the case and the evidence presented at the hearing, Judge Fine assumed the role of the General Counsel and proceeded to invent the content of and the reasoning behind the February and April conversations, to support his predetermined theory. For instance, Judge Fine states:

Sprague's multiple phone calls with Wheeler prior to Sprague's filing the April 3 [petition], were more than benign but rather dealt with Respondent's strategy as to the viability of filing the April 3 petition in view of what was transpiring during its negotiations with the Union. In this regard, Sprague only filed the April 3 petition after repeated consults with Wheeler who was introduced to Sprague by Respondent and used by Respondent as a labor relations consultant. The timing of the April 3 filing close in time to the Union's rejection of Respondent's March 1 proposal suggests Respondent was interjecting its negotiating strategy with the Union into the timing of Sprague's filing of his second decertification petition.

See, Decision, p. 4, FN 11. Another example is as follows:

Sprague testified that shortly before he filed his second decertification petition he had another phone call with Wheeler. Following that call, on April 3, Sprague filed the current decertification petition in Case No. 8-RD-77965. As set forth above, I do not find the timing of Sprague's and Wheeler's contacts to be coincidental. Rather, the provision of Wheeler's number to Sprague by J.R. Guagenti appears to be part of a planned strategy to guide Sprague through the decertification process. In this regard, the existing collective-bargaining agreement ran through February 14, the date of Sprague's prior petition. The Union believed the parties had reached a successor agreement on February 14 as it sent the terms of the contract to the employees for ratification. However, on March 1, Respondent sent the Union a new proposal on personal days, which the Union rejected on March 14. Two weeks later, after several phone calls with Wheeler, the last being shortly before April 3, Sprague filed his second decertification petition. These phone contacts suggest Respondent was orchestrating the timing of the petition's filing by Sprague to coincide with its bargaining strategy, with its ultimate purpose to dislodge the Union.

Id. pp. 12-13. These findings were well beyond the scope of the Complaint and are significant expansion of the General Counsel's theory of the case. More importantly, there is nothing in the record to support Judge Fine's conjectures. Judge Fine has exhibited a considerable bias in his rulings and, as such, if the Board remands this case for additional evidence to be heard the Respondent will move to recuse Judge Fine.

## **II. FACTS**

### **A. General Background**

C & G is a beer distributor for Anheuser Busch. (Tr. p. 40.) The Company serves the following counties out of its Lima, Ohio facility: Allen, Auglaize, Putnam and Hardin. (Id.)

Bryan Holliday (“Holliday”) is the first shift warehouse manager and Anthony Azzarrello (“Azzarrello”) is currently the second shift warehouse manager. (Id. at p. 73.) The warehouse managers also serve as the supervisors of the drivers. (Id. at p. 75.) The Company has three owners, Gary Guagenti, Mark Guagenti and Fino Cecala. (Id. at pp. 75-76.) Joseph R. (“J.R.”) Guagenti serves as the Company’s Human Resources Manager. (Id. at p. 210.) The bargaining unit is comprised of the Company’s drivers and warehouse employees. (Id. at p. 49.) The number of employees in the bargaining unit is somewhere in the mid twenties. (Id.)

**B. Decertification and De-authorization Petitions**

Intervenor Sprague,<sup>2</sup> an employee of Respondent, has filed a total of four (4) petitions with the National Labor Relations Board (“Board”). Sprague filed a decertification petition in Case No. 8-RD-74472 on February 12, 2012. (G.C. Ex. 8.) Sprague filed a decertification petition in Case No. 8-RD-77965 on April 3, 2012. (Jt. Ex. 1, ¶ 2 and Ex. A attached thereto.) On September 20, 2012, Sprague filed Case 8-RD-89588 which was withdrawn after Sprague learned he used the wrong petition form to file a de-authorization petition.<sup>3</sup> (Id. at ¶ 10 and Ex. C and D attached thereto.) On October 4, 2012, Sprague filed a de-authorization petition in Case 8-UD-90639. (Id. at ¶ 11 and Ex. E attached thereto.)

In April 2012 J.R. Guagenti hired Wheeler to represent C & G and the employees who had filed a decertification petition. (Tr. p. 248.) Wheeler is a labor relations consultant for Midwest Management Consultants, Inc. (Id. at p. 246.) Specifically, Wheeler represents management and employees in matters involving labor relations. (Id. at p. 245.) Wheeler has also had experience representing unions. (Id.) Sometime after Sprague filed his February 12,

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<sup>2</sup> Sprague has been with the Company for approximately four (4) years. He is currently a warehouseman and works on the first shift. During his employment with the Company Sprague has also been a warehouseman and shift leader on the second shift. (Tr. pp. 30-33.)

<sup>3</sup> Region 8 sent Sprague an RD Petition instead of an UD Petition. Compare Ex. C and E attached to Jt. Ex. 1.

2012 decertification petition (8-RD-74472) J.R. Guagenti gave Wheeler's telephone number to Sprague. (Id. at p. 92-94.) Prior to filing the April 3, 2012 decertification petition (8-RD-77965) Sprague notified Wheeler that he would be resubmitting the decertification petition. (Id. at p. 98.) On April 16, 2012 Wheeler held a meeting with all of the bargaining unit employees to explain the facts and the employees' rights with respect to the decertification petition. (Id. at pp. 95-96, 166-167 & 196-197). The April 3, 2012 decertification petition ultimately resulted in a representation hearing. (Id. at p. 99.)

On August 10, 2012, Sprague attended a representation hearing in Case No. 8-RD-77965 at the NLRB Regional Office in Cleveland, Ohio. (Jt. Ex. 1, ¶ 4.) Accordingly, Sprague did not report to work on August 10, 2012. (Id.) Sprague was the only bargaining unit employee in attendance at the representation hearing. (Id. at ¶ 5.) C & G paid Sprague his regular wages on August 10, 2012 for attending the representation hearing.<sup>4</sup> (Id.) Sprague was present at the August 10, 2012 hearing in his capacity as the decertification petitioner. (Id.) Sprague did not testify on behalf of C & G at the August 10, 2012 hearing. (Id.) The Company provided employee Sprague use of a company vehicle to travel to and from Lima, Ohio to Cleveland, Ohio for Sprague to attend the August 10, 2012 hearing. (Id. at ¶ 6.) C & G provided the use of the company vehicle (red Ford Ranger) at no charge to Sprague other than fuel costs. (Id. & Tr. p. 99).

C & G provided Sprague the use of a vehicle because his car was inoperable as the clutch had failed. (Tr. pp. 99 & 121.) Sprague would not have been able to attend the hearing if the Company had not loaned him a vehicle as the driving distance between Lima, Ohio and Cleveland,

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<sup>4</sup> The Company also paid Sprague for the time he missed on August 9, 2012 due to having to attend the hearing. (Tr. pp. 214-215 & G.C. Ex. 9.) At the time of the hearing Sprague was working the second shift (4:00 p.m. to 12:30 a.m.). (Id. at p. 34 & G.C. Ex. 9.) Sprague clocked out at 9:39 p.m. as he was required to be in Cleveland by 10:00 a.m. the following morning, a roughly two and one half hour drive. (G.C. Ex. 9.)

Ohio is approximately 156 to 176 miles, meaning the round trip driving distance between Lima, Ohio and Cleveland, Ohio is approximately 312 to 352 miles. (Tr. p. 99 & Jt. Ex. 1, ¶ 6.) Sprague notified J.R. Guagenti that he needed a vehicle to attend the hearing in addition to other days that week due to the fact that the clutch had gone out on his car. (Tr. p. 100.) Sprague's manager, Holliday, provided him with the vehicle. (Tr. pp. 99-100.) The Company did not provide bargaining unit employees other than Sprague use of a company vehicle to travel to and from Lima, Ohio to Cleveland, Ohio to attend the August 10, 2012 representation because, as noted above, no other bargaining unit employees attended the hearing. (Jt. Ex. 1, at ¶¶ 5 & 7.)

