UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

----------X

MV PUBLIC Transportation, INC.

:

and :

: Case Nos. 29-CA-29530
29-CA-29760

JOHN D. RUSSELL, AN INDIVIDUAL

-

:

and Case No. 29-CA-29544

:

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

and Case No. 29-CA-29619

ERIC BAUMWOLL, AN INDIVIDUAL

and

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Party to the Contract

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

And

JOHN D. RUSSELL, AN INDIVIDUAL

Case No. 29-CB-13981

:

----------X

BRIEF OF RESPONDENT LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL ROSAS

George A. Kirschenbaum
Cary Kane LLP
1350 Broadway, Suite 1400
New York, NY 10018
(212) 868-6300
Attorney for Local 707, I.B.T.

RELEVANT PROCEDURAL HISTORY

On March 31, 2009, John Russell (hereinafter referred to as "Russell") filed the unfair labor practice charges in Case No. 29-CB-13981 (GC. Ex. 1-C)[1] against Local 707, International Brotherhood of Teamsters (hereinafter referred to as "Local 707") and Case No. 29-CA-29530 (GC Ex. 1-A) against his Employer, MV Public Transportation, Inc. (hereinafter referred to as "MVP" or the "Employer"). The gist of those two charges is that on an unspecified date in the past, MVP and Local 707 entered into an improper Recognition Agreement covering a bargaining unit of the Employer's employees and then entered into a Collective Bargaining Agreement. Finally the charges claim that Local 707 was improperly given, and accepted, assistance from the Employer. The charge against the Employer also alleges that the Employer required employees to sign Union cards at a time that a majority was not represented by Local 707. Those charges were served by regular mail on the Employer and Local 707 on April 2, 2009 (GC Ex. 1-B and D).

After a lengthy investigation, Region 29 of the National Labor Relations Board issued the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on September 30, 2009 (GC Ex. 1-M).

On October 15, 2009 Local 707 filed its Motion for Summary Judgment asking that the Complaint in Case No. 29-CB-13981 be dismissed because the alleged unfair labor practice occurred more than six months prior to the filing of the unfair labor practice charge by Russell (GC Ex. 1-S). Therefore, the allegations are barred by the Act's statute of limitations. Also on October 15, 2009, the Employer filed its Motion to Partially Dismiss the Complaint or, In the

[1] References to the General Counsel's Exhibits will be noted as "GC. Ex." and followed by the appropriate number. References to the Employer's Exhibits will be noted as "MV. Ex." and followed by the appropriate number. References to Exhibits introduced by Local 707, IBT will be noted by "707 Ex. and followed by the appropriate number and references to any Exhibits introduced by Charging Party Local 1181-1061, ATU, AFL-CIO will be noted by "1181 Ex." and followed by the appropriate number.

Alternative, Motion for Partial Summary Judgment which sought to have the allegations of Case No. 29-CA-29530 dismissed on the same statute of limitations grounds GC Ex 1-T). On October 23, 2009 MVP filed its Second Motion for Summary Judgment (GC Ex. 1-W) and on November 6, 2009, Counsel for the General Counsel filed her Opposition to the Motions (GC Ex. 1-X). On November 13, 2009 the Employer filed its Reply to the General Counsel's Opposition (GC Ex. 1-Z). On December 3, 2009 the Board denied the Motions and invited Local 707 and the Employer to renew their Motions at the hearing before the Administrative Law Judge (GC Ex. 1-BB).

The hearing in these consolidated cases was held at the offices of Region 29 on various dates in December 2009 and January 2010 before Administrative Law Judge Michael Rosas (hereinafter referred to as "ALJ Rosas" or the "ALJ"). At the hearing both the Employer and Local 707 renewed their Motions and the ALJ reserved ruling on them until after the hearing was closed.

On June 7, 2010 the ALJ issued his Decision. Thereafter, on June 14, 2010, ALJ Rosas issued a Supplemental Decision entitled "Errata" in this matter.[2] Pursuant to the provisions of Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Local 707 is hereby filing its Exceptions to the Decision of ALJ Rosas and this Brief in Support of the Exceptions.

---

[2] References to the Decision of ALJ Rosas will be noted as ALJD and followed by the appropriate page and line numbers. References to the Errata Supplement to the ALJD will be noted as ALJD Errata and followed by the appropriate page and line numbers.

STATEMENT OF THE CASE

THE SECTION 10 (b) ISSUE

On August 28, 2008 Local 707 and the Employer entered into a Card Check and Neutrality Agreement covering the Employer's facility in Staten Island, NY (Jt. Ex. 3). In that Agreement the Employer agreed to recognize Local 707 "upon a showing by the Union that it represents a majority of employees in the appropriate bargaining unit…" (Jt. Ex. 3, paragraph 3; Tr. 417)[3].

