

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

WELLS ENTERPRISES, INC.

Respondent

and

NEAL THOMAS KRUCKENBERG, AN INDIVIDUAL

Charging Party

and

UNITED DAIRY WORKERS OF LE MARS

Party In Interest

Case 18-CA-150544

UNITED DAIRY WORKERS OF LE MARS

Respondent

and

NEAL THOMAS KRUCKENBERG, AN INDIVIDUAL

Charging Party

and

WELLS ENTERPRISES, INC.

Party In Interest

Case 18-CB-153774

**GENERAL COUNSEL'S ANSWERING BRIEF TO BOTH RESPONDENT
WELLS ENTERPRISES, INC. AND RESPONDENT DAIRY WORKERS OF LE MARS
EXCEPTIONS AND SUPPORTING BRIEFS AND GENERAL COUNSEL'S MOTION
TO REJECT RESPONDENT WELLS ENTERPRISES, INC. AFFIDAVIT IN SUPPORT
OF EXCEPTIONS**

Submitted by:

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General Counsel respectfully submits this Answering Brief to both Respondent Wells Enterprises, Inc.'s (Respondent Wells) and Respondent United Dairy Workers of Le Mars' (Respondent Union) Exceptions and Supporting Briefs to the Decision of the Administrative Law Judge Eric M. Fine. General Counsel also requests that the Board reject Respondent Wells' affidavit in Support of its Exceptions. General Counsel urges that the Board promptly adopt the Decision of the Administrative Law Judge, his findings fully detailing the relevant facts, and his legal analysis. The Judge correctly applied the applicable law. Given the Judge's conclusions in this case, the Board should also adopt his recommended remedies and Order. In the following sections General Counsel will present an introduction, a brief factual recital, and legal analysis, including arguments concerning the propriety of the Judge's recommended remedies and support for General Counsel's motion to reject Respondent Wells' belated affidavit.

INTRODUCTION

As the Judge correctly found, General Counsel has established that Respondent Wells has for many years been the exclusive provider of funds used by Respondent Union for its operations. This support is impermissible under the Act. Respondent Wells' principal factual defense is disingenuous. Respondent Wells in its Brief in Support of its Exceptions (Respondent Wells' Brief) asserts the following:

Further, the Employer never provided any funding to the Union. (Tr. at p.81). In fact, Chesterman is the only Respondent source of revenue for the Union. (Tr. at p. 108).
(Respondent Wells' Brief at 9-10 (footnote omitted)).

Nevertheless, the Employer has not violated either of these sections of Act [Section 8(a)(1) or Section 8(a)(2)] by merely allowing Chesterman's operation of vending machines on the Employer's property, and allowing Chesterman's transmission of a small portion of the vending machine revenue to the Union. (Respondent Wells' Brief at 21).

Respondent Wells' gloss on the facts ignores both the facts of this case and applicable law. Particularly, it is clear, as found by the Judge, the eight percent commission proceeds from Chesterman's vending/micro markets at Respondent Wells' facilities are Respondent Wells' property. The analysis found the *Post Publishing Company*, 136 NLRB 272 (1982), enfd. denied 311 F.2d 565 (7th Cir. 1962), is particularly helpful in considering Respondent Wells' arguments in this matter. The trial examiner noted the following:

It is clear from these fact that well over 95 percent of the money used by the PCCU [Union] in its normal operations since 1959 has come from operations controlled by Respondent (fn. 15) Admissions of Minahan and Cartier show that Respondent at all times had control over the cafeteria and vending machine operations through its right to permit these operations on its premises, which license it could obviously terminate at any time and its deliberate arrangements for transfer of the proceeds therefrom directly to the PCCU." Id at 282.

General Counsel further asserts the Judge's thorough legal analysis fully supports his conclusion of unlawful conduct by Respondents. General Counsel fully agrees with his recommended Order. The developed evidence introduced in this case establishes overwhelming financial support to Respondent Union. Without Respondent Wells' financial support— Respondent Union could not function. Every aspect of Respondent Union's operation is paid for by funds received from Respondent Wells. This financial domination fully supports the Judge's recommended remedies.

