

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

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

ERIC BAUMWOLL, AN INDIVIDUAL

Case No.: 29-CA-29619

and

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

**LOCAL 707, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

and

Case No. 29-CB-13981

JOHN D. RUSSELL, AN INDIVIDUAL

Date of Mailing: August 11, 2010

**AFFIDAVIT OF SERVICE OF: Counsel for the General Counsel's Answering Brief
in Opposition to Respondents' Exceptions**

I, the undersigned employee of the National Labor Relations Board being duly sworn, depose and say that on the date indicated above, I served the above-entitled document on the following persons at the addresses set forth below, in the manner set forth opposite each recipient:

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Subscribed and sworn to me this 11th day of August, 2010

Designated Agent, National Labor Relations Board

A handwritten signature in black ink, appearing to read "Gary Lipp". The signature is written in a cursive style with a large, looping initial "G".

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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS**

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I. PROCEDURAL HISTORY OF THE CASE

This case was litigated before Administrative Law Judge Michael A. Rosas on December 8 - 10, December 11, 16 and 17, 2009, and January 19, 2010. On June 7, 2010, ALJ Rosas issued his Decision in which he found that Respondent MV Public Transportation, Inc. ("Respondent MV") and Respondent Local 707, International Brotherhood of Teamsters ("Respondent 707") (jointly referred to as Respondents) committed most of the violations alleged in the Complaint.¹ Specifically, ALJ Rosas found that Respondent MV unlawfully recognized Respondent 707 as the collective bargaining representative of certain of its employees at a time when it did not yet employ a representative segment of its ultimate employee complement and it was not engaged in normal business operations. ALJ Rosas likewise found that Respondent 707 unlawfully accepted recognition from Respondent MV under such conditions. Respondents both violated the Act when they unlawfully entered into a collective bargaining agreement covering Respondent MV's employees which contained a union security clause.

ALJ Rosas also found that Respondent MV violated Section 8(a)(1) of the Act when its general manager, Quinto Rapacioli, threatened its employees with discharge for supporting rival union and Charging Party Local 1181, Amalgamated Transit Union, AFL-CIO ("Local 1181") and directed employees not to speak about Local 1181 at Respondent MV's facility. ALJ Rosas further found that Respondent MV violated Section 8(a)(1) of the Act when general manager Rapacioli photographed employees soliciting other employees to support another union (Local 726, International Union of Journeymen and Allied Trades) and directed an employee to retrieve and turn over a

¹ ALJ Rosas did not find that Respondent MV violated the Act, as alleged in the Complaint, by spitting at an employee, threatening to call the police and inflict unspecified harm upon an employee's family. (ALJD at 20).

Local 726 authorization card the employee signed, which Rapacioli proceeded to rip up. Finally, ALJ Rosas found that Respondent MV violated Section 8(a)(1) and (2) of the Act by directing its employees or applicants for employment, as condition of their employment, to sign cards authorizing Respondent 707 to represent them, and by informing employees and applicants for employment that they had to sign cards which authorized that dues be deducted for Respondent 707 in order to be employed.

Respondents except to ALJ Rosas' conclusion that they violated the Act by entering into the recognition agreement on September 12, 2008, and collective bargaining agreement on December 12, 2008. Respondents also except to certain factual findings and credibility resolutions made by ALJ Rosas, which underlie his findings of fact and conclusions of law. Respondents do not except to any of the other Section 8(a)(1) and (2) violations found by ALJ Rosas. Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits its Answering Brief in Response to Respondents' Exceptions.

II. FACTS

ALJ Rosas provided a detailed factual summary in his decision. Counsel for the General Counsel will review the record evidence which is relevant to Respondents' exceptions.

- A. The Record Evidence Supports ALJ Rosas' Finding That Respondent MV Did Not Have a Substantial and Representative Complement of Employees at the Time of the Recognition and It Was Not Engaged in Its Normal Business Operations
 1. Respondent MV Bids on Contract to Operate on Staten Island With a Base of 150 Vehicles