Then, on September 8, 2008, Local 707 President Kevin McCaffrey notified the Employer that Local 707 did in fact represent a majority of the bargaining unit employees (GC Ex.19; Tr. 418). The parties scheduled a Card Check to be conducted by the neutral arbitrator Elliott Shriftman. The card check was conducted on September 11, 2008. At the conclusion of the card check, Shriftman certified that Local 707 did in fact represent a majority of the bargaining unit employees (GC Ex. 8-b; Tr. 418, 419). On September 12, 2008, Local 707 and the Employer entered into a Recognition Agreement in which the Employer recognized Local 707 as the exclusive bargaining representative of its bargaining unit employees (Jt. Ex. 2; Tr. 418).

Following the execution of the Recognition Agreement, the parties notified the Regional Director of Region 29, pursuant to the holding in *Dana Corporation*, 351 NLRB 434 (2007), and the Regional Director opened Case No. 29-VR-13. By letter dated September 18, 2008, Regional Director Blyer acknowledged receipt of the notice of voluntary recognition and asked the Employer for certain information (GC Ex. 13).

---

[3] References to the Transcript of testimony in this matter will be noted as "Tr." and followed by the appropriate page numbers.

Following the execution of the Recognition Agreement, it was posted in the drivers' room of the Employer's facility with a copy of the Certification issued by Arbitrator Shriftman. The Employer's General Manager, Quinto Rapacioli and Local 707 Business Agent Danny Pacheco both testified about this (Tr. 421, 422, 427, 547, 548).[4]

In addition to posting each of the above notices about Local 707's recognition by the Employer, Pacheco spoke to the employees as they arrived at work in order to keep the employees advised of the status of Local 707's organizing. Shortly after the execution of the Recognition Agreement, Pacheco began telling the employees that Local 707 had been recognized as their Union. He told each employee that he saw that they should start thinking about proposals for when the Union and Employer started collective bargaining. (Tr. 550-552). ALJ Rosas seems to have disregarded Pacheco's description of his discussions with employees because he did not identify which employees he spoke with (ALJD p. 9, l. 30). In fact, however, Pacheco did identify those employees with whom he spoke. He stated, without hesitation, and without contradiction, that following recognition he spoke with every employee he saw and told them of the Union's recognition and that they should start thinking of contract proposals for collective bargaining negotiations (Tr. 547 – 550).

Discussion:

A. The Charges Was Timely

Section 10 (b) of the Act states in pertinent part that : "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge

[4] The ALJ did not credit this testimony by either Rapacioli or Pacheco. Rather he credited testimony of Eric Baumwoll, John Russell and Steven Rebracca. However, an examination of the testimony of these three individuals shows that they could only testify that they did not recall seeing the postings. They could not testify that the postings were not there. Hence, the ALJ's credibility finding on this issue should be overturned.

with the Board and the service of a copy thereof on the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." Thus, Section 10 (b) creates a two- part standard by which the statute of limitations in unfair labor practice cases is measured. First, the underlying charge must be filed within six months of commission of the alleged unfair labor practice. Second, the underlying charge must have been served on the Charged Party within six months of the alleged unfair labor practice. Neither standard has been met in this matter.

Local 707 and the Employer entered into their Recognition Agreement on September 12, 2008. Russell, who was hired by the Employer in October 2008, filed the unfair labor practice charge on March 31, 2009. That charge was served by regular mail upon Local 707 on April 2, 2009. Neither of those dates is within six months of the recognition of Local 707 by MVP.

In order for Russell's charge to be timely, it should have been filed and served no later than March 12, 2009, six months after the date of recognition. There has been no allegation that either Local 707 or the Employer tried to hide the Recognition Agreement from bargaining unit employees. In fact, there was ample testimony elicited at the hearing that immediately after the recognition and continuing at least through the *Dana* posting period, the Employer and Local 707 were completely open about the recognition.[5] Copies of the Arbitrator's Certification and the Recognition Agreement were conspicuously posted in the Drivers' Room at the Employer's facility. A copy of the *Dana* Notice and accompanying correspondence from Region 29 were also posted. Union representative Danny Pacheco spoke to employees about the recognition and asked the employees to prepare demands for collective bargaining.

[5] Russell even testified that he learned about the Union on his first day of employment.