In about early September 2012, Sprague called Wheeler and asked him if there was anything else he (Sprague) could do if the NLRB did not let him proceed to a decertification election. (Id. at ¶ 9 & Tr. pp. 113-115 and 117.) Wheeler told Sprague that he could file a de-authorization petition. (Jt. Ex. 1, ¶ 9 & 117.) Wheeler explained to Sprague the procedures to file a de-authorization petition. (Jt. Ex. 1, ¶ 9.) Specifically, Wheeler explained what a de-authorization was and the differences between a decertification petition and a de-authorization petition. (Tr. pp. 117-118.) Within a week of his September 2012 conversation with Wheeler, Sprague began working on a de-authorization petition. (Id. at pp. 132-133.) It only took him a single day to gather the necessary signatures. (Id.) No one from management helped him obtain the signatures and/or prepare the petition.<sup>5</sup> (Id. at p. 135.)

The NLRB sent Sprague the paperwork for the de-authorization petition. (Id. at pp. 134 & 135.) Sprague knew to contact the NLRB because that is how he obtained the paperwork for the decertification petition. (Id. at p. 134.) The NLRB prepared the petition for him. (Id. at 135.) Within two weeks of the early September 2012 conversation with Wheeler, Sprague filed the de-authorization petition. (Id. at pp. 133-134.) However, as noted above, the September 20,

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<sup>5</sup> This holds true with respect to all four petitions filed by Sprague. (Tr. p. 135.)

2012, petition was withdrawn after Sprague learned he used the wrong petition form to file a de-authorization petition.<sup>6</sup> (Jt. Ex. 1, ¶ 10 and Ex. C and D attached thereto.) Subsequently, on October 4, 2012, Sprague filed a de-authorization petition in Case 8-UD-90639. (Id. at ¶ 11 and Ex. E attached thereto.) Soon thereafter, Wheeler held another meeting with all of the bargaining unit employees regarding the de-authorization petition. (Tr. pp. 166-167 & 196-197.)

**C. Company Policy Regarding Personal Use of Company Vehicles**

C & G has maintained (and continues to do so) a policy and/or practice permitting bargaining unit employees to use company vehicles for non-work related purposes that are of a personal nature. (Jt. Ex. 1, ¶ 8.) Such non-work related purposes are by way of example, hauling and moving employees' personal property such as furniture, driveway snow removal, the hauling of firewood and moving dirt. (Id. & Tr. p. 256.) The Company also allows the use of its vehicles if an employee's personal vehicle is suffering from any sort of mechanical issues. (Tr. p. 254.) Employees have used Company vehicles for up to a week under these circumstances. (Id. at pp. 254-255.)

Holliday, the warehouse manager since 2004, noted he, as well as other members of management, allow employees to borrow company vehicles for non-work related purposes. (Id. at p. 253.) The Company does not have any sort of mileage restriction associated with this policy. (Id. at pp. 254-256.) The Company does not record the number of miles on the vehicle when it leaves the premises or when it is returned by the employee. (Id. at pp. 255-256.) Essentially, the employees are able to go wherever they need to go without any restrictions. (Id.) As long as a vehicle is available, the Company allows the employees to use a Company vehicle for whatever non-work related reason the employee needs the vehicle. (Id. at p. 254.) In fact, in

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<sup>6</sup> Region 8 sent Sprague an RD Petition instead of an UD Petition. Compare Ex. C and E attached to Jt. Ex. 1. Rather than simply file a new form, the Region also required a new petition (signatures). It would appear that Region 8 was trying to make it as difficult as possible for Sprague to exercise his Section 7 rights.

the past two years approximately fifteen (15) to twenty (20) bargaining unit employees have used company vehicles for non-work related purposes. (Id. at pp. 253-254.) Notably, every employee witness, whether called to testify on behalf of the Company or the General Counsel and the Charging Party, had either used a Company vehicle for a non-work related purpose or knew of another bargaining unit member who had. The examples cited during the hearing are as follows:

- Sprague used the Company's box truck to move from one house to another. He had the vehicle overnight and he received permission to use the vehicle from Holliday. (Id. at p. 138.)
- Cory Cira ("Cira"), a warehouse employee on second shift, used a Company vehicle to move from one house in Wapakoneta to another house in Wapakoneta. (Id. at p. 142.)
- Sprague helped Cira move from Wapakoneta to Van Wert. Sprague requested use of the Company vehicle from Holliday. Sprague estimates that the trip was "easily" 120 miles round trip. (Id. at pp. 149-151.)
- Chad Pierce ("Pierce"), the current union steward who testified on behalf of the General Counsel and the Charging Party, used a Company truck to pick up and move a dresser. He informed Holliday that his truck was broken down and he needed the use of a Company vehicle. (Id. at pp. 161-162.) Pierce also noted that he has never asked for use of a company vehicle and been turned down. (Id. at p. 176.)
- Todd Graham ("Graham") used a Company vehicle to haul mulch one summer Saturday afternoon. Pierce observed Graham hauling the mulch in a Company truck. (Id. at pp. 163-164.)
- Graham used a Company vehicle on another occasion to haul firewood. (Id. at pp. 259-260.) Graham received permission from Holliday. (Id. at p. 261).

- Chad Crumrine (“Crumrine”), a current driver who testified on behalf of the General Counsel and the Charging Party, admitted on cross examination that Jacob Hume (“Hume”) used a Company vehicle just before Christmas 2012 to pick up and unload a gun safe. Hume received permission from Holliday and received assistance from Crumrine in picking up the safe. (Id. at pp. 188-192 & 261-262 [testimony of Holliday].) Notably, on direct examination, Crumrine testified that he was not aware of any bargaining unit employees that had been allowed to use a Company vehicle for personal reasons nor was he aware of a Company policy that would allow him to use a Company vehicle for personal reasons. (Id. at p. 179 & 187.) He also testified that the Company does not allow bargaining unit members to use a Company vehicle if they are having car problems. (Id. at p. 187.) Crumrine’s testimony on direct was contrary to every employee witness who offered testimony with respect to personal use of Company vehicles. Accordingly, his testimony on direct was contrary to the record evidence and should be disregarded as untruthful.
- William Klinker (“Klinker”), a thirty five (35) year employee and current driver who testified on behalf of the General Counsel and the Charging Party, noted that Azzarello, the current night manager, used a company vehicle to move furniture. (Id. at pp. 194-195 & 198-199.) Azzarello was in the bargaining unit at the time he used the Company vehicle. (Id. at p. 200.) Klinker also testified that he is not aware of anyone who has asked to borrow a Company vehicle for personal use and not been allowed to do so. (Id. at p. 199.)
- Keith Paul (“Paul”), a nineteen (19) year employee and current driver, has borrowed a company vehicle approximately forty (40) times during his tenure. (Id. at pp. 233-234 &

235.) He uses a Company vehicle at least two times a year to move Pepsi product and a freezer from the football stadium to the high school. (Id at pp. 233-234.) He estimates putting 100 miles on a Company vehicle per year. (Id. at pp. 238-239.) He has also used a Company vehicle when his personal vehicle was suffering from mechanical issues. (Id. at pp. 236-237.) He obtains permission to use Company vehicles from Holliday. Notably, Paul was a union steward and an alternate steward for ten (10) of his nineteen (19) years with the Company. (Id. at p. 236.)

