

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

C & G DISTRIBUTING, CO. INC.

and

CASE 08-CA-091304

**TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS, LOCAL NO. 908
A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
INTERVENER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the Acting General Counsel respectfully files this Answering Brief to Intervener Jerry Sprague's Exceptions to Administrative Law Judge Eric M. Fine's Decision.¹

On October 15, 2012, upon a charge filed by Truck Drivers, Warehousemen and Helpers, Local 908 a/w the International Brotherhood of Teamsters (Union), a complaint was issued on December 28, 2012, against Respondent C & G Distributing Company, Inc. (Respondent) alleging that Respondent violated Section 8(a)(1) of the Act by the following: (1) providing 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 petitioner Jerry Sprague in order for Sprague to attend a representation proceeding for a decertification petition which Sprague filed and, (2) through its agent William P. Wheeler, providing advice and assistance to Sprague with regard to the filing of a de-authorization petition.

¹ In this Brief, the ALJ's Decision in JD-29-13 will be identified as "ALJD" page and line. References to the official transcript of this proceeding will be referred to as Tr. __.

On February 20, 2013, a hearing concerning this matter was held before the Honorable Eric M. Fine (ALJ). At hearing, the ALJ granted Jerry Sprague's motion to appear as an Intervener (Intevener) in the proceeding.

On April 24, 2013, the ALJ issued his detailed and well-reasoned decision that Respondent committed the Section 8(a)(1) violations as alleged in the complaint. The ALJ provided for a remedy, recommended Board Order and Notice to Employees to remedy these violations of the Act. (ALJD 21:20- 22:5; Appendix) Finding that the Respondent provided more than ministerial aid to the Intervener in advancing his petition efforts, the ALJ found that the pending decertification petition in Case 8-RD-77965 and the pending de-authorization petition in Case 8-UD-90639 are tainted, and recommended to the Board that they be dismissed. (ALJD 20:27-31)

On June 21, 2013, Respondent and Intervener, separately filed exceptions to the ALJ's Decision. On June 28, 2013, Respondent withdrew its exceptions. Accordingly, this Answering Brief only addresses the pending exceptions filed by the Intervener. The Intervener's exceptions are addressed categorically below:

1. THE ALJ'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE PROPERLY BASED UPON THE ENTIRETY OF THE RECORD AND APPLICABLE LAW AND SHOULD BE AFFIRMED, AND INTERVENER'S EXCEPTIONS 1-3, 20-23 SHOULD BE DENIED

The ALJ squarely relied upon the entirety of the record and the applicable law to support his findings of fact and conclusions of law. Intervener's exceptions 1-3 and 20-23, erroneously claim that the ALJ relied upon evidence not alleged in the complaint to support his conclusions that Respondent provided more than ministerial aid to the Intervener in filing and processing the decertification and de-authorization petitions by (1) paying for the Intervener's wages and

providing transportation in order for the Intervener to attend a decertification hearing on August 10, 2013 and (2) through its agent Wheeler, suggesting that the Intervener file a de-authorization petition. (ALJD 21:10-17)

The record contains ample support for the ALJ's conclusions of law concerning these 8(a)(1) violations.

With regard to the allegation concerning Respondent's assistance with processing the Intervener's decertification petition, the parties stipulated, and the ALJ found that: on August 10, 2012, the Intervener attended a representation hearing in Case 8-RD-77965 at the NLRB Regional Office in Cleveland, Ohio; the Intervener did not report to work on August 10; the Intervener was the only bargaining unit employee in attendance at the hearing; the Respondent paid his regular wages for August 10 for attending the hearing; the Intervener was present at the hearing in his capacity as the decertification petitioner; the Intervener did not testify on behalf of Respondent at the August 10 hearing;² Respondent provided the Intervener with the use of a company vehicle to travel to and from Lima, Ohio to Cleveland Ohio for the Intervener to attend the August 10 hearing at no charge to the Intervener other than fuel costs; the round trip driving distance between Lima, Ohio and Cleveland, Ohio, is approximately 312 to 352 miles; and, Respondent did not provide bargaining unit employees other than the Intervener the use of a company vehicle to travel to and from Lima and Cleveland to attend the August 10 hearing. (ALJD 5:6-16) Additionally, the record contains evidence that Respondent gave the Intervener 10 hours and 15 minutes of paid leave spanning two days to attend the representation hearing and that this paid leave allowed the Intervener to receive overtime pay for 46 minutes. (ALJD 6:12-14). The ALJ found that Respondent's loan of the vehicle for a lengthy trip and the payment of