Local 707 submits that ALJ Rosas incorrectly applied the controlling precedent in ruling that the charge in this matter was timely filed. In *Local Lodge No. 1424 v. N.L.R.B. (Bryan Mfg.)*, 362 U.S. 411, 423 (1960), the United States Supreme Court established the standard to be followed in improper recognition cases when it said "the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed, and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis." Thus, it is clear that there can be no valid claim that the allegedly improper recognition created a continuing violation under the Act. The statute of limitations should be measured from September 12, 2008, the date of the allegedly improper recognition.

It is just as clear that employees became aware of the recognition immediately after it occurred. Danny Pacheco testified that he posted the Certification by Arbitrator Shriftman and the Recognition Agreement on or about September 15, 2008 and that he immediately began discussing the recognition with employees. Thus, the latest that the statute of limitations could have commenced running is September 15, 2008, which would make the conclusion of the six month period, March 15, 2008. Even if this date is used, the charge was filed and served in an untimely manner. In *R.J.E. Leasing Corp.,* 262 NLRB 373 (1982) the Board held that the 10 (b) period began to run when employees became aware of the allegedly illegal acts. A similar holding was issued by the Fifth Circuit in *Texas World Serv. Co. v. NLRB,* 928 F. 2d 1426 (5th Cir., 1991). An examination of the record clearly establishes that the bargaining unit employees became aware of the Employer's recognition of Local 707 no later than the middle of September 2008 when Pacheco was advising them that Local 707 was recognized and told them to think about negotiations.

Thus, ALJ Rosa's findings that neither the Employer nor Local 707 kept employees advised of the status of Local 707's organizing and that the underlying unfair labor practice charges were timely filed are clearly erroneous and should be overturned by the Board. The ALJ's reliance upon the posting of the *Dana* Notice, on October 5, 2008, to start the Section 10 (b) period is equally erroneous. There is ample evidence in the record, including the unrebutted testimony of Local 707 Business Agent Pacheco, that the employees knew no later than mid September 2008 that Local 707 had been recognized by MVP. Therefore, since the 10 (b) period begins to run when employees become aware of the recognition, the period would have started no later than mid September 2008. The instant charges were filed on March 31, 2009. They are barred by the statute of limitations. The charges should have been dismissed as untimely.

LOCAL 707 REPRESENTED A MAJORITY OF EMPLOYEES AT THE TIME OF RECOGNITION

The ALJ found that MVP's recognition of Local 707 was improper because at the time of recognition it did not employ a representative segment of its ultimate employee complement and was not yet engaged in normal business operations. Also, ALJ Rosas found that the Employer violated the Act by entering into a Collective Bargaining Agreement with Local 707. (ALJD, p. 21, l. 35-38, 40-43). Then, ALJ Rosa made the companion finding that when Local 707 accepted recognition and entering into the Collective Bargaining Agreement with MVP, it violated the Act (ALJD, p. 21, l. 45-48). In addition, the ALJ directed the Respondents to cease applying their Recognition Agreement, cease applying the terms of the Collective Bargaining Agreement and reimburse employees for dues and initiation fees "involuntarily exacted from them as a result of the unlawful application of the union-security clause in the collective bargaining agreement."

(ALJD, p. 22, l. 12-14, 14-16, 17-21, 37-39, 41-42; p. 23, l. 17-19, 21-24; ALJ Errata p. 2. L. 8-11, 13-15, 26-32). Local 707 respectfully submits that each of these holdings is erroneous and should be overturned by the Board.[6]

In September 2008, when Local 707 and MVP entered into their Recognition Agreement, the employer had 22 bargaining unit employees (GC Ex. 8-b). Since that time, the unit has grown, but there was no showing below that this growth should negate the Respondents' good faith Recognition Agreement and subsequent good faith negotiations that led to the Collective Bargaining Agreement.

When the Employer entered into its contract with the New York City Transit Authority (hereinafter "NYCTA") it had no way of knowing how many routes it would be assigned by the NYCTA. Likewise, it could not tell how many vehicles it would be awarded or how many employees would be needed. The General Counsel introduced no testimony at the hearing which cast any doubt upon this testimony of the Employer's General Manager Quinto Rapacioli.

Rapacioli's un-rebutted testimony was open and candid. He said that even if there was going to be an expansion; there was no way to predict how long it would take (Tr. 321). At the time that MVP was given a contract, RJR (one of its major competitors) was still operating under a contract with the NYCTA on Staten Island. At the time, RJR was operating ninety-seven buses and it was attempting to get its contract renewed. (Tr. 397, 407). It was not until December 2008 that Rapacioli knew for certain that RJR's contract would not be renewed (Tr. 398). If RJR's contract had been renewed by the NYCTA it would have had a negative impact on MVP, which would have been left with routes for only about twenty or thirty buses (Tr. 411).