- Terry Conley (“Conley”), a former driver for the Company, borrowed a Company vehicle for a week when his personal vehicle was inoperable due to mechanical issues. He received permission to do so from Matt Triplehorne (“Triplehorne”), another member of management. (Id at pp. 258-259.)

### III. **LAW AND ARGUMENT**

#### A. **EXCEPTION I – Judge Fine Erred in Finding Respondent Committed Unfair Labor Practices Directly Tied to the Decertification Process and Provided More Than Ministerial Aid to Intervenor Jerry Sprague’s Petition Efforts and, Therefore, Violated Section 8(A)(1) of the Act as Judge Fine Went Beyond the Scope of the Complaint and Expanded the General Counsel’s Theory of the Case. Accordingly, Judge Fine Inappropriately Made Unfair Labor Practice Findings That Were Not Fully and Fairly Litigated, and, as Such, Violated Respondent’s Due Process Rights**

General Counsel asserted only that C & G provided more than lawful ministerial aid/assistance to employees with the *filing* and *processing* of a decertification petition when *more than four months after the petition had been filed* it paid the wages of and provided the use of a Company vehicle to its employee and the petitioner, Sprague, in order to attend the August 10, 2012 representation proceeding in case 8-RD-77965. (Complaint, ¶ 8.) (Emphasis added.) General Counsel further asserts that C & G provided more than lawful ministerial aid/assistance to Sprague in seeking the rescission of a union security clause when in or around

August and September 2012 Respondent's Agent, Wheeler, allegedly provided advice and assistance to Sprague with regard to the filing of a de-authorization petition. (Complaint, ¶9 (A) and (B).)

Nevertheless, General Counsel provided no evidence illustrating that C & G and/or Wheeler assisted Sprague in any way with respect to the preparation, circulation, wording, signing of the petitions or the filing and processing of the petitions. Notably, when Sprague testified that he received no assistance from management and/or Wheeler with respect to preparation, circulation, obtaining signatures or the filing and processing of the petitions and that he contacted the NLRB for the necessary paperwork that needed to be filed, the General Counsel objected based upon relevance. The General Counsel asserted that the testimony was not related to any of the allegations set forth in the Complaint nor was it a part of his case in chief and, as such, it was irrelevant. (Id. at pp. 135-137.) Accordingly, General Counsel is necessarily alleging that the decertification petition is tainted based upon circumstances that occurred well *after* it had been filed and that the de-authorization petition is tainted based upon a single question Sprague asked Wheeler. (Jt. Ex. 1, ¶ 9.) General Counsel failed to satisfy its burden to show that the Company and/or Wheeler provided more than ministerial assistance to Sprague in the filing and processing of a decertification and the rescission of a union security clause (filing of a de-authorization petition) as alleged in the Complaint.

Notwithstanding all of the above, Judge Fine found a violation of § 8(a)(1), but not on theory of the Complaint. As there was no evidence that Responded violated the Act as expressly alleged in the Complaint, Judge Fine, *sua sponte*, concocted his own theory of the case to support his finding of a violation. In doing so, Judge Fine went well beyond the scope of the Complaint and presumed facts not in evidence in order to set forth an elaborate scheme between

Wheeler, Respondent and Sprague to decertify the union. Decision pp. 3-5, 12-13, 16, 20 and FN's 9-11. Judge Fine clearly went beyond the General Counsel's theory of the case in relying upon February and April conversations between Respondent, Wheeler and Sprague, none of which was alleged in General Counsel's Complaint or litigated during the hearing. General Counsel explicitly restricted his theory of the case to events in August and September. Complaint ¶¶ 8-9. The General Counsel further restricted its theory of the case during the Hearing. Again, when Sprague testified that he received no assistance from management and/or Wheeler with respect to preparation, circulation, obtaining signatures or the filing and processing of the petitions and that he contacted the NLRB for the necessary paperwork that needed to be filed, General Counsel objected based upon relevance, asserting that the testimony was not related to any of the allegations set forth in the Complaint nor was it a part of his case in chief and, as such, it was irrelevant. (Id. at pp. 135-137.)

The General Counsel's assertions on the record and in the Complaint illustrate that the General Counsel expressly chose to proceed on a narrow theory of violation under Complaint paragraph's 8 and 9. Both the General Counsel's assertions, as well as the express language of the Complaint, reasonably led the Company to believe that it would not have to defend and/or explain the reasoning behind the February and April conversations between Wheeler and Sprague.<sup>7</sup> Judge Fine's finding of a violation of the Act based upon these very conversations violated the Company's due process. See, *Mueller Co.*, 332 NLRB 1350, 1350 (2000) (Board reversed the Judge on due process grounds where judge found a violation on a theory disclaimed by General Counsel).

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<sup>7</sup> The General Counsel made a conscious decision to proceed under a very limited theory of violation. All one has to do is review the Company's proffered testimony in Case 8-RD-77964 to understand why. (Board misconduct in suggesting that Sprague should withdraw his decertification petition due to threats he was receiving from the union and phone calls from Board agent to Wheeler instructing Wheeler That Sprague had yet to re-file the decertification petition, asking that Wheeler contact Sprague.)

Additionally, the Board has previously ruled that the judge should not decide an issue that the judge alone has inserted in the hearing. See, *Buonadonna Shoprite, LLC*, 2011 NLRB LEXIS 108, \*7 (2011). In determining whether a company's due process rights were violated, the Board considers the scope of the complaint and any representations by the General Counsel with respect to the violation, as well as the differences between the theory litigated and the judge's theory. *Id.*, citing *Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory.) See also, *Corry Contract, Inc.*, 289 NLRB 396 (1988) (Judge improperly went beyond the scope of the complaint by finding § 8(a)(1) violations with respect to certain statements because the complaint did not allege those incidents, General Counsel did not amend the complaint during the hearing and the General Counsel did not allege these incidents were violations at the hearing or in its post hearing brief. As such, the allegations were not actually litigated); *NLRB v. Tennsco Corp.*, 339 F.2d 396 (6<sup>th</sup> Cir. 1964) (Respondent cannot be found guilty of an unfair labor practice of which it had no fair notice and not encompassed by the complaint); and *Maddox Heating & Air Conditioning Inc.*, 340 NLRB 43, \*8 (2003) (Board reversed Judge's ruling that Respondent's referral policy per se violated the Act because it is inappropriate to make unfair labor practice findings that were not fully and fairly litigated. Board also refused to entertain the Judge's theory that the policy was inherently destructive of employee rights under the *Great Dane* Doctrine and sufficient by itself to establish animus because these matters were neither alleged nor litigated).

**1. The decertification petition and de-authorization petition are not tainted.**

Based upon the General Counsel's limited scope of the Complaint and its narrow theory of the case, C & G did not violate the Act. In *Eastern States Optical Co.*, 275 NLRB 371, 372

(1985), the Board set forth the general legal criterion used to evaluate an employer's conduct with respect to its employees' decertification efforts and stated as follows:

It is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed ministerial aid, its actions must occur in a situational context free of coercive conduct. In short, the essential inquiry is whether the preparation[,] circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.

(Internal citation and quotations omitted). Furthermore, in *Placke Toyota*, 215 NLRB 395, 395 (1974), the Board sought to clarify the distinction between lawful ministerial aid and unlawful employer assistance, and stated as follows:

[A]lthough an employer does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing a union as the bargaining representative, it is unlawful for him subsequently to involve himself in furthering employee efforts directed toward that very end.

(Internal citation omitted). The most critical fact in these cases is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." See, *Eastern States Optical Co.*, *supra*, at 372. Here, it is clear that it did.