² The sole issue at the decertification hearing was whether a valid collective-bargaining agreement existed prior the Intervener's filing of the decertification petition, which would effectively serve as a bar to the election petition. (ALJD 5:42-46)

wages to the Intervener while he was on that trip were combined acts of Respondent's ongoing conduct to promote the Intervener's decertification efforts. (ALJD 15:42-48)

In finding Respondent's conduct above violates Section 8(a)(1), the ALJ correctly cited Lee Lumber and Bldg Material Corp., 306 NLRB 408, *enfd. in. rel. part*, 117 F 3d 1454 (DC Cir. 1997) and Dayton Blueprint Co, 193 NLRB 1100 (1971) in which the Board has held that an employer renders unlawful assistance in conjunction with decertification activity where employees are paid for time off in processing the election petition and where transportation is provided. (ALJD 10:27-43)

With regard to the allegation that Respondent, by its agent William P. Wheeler, unlawfully provided advice and other assistance to the Intervener to facilitate the Intervener's filing of a de-authorization petition, the record contains evidence that Respondent hired Wheeler, a labor relations consultant, and thereafter gave the Intervener Wheeler's phone number after the Intervener filed a decertification petition in Case 8-RD-74472 on February 14, 2012. (ALJD 12:18-22). The ALJ's conclusion that Respondent provided the Intervener with Wheeler's phone number without solicitation was solidly based upon testimony that the Intervener did not ask Respondent for Wheeler's phone number nor did he know who Wheeler was prior to the Respondent providing him with Wheeler's contact information. (ALJD 12:24-29).

The record contains evidence that between February and December 2012, the Intervener and Wheeler had approximately ten telephone conversations and the ALJ concluded that the number and timing of the calls shows that the Respondent, through Wheeler, took more than a benign role in the decertification process. (ALJD 12:31-35) In this regard, the ALJ properly considered evidence that an existing collective-bargaining agreement was in effect until February 14th, the date the Intervener filed the decertification petition in Case 8-RD-74472. The record

establishes that the Union believed that the parties reached a successor agreement on February 14th which it had sent to employees for a ratification vote. The Respondent, however, sent the Union a new contract proposal on March 1st which the Union rejected on March 14th. The ALJ found that two weeks later, after several phone calls between Wheeler and the Intervener, the Intervener filed the pending decertification petition in Case 8-RD-77965. (ALJD 13:2-13). The ALJ correctly concluded that the contacts between Respondent's agent and the Intervener were well beyond mere coincidence and that the timing of these contacts was coordinated with Respondent's bargaining strategy, whose ultimate purpose was to dislodge the Union. (ALJD 13:4-10).

With regard to the complaint allegation, the ALJ relied upon the Intervener's testimony that a couple days after the August 10th hearing on the decertification petition, he and Wheeler had a telephone conversation in which he told Wheeler that he did not think the hearing went well. He asked Wheeler if there was any other legal things he could do to get out of the Union. (ALJD 14:1-4) Wheeler told the Intervener about the filing of a de-authorization petition, including the percentage of votes that needed to be cast in order for the Board to certify the rescission of the contractual union security provisions. (ALJD 14:14-16) Wheeler told the Intervener that if he could get enough people to support the de-authorization petition, it would give employees a chance not to have to pay union dues. (ALJD 14:7-9) The Intervener testified that during a conversation in September 2012, he asked Wheeler for his advice on whether it was a smart move to file the de-authorization petition or whether it might be dismissed. (ALJD 16:1-3) The Intervener testified that he did not know what a de-authorization petition was prior to his conversations with Wheeler and that a week after speaking to Wheeler, he started working on the petition which was ultimately filed in Case 8-UD-90639 on October 4, 2012. (ALJD 16:3-8)