In 2007, the New York City Transit Authority sought bids from para-transit providers to provide para-transit services in Staten Island, New York. (Tr. 394).² Respondent MV and other companies bid for the work, including RJR Paratransit, which had an existing contract to operate on Staten Island. (Tr. 396). Respondent MV submitted various bid documents including, “MV Transportation, Inc.’s Proposal to MTA – New York City Transit for Access-A-Ride,” (the “Proposal”), in evidence in redacted form as GC Ex. 21(a), and in full as rejected exhibit GC Ex. 21. Section V. of the Proposal, “Vehicles” states, “MV’s proposal contemplates the operation of 150 revenue vehicles, expanding to 300 revenue vehicles, to be operated from our proposed facility located at 125 Lake Avenue, Staten Island, NY.” (See GC Ex. 21(a) at 17; Tr. 296, 395). Paragraph d.4. of the Proposal, “Expansion Plan,” states:

MV is proposing to operate 300 vehicles for the Access-A-Ride Service. Our proposed facilities are sufficient to accommodate this size for a fleet, however, we do not expect to start at this level of service.

MV is proposing to start with an approximate 150 vehicle fleet for this project. Our startup plan shows that we believe we can be fully operation[sic] with this starting fleet in approximately three months and we could begin partial operations even earlier.

Once we have stabilized the startup operations, we would then look to start expanding the operation. We believe that a 50 vehicle per year expansion will allow us to add the additional service on the street without impacting existing operations. It is critical that the passengers are only positively affected as the expansions are taking place. This expansion plan offers ample time to proper hiring and training thus ensuring a safe, quality operation.

This expansion plan closely mirrors the MTA expected growth in the Access-A-Ride service over the next few years. By following this plan,

² “Tr.” refers to the official transcript of the hearing; “GC Ex.” refers to the General Counsel’s exhibits; “R. MV Ex.” refers to Respondent MV’s exhibits; “R. 707 Ex.” refers to Respondent 707’s exhibits; “CP Ex.” refers to Local 1181’s exhibits; “J. Ex.” refers to Joint Exhibits; “ALJ Ex.” refers to the Administrative Law Judge’s Exhibits; “ALJD” refers to ALJ Rosas Decision; “R. MV E.” refers to Respondent MV’s Exceptions; “R. MV Br.” refers to Respondent MV’s Brief in Support of Exceptions; “R. 707 E.” refers to Respondent 707’s Exceptions; “R. 707 Br.” refers to Respondent 707’s Brief in Support of Exceptions;

MV would be at the full 300 vehicle operation limit in a three to four year period.

(GC Ex. 21a at 48).

In addition to the Proposal, Respondent MV submitted its Best and Final Offer, which includes its final price proposal (the “Price Proposal”) (GC Ex. 36(a)). According to the BAFO Price Proposal, Respondent MV anticipated operating 150 vehicles initially. Id. at 2. For those 150 vehicles, Respondent MV anticipated having 300 drivers. (See e.g. BAFO Price Proposal at 12 “Driver training: 110 hours – 300 drivers for 150 vehicles. (Payroll, fringe, D/A, physicals)). The BAFO Price Proposal also states under the column heading, “Quality (Number of Employees)” that 237 drivers were projected. (Id. at 15)

The facility which MV proposed using to service the Contract with the NYCTA had 25,000 square feet of office space, 23,000 square feet of maintenance space and 86,000 square feet of parking space with “the capability of supporting the 300 vehicles that we are proposing.” (GC Ex. 21a at 57).

2. Respondent MV Wins Bid and Prepares to Operate

Respondent MV received a letter dated August 29, 2008, from a representative of the NYCTA congratulating it on the award of the Contract and discussing the ramping up of Respondent MV’s service, and the ramping down of the service provided by the other carriers who did not receive contracts. (CP 1181 Ex. 2). On September 5, 2008, the NYCTA issued a Notice of Award/Notice to Proceed³ to Respondent MV, officially

³ The Contract defines the, “Notice of Award” as “a document that apprises the Contractor that this Contract has been approved by the Authority; the “Notice to Proceed” is defined as “a document that directs the Contractor to start work.” (GC Ex. 20, Specific Provisions, Art. 101, A.47 & 48).

awarding it the Staten Island contract. (GC Exs. 20 & 22.) The September 5th Notice of Award, addressed to Respondent MV's Vice-President W.C. Phil, states:

You are hereby notified that your BAFO Price Proposal for Contract No. 07H9751 for Access-A-Ride Paratransit Transportation Service has been accepted by the Authority and the Contract is hereby awarded to your firm in the estimated amount of \$422,066,234.00. The Contract is deemed to be in effect as of the above date.