---

[6] Initially, it is noted that since each of the allegations leading to these findings is based upon the charges that were filed in an untimely manner, the Board will not need to address them after the underlying charges are dismissed as time- barred.

The NYCTA has the freedom of deciding which of seventeen carriers receives the buses or the routes (Tr. 402). The NYCTA is not required to follow the ramp-up schedule in a contract (GC Ex. 20, Attachment 30; Tr. 402). Despite what the contract states, NYCTA could just take buses away from one carrier and give them to another (Tr. 404). There is nothing in MVP's contract with the NYCTA that guarantees the number of routes or that requires the number of drivers at any given time (Tr. 404).

The General Counsel had ample opportunity to subpoena witnesses from the New York City Transit Authority to contradict Rapacioli's testimony. The General Counsel chose not to call any witnesses from the NYCTA and disregarded the testimony of the General Manager. Thus, the only testimony concerning this issue shows that the Employer did not know, when it entered into its Recognition Agreement with Local 707, how big it would grow if at all. It did not know if or when growth might occur or if its competitor on Staten Island (RJR) would have its contract renewed allowing it to continue to service routes with ninety-seven buses. The ALJ erroneously chose to ignore Rapacioli's testimony. Admittedly, the Contract talks about future growth, but there was absolutely no guarantee at the time of the contract's signing that the growth would occur.

To establish whether parties have satisfied the "representative complement" test, the Board takes a two-pronged approach. That is, the Board examines whether the Employer employed a substantial and representative complement of its projected workforce and whether it was engaged in its normal operations. *See New Concept Solutions,* 349 NLRB 1162 (2007). Here, it is clear that the Employer believed it was operating with a substantial and representative complement of employees since it had no guarantees that its business would increase. Likewise,

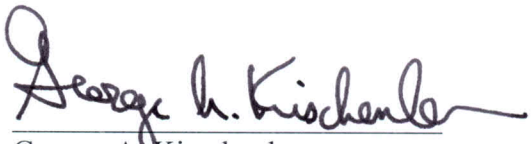
by employing bargaining unit employees, training them to service their customers and allowing them to drive their vehicles, the Employer was engaged in its normal operations.

The ALJ's refusal to consider the testimony of Rapacioli, and his complete disregard of the Employer's explanation of the terms of its contract with the NYCTA, were clearly erroneous. Thus, his findings concerning the representative complement of employees and related issues were likewise erroneous and should be overturned by the Board. The record evidence is clear that at the time that MVP recognized Local 707, it did not know how big, or how quickly it would grow, if at all. When Local 707 demonstrated that it represented a majority of MVP's unit employees, in September 2008, the Employer had to act in good faith and recognize Local 707. It could not legally have delayed recognition by claiming that it might grow into a larger enterprise at some point in the future.

CONCLUSION

Based upon the issues raised in the attached Exceptions to the Decision of the Administrative Law Judge, and the arguments raised herein, Local 707 respectfully submits that the Decision of ALJ Rosas contains erroneous rulings and should be overturned by the Board. Hence, it is respectfully submitted that the Complaint allegations pertaining to Case Nos. 29-CB-13981 and 29-CA-29530 should be dismissed in their entirety.

Respectfully submitted,



George A. Kirschenbaum
Cary Kane LLP
1350 Broadway, Suite 1400
New York, NY 10018
(212) 868-6300
(212) 868-6302
Attorney for Local 707, IBT

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2010 I have caused the foregoing Brief in Support of Exceptions to the Decision of Administrative Law Judge Michael Rosas to be served electronically via the NLRB's e-filing system and further certify that I have caused copies of the foregoing document to be served via electronic mail on the following:

H. Tor Christensen, Esq.
Littler Mendelson PC
1150 17th Street, NW
Washington, DC 20036
TOChristensen@littler.com

Richard A. Brook, Esq.
Meyer, Suozzi, English & Klein
1350 Broadway
New York, NY 10018
rbrook@msek.com

Nancy Lipin, Esq.
Region 29, National Labor Relations Board
Two Metro Tech Center
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201-4201
Nancy.lipin@nlrb.gov

John D. Russell
667 Quincy Avenue
Staten Island, NY 10305
Kmf1313@gmail.com

Eric Baumwoll
63 Ebony Street
Staten Island, NY 10306
easyenyc@msn.com

George A. Kirschenbaum