The assistance provided by the Company in this matter can only be classified as ministerial. For instance, in *Ernst Home Centers*, 308 NLRB 848 (1992), the Board found that the employer did not provide more than ministerial aid to employees' decertification efforts when the employer simply responded to an employee's request for some language for a decertification petition. The Board found that this was not unwarranted employer encouragement to file a decertification petition, but only ministerial aid to an employee who had decided to file a petition of her own volition. (*Id.*) Consequently, the Board determined that merely replying to an employee's request for decertification language, in the absence of any

evidence that the employer encouraged or suggested that the employee file the decertification petition, did not constitute a violation of § 8(a)(1). (Id.)

Likewise, in *Eastern States Optical Co., supra*, the Board concluded that the employer did not provide more than ministerial aid to its employees in their preparation of a decertification petition despite the fact that the employer's attorney assisted an employee on two separate occasions. (Id. at 371.) In one instance the employer's attorney provided an employee with some assistance regarding the language of a decertification petition. (Id.) Later, the employer's attorney provided additional information such as the unit description, the names of the employer's officials, and the fact that six signatures were probably sufficient for the petition. (Id.) Similar to the situation at issue herein, it was undisputed that the employer played no role in the employees' decision to *initiate* the decertification proceedings and it was undisputed that the employer did not solicit any signatures. (Id. at 372.) (Emphasis added). Additionally, the Board found the following: the employee had initiated the contact with the employer's attorney in both instances; the employee informed the employer's attorney that the decertification effort was already in progress; the attorney did nothing to encourage it; and the attorney did nothing more than provide assistance in wording the petition and supply readily available factual information. (Id.) Accordingly, the Board concluded that employer assistance in wording the petition, was lawful where "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." (Id.)

Moreover, in *Washington Street Brass & Iron Foundry, Inc.*, 268 NLRB 338, 338 (1983), an employer offered minor assistance in the wording of a petition upon the specific request of an employee. Then, the employees circulated and signed the petition "without further manifestation of [the employer's] approval." (Id. at 339.) Furthermore, the employer allowed the employees

to take the day off, subject to Saturday makeup time, a routine practice, to file the petition. The employer's agent also gave the employee a ride to the Board's Regional Office. Notwithstanding, the ALJ concluded, and the Board subsequently agreed, that the employer did not provide unlawful assistance. The ALJ reasoned that the verbiage assistance was merely to "provide some inconsequential phrases upon the specific request of the employee," and the employer's assistance *after* the petition had been signed "plainly had no impact on the employees' willingness to sign the petition." Id. (Emphasis added). Moreover, in giving the employee the day off, the employer treated him in the same manner he would have treated him had he asked for the day off for any other personal reason. (Id.) Accordingly, the ALJ concluded that the employer's conduct did not have a "tendency . . . to interfere with the free exercise of the rights guaranteed to employees under the Act." (Id.)

**a. Use of a Company vehicle and payment of wages on the day of the representation hearing in Case 8-RD-77965 does not taint a petition that has already been filed.**

The Company did provide transportation and pay Mr. Sprague as if he had worked his normal shift on the day of the representation hearing. Mr. Sprague was experiencing vehicle problems at the time and would have been hard pressed to attend the hearing without the use of a Company vehicle. As noted above, it is not unusual for the Company to provide the use of a company vehicle to its employees for non-work related issues. Additionally, the evidence is quite clear that the Company does not discriminate against any of its employees with respect to this policy. Two of the witnesses who testified to having used a Company vehicle were the former union steward (Paul) and the current union steward (Pierce.) Another witness for the General Counsel and the Charging Party (Klinker) noted that he is unaware of any employee who has ever been disallowed the use of a Company vehicle for any non-work related issue.

General Counsel and the charging party also sought to differentiate Sprague's use of the vehicle to travel to the hearing in Cleveland due to the amount of miles Sprague traveled as opposed to the other employees' "local" use of vehicles. C & G maintains such a distinction is irrelevant considering the overwhelming evidence establishing the employees' unbridled use of Company vehicles for non work related issues. For instance, Sprague and Cira used a Company vehicle to move Cira from Wapakoneta to Van Wert, at least a 120 mile round trip venture. Additionally, Paul, a former union Steward, has used a Company vehicle approximately forty (40) times during his nineteen (19) year tenure. He estimated putting 100 miles a year on a Company vehicle to transport Pepsi product and a freezer from the football stadium to the school twice a year. Thus, Paul has put some 1,900 miles on Company vehicles while using them for personal use. The record evidence clearly illustrates that the Company does not place any mileage restrictions upon any of its employees with respect to use of a Company vehicle for non work related purposes. Thus, in providing the use of a Company vehicle to Sprague, C & G treated him in the same manner it would have treated any other employee who asked for the use of a Company vehicle for non work related reasons.

Additionally, the Company is well within its right to pay Mr. Sprague for attending the hearing. Notwithstanding the fact that Sprague was present at the August 10, 2012 hearing in his capacity as the decertification petitioner in Case No. 8-RD-77965 and he did not testify on behalf of the Company, he was still a possible witness to be called by the Company in the event any testimony presented by the union would need to be rebutted. Accordingly, Sprague's attendance at the hearing was necessary and the Company could lawfully compensate him for his attendance. See, *General Electric Co.*, 230 NLRB 683, 684-687 (1977). See also, *D.L. Baker*, 351 NLRB 515, 515 (2007), citing *General Electric Co.* (the Board has deemed employee wages

to be a reasonable measure for determining witness fees); *Rexart Color & Chemical Co., Inc.*, 246 NLRB 240, 255 (1979), citing *General Electric Co.* (Employer who paid full wages to friendly employee witnesses but paid nothing to employee witnesses of the General Counsel violated neither Section 8(a)(1) nor (4) of the Act. Therefore, the employer did not violate said sections when it did not bar an employee witness for the General Counsel from attending the hearing or penalize him from being absent from work, but did refuse to pay him for the absent time); and *General Die Casters, Inc. Co.*, 358 NLRB No. 85, FN2 (2012), citing *General Electric Co.* (Employer may pay an employee's witness fee in the form of wages the employee would lose as a result of testifying or to compensate the employee for attending the hearing).

Even if the actions noted above are found to be employer assistance, the assistance was ministerial, and well *after* the petition had been initiated, signed and filed and, as such, clearly had no impact on the employees' willingness to sign the petition. Moreover, Sprague's use of a Company vehicle to travel to the hearing occurred *after* he and the employees freely decided to circulate the petition and to seek a decertification election. As such, just as in *Washington Street Brass & Iron Foundry, Inc., supra*, the Company's conduct did not have a "tendency . . . to interfere with the free exercise of the rights guaranteed to employees under the Act." The only parties interfering with the free exercise of the rights guaranteed to employees under the Act is the General Counsel, the Charging Party and Judge Fine. Sprague and his colleagues have filed four (4) petitions and have yet to be given a chance to vote. The General Counsel and the charging party assert that the Company provided more than ministerial aid because Sprague drove a Company vehicle to the representation hearing because his car was suffering mechanical issues. Again, the record evidence expressly illustrates that no employee has ever been denied the use of a Company vehicle for non-work related purposes. Accordingly, in providing Sprague

with the use of a Company vehicle, C & G treated him in the same manner it has treated all its employees who request use of a Company vehicle for any other non-work related purpose. Sprague had a Section 7 right to file a decertification petition and attend the hearing. Any attempt to deny him the use of Company vehicle to travel to the hearing simply because it was a petition adverse to the union is a violation of Sprague's Section 7 rights.