All invoices are to be submitted in accordance with Article 110, Section C of the Contract. Please reference your Contract No. 07H9751N and Purchase Order No. A2401. Enclosed is a fully executed original Contract for your records.

(GC Ex. 22).⁴

The record evidence shows that the terms of the Contract relating to the size and scope of the operation, which was ultimately awarded, were in line with Respondent MV's proposals to the NYCTA. Pursuant to the Contract, Respondent MV was awarded \$422,066,234.00 to perform para-transit services for a period of ten years. The Contract states that the "base" number of vehicles to be operated by Respondent MV is 150. (GC Ex. 20, Attachment No. 2, Price Schedule). The Contract specifies that once Respondent MV was operating 150 vehicles, the number of vehicles it operated would expand from 150 to 300. Id. Attachment No. 30 to the Contract, "Start Up and Expansion Plan," provides that following the date of the Notice of Award/Notice to Proceed (September 5, 2008):

The contractor shall field the specified Revenue Service within the applicable periods of time set forth below:

Fifteen (15) vehicles within forty-five (45) calendar days from NOA/NTP.

⁴ In its exceptions 5 and 9, Respondent MV asserts that ALJ Rosas erred and was "inappropriate" in finding that the NYCTA Contract was not conditional and was final. However, Respondent MV offered no evidence at trial to rebut the documentary evidence, and offered no support for these exceptions in its brief. (R. MV Br. at 8).

Twenty (20) additional vehicles per month for the first three (3) months after forty-five (45) calendar days from NOA/NTP.

Ten (10) additional vehicles each month thereafter until 150 vehicles is reached.

Expansion Schedule

Expansion:

After completion of initial 150 vehicles, ten (10) additional vehicles per month, until 300 vehicles is reached.

Thus, pursuant to the terms of the Contract, by October 20, 2008, MV would be operating with 15 vehicles, by November 20, 2008, 35 vehicles, by December 20, 2008, 55 vehicles and by January 20, 2009, 75 vehicles. Thereafter, the Contract provides for 10 additional vehicles per month until 150 was reached. After Respondent reached 150 vehicles, 10 additional vehicles per month would be provided to Respondent MV to operate until 300 vehicles was reached. The Contract also incorporates Respondent MV's BAFO (Best and Final Offer). (See GC Ex. 20, General Contract Provisions Article 201, d., Agreement at 1). The Contract makes clear that Respondent MV was bound to perform as prescribed in the Contract. (See e.g. GC Ex. 20, General Contract Provisions, Article 201, "The Contractor agrees to perform the Work in accordance with requirements and terms and provisions hereinafter set forth in the Contract Documents. In consideration for the complete, satisfactory and proper performance thereof by the Contractor, the Authority agrees to pay to the Contractor, and the Contractor agrees to accept as full compensation therefore, the sums of money set forth in the Price Schedule at the time and in the manner and upon the terms and conditions hereinafter set forth in the Contract Documents.) Indeed, by letter dated September 22, 2008, NYCTA Contract Management Officer Michael Cosgrove advised general manager Rapacioli that while Respondent

MV's facility at Richmond Terrace was being completed, the NYCTA expected it to "maintain the ramp up commitment in the BAFO and operate temporarily from 40 LaSalle Street." (GC Ex. 27).

Respondent MV prepared for an expansion of its operations in accordance with the terms of the Contract by creating a "ramp-up" chart. (GC Ex. 28). Rapacioli testified that he prepared this chart when he, "was asked to put together a projected ramp up schedule, so we could be ready to hire people and project how many buses we would receive in order to get to the number specified in the contract." (Tr. 345). Rapacioli prepared the chart in September 2008. (Tr. 348). Rapacioli hand-wrote at the top of the chart, "Contract Requirement." (Tr. 347). The chart shows the following regarding Respondent MV's projections concerning the number of drivers and other employees that would be required to service the NYCTA Contract which it had been awarded⁵:

Date	Buses Assigned	Buses in Service	10% Relief	Total Drivers
8/25/08	0	0	0	0
9/1/08	0	0	0	0
9/8/08	0	0	0	0
9/15/08	2	0	0	0
9/22/08	11	0	0	0
10/1/08	11	8	1	9
10/13/08	11	8	1	15
10/20/08	17	15	2	27
11/17/08	39	35	6	64

⁵ See GC Ex. 28 for complete chart.