The ALJ points out that at first blush, Wheeler's remarks to the Intervener about the de-authorization process appear to fall within the protections of Section 8(c) of the Act or are ministerial acts. The ALJ, however, correctly cites to Texaco, Inc. v. NLRB, 722 F. 2d 1226, (5th Cir. 1984) for proposition that Respondent's conduct, through Wheeler, must be viewed under the totality of the circumstances. (ALJD 16:-12-13)

Insodoing, the ALJ appropriately considered the entirety of the record and the applicable law to support his findings that the Intervener "was doing Respondent's bidding in spearheading the decertification and de-authorization activities." (ALJD 15:9-11) To that end, the ALJ properly considered evidence to which the Intervener takes exception in its Exceptions 1-3 and its catch-all Exceptions 20-23. Here, the evidence that Respondent introduced Wheeler to the Intervener in an effort to support the Intervener's decertification efforts and that Wheeler, through multiple calls with the Intervener, provided the Intervener with free advice concerning the decertification process is relevant to the ALJ's conclusion that the Intervener and Respondent were "operating arm and arm" in the Intervener's efforts to decertify the Union. Evidence of these efforts is manifested by the fact that Respondent provided transportation and paid the Intervener to attend the August 10th decertification hearing. Given the foregoing evidence as a backdrop, Wheeler's advice and suggestion that the Intervener file a de-authorization petition – a petition which the Intervener had no fixed intent to file until it was suggested to him by Respondent's agent – was clearly beyond ministerial aid. This supports the ALJ's conclusion that the Respondent, through Wheeler, unlawfully promoted the de-authorization process and went beyond providing mere ministerial aid. (ALJD 16:23-27) Condon Transport, 211 NLRB 297 (1974)

The Intervener inappropriately claims that the ALJ went beyond the four walls of the complaint in considering relevant evidence contained in the record. The ALJ correctly pointed out that the propriety of Respondent and the Intervener's conduct, "must be assessed in light of all of the facts the case." (ALJD 12:9-12 *citing*, Texaco, Inc. v. NLRB, 722 F. 2d 1226, 1235 (5th Cir. 1984)) Here, the ALJ properly considered the entirety of the record in concluding that Respondent violated 8(a)(1) when it paid the Intervener's wages and transportation to attend the decertification hearing and through its agent, suggested the idea to file a de-authorization petition. Accordingly, the ALJ's findings of facts and the record as a whole supports these violations and should be affirmed. The Intervener's exceptions 1-3 and 20-23 should be denied.

2. THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY PAID THE WAGES AND TRANSPORTATION FOR THE INTERVENER TO ATTEND THE DECERTIFICATION HEARING ON AUGUST 10, 2012 IN CASE 8-RD-77965 SHOULD BE AFFIRMED AND, INTERVENER'S EXCEPTIONS 4-7, 12-15 & 20-23 SHOULD BE DENIED

Intervener's contention that Respondent acted lawfully when it provided the Intervener with transportation to attend the decertification hearing and paid the Intervener wages for hours he did not work is unsupported by the record evidence and applicable Board law.

Quite simply, the Intervener ignores well-established Board precedent cited by the ALJ in support of his proper findings. Amer-Cal Indus., 274 NLRB 1046 (1985), Lee Lumber and Building Materials Corp, 306 NLRB 408, *enfd. in rel. part.* 117 F. 3d 1454 (DC Cir. 1997), Dayton Blueprint Co, 193 NLRB 1100, 1107-1108 (1971) and Texaco Inc. v. NLRB, 722 F. 2d 1229 (5th Cir. 1984).

