

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WELLS ENTERPRISES, INC.

Respondent

and

NEAL THOMAS KRUCKENBERG, AN
INDIVIDUAL

Charging Party

and

UNITED DAIRY WORKERS OF LE MARS

Party In Interest

UNITED DAIRY WORKERS OF LE MARS

Respondent

and

NEAL THOMAS KRUCKENBERG, AN
INDIVIDUAL

Charging Party

and

WELLS ENTERPRISES, INC.

Party In Interest

Case 18-CA-150544

Case 18-CB-153774

**RESPONDENT WELLS ENTERPRISES,
INC.'S REPLY BRIEF IN SUPPORT OF
ITS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S
DECISION**

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I. INTRODUCTION

The Charging Party's and the General Counsel's respective answering briefs simply repeat the unsupported factual and erroneous legal propositions which Administrative Law Judge ("ALJ") Fine relied upon in his erroneous Decision and Recommended Order ("Decision"). The Respondent Wells Enterprises, Inc. ("Wells" or "the Employer"), submits the following Reply Brief in support of its Exceptions.

II. ARGUMENT

The Charging Party and General Counsel seek to destroy a well-functioning collective bargaining relationship and impose the most extreme of remedies despite a lawful and cooperative funding arrangement, which was the only Employer conduct at issue before the ALJ. The ALJ's Decision, if adopted, would deny more than 1,500 employees the benefits of collective representation and bargaining, and would nullify and thereby deny these employees the benefits of a comprehensive labor agreement. That Decision ignores the only issue that was litigated in this matter (the Union's source of funding) and the only remedy (termination of that funding arrangement) which the General Counsel sought. The following facts demonstrate why the ALJ's Decision must not, and cannot properly, be adopted by the Board:

1. The Charging Party's answering brief advances factual arguments and legal conclusions that are entirely unsupported in the record, that are irrelevant to the only issue actually litigated in this case (the Union's source of funding), and that fall outside the Section 10(b) period.
2. The ALJ entirely ignored controlling Court of Appeals precedent and instead relied upon inapplicable case law that does not support the ALJ's findings and recommended remedies.
3. None of the arguments that the General Counsel or the Charging Party advance in their answering briefs support the ALJ's recommended remedies, which the General Counsel never sought and which are contrary to the purpose of the Act.
4. The General Counsel and the Charging Party object to the Board taking administrative notice of the Region's 2005 Case and related action, because they

realize that the 2005 Case demonstrates why the ALJ's findings and recommended remedies in this case are so erroneous.

A. THE BOARD SHOULD REJECT THE CHARGING PARTY'S REFERENCE TO IRRELEVANT AND UNSUPPORTED FACTUAL AND LEGAL PROPOSITIONS.

It is undisputed that Employer domination is not at issue in this case, and the parties never litigated that issue. The General Counsel did not plead domination in his Complaint, and it was not found by the ALJ. (*See* Compl. ¶¶ 4-5; *See generally* ALJ Decision at P. 19, L. 36 – P. 23, L. 47; P. 26, L. 7–29.) As set forth in detail in the Respondent's brief in support of its Exceptions, there are no facts supporting a finding of unlawful Employer domination in this case, nor are there sufficient facts to support a finding of unlawful assistance. (*See* Employer's Exceptions Br. at 22–28.)

Through the use of hyperbole and inflammatory accusations, the Charging Party's answering brief asserts a litany of irrelevant and entirely unsupported factual and legal propositions that have no bearing on the issue that was litigated before the ALJ. For example, the Charging Party incorrectly invokes the contract bar rule, which has no place in this case and was never litigated. (C.P.'s Answering Br. at 7.) The Charging Party also references purported actions that fall outside the Section 10(b) period, such as the formation of the Union. (C.P.'s Answering Br. at 11.) The Board should reject such references, as any purported actions falling outside the Section 10(b) period, which began on October 21, 2014, cannot form the basis for finding a violation of the Act. Even more improper, the Charging Party contends that the funding arrangement at issue in this case constitutes a felony. (C.P.'s Answering Br. at 10–11.) Again, these allegations are irrelevant to the issue before the Board, were never tried, and are not based upon the facts in the record. Contrary to the Charging Party's suggestion, the Employer never provided the Union with illegal kickbacks in the course of their relationship. Thus, the

Charging Party's citation to the *Jackson Engineering* case is misplaced. (C.P.'s Answering Br. at 10–11.) In that case, an employer's president paid concealed kickback payments to the union's vice-president with approval of the union's president. *Jackson Eng'g Co.*, 265 NLRB 1688, 1688–89 (1982). That categorically did not occur here, and the Board should reject the Charging Party's apparent accusation to the contrary.