12/22/08	61	55	9	100
1/19/09	83	75	12	136
2/16/09	94	85	14	154
3/16/09	105	95	16	172
4/13/09	116	105	17	191
5/11/09	127	115	19	209
6/15/09	138	125	21	227
7/13/09	149	135	22	245
8/10/09	149	135	22	245

Based upon Rapacioli’s calculations, Respondent MV would need 267 drivers to operate 149 vehicles.

3. There is No Credible Record Evidence That Respondent MV’s Contract With the NYCTA Was in Jeopardy at the Time of the Recognition

Respondent MV argues in its exceptions that despite all of its planning and projections, it was “completely unaware of the number of routes or vehicles that would be assigned to it.” (R. MV Br. at 3). (See also R. 707 Br. at 8). Respondent MV argues that because RJR was still operating at the time of the recognition, its prospects were completely unknown. Id. In support of this argument at the hearing, Rapacioli provided hearsay testimony, which was admitted only as background evidence, that he was aware that RJR was making certain efforts to get a contract extension. (Tr. 397). Respondent presented no *evidence*, however, that its Contract with the NYCTA was in jeopardy. (See e.g. Tr. at 46, “There was a rumor that they had no contract and he was trying to get

one.”) The only fact Rapacioli pointed to in support of his position that he did not have any idea what the size of Respondent MV’s operation would be was that, “if you don’t perform right, they might remove vehicles from you.” (Tr. 397). Respondent conveniently ignores the significant documentary evidence which proves that both Respondent MV and the NYCTA fully anticipated that it would be operating with at least 150 vehicles. Indeed, Rapacioli testified that if Respondent MV did not have drivers available when routes were assigned, it would be fined \$500, thereby compelling it to have sufficient numbers of drivers trained and prepared to enter revenue service following the Contract award. (Tr. 401). Moreover, the NYCTA clearly states in its August 29, 2008, letter to Respondent MV, in which it congratulates the company on winning the bid, that as it ramped up, the existing carriers would be ramping down. (ALJD at 5). Thus, Respondents’ reliance on RJR’s having continued to provide service at the time of recognition is utterly disingenuous and ignores the record evidence.

4. Start-Up Hiring, Training and the Recognition

Respondent MV began hiring drivers in late August 2008, and commenced training on or about August 28, 2008. (Tr. 400). Current employee driver Stephen Rebracca testified, pursuant to a subpoena *ad testificandum* from Counsel for the General Counsel, that when he started working for Respondent MV on August 28, 2008, there were 22 other driver trainees in the first training class. (Tr. 208). From late August of 2008 until October 1, 2008, the first class of drivers was being trained, tested and certified. (Tr. 210-212). As part of the training process, trainees watched safety videos, practiced driving on the road with trainers, received classroom instruction, took various tests, including an examination to become “19A” certified by the NYCTA. Id. As found

by ALJ Rosas, on the date of recognition, trainees were still in classroom training and had not yet received training operating vehicles at the LaSalle Street facility where drivers would ultimately work. (ALJD at 16). Once drivers became “19A” certified, the NYCTA issued drivers ID numbers and they were then eligible to go out on the road. (Tr. 210-212). Rapacioli testified that the NYCTA required 80 hours of training per driver, but Respondent MV required its drivers to go through 96 hours of training. (Tr. 399). Rapacioli testified that in every class of trainees there would be some who did not complete the training (Tr. 456-457) and there is high turnover. (Tr. 401). Rapacioli also testified that there were very few drivers who started at Respondent MV with experience. (Tr. 399).

Rebracca testified that on the first day of class, which was prior to the issuance of the Notice of Award, several representatives of Respondent 707, including Danny Pacheco, met the new employees at the gate to Respondent MV’s 125 Lake Avenue, Staten Island facility. (Tr. 207). The Respondent 707 representatives asked the trainees to sign cards and some of the trainees returned signed cards to those representatives.⁶ (Tr. 208).

On the same day that employees first started training classes, August 28, 2008, Respondents executed a document entitled “Card Check and Neutrality agreement for Staten Island, New York.” (Joint Ex. 3). The Agreement provides, among other things, that upon a showing of majority status in a unit of, “full-time and regular part-time drivers in Staten Island, NY, excluding warehouse employees, mechanics and similar maintenance employees...” Respondent MV would recognize Respondent 707. (Id.).