The record contains ample evidence that the Respondent provided the Intervener with transportation to attend the decertification hearing and paid the Intervener 10 ¼ hours of paid

leave for his attendance at the hearing. Again, this enabled the Intervener to earn 46 minutes of overtime pay.

However, in its exceptions, the Intervener incredulously argues that Respondent did not provide him more than ministerial aid or assistance when it paid for his time to attend the decertification hearing or provided the Intervener with transportation to attend this hearing. The Intervener's argument has no basis in law.

The Board has long held that an employer's lawful involvement with a decertification petition is limited to providing accurate information in response to employee questions without threats or promises. Amer-Cal Indus., 274 NLRB 1046 (1985); Amored Transport, 339 NLRB 374 (2003); Wire Products Mfg. Corp., 326 NLRB 625 (1998)/. The Board has further held that an employer renders unlawful assistance, beyond ministerial aid, in conjunction with decertification activity where employees are paid for time spent in filing elections petitions and where transportation is provided. Lee Lumber and Bldg. Material Corp., *supra.*; Dayton Blueprint Co., *supra.*, NLRB v. Proler International Co., 635 F. 2d 351 (5th Cir. 1981) (payment of employees for engaging in anti-union activities constitutes unlawful Section 8(a)(1) interference). The record clearly establishes that Respondent provided transportation and paid the Intervener to attend the decertification proceeding. This conduct violates Section 8(a)(1).

The Intervener further contends that Respondent's past practice of lending vehicles to employees somehow negates any finding that permitting the Intervener to use its truck violated Section 8(a)(1). Based on the record evidence, the Intervener's use of the Respondent's truck to attend the decertification hearing far exceeded, both in purpose and the distance traveled, all other instances when Respondent permitted employees to use company vehicles. (Tr. 148-150, 162-165, 188-192, 194-195, 200, 233-239 259-263) The ALJ relied upon Respondent's

Warehouse Manager Bryan Holliday's testimony that all previous vehicle loans to employees had been for local driving for errands. Holliday admitted that a 312-352 mile trip to and from Cleveland is not local. (ALJD 15:32-36) Notably, the record is bereft of any occasions where an employee borrowed a company vehicle, took leave from work for a personal matter, and was paid over a full day's wages in addition to the loan of the vehicle. (ALJD 15:41-43) The ALJ properly found that the loan of a vehicle to the Intervener for the lengthy trip to the hearing and the payment of his wages while he was on that trip constitutes, "a combined act and part and parcel of Respondent's ongoing conduct to promote [the Intervener's] decertification efforts." (ALJD 15:43-46)

Finally, the Intervener mischaracterizes the Board's holding in General Electric Co., 230 NLRB 638 (1977) when it asserts that an Employer can lawfully pay a decertification petitioner wages to appear as a witness in a decertification proceeding. In General Electric, the Board held that an employer, in a unfair labor practice proceeding, can lawfully use an employee's wages to compensate an employee it calls to testify for witness fees. An employer's failure to pay employees called as witnesses by other parties does not violate the Act. As the ALJ correctly found, the Respondent did not call the Intervener as a witness in the representation proceeding at issue. The sole question concerning representation in that hearing was a contract bar. Given the Intervener's lack of involvement with the negotiations of the collective-bargaining agreement, any assertion that Respondent might have called him as a witness is specious at best. (ALJD 17:32-18:9)

Based upon the foregoing, the ALJ's finding of fact that Respondent unlawfully paid the wages and transportation for the Intervener to attend the decertification hearing should be affirmed and, Intervener's exceptions 4-7, 12-15 & 20-23 should be denied.

3. THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY SUGGESTED TO THE INTERVENER THE IDEA OF FILING A DE-AUTHORIZATION PETITION AND PROVIDING THE INTERVENER WITH ADVICE SHOULD BE AFFIRMED, AND INTERVENER'S EXCEPTIONS 16-23 SHOULD BE DENIED.