General Counsel also requests that the Board reject Respondent Wells' affidavit, as Respondent has offered no valid basis for its consideration, and further reject all of Respondent Wells' arguments related to the offered proof.

BRIEF FACTUAL RECITAL

A useful summary of conceded facts (with some editorial comments, in brackets) concerning Respondent's Union's funding, taken from Respondent Union's brief, follows:

United Dairy does not collect any initiation fees, dues or assessments. (Tr. 26:8-10). The collective bargaining agreement allows for a dues payroll deductions or a "checkoff" but this checkoff has never been implemented. (Respondent Wells Ex. 2, p. 4; Tr 27:13-23). United Dairy is funded by an eight percent commission from vending machines and "micro-markets" [footnote omitted] that are used by United Dairy members. [and non unit employees, supervisors and management, See Tr. 29] (Tr. 28:9-14, 31:12-22). The vending machines and micro-markets are provided by Chesterman Co. and its subsidiary, Premium Food and Beverage ("Chesterman"). (Tr. 120:16-22; GC Exs. 10-11). Chesterman and Wells are the only parties to the agreements regarding the vending machines and the micro-markets. (GC Exs. 10-11). (Respondent Union's Brief at pages 3 and 4).

Additionally, General Counsel notes the following facts concerning vending services:

1. Only Respondent Wells negotiated with Chesterman concerning their vending agreements (GC Ex 10 and GC Ex. 18(b) – letter from McCannon to Vondrak dated June 25, 2015, and GC Ex. 18(a)) e-mail -- exchange between Deb McCannon and Jesse Vondrak on June 26, 2015, and July 1, 2015).
2. Respondent Wells provides the space and utilities services that Chesterman uses for its vending services. (Tr. 106).
3. During the period from 2009 until June 2015 " .Chesterman made some [apparently all] checks payable for vending machine proceeds to Employer [Respondent Wells] and the Credit Union accepted and deposited these checks into the [Respondent]Union account. (Tr. at pp. 33-35, 126) (Respondent Wells' Brief at 11) (See also Vondrak testimony at Tr. 126).
4. At all material times, "Chesterman always issued a separate check to Wells for commissions derived from vending machine and related sales at the Wells corporate office." (Tr. at p. 129)." (Respondent Wells' Brief at p. 11, fn 8).

5. On June 25, 2015, by letter, Respondent Wells demanded: (GC Ex. 18(b))¹

Effective immediately, please make the following changes with respect to any and all commission checks payable by Chesterman in connection with vending machines placed by Chesterman at non-corporate facilities owned by Wells Enterprises, Inc.

- Make such checks payable to “United Dairy Workers of LeMars;”
- Eliminate any and all references to “Wells Enterprises, Inc.” “Wells Dairy, Inc.,” and/or “Wells” on such checks; and
- Mail such checks directly to “United Dairy Workers of LeMars, Attention: Al De Vos, Treasurer, PO Box 63, LeMars, Iowa, 51031.”

Please send the undersigned an e-mail, confirming Chesterman’s receipt of this letter and intent to comply with the requests herein.

Additionally, General Counsel highlights the following facts concerning facts related to Respondent Union and its relationship with Respondent Wells.

1. As noted above in its Brief, Respondent Union is funded exclusively by vending machine proceeds.
2. Respondent Union has no form or procedure for voluntary dues checkoff or contribution to Respondent Union and has never secured such authority from employees. (Testimony of Allen DeVos, Tr. 26-28).
3. In late November 2015, Respondent Wells required that Respondent Union confirm changes in procedures Respondent Wells implemented with Chesterman concerning vending machine proceeds that were transmitted to Respondent Union. (GC Ex 5(a) and 5(b)).²

¹ A similar set of requirements was presented to Chesterman and completed in November 2015 (See GC Ex. 22(a)-22(d)).

² This process parallels Respondent Wells’ efforts set forth in (GC Ex 22(a)-22(d)).