In addition, the Charging Party's purported and entirely self-serving contention that he "subjectively felt there was domination" (C.P.'s Answering Br. at 10) is unsupported by the record. In fact, Mr. Kruckenberg never testified at the trial regarding the above-captioned cases. His conclusory allegation is also completely contrary to the facts in the record. As a past President of the Union who was tasked with submitting accurate reports to the Department of Labor, Neal Kruckenberg ironically in effect contends that he served as president of a labor organization while complicit in the actions that he now claims violate the Act. (*See* Employer's Exceptions Br. at 14.)

B. THE BOARD SHOULD FOLLOW APPLICABLE COURT OF APPEALS PRECEDENT AND FIND THAT THE FUNDING ARRANGEMENT AT ISSUE CONSTITUTES MERE COOPERATION, NOT UNLAWFUL ASSISTANCE.

Contrary to the ALJ's findings, the Employer has not unlawfully assisted the Union through its mere cooperation with an independent company (Chesterman) which the Employer allows to operate vending machines on the Employer's property. As set forth in the Employer's brief in support of its Exceptions, such cooperation is lawful and cannot form the basis of a violation of the Act, particularly when the Employer and the Union have had an arm's-length, legitimate relationship that promotes the purpose of the Act—*i.e.* cooperation between management and labor. (*See* Employer's Exceptions Br. at 21–22.)

At the expense of the Employer's employees and their Union, the Charging Party and the

General Counsel ignore the cases which distinguish between lawful cooperation and unlawful assistance, and instead focus on the Board's underlying decision in the *Post Publishing* case, as did the ALJ. The Board should not make the same mistakes. Rather, the Board should follow the Seventh Circuit Court of Appeals decision in *Post Publishing*, which the Board and other Circuit Courts have favorably cited. (*See Employer's Exceptions Br. at 24 (collecting cases).*) Indeed, the Board should follow its decision in *Modern Plastics*, in which it cited *Post Publishing* and directly acknowledged that a union's mere receipt of revenue from vending machines does not constitute a violation of the Act when, like the instant case, it occurs in isolation, with no other evidence of unlawful support or domination. (*See Employer's Exceptions Br. at 24 (citing Modern Plastics Corp., 155 NLRB 1126, 1136, n.20 (1965) (referring specifically to the conduct at issue in Post Publishing as an example of conduct in isolation that does not constitute a violation of the Act).*)

In *NLRB v. Post Publishing Co.*, 311 F.2d 565, 567–70 (7th Cir. 1962), the Court of Appeals overturned the Board's decision and found that it was entirely lawful for a union to receive funds from an employer's cafeteria and coffee vending machine. In that case, the Seventh Circuit stated that a vending machine funding relationship

is a permissible form of friendly cooperation designed to foster and resulting in uninterrupted harmonious labor-management relations, and is not the form of 'support' designed to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative.

See id. at 569–70. The Court of Appeals decision in *Post Publishing* is the most directly applicable case and should be respected by the Board.¹

¹ In his answering brief, the Charging Party again relies on the inapplicable *Utrad* case. (C.P.'s Answering Br. at 9.) In *Utrad*, the fact that a union received vending machine revenue as its sole source of income was just one fact which the Seventh Circuit relied upon in affirming the NLRB's determination that the employer improperly contributed support to the union. *See Utrad Corp. v. NLRB*, 454 F. 2d 520, 522-23 (7th Cir. 1971), *reh'g denied*.

The new cases cited in the Charging Party's answering brief and post-brief letter are inapplicable. In one, the employer offered to pay the full-time salaries of the president and benefit representative. (C.P.'s Answering Br. at 12 (citing *Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union*, 734 F.3d 708 (7th Cir. 2013).) In another, the employer paid the salaries of union officers in certain contexts and engaged in other conduct alleged to constitute domination and support. *NLRB v. Southern Bell Telephone & Telegraph Co.*, 319 U.S. 50 (1943).² That has not occurred here. In this case, employees decide how many regarding vending machine and micro-market items to purchase. Their decisions alone result in a small percentage of vending machine revenue being provided to the Union. The Employer does not tell employees what purchases to make, does not offer to buy employees their snack items, and does not require Union support through employee purchases.³ Nor does the Employer pay the Union's bills, as the Charging Party and General Counsel allege. (C.P.'s Answering Br. at 14; G.C.'s Answering Br. at 7.) Importantly, the Employer has never engaged in any anti-union action or any action suggesting that it would ever threaten to eliminate the cooperative funding arrangement or fire employees for "trying to buck the system" as the Charging Party erroneously states. (C.P.'s Answering Br. at 14).

The NLRB, and then the Seventh Circuit, did not find that receipt of vending machine proceeds alone constituted a violation of the Act. *See id.* In coming to its decision, the Seventh Circuit relied on a number of other facts and specifically stated that "[t]aken together, the facts here . . . add up to an unmistakable picture of Company support." *Id.* at 523. In other words, the union's receipt of vending machine revenue was not dispositive because the Seventh Circuit did not rely on that single fact, but instead relied on a number of facts considered on the whole.