Intervener's contention that Respondent acted lawfully when it suggested that the Intervener file a de-authorization petition is not rooted in law or the evidence in this case. The Intervener submits that the de-authorization information that Wheeler provided to the Intervener was primarily informational and protected under Section 8(c) of the Act. The Intervener, however, ignores the totality of the circumstances, namely, the history and context of the relationship among Respondent, Wheeler and the Intervener at the time Wheeler suggested and provided advice to the Intervener about the de-authorization process.

As noted above, the record clearly establishes that Respondent hired and introduced Wheeler to the Intervener, that Wheeler and the Intervener had multiple calls in which Wheeler gave the Intervener free and unsolicited advice furthering Respondent's goal of getting rid of the Union. Respondent then paid the Intervener by the vehicle loan and his wages to attend the hearing. (ALJD 14:32-15:9) After the hearing, the Intervener asked Wheeler if there was any other legal action that he could take to get out of the union. (ALJD 6:19-20) Wheeler told the Intervener that he could file a de-authorization petition and, with adequate employees' support for the de-authorization petition, it would give employees a chance not to pay union dues. (ALJD 6:22-23) The record clearly establishes that the idea of filing a de-authorization petition originated from Respondent's agent. Prior to this conversation, the Intervener had no idea what a de-authorization petition was and clearly had no fixed intent to file such a petition until Wheeler suggested it. (ALJD 6:26-27) Even after this August 2012 telephone conversation, Wheeler continued to give advice about the de-authorization process to the Intervener. The

record establishes that in a follow-up telephone conversation in September 2012, the Intervener sought and received advice from Wheeler about proceeding with the de-authorization petition. (ALJD 14:10-11) Wheeler promoted the de-authorization petition and the Intervener then initiated efforts to gather employees' signatures to support the filing of Case 8-UD-90639. (ALJD 14:17-22)

The Intervener misses the holdings of cases it cites in Washington Street Foundry, 268 NLRB 338 (1983), Ernst Home Ctrs, 308 NLRB 848 (1992) by suggesting that an employer can render ministerial aid to an employee by providing information regarding Board processes and procedures. The Intervener conveniently leaves out that such ministerial aid, "must occur in a situational context free of coercive conduct." Eastern States Optical Co., 275 NLRB 371 (1985). In the instant case, the ALJ properly found that Respondent coerced the Intervener in processing his decertification petition when it gave him transportation and wages to attend the hearing. As the ALJ pointed out, "[t]he provision of these benefits removes Respondent from a situation free from coercive conduct." (ALJD 17:22-23) Accordingly, Wheeler's subsequent advice, suggestions and promotion of de-authorization exceeds ministerial aid and violates Section 8(a)(1). Indeed, the record is clear that Wheeler planted the de-authorization seed when the Intervener had no intent on taking such action. (ALJD 16:4-5) Condon Transport, Inc., 211 NLRB 297 (1974) (finding a Section 8(a)(1) violation where an employer provided decertification petition information employees with the intent of implanting the idea among employees).

Counsel for the Acting General Counsel urges the Board to find that the ALJ's conclusion that Respondent unlawfully suggested to the Intervener the idea of filing a de-authorization

petition and providing the Intervener with advice should be affirmed. The Intervener's exceptions 16-23 should be denied.

4. THE BOARD'S MINISTERIAL AID STANDARDS ARE CONSTITUTIONAL AND INTERVENER'S EXCEPTIONS 8-11 AND 20-23 MUST BE DENIED.

The Intervener also argues that Respondent's communications with the Intervener constitute "free speech" protected by the First Amendment and Section 8(c) of the Act. The Intervener, however, fails to recognize that restrictions can be placed upon an employer's speech, when the speech conflicts with or infringes on established rights, including rights established under Section 7 of the Act. *See, Wild Oats Market, Inc.*, 336 NLRB 179, 182 (2001)

As the ALJ pointed out, "the essence of prescribed conduct is not merely opposition to union activity, but interference or coercion which makes impossible the free exercise of employees' right." (ALJD 12:11-14; *citing Monroe Tube Co., Inc.*, 545 F. 2d 1320, 1325 (2nd Cir. 1976). Here, Respondent promoted the decertification process by providing the Intervener with an experienced labor relations adviser that it hired, paid the Intervener wages and provided him transportation to attend the decertification hearing and thereafter, suggested to him the idea of filing the de-authorization petition. (ALJD 14:34-38).