4. Respondent Union uses vending machine proceeds to pay all of its expenses. (GC Ex 5(a) and 5(b)).

LEGAL ANALYSIS

The Administrative Law Judge carefully and correctly analyzed Board law. Likewise, Respondents' efforts to distinguish cases relied on by the Judge were unsuccessful. And, in part, Respondent recognizes that cases cited by the Judge establish that providing vending machine proceeds to a union are an unfair labor practice. However, several of Respondent Wells' arguments require response. A repeated refrain is Respondent Wells (and collaterally to Respondent Union) did not violate the Act " by merely allowing Chesterman's operation of vending machines on Employer's property, and allowing Chesterman's transmission of a small portion of vending machine revenue to the Union." Respondents fail to acknowledge the eight percent commission of vending sales is Respondent Wells' property. The analysis in *The Post Publishing Company*, 136 NLRB 272 (1962), and other cases relied upon by the Judge correctly so finds. The commission on vending machines revenues belongs to Respondent Wells. The following testimony reflects Chesterman's confirmation of that point.

GC – Q – If this letter [GC Ex.18b] had said "Please make all checks payable to Wells Enterprises, Inc. you would have done that, wouldn't you?"

Witness [Vondrak] – A. Correct.

GC – Q – Add if she'd [McCannon] said send it, the whole proceeds for the contract, you would have done that, right?

Witness [Vondrak] –A – Yes.

Judge Fine – Q –She would have said what?

GC –Q– If she’d have said “We want all the commissions to be paid to Well’s Enterprises, Inc.,” you would have done that?

Witness [Vondrak] – A – Yes.

GC – Q – It’s her money right?

Judge Fine – Well, wait, he just.

Mr. Castle – Objection!

Judge Fine – He agreed to it. He agreed with your answer.

GC – Yes.

(Tr 135, lines 7-23).

Respondent also repeatedly argues: “Further neither the Union nor any bargaining unit employee represented by the Union have objected to any aspect of the foregoing flow of funds.”

(Respondent Wells’ Brief at p. 19; similarly, See Respondent Union’s Brief at p. 8).

Employee objection is not required; an employer can only forward monies to a labor organization pursuant to “a written assignment” such as a valid checkoff authorization. See Section 302 (c)(4) of Labor Management Relations Act. General Counsel asserts Respondent’s vending machine arrangements impose an eight percent tax on all employees vending purchase [including unrepresented individuals using vending machines]. This is akin to mandatory support for Respondent Union in Iowa, a right-to-work state. Respondents argue employee vending machine purchases are voluntary; this ignores Respondent Wells’ efforts to accommodate employee needs and provide attractive food/refreshment options to its employees. Thus, the only real option for employees who do not want to support Respondent Union is to completely forego in-plant food services.

As noted by the Judge, vending machine proceeds are not “small” but substantial; Respondent Union reported vending revenues in 2015 totaled \$25,644 through October 21, 2015. Respondents note Respondent Wells does not provide Respondent Union with any offices, facilities, technical, administrative, or clerical support. As the Judge noted, funds provided by Respondent Wells permit the Union to purchase bookkeeping services, (Tr. 40 lines 4-6), equipment, space rental, and liability insurance. (See GC Ex 5(b). Importantly, Respondent Wells has also funded Respondent Union’s legal expense, including defense of the instant unfair labor practices. (Tr. 43 at lines 15-17).

REMEDY

General Counsel asserts the Administrative Law Judge fashioned an appropriate remedy in this case. General Counsel initially principally sought cessation of Respondent’s funding arrangement with Respondent Union; that remedy is no longer appropriate. Evidence adduced during the course of this proceeding requires a substantially more expansive remedy and General Counsel fully supports the Judge’s proposed remedy.³ The Board is responsible for fashioning a remedy that “effectuates the policies of this Act.” See Section 10(c) of the Act. The Board described its task as follows in *Hacienda Resort Hotel and Casino*, 363 NLRB No. 7, (September 10, 2015):

The Board has recognized its “duty and ‘broad discretionary’ authority under Section 10(c) to tailor its remedies to varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case.” *Diamond Walnut Growers, Inc.*, 340 NLRB 1123, 1132 (2003). Thus, the Board has “broad discretion to fashion ‘a just remedy’ to fit the circumstances of each case it confronts.” *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Maramont Corp.*, 317 NLRB 1035, 1037 (1995)); see also *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 3 (2014).

³ Respondents during the trial introduced evidence attempting show Respondent Union’s independence. The facts as developed belie that conclusion.