**b. Answering a question submitted by an employee who initiated the contact does not taint the de-authorization petition.**

General Counsel further asserts that C & G provided more than lawful ministerial aid/assistance to Sprague in seeking the rescission of a union security clause when in or around August and September 2012 Respondent's Agent, Wheeler, provided advice and assistance to Sprague with regard to the filing of a de-authorization petition. (Complaint, ¶9 (A) and (B).) The parties stipulated, Sprague called Wheeler early September 2012 and asked him if there was anything else he (Sprague) could do if the NLRB did not let him proceed to a decertification election. (Jt. Ex. 1, ¶ 9.) Wheeler told Sprague that he could file a de-authorization petition. (Id.) Wheeler explained to Sprague the procedures to file a de-authorization petition. (Id.) Nonetheless, based upon Sprague's testimony, General Counsel and the Charging Party maintain that that nearly the identical conversation took place a couple of days after the August 10, 2012 Representation Hearing. Sprague testified as follows:

Q. And, isn't it true that a couple days after the August 10th, 2010 -- August 10th, 2012 hearing you had a conversation with Mr. Wheeler --

A. Yes.

Q. -- isn't that correct?

A. Yes.

Q. And isn't it true that you told him that you didn't believe the hearing went well?

A. Yes. I believe I actually told him I was being railroaded by the NLRB.

Q. Okay. Do you recall what else you told – do you recall, did you call him, or did he call you during that conversation?

A. I don't remember. I probably called him. I mean, I was -- I -- that -- I'm not a hundred percent sure, but I -- but I would probably have called him at that time.

(Tr. pp. 108-109.)

THE WITNESS: That I -- that I didn't think that -- I thought that -- I -- I told him that I thought you guys were with the Union. And then I -- I wanted to know if there was any other legal things I could do to get out of this union.

Q. Okay. What did Mr. Wheeler tell you at that time?

A. He told me about the De-authorization.

(Id. at pp. 109-110.)

JUDGE FINE: Well, I'm -- hold it. I believe your testimony was you went to the hearing --

THE WITNESS: Uh-huh.

JUDGE FINE: -- and you -- then you called him -- and you think you called him and told him you didn't think it ---

THE WITNESS: I know I talked to him, but I'm not sure who called who.

JUDGE FINE: All right. But you said before you thought it was you because --

THE WITNESS: Yeah. I believe it was probably me. I mean, it makes more sense to me.

JUDGE FINE: And you told him that the hearing -- you thought that the hearing - - you said that the hearing -- you didn't think the hearing went well; correct?

THE WITNESS: Yes.

JUDGE FINE: So your call or your conversation had to be after the hearing; correct?

THE WITNESS: Yes. Yes, it is.

JUDGE FINE: Do you know how many days it was after the hearing?

THE WITNESS: It would have been within the next week, I'm sure. I mean, I -- I couldn't tell you if it was one day, two days, I don't remember.

(Id. at p. 111.)

Q. We're talking back to that conversation, itself. What else did you talk about? You told Mr. Wheeler you didn't believe the hearing went well, and you asked him if there was anything else you could do to remove the Union.

A. Yes. Well, to --

Q. What did Mr. --

A. -- remove myself from the Union.

Q. To remove yourself from the Union. What did Mr. Wheeler tell you?

A. He said that I had the legal right to -- to do a De-authorization.

Q. And that would help remove you from the Union?

A. Well, he said that it -- it -- it would get us a chance to, if -- if -- if I could get enough people to support it, it would give us a chance to not have to pay union dues anymore.

(Id. at p. 112.)

With respect to the September 2012 conversation Sprague testified as follows:

Q. Okay. Did you have a follow-up conversation with Mr. Wheeler in September of 2012?

A. Yes.

Q. Okay. And who called whom?

A. I called him.

(Id. at pp. 113-114.)

Q. Okay. Well, I'm going to ask you some questions -- now, do you recall what the conversation that you had with him in early December [sic] 2012 was about?

A. That was that -- I mean, even as -- as it reads here, it was just -- it was -- it was more conversation about what I could do if they didn't allow me to go through with the decertification --

Q. Well, let -- let me --

A. -- allow us to have a vote.

Q. -- let me backtrack. Isn't it true that Mr. -- you asked Mr. Wheeler is there anything you could -- you could do if the NLRB doesn't let you proceed to a decertification election?

A. Yes.

Q. And isn't it true that Mr. Wheeler told you you could file a De-authorization Petition?

A. Yes.

Q. Did you know what a De-authorization Petition was prior to that conversation with Mr. -- prior to that conversation, or the August 10th -- the conversation in -- a couple days after the R case hearing, the representation case hearing?

A. I did not.

Q. Okay. And isn't it true that Mr. Wheeler explained the De-authorization -- what the De-authorization Petition was?

A. Yes.

Q. Do you recall what, if anything, he explained about the De-authorization to you?

A. Yeah. He told me that, you know, if -- if I could get -- I can't remember like all the details, but I know it was different facts from -- different from the decertification in the fact that you had to have 50 of the -- 50 percent of the Union vote to do a De-authorization, as opposed to a decertification, where you only had to have 50 percent of those who showed up to vote.

Q. Is that what Mr. Wheeler explained to you in that conversation?

A. That was part -- that was -- that was part of it. The de-authorization was just so we could quit paying dues to the Union. And that -- that was pretty much what all he said.

Q. Is that all that Mr. Wheeler told you in that conversation?

A. Pretty much. I mean, I don't remember anything else besides that.

Q. And shortly after the September 12<sup>th</sup> [sic]<sup>8</sup> conversation with Mr. Wheeler you filed a De-authorization Petition with the Board, isn't that correct?

A. Yes.

(Id. at pp. 116-118.)

Sprague only had one conversation with Wheeler regarding a de-authorization petition. The Company maintains that the only conversation Sprague had with Wheeler regarding a de-authorization petition took place in September, not August, because that is what the record evidence illustrates, including the parties' stipulated facts. (Jt. Ex. 1.) For instance, Sprague testified that it was possible that the conversation with Wheeler concerning de-authorization occurred in September as he cannot remember the exact dates. (Tr. p. 132.) Moreover, Sprague began working on a de-authorization petition approximately a week after his conversation with Wheeler. (Id.) Sprague only needed a day to gather the necessary signatures and filed the de-authorization within a few weeks of his early September 2012 conversation. (Id. at pp. 133-134.) This testimony is supported by the fact that Sprague, on September 20, 2012, filed Case 8-RD-89588 which was subsequently withdrawn after he became aware that he used the wrong petition form to file a de-authorization petition. (Jt. Ex. 1, ¶ 10 and Ex. C and D attached thereto.) Consequently, on October 4, 2012, Sprague filed a de-authorization petition in Case 8-UD-90639. (Id. at ¶ 11 and Ex. E attached thereto.) Furthermore, Wheeler testified that he did not have any conversations with Sprague concerning a de-authorization petition in June, July or August of 2012. (Tr. p. 246.)

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<sup>8</sup> There is no evidence in the record indicating the actual date of the conversation was September 12. The parties stipulated the conversation took place in early September 2012.