² This case was cited for the first time in the post-brief letter from the Charging Party's counsel dated August 25, 2016, which the Employer's counsel received on August 29, 2016.

³ Contrary to the General Counsel's assertion, the 8% commission of vending sales is not Respondent's "property." (G.C.'s Answering Br. at 2, 5.) Instead, the vending sales are the result of employees' purchases.

In the Supreme Court case cited by the Charging Party, the NLRB determined that it was a violation of the Act for an employer and union to enter into an agreement recognizing the union as the exclusive bargaining representative of certain employees when, despite the parties' good faith belief, the union did not actually have majority support. (C.P.'s Answering Br. at 13 (citing *I.L.G.W.L.L. v. NLRB*, 366 U.S. 731 (1961).) The case has no applicability here because the General Counsel's Complaints did not challenge the Union's majority support at the inception of its representative status or otherwise, and the legality of the Union's representative status was not at issue in this case. The ALJ's contention that the parties "sought to litigate the full relationship" between the parties does not provide any consolation. (ALJ Decision at P. 22, n.4.) The parties merely litigated the funding arrangement at issue in this case, which the General Counsel's Complaint challenged. (*See* Compl. ¶ 4.) Further, any issues regarding formation of or support for the Union would fall outside the Section 10(b) period and thus cannot form the basis of a violation of the Act.

The Employer has not violated the Act by merely allowing Chesterman's operation of vending machines on the Employer's property, and allowing Chesterman's transmission of a small portion of vending machine revenue to the Union. The case law is clear that such conduct constitutes mere cooperation, not unlawful assistance, and that there must be additional unlawful employer conduct before mere vending machine revenue can justify a finding of unlawful employer interference, domination, or support of a union. The ALJ's finding to the contrary is erroneous, and the Board should sustain the Employer's Exceptions to the ALJ's Decision.

- C. **IF THE BOARD WERE TO APPROVE A REMEDY, IT SHOULD APPROVE THE ONLY REMEDY SOUGHT IN THIS CASE (CESSATION OF THE FUNDING ARRANGEMENT), WHICH IS THE ONLY REMEDY THAT IS NO BROADER THAN NECESSARY.**

The Employer and the Union maintain an arm's-length but cooperative relationship

which serves the interests of the employees the Union represents, and their Iowa community. Neither the Employer nor the Union should be penalized for a relationship that is functional and lawfully cooperative. Yet the ALJ recommended the most extreme of remedies, despite the fact that the ALJ's remedies are overbroad, there was no finding of Employer domination, and the ALJ's recommended remedies were never sought by the General Counsel.

The NLRB's own precedent acknowledges that no remedy should be broader than necessary to redress the alleged unfair labor practice. (*See* Employer's Exceptions Br. at 30–31 (collecting cases).) In fact, the Eighth Circuit has determined that a union should not be disestablished if there is no evidence of actual domination—meaning actual employer control, not mere employer assistance. (*See* Employer's Exceptions Br. at 32 (collecting cases).) The ALJ did not find domination in this case, nor did the General Counsel allege domination in its Complaint. (*See* Compl. ¶¶ 4–5; *See generally* ALJ Decision at P. 19, L. 36 – P. 23, L. 47; P. 26, L. 7–29.) Therefore, the ALJ's recommended order went beyond the scope of the General Counsel's Complaint and beyond the scope of the facts of this case.

It is ironic, given the General Counsel's Complaint, that the General Counsel has opposed the Employer's Exceptions with respect to the ALJ's recommended remedy. The General Counsel's suggestion that it now “supports the Judge's proposed remedy” (G.C.'s Answering Br. at 7) is convenient but not persuasive. Throughout this case, the General Counsel confirmed that it only sought cessation of the funding arrangement. Indeed, during pretrial conferences regarding this matter, the General Counsel repeatedly stated that the only relief the NLRB sought was cessation of the funding arrangement. The General Counsel acknowledged that the NLRB's Division of Advice had directed the General Counsel to seek only cessation of the Union's receipt of revenue from Chesterman's vending machines. The General Counsel and

the NLRB's Division of Advice did not view the facts of this case as warranting a termination of recognition remedy, and thus, no such remedy should be imposed.

The supposed "additional evidence" (G.C.'s Answering Br. at 8) that the General Counsel now claims supports a more expansive remedy does not properly do so and cannot be relied upon. For example, as explained in the Employer's brief in support of its Exceptions, the amount of funding the Union received is irrelevant and falls outside the Section 10(b) period. (*See* Employer's Exceptions Br. at 5, 10, 36.) Further, such amounts must be put in the context of the approximately 1,565 number of Wells employees and the fact that employees themselves determine the amount of funds the Union receives as a result of their purchasing decisions. (*See* Employer's Exceptions Br. at 10, 29.) Similarly, whether Union officers or members were paid in limited contexts for certain Union-related activities is irrelevant to the issue that was actually litigated in this case (the Union's funding source), and again falls outside the Section 10(b) period.