In *NLRB v. Gissel Packing Co.*, 395 NLRB 575, 618 (1969), the Supreme Court held that an employer enjoys the freedom of speech guaranteed by the First Amendment within the confines of the following framework:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso of Section 8(c).

Respondent's unlawful actions when it provided transportation and wages and when it suggested to the Intervener that he file a de-authorization petition is clearly coercive conduct that violates Section 8(a)(1). The Supreme Court was clear in Gissel that employees' rights under Section 7 outweigh an employer's right of expression. In light of Respondent's coercive conduct which clearly violates Section 8(a)(1), neither the First Amendment nor Section 8(c) protect the Respondent's expressions here.

Based upon the foregoing, Counsel for the Acting General Counsel urges the Board to deny exceptions 8-11 and 20-23.

5. THE ALJ PROPERLY RECOMMENDED TO THE BOARD THAT THE INTERVENER'S DECERTIFICATION PETITION IN CASE 8-RD-77965 AND INTERVENER'S DE-AUTHORIZATION PETITION IN CASE 8-UD-90639 MUST BE DISMISSED AND INTERVENER'S EXCEPTIONS 20-22 MUST BE DENIED.

Contrary to the Intervener's argument, the ALJ properly relied upon SFO Good-Nite Inn, LLC, 355 NLRB No. 16, slip op. (July 19, 2011) *enfd.* 700 F. 3d 1 (DC Cir. 2012), in recommending that the Intervener's petitions be dismissed. As stated by the Board in SFO:

[A]n employer's commission of unfair labor practices assisting, supporting, encouraging or otherwise directly advancing an employee decertification effort taints a resulting petition. As described, this presumption is based on the predictable result of an employer's unlawful, direct participating in an employee decertification effort – a petition plagued with uncertainty because of the very nature of the employer's unfair labor practices....[W]hen an employer unlawfully thrusts itself into its employees' decertification debate, there is little need for extended analysis of the likely impact of the employer's misconduct. (ALJD 18:51-19:15; *Id.* at slip. op 3-4)

Intervener's contention that SFO is not controlling because the unfair labor practices occurred in that case prior to the filing of the petition is not convincing nor supported by the record. The ALJ found that Respondent introduced Wheeler to the Intervener prior to the filing

both the decertification petition in Case 8-RD-77965 and the de-authorization petition in Case 8-UD-90639.

As correctly found by the ALJ, Respondent's unfair labor practices are directly tied to the decertification process and Respondent's conduct tainted Intervener's pending de-certification and de-authorization petitions. In making his recommendation that these petitions be dismissed, the ALJ properly relied upon Overnight Transportation Co., 333 NLRB 1392 (2001) and Mercy, Inc., 346 NLRB 1004 (2006) holding that the Board will dismiss decertification petitions where the petitions are tainted by an employer's unfair labor practices.

Based upon the foregoing, the ALJ properly recommended to the Board that the decertification petition in Case 8-RD-77965 and the de-authorization petition in Case 8-UD-90639 be dismissed. Intervener's exceptions 20-22 must be denied.

CONCLUSION

Based on the foregoing, the ALJ's conclusions of law, his recommended remedy, the recommended Board Order and Notice to Employees as well as his recommendation that the petitions in Cases 8-RD-77965 and 8-UD-90639 be dismissed, should be affirmed and the Intervener's exceptions should be denied in their entirety.

Dated at Cleveland, Ohio this 19th day of July 2013.

Respectfully submitted,

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