As noted above, Sprague had some difficulty remembering certain events and/or specific dates. For instance, Sprague testified that Wheeler held two meetings with all of the bargaining unit employees, the first meeting was about the decertification petition and the second meeting was about the de-authorization petition. (Id. at pp. 95 -96.) Sprague also testified that one of the meetings took place in July. (Id. at pp. 104-105 & 207.) However, several witnesses (even those called to testify on behalf of General Counsel and the Charging Party) confirmed that the meetings took place in April and October and that no meeting took place July. (Id. at pp. 166-168, 196-198 & 246.) Sprague was correct that there were two meetings; he just could not remember the dates. Another example is Sprague's testimony that during one of his conversations with Wheeler, Wheeler told him he was a former Board Agent for the NLRB. (Id. at p. 96.) However, Sprague testified that he met with the Company's legal counsel in April 2012. (Id. at p. 123.) Sprague noted that during this meeting, C & G's legal counsel informed him that he was a former Board Agent with the NLRB and, thus, it was possible that Sprague mistakenly attributed the statement of the Company's legal counsel to Wheeler. (Id. at pp. 123-124 & 127.) Sprague repeatedly noted in his testimony that he was unsure with respect to the dates of certain events and the record evidence indicates a single conversation, the early September 2012 conversation, between Sprague and Wheeler as set forth in the parties' stipulated facts. (Jt. Ex. 1, ¶9.)

Nonetheless, even if Wheeler and Sprague did have a phone conversation in August 2012 sometime after the representation hearing, it still does not rise to a level above and beyond ministerial aid. Sprague asked a specific question and Wheeler responded. Sprague initiated the contact. There is no evidence, nor did the General Counsel or the Charging Party allege, that Wheeler or anyone from C & G assisted with the preparation, the circulation, the signing of the

petition or the filing and processing of the petition. Consequently, the preparation, circulation, signing, filing and processing of the petition constituted the free and uncoerced act of the employees. Sprague's action was voluntary as he was not coerced in any way. Wheeler's actions, in answering Sprague's question, did not have a tendency to interfere with the free exercise of the rights guaranteed to the employees under the Act. See, *Washington Street Brass & Iron Foundry, Inc.*, *supra*. See also, *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) (Employer provided only lawful ministerial assistance to its employee in the drafting of a decertification petition where employee initiated contact with the employer and inquired "if there was any way that [he] could get out of being in the union"). As evidenced by the four (4) petitions filed by Sprague and the employees, it is clear that the employees have freely decided to abandon their support for the union. Hopefully, Sprague and his colleagues will be allowed to exercise their rights guaranteed them under the Act.

**B. Exception II – Judge Fine Erred in Finding Jerry Sprague, William Wheeler and Respondent Conspired to File the April 3, 2012 Decertification Petition Because it is Beyond the Scope of the Complaint, Expands the General Counsel's Narrow Theory of the Case and is Nothing More Than Conjecture Wholly Unsupported by the Record Evidence Elicited During the One Day Hearing**

It is well established that the General Counsel serves as the master of the complaint and controls the theory of the case. See, *Fineberg Packing Co.*, 349 NLRB 294, 296 (2007). As noted above, the Complaint only alleges violations of the Act based upon incidents which occurred in August and September of 2012. Nonetheless, Judge Fine interjected his own theory of the case and created an elaborate scheme between Sprague, Wheeler and Respondent which supposedly began in February of 2012 to oust the union through the filing of the April 3 decertification petition.

Judge Fine stated as follows:

Sprague filed a decertification petition in case 8-RD-74472 on February 14 and he subsequently withdrew it.<sup>9</sup> The record does not reveal why Sprague withdrew the February 14 petition. However, the Regional Director's "Decision and Direction of Election" in Case 8-RD-77965 issued on November 8 reveals the most recent collective-bargaining agreement for this bargaining unit was effective through February 14, leading to a possible conclusion the contract was still in effect on February 14 when the February 14 petition was filed and therefore an argument could have been made that the petition was barred by that contract. The Regional Director's decision in Case 8-RD-77964 shows that, following a period of negotiations for a new contract, on February 14 the Union submitted what it believed to be a tentative agreement for a new collective-bargaining agreement with Respondent to its membership for ratification and the agreement was ratified on that date. However, on March 1 the Employer's labor consultant sent the Union an email containing new language concerning an article relating to personal days. The Union sent a reply on March 14, stating they wanted to leave that article as it was.

Sprague testified J.R. Guagenti provided Sprague with Wheeler's phone number some time prior to April 25, but after Sprague filed the February 14 decertification petition. Sprague identified an affidavit he gave to Board Attorney Choudhury on December 17. Upon review of the affidavit, Sprague testified he began talking to Wheeler after Sprague filed the February 14 decertification petition. Sprague testified that between February and December 17, he spoke to Wheeler around 10 times on the telephone. Sprague testified he spoke to Wheeler in February, and Wheeler told him that he was a former agent of the NLRB and he gets involved as a consultant in cases like these.<sup>10</sup> Sprague testified Wheeler may have called Sprague once or twice in late February because Sprague had called him and left a voice mail. Concerning whether he spoke to Wheeler during work time, Sprague testified he would always tell Wheeler to call him after 5:30 pm. Sprague testified his affidavit stated "The next time I spoke with Bill Wheeler was shortly after I withdrew the first petition, which I believe was in late February 2012."<sup>11</sup> "Do not recall whether I called Bill, or Bill called me. The phone call

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<sup>9</sup> "Sprague was called as an adverse witness by counsel for the Acting General Counsel, and at times was a difficult witness. He was argumentative, and often professed poor recall requiring his memory to be refreshed by pre-hearing affidavits. Sprague also stated he was hard of hearing and had to lip read. However, he had no trouble understanding and answering questions asked at the trial to the extent he claimed his memory would permit." Decision, p. 3, FN 7.

<sup>10</sup> "Respondent's counsel subsequently suggested to Sprague in the form of leading questions to which Sprague tacitly agreed that it was Mason and not Wheeler who informed Sprague that he was a former Board agent. However, Sprague initially and repeatedly testified Wheeler informed him that Wheeler was a former Board agent, an assertion Wheeler did not deny. I have therefore credited Sprague's initial testimony that Wheeler informed him of such." Decision, pp. 3-4, FN 9.

<sup>11</sup> While Wheeler testified he was not employed with Respondent as a labor consultant until April, he did not deny having phone contact with Sprague in February. Moreover, Wheeler's association with Mason may have led Wheeler to have contact with Sprague prior to Wheeler having a formal contract agreement with Respondent. Noting the specificity of Sprague's testimony pre and during the hearing concerning his February contacts with Wheeler, and Wheeler's failure to deny they took place, I have credited Sprague's uncontradicted testimony as to the

took place at work.” Sprague testified the phone call did take place at work but he did not think he was on the clock. He testified he was on the second shift at that time. He testified Wheeler had called Sprague during work time but Sprague told Wheeler the time Sprague’s shift ended and for Wheeler to call him then.<sup>12</sup> On April 3, Sprague filed a decertification petition in Case No. 8-RD-77965. Sprague testified that shortly before he filed the April 3 petition, he had another phone call with Wheeler, during which Sprague told Wheeler that he was going to file the petition.<sup>13</sup>

Sprague testified that Wheeler spoke at two meetings conducted by Respondent to all union represented employees during which Wheeler told them their rights were concerning decertification. Sprague testified that at the second meeting Wheeler spoke about the subsequent de-authorization petition Sprague had filed. Sprague testified that Wheeler called Sprague prior to the first meeting to give him notice of the meeting. Current employee Chad Pierce testified the initial meeting he attended at which Wheeler spoke at Respondent’s facility took place on April 16. Pierce recalled the date because Pierce closed on his home the day of the meeting. Pierce testified all the bargaining unit employees attended along with J.R. Guagenti, Fino Cecala, and Gary Guagenti. Pierce testified Wheeler spoke at a second meeting in October. He testified all the bargaining unit employees were there and it was a mandatory meeting. Pierce testified the same three managers attended.<sup>14</sup>

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February calls. Decision, p. 4, FN 9. Respondent did not elicit testimony from Wheeler regarding these calls as they are well beyond the scope of the Complaint and not a part of the General Counsel’s theory of the case.