⁶ Rapacioli testified on direct examination that [he] “was informed by my company that we have an agreement with the Union and that they will come to the front, you know, when in front of the place and attempt to sign up drivers.” (Tr. 417).

On September 8, 2008, just three days after the NYCTA awarded the Staten Island Contract to Respondent MV, Respondent 707's president, Kevin McCaffrey, by letter dated September 8, 2008, advised Respondent MV that it believed that it had "majority status" and requested a card check pursuant to the parties' card check agreement. (GC Ex. 19). On September 11, 2008, arbitrator Elliot D. Shriftman, Esq. issued a, "Certification of Results of Card Check and Count" (the "Certification"). The Certification states that the arbitrator reviewed twenty Local 707 authorization cards signed by employees in the unit of drivers excluding all other employees, which consisted of twenty-two employees, and that based upon payroll during the payroll period ending September 13, 2008, Respondent 707, "was designated by a majority of the Employer's employees in the Unit as their representative for purposes of collective bargaining." (GC Ex. 8b).

The next day, September 12, 2008, Respondents entered into a Recognition Agreement which provides that, based upon Arbitrator Shriftman's Certification, Respondent MV recognizes Respondent 707 as, "the exclusive representative for the purposes of collective bargaining of all the Employer's full time and regular part time drivers in Staten Island, NY but excluding warehouse employees, mechanics and similar maintenance employees, office clerical employees, managerial employees, guards and supervisors as defined in the [Act]." (J. Ex. 2).

ALJ Rosas properly found that the September 12, 2008 recognition was premature. Respondent MV was not yet engaged in normal operations, namely, driving disabled and elderly clients to appointments within New York City. The record evidence is clear that Respondent MV did not provide Access-A-Ride services to the public until

October 1, 2008. The record evidence is also clear that at the time of the recognition, as set forth infra, it did not employ a representative segment of its anticipated or actual full employee complement.

5. Respondent MV Commences Normal Business Operations

Respondents both except to ALJ Rosas factual finding that Respondent MV was not engaged in normal business operations when it recognized Respondent 707.⁷ As set forth below, there is abundant evidence supporting ALJ Rosas' conclusion.

The record evidence is undisputed that Respondent MV began operating vehicles pursuant to its Contract on October 1, 2008. (GC Ex. 23) In an email dated September 29, 2008, from NYCTA representative Edward Loy, to members of Respondent MV's management, including Rapacioli, Loy states, "We would like to welcome [Respondent MV] as one of our new Carrier (sic). [Respondent MV] will be operating eight (8) routes effective, Wednesday, October 1, 2008 for Weekday Ramp-Up. These routes will operate four (4) Vans and four (4) Sedans, which are on the attached matrix and as follows....." (GC Ex. 25.)

Respondent MV issued a press release on October 6, 2008, which states, in part:

MV Public Transportation, Inc. -- chosen by the New York Metropolitan Transit Authority to manage and operate paratransit services for Staten Island -- has successfully begun operation of the Access-A-Ride paratransit services in the borough.

In less than 30 days from contract signing, MV placed a strong team in position, and transitioned into the service. Under the terms of the 10-year contract, MV began providing service on October 1 with 11 vehicles on eight routes.

⁷ (R. MV E. #6; R. 707 E. #4).

(GC Ex. 23). (See also testimony of Stephen Rebracca at Tr. 212). Thus, there is no dispute that on September 12, 2008, Respondent MV was only engaged in training and start-up activities.

6. Respondent MV's Employee Complement Rises Quickly Following the September 12, 2008 Recognition

a. ALJ Rosas Properly Drew an Adverse Inference Against Respondent MV Regarding Respondent MV's Payroll Records

Prior to the hearing, Counsel for the General Counsel issued subpoena *duces tecum* B-628232, which requested information, including but not limited to, payroll records as would show all employees employed by Respondent MV at its Staten Island facility from the commencement of operations to the present, their dates of hire, number of hours worked and job classifications. At the hearing, Respondent MV produced certain payroll records, which are in evidence as GC Ex. 31. However, when it would not stipulate to their authenticity (ALJ Ex. 3 at 2), the General Counsel called Respondent MV's custodian of records Rapacioli, to authenticate the payroll records, as well as other documents produced by Respondent MV in response to General Counsel's subpoenas. Counsel for the General Counsel questioned Rapacioli about the payroll records, and the meaning of certain codes used in those records to designate various job classifications. Rapacioli testified that he would not swear to the accuracy of the records, and that certain dates, including hire dates, contained in the records were wrong. (Tr. 350, 447; ALJ Ex. 3 at 2).