A similar responsibility is required of the Judge.

Additional evidence adduced at the hearing supports the Judge's conclusion that "Wells refrain from recognizing or bargaining with the Union when the current contract expires until the Union is certified by Board." (Judge's decision at p. 25). Supporting facts include, most importantly, that Respondent Wells is Respondent Union's exclusive source of funding. Its support is substantial and not "small" as claimed by Respondent Wells. Respondent Wells funds all of Respondent Union's functions and only that funding permits Respondent Union to be a viable labor organization. Respondent Wells contractual commitments also furnish substantial assistance to Respondent Union including one hour paid per month for officers to confer with each other after joint meetings and five hours per week to be used by the Union's President at his discretion. (Respondent Employer Ex. 2). Respondent Union's bargaining committee was also paid for their basic work hours for a period of about four months when they bargained the most recent collective bargaining agreement. (Tr. 85-87). This testimony was adduced by Respondent Union's counsel. There is no provision in the collective bargaining agreement describing any such arrangements. The above examples reflect substantial additional evidence of assistance to Respondent Union, beyond what was alleged in the complaint and beyond information disclosed to the General Counsel during the investigation. Also previously not disclosed to the General Counsel by Respondents, and secured by subpoenaed document, was Respondent Wells' efforts to alter the procedures for conveying vending proceeds to the Respondent Union. (GC Ex 18(a) and 18(b) and 22(a)(b) and (c)). Additionally, Respondent Wells interfered with the independent functioning of Respondent Union by repeatedly directing Union Secretary/Treasurer DeVos to confirm in writing Respondent Wells' initiated procedures concerning vending funds provided to Respondent Union. (GC Ex 19(a)(b) and (c)). All the above disclosures reflect further examples

of unlawful interference with the independence of Respondent Union and supports the Judge's recommendation for additional remedial actions.

The Board should reject the Affidavit in support of Respondent Wells' Exception and disregard and all arguments based on this argument.

Respondent Wells has proffered an affidavit with documents concerning charges filed in 2005. Three charges, Cases 8-CA-17549, 18-CB-4462 and 18-CB-4441, are identified in the submission. Simply put, these are administrative determinations and do not constitute a determination of the Board in an adjudicated case.

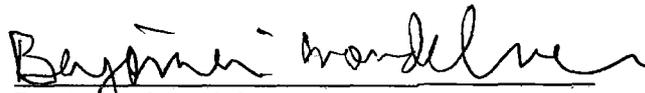
Additionally, Respondent Wells has not offered any valid explanation why these documents were not offered before the record closed. The Board routinely rejects such efforts. See *AAA Five Sprinkler, Inc.*, 322 NLRB 69, fn. 1 (1996), and *Postal Service*, 310 NLRB 391, fn. 1 (1993). The underlying files in these cases no longer exist. The facts upon which these cases were decided are not available. It facially appears that this involves multiple facilities including a facility located in Omaha, Nebraska. Additionally, a regional determination that is more than 10 years old has no value in evaluating circumstances occurring 10 years later.

CONCLUSION

General Counsel, based upon the rationale described above urges the Board to adopt the Administrative Law Judge's Decision. The Decision is thoughtful and comprehensive. The Judge's recommended remedies are balanced and clearly appropriate in light of the evidence presented at trial. Finally, the Board should reject Respondent's Affidavit In Support of Exceptions.

Dated at Milwaukee, Wisconsin, this 15th day of August 2016.

Respectfully Submitted,



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Attachments

Wells Enterprises, Inc.
Case 18-CA-150544
and
Untied Dairy Workers of Le Mars
(Wells Enterprises, Inc.)
Case 18-CB-153774

CERTIFICATE OF SERVICE

I hereby certify that I served the attached General Counsel's Answering Brief To Both Respondent Wells Enterprises, Inc. And Respondent Dairy Workers Of Le Mars Exceptions And Supporting Briefs And General Counsel's Motion To Reject Respondent Wells Enterprises, Inc. Affidavit In Support Of Exceptions on the parties listed below, by regular mail and email on August 15, 2016.

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August 15, 2016

Date

Carla Becker, Designated Agent of NLRB

Name

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Signature