The General Counsel acknowledges in its brief that these facts are "beyond what was alleged in the complaint." (G.C.'s Answering Br. at 8; *See* Compl. ¶¶ 4–5.) Such facts cannot form the basis for finding a violation of the Act. *See Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967) ("Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice.") Additionally, much of the conduct referenced in the General Counsel's brief occurred outside the Section 10(b) period, which began on October 21, 2014. Such conduct cannot, as a matter of law, form the basis of a violation of the Act.

There is no legitimate reason for the Board to enforce a dysfunctional, unnecessarily broad remedy, which was not even sought by the General Counsel and which is broader than

necessary to redress the supposed violation of the Act. The only remedy that would narrowly and properly redress the Employer's alleged unfair labor practice would be to merely reform Chesterman's approach to sending a portion of vending machine revenue to the Union. The ALJ's recommended termination of recognition and labor agreement nullification remedies are not directed toward a violation of the Act which the General Counsel alleged or which was litigated in this case. Due process therefore demands that the Board deny the ALJ's termination of recognition remedy and sustain the Employer's Exceptions.

D. THE BOARD SHOULD TAKE ADMINISTRATIVE NOTICE OF THE BOARD'S FINDINGS IN ITS 2005 CASE.

The Charging Party appears to believe that the Employer seeks the Board to invoke *res judicata* or collateral estoppel with respect to the Board's determination in Case No. 18-CA-17549 ("2005 Case"). (C.P.'s Answering Br. at 16.) Instead, the Employer seeks to have the Board take administrative notice of the 2005 Case. The Board's decisions and procedural guidelines anticipate and permit the Board to take such administrative notice of its own administrative actions. *See Farmer Bros. Co.*, 303 NLRB 638, n.1 (1991) ("The Board may take administrative notice of its own proceedings."); *Earthgrains Co.*, 338 NLRB 845, 853-54 (2003) (taking administrative notice of prior action as background information); NLRB Bench Book § 16-201 (Oct. 2015). Taking administrative notice does not require a reopening of the record pursuant to Board Rule § 102.48(d)(1), as the General Counsel seems to suggest. (G.C.'s Answering Br. at 9.)⁴

⁴ Because the Employer does not seek a reopening of the record, the Employer need not demonstrate why the documents related to the 2005 Case could not have been discovered prior to the hearing before the ALJ. As such, the cases cited by the General Counsel are inapplicable. (G.C.'s Answering Br. at 9.) At any rate, at the time of the hearing in this case, neither the attorneys of the Employer's current General Counsel's office, nor undersigned counsel for the Employer, were involved with the Board's 2005 Case. (Castle Affidavit ¶ 2.) The Employer's undersigned counsel only became aware of NLRB Case No. 18-CA-17549

In its answering brief, the General Counsel now claims that the underlying files in the 2005 Case “no longer exist.” (G.C.’s Answering Br. at 9.) It is ironic that Attorney M. H. Weinberg, the attorney who represented both the charging party in the 2005 Case and the Charging Party in this case, said nothing about the 2005 Case during the entire proceeding of this case, including at the 2016 hearing before the ALJ. Had Attorney Weinberg done so, the Employer could have subpoenaed Attorney Weinberg or the Charging Party in the 2005 Case in an attempt to obtain access to the documents at issue. But instead, Attorney Weinberg remained silent with respect to the 2005 proceedings, of which he was clearly aware.

The Employer requests that the Board take administrative notice of the Board’s determination in the 2005 Case because the Employer would be prejudiced in light of its undoubted reliance upon the result of the 2005 Case—by continuing the funding arrangement which the Board’s 2005 Case vindicated. Neither the General Counsel nor Charging Party Kruckenberg would be prejudiced by the Board now taking administrative notice of the 2005 Case of which they were directly, or at least constructively, aware. The Board’s 2005 vindication of the funding arrangement at issue in this case, and the Employer’s reliance on that 2005 vindication, justifies the Board taking administrative notice of the Board’s 2005 Case.

III. CONCLUSION

The Respondent Wells Enterprises, Inc. respectfully requests that the National Labor Relations Board sustain the Respondent Employer’s exceptions in their entirety, and dismiss the General Counsel’s Complaints against the Respondent Employer in their entirety.

in July, 2016 in the course of drafting the brief in support of the Employer’s Exceptions to the ALJ’s Decision. (Castle Affidavit ¶ 2.)

Date: August 29, 2016

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