<sup>12</sup> “As set forth above, Sprague testified Wheeler called him during work time. However, Respondent has a policy in its handbook that, “The use of personal cellular phones during work time is prohibited.” The handbook also stated that employees will not be called to the company phone except in the case of an emergency, nor would the company make it a practice to take messages.” Decision, p. 4, FN 10. General Counsel neither alleged in its Complaint or its theory of the case that Sprague violated the Company’s cell phone policy. This is another example of Judge Fine interjecting his own theory of the case by going beyond the scope of the Complaint and expanding the General Counsel’s theory of the case.

<sup>13</sup> “The Regional Director’s “Decision and Direction of Election” in Case 8-RD-77965 reveals that the only issue in that case was whether the parties had reached a new collective-bargaining agreement on February 14, which would have barred the filing of Sprague’s April 3 decertification petition. The Union, although it was to eventually lose its argument before the Regional Director, asserted the contract it ratified on February 14 barred the April 3 petition. The chronology set forth in the Regional Director’s decision included: the Union’s February 14 contract ratification vote; the Respondent’s March 1 proposal to amend prior language on personal days; and the Union’s rejection of that proposal on March 14. The chronology leads to an inference that Sprague’s multiple phone calls with Wheeler prior to Sprague’s filing the April 3, were more than benign but rather dealt with Respondent’s strategy as to the viability of filing the April 3 petition in view of what was transpiring during its negotiations with the Union. In this regard, Sprague only filed the April 3 petition after repeated consults with Wheeler who was introduced to Sprague by Respondent and used by Respondent as a labor relations consultant. The timing of the April 3 filing close in time to the Union’s rejection of Respondent’s March 1 proposal suggests Respondent was interjecting its negotiating strategy with the Union into the timing of Sprague’s filing of his second decertification petition.” Decision, p. 4, FN 11. This is another example of Judge Fine interjecting his own theory of the case by going beyond the scope of the Complaint and expanding the General Counsel’s theory of the case. Judge Fine’s inferences and suppositions are mere conjecture and wholly unsupported by any record evidence.

<sup>14</sup> “Current employee William Klinker confirmed Pierce’s testimony that Wheeler spoke at two meetings with all the bargaining unit employees, that the first was in April and the second in October. Klinker confirmed Pierce’s testimony as to the attendance of Respondent’s owners and J.R. Guagenti at the meetings. Klinker testified the April

Complaint, pp. 3-5, FN's included in original. Based upon these conjectures wholly unsupported by testimony and/or record evidence elicited at trial, Judge Fine made the following determinations:

In the instant case, then shift leader Sprague filed a decertification petition in case 8-RD-74472 on February 14, and he subsequently withdrew it. Sprague testified Vice President of Human Resources J.R. Guagenti provided Sprague with Labor Consultant Wheeler's phone number after Sprague filed the February 14 decertification petition. Wheeler testified he was hired by Respondent, "To represent management and the employees of that company with respect to a decertification petition that had been filed." I have concluded that J.R. Guagenti's provision of Wheeler's phone number to Sprague was unsolicited by Sprague. In this regard, neither Sprague nor J.R. Guagenti testified Sprague asked for assistance or for Wheeler's number. In fact, Sprague's testimony reveals he did not know who Wheeler was prior to J.R. Guagenti providing him with Wheeler's contact information. Rather, I find the provision of the phone number and contact information was an unsolicited act on the part of Respondent in furtherance of Sprague's decertification efforts.

Sprague testified he began talking to Wheeler after Sprague filed the February 14 decertification petition. Sprague testified that between February and December 17, he spoke to Wheeler around 10 times on the telephone. I find that Sprague's recall of the substance of his multiple conversations with Wheeler was purposely vague. Rather, the number and timing of the calls suggests that Wheeler took more than a benign role in the decertification process contrary to the role the tenor of Sprague's testimony attempted to suggest. Sprague testified Wheeler may have called Sprague once or twice in late February because Sprague had called him and left a voice mail. Concerning whether he spoke to Wheeler during work time, Sprague testified his pre-hearing affidavit stated "The next time I spoke with Bill Wheeler was shortly after I withdrew the first petition, which I believe was in late February 2012." "Do not recall whether I called Bill, or Bill called me. The phone call took place at work." Sprague testified he was on the second shift at that time. He testified Wheeler had called Sprague during work time but Sprague told Wheeler the time Sprague's shift ended and for Wheeler to call him then. Sprague's admission that he took calls from Wheeler during work time, even if they were just to schedule another call as Sprague claimed, is an admission that Wheeler called Sprague in violation of Respondent's published cell phone policy which states, "The use of personal cellular phones during work time is prohibited."

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meeting lasted about 90 minutes and Wheeler explained things about the decertification petition. Sprague estimated the initial company meeting Wheeler attended took place in July. However, Sprague's recollection was hazy as to the date, and I have credited Pierce that the meeting took place on April 16." Decision, p. 5, FN 12.

Sprague testified that shortly before he filed his second decertification petition he had another phone call with Wheeler. Following that call, on April 3, Sprague filed the current decertification petition in Case No. 8-RD-77965. As set forth above, I do not find the timing of Sprague's and Wheeler's contacts to be coincidental. Rather, the provision of Wheeler's number to Sprague by J.R. Guagenti appears to be part of a planned strategy to guide Sprague through the decertification process. In this regard, the existing collective-bargaining agreement ran through February 14, the date of Sprague's prior petition. The Union believed the parties had reached a successor agreement on February 14 as it sent the terms of the contract to the employees for ratification. However, on March 1, Respondent sent the Union a new proposal on personal days, which the Union rejected on March 14. Two weeks later, after several phone calls with Wheeler, the last being shortly before April 3, Sprague filed his second decertification petition. These phone contacts suggest Respondent was orchestrating the timing of the petition's filing by Sprague to coincide with its bargaining strategy, with its ultimate purpose to dislodge the Union.

On April 16, Wheeler spoke at Respondent's facility at a mandatory meeting for bargaining unit employees. In addition to the bargaining unit employees, J.R. Guagenti attended along with Respondent's owners Cecala and Gary Guagenti. Sprague testified Wheeler told the employees their rights concerning decertification. The meeting lasted around 90 minutes. Sprague testified Wheeler called him around two or three days before the April 16 meeting to give Sprague a heads-up. Sprague testified Wheeler informed him that they were going to have a meeting at work for all the union employees and they were going to explain their rights as it pertained to the decertification petition. This continued contact between Wheeler and Sprague supports my conclusion that Sprague and Respondent's officials were working hand in hand in the decertification process.

Id. pp. 12-13. Judge Fine further concluded:

I find Wheeler's suggesting to Sprague that he file the de-authorization petition constitutes conduct violative of Section 8(a)(1) of the Act. Wheeler's conduct must be viewed in the totality of the circumstances in which it came. See *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1235 (5th Cir. 1984).<sup>15</sup> 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,

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<sup>15</sup> "Respondent argued at the hearing, and reiterates in its brief, that a stipulation the parties entered into should have foreclosed a hearing in this matter. To their credit, the parties did enter into a stipulation concerning certain matters which was admitted into evidence. However, the stipulation did not contain an agreement that it was to preclude any party from submitting additional evidence, and I have found the evidence submitted helpful as to gaining an understanding as to the totality of the circumstances as to what took place at Respondent's facility concerning Sprague's petitions." Decision, p. 16, FN 26.

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. I find that through Wheeler and its other conduct, Respondent crossed the line and was promoting decertification as opposed to providing mere ministerial aid. See, *Condon Transport*, 211 NLRB 297, 302 (1974).

Id. p. 16, FN included in original. Lastly, Judge Fine stated:

Respondent directly insinuated itself into the decertification process by introducing Sprague, on its own initiative, to Respondent's Labor Consultant Wheeler. Thereafter, Wheeler advised Sprague at every step of the way during the decertification process, as Sprague's testimony reveals that he spoke to Wheeler around the time he withdrew his initial decertification petition, and shortly before Sprague filed the current petition on April 3. On August 9 and 10, Respondent paid Sprague's wages and provided him transportation on August 10 so that he could drive over 300 miles to attend the decertification hearing. Following the hearing, Sprague again contacted Wheeler who informed Sprague of the idea of filing a deauthorization petition. Under the Board's pronouncements in *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011), enf. 700 F.3d 1 (D.C. Cir. 2012), I find Respondent has committed unfair labor practices directly tied to the decertification process and has provided more than ministerial aid in to advance Sprague's petition efforts. I therefore find Respondent, by its conduct, has tainted the currently pending decertification and de-authorization petitions filed by Sprague. Accordingly, I recommend to the Board that those petitions be dismissed.<sup>16</sup>

Id. p. 20, FN included in original.

Judge Fine goes so far as to cite a violation of the Company's cell phone policy and another elaborate conspiracy related to the Company's bargaining strategy and the timing of the filing of the April 3, 2012 petition. Decision, pp. 3-5, 12-13 and FN's 10-11. None of the

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<sup>16</sup> "Counsel for the Acting General Counsel did not specifically address whether the petitions were tainted in his post-hearing brief. However, the issue of taint was addressed by Respondent and the Intervener in their briefs. Moreover, the matter was fully litigated as the nature of the remedy here is a direct result of the violations found." Decision, p. 20, FN 29.

February and April conversations (and unsupported inferences there from) that Judge Fine uses to create a conspiracy between Sprague, Wheeler, and Respondent to decertify the union were developed in General Counsel's Complaint, its theory of the case during the hearing or its post hearing brief. As such, Respondent had no notice and no opportunity to adduce the evidence it had related to why Sprague withdrew the first decertification petition, why Sprague had Wheeler's number and why Sprague and Wheeler talked on the phone in February and April. Moreover, the General Counsel's Complaint, its representations at the Hearing, its arguments in its post hearing brief and most importantly, its objections<sup>17</sup> at the Hearing when Respondent questioned Sprague he received no assistance from management and/or Wheeler with respect to preparation, circulation, obtaining signatures or the filing and processing of the petitions and that he contacted the NLRB for the necessary paperwork that needed to be filed, reasonably led the Respondent to believe that it would not have to defend and/or explain these points.

**C. Exception III – Judge Fine Was Biased and Had Predetermined His Own Theory of the Case**

In citing *SFO Good-Nite Inn, LLC*, Judge Fine plainly establishes that he had predetermined his own theory of the case. The General Counsel's Complaint explicitly limits the Company's alleged violations of the Act to August and September of 2012. In so doing, the General Counsel did not allege in the Complaint, its theory of the case, or its post hearing brief that Sprague received more than ministerial assistance from management and/or Wheeler with respect to the initiation, preparation, circulation, obtaining signatures or the filing and processing of both the decertification and de-authorization petitions. Nor did the General Counsel allege that C & G actively solicited, promoted or encouraged the petition. The General Counsel did not

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<sup>17</sup> The General Counsel objected based upon relevance, asserting that the testimony was not related to any of the allegations set forth in the Complaint nor was it a part of his case in chief and, as such, it was irrelevant. (Tr., pp. 135-137.)

argue, much less cite, *SFO Good-Nite* in its post hearing brief. Notwithstanding, Judge Fine applied *SFO Good-Nite* because it supported his predetermined theory of the case.

#### **IV. AFFIRMATIVE DEFENSES**

##### **A. The Board Lacks a Lawful Quorum of Three Members**

In its Second Amended Answer to General Counsel’s Complaint, Respondent included the affirmative defense that the Board cannot lawfully act in this matter as the new members have not been validly appointed and, as such, the Board lacks a quorum to act. Specifically, the Board has no legal authority to function when it lacks a quorum of three members. See, *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this necessary quorum. Cf. *Ryder v. United States*, 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board currently lacks a quorum because Sharon Block and Richard Griffin are not lawful members of the Board. On January 4, 2012, President Obama announced “recess” appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments. The President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Consequently, the appointments of Block and Griffin to the Board are invalid under Articles I and II of the U.S. Constitution. See, *Noel Canning v. NLRB*, Case No. 12-1115 (D.C. Cir. 2013) (Court ruled that the Board currently lacks the requisite Board quorum because the appointments of members Sharon Block, Richard Griffin, and Terrence Flynn are unconstitutional and invalid.)

**B. The Complaint Is Ultra Vires**

In its Second Amended Answer to General Counsel’s Complaint, Respondent included the affirmative defense that the Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed. Specifically, the Act provides that, “[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy.” See, 29 U.S.C. § 153(d). Furthermore, the statute places an express limitation on this authority to designate an Acting General Counsel: “[N]o person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate . . . .” *Id.*

President Obama designated Lafe Solomon as Acting General Counsel but failed to submit a nomination to the Senate to fill the position of the General Counsel within 40 days of that designation. Accordingly, the Act prohibited Mr. Solomon from serving as Acting General Counsel more than forty (40) days after his appointment and, as such, he lacked authority to direct the Complaint to be filed against C & G in this matter.

**V. CONCLUSION**

For the reasons outlined above and in accordance with the evidence, Respondent did violate Section 8(a)(1) of the Act. Judge Fine violated Respondent C& G’s due process rights by improperly going well beyond the scope of the Complaint and greatly expanding the General Counsel’s narrow theory of the case. Accordingly, the Respondent respectfully requests that the Board reverse Judge Fine’s Decisions and Recommended Order in its entirety, and subsequently dismiss the charges as alleged against C & G Distributing Company Inc., in the Complaint.

Dated at Dublin, Ohio on this 21<sup>st</sup> day of June, 2013.

Respectfully submitted,

/s/ Ronald L. Mason

Ronald L. Mason (#0030110)

Aaron T. Tulencik (#0073049)

Mason Law Firm Co., L.P.A.

425 Metro Place North, Suite 620

Dublin, Ohio 43017

t: 614.734.9450

f: 614.734.9451

e-mail: [rmason@maslawfirm.com](mailto:rmason@maslawfirm.com)

[atulencik@maslawfirm.com](mailto:atulencik@maslawfirm.com)

*Counsel For The Respondent,  
C & G Distributing Company, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 21, 2013, an electronic original of Respondent C &G Distributing Company, Inc.'s Exceptions and Brief in Support was transmitted to the Executive Secretary via the Department Of Labor, National Labor Relations Board electronic filing system and e-mail and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

Rudra Choudhury, Attorney  
National Labor Relations Board, Region 8  
Anthony J. Celebreeze Federal Building  
1240 E. Ninth Street, Room 1695  
Cleveland, OH 44199-2086  
[Rudra.Choudhury@nlrb.gov](mailto:Rudra.Choudhury@nlrb.gov)

*Counsel for the General Counsel*

Julie Ford, Esq.  
Doll Jansen Ford & Rakay  
111 W. First St., Suite 1100  
Dayton, OH 45402-1156  
[jford@djflawfirm.com](mailto:jford@djflawfirm.com)

*Counsel for Charging Party*

William L. Messenger  
National Right to Work Legal Defense Foundation  
8001 Braddock Rd., Suite 600  
Springfield VA 22160  
[wlm@nrtw.org](mailto:wlm@nrtw.org)

*Counsel for Intervenor*

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/s/ Aaron T. Tulencik  
Aaron T. Tulencik