As a result of Rapacioli's testimony, and Respondent MV's refusal to stipulate to the authenticity of its own payroll records, Counsel for the General Counsel requested a

subpoena *duces tecum* seeking additional records relating to the number of employees employed by Respondent MV from August of 2008 until the present. (TR. 475-477). ALJ Rosas granted General Counsel's request to subpoena certain documents, namely I-9 forms and remittance reports, from the commencement of operations until July 31, 2009. (Tr. 488, 492). Judge Rosas denied General Counsel's request for other documents. Respondent MV filed a Motion to Revoke the subpoena seeking I-9 records, and ALJ Rosas denied this Motion. (ALJ Ex. 3). In his Order denying Respondent MV's Motion to Revoke, ALJ Rosas stated that the information sought by General Counsel was relevant to Respondent MV's "employee complement from its commencement of operations through July 31, 2009." *Id.* The ALJ stated, "Moreover, under circumstances where MV has created an issue as to the reliability of its own payroll records, it is not unduly burdensome to require it to produce additional documentation indicating when employees begin working on MV's Staten Island contract." (ALJ Ex. 3 at 3).

The subpoena was returnable on January 19, 2010, the final date of hearing. On January 11, 2010, prior to the return date, counsel for Respondent MV sent a letter to Counsel for the General Counsel, stating that it would not provide the I-9 forms which the ALJ ordered it to produce. (ALJ Ex. 4 at 3). Instead, Respondent MV produced a compilation of payroll data, which it claimed was "prepared from several different sources." (ALJ Ex. 4). Because Respondent MV stated it would not comply with the subpoena, on January 13, 2010, Counsel for the General Counsel requested a postponement of the hearing to seek enforcement of the subpoena in United States District Court. *Id.* ALJ Rosas denied Counsel for the General Counsel's request for a postponement, and the hearing resumed on January 19, 2010. On the final day of hearing

on January 19th, Judge Rosas gave Respondent MV another opportunity to produce the subpoenaed I-9 forms. Respondent MV refused to do so. (ALJD at 3). ALJ Rosas stated at the conclusion of the hearing that he was in a position to draw adverse inferences based on Respondent MV's refusal to comply with a subpoena, and that Counsel for the General Counsel should set forth in her brief to the ALJ those inferences she sought. (Tr. 775).

Counsel for the General Counsel sought the following inferences with respect to the payroll records in evidence, GC Exs. 30 and 31: 1. that the records are accurate in all respects, including hire dates, except to the extent that there is reliable record evidence demonstrating that they are incorrect in some respect; 2. that if the I-9 forms had been produced they would not support any claim relating to employee complement made by Respondent MV; and, 3. that General Counsel be granted the most advantageous inference which can be made where there is uncertainty in the records. ALJ Rosas granted Counsel for the General Counsel's request for adverse inferences in the following respects: 1. the payroll information produced would be deemed accurate as to hiring dates, hours worked, job classifications, and all other information contained therein, except where reliable evidence indicates otherwise; and 2. to the extent that any such information is uncertain, an inference would be drawn in favor of the General Counsel. (ALJD at 3).

Such inferences are appropriate given the fact that, when confronted with payroll records damaging to its position, Respondent MV incredibly attempted to inject ambiguity into their authenticity, and then, when faced with a subsequent subpoena compelling production of other records (I-9 Forms), which would furnish the same kind

of information, simply refused to produce them, despite being ordered to do so by the ALJ. See e.g. Paint America Services, Inc., 353 NLRB No. 100 (2009) (adverse inference that subpoenaed documents if produced would be unfavorable to subpoenaed respondent was granted where respondent refused to produce responsive documents). Board law permitting an adverse inference to be drawn against a party is particularly applicable to one such as Respondent MV, which seeks to avoid the truth first through obfuscation and then through outright refusal to turn over relevant documents.

Astonishingly, in complaining that the ALJ drew an improper adverse inference regarding the payroll records (R. MV E. #1, 2), Respondent MV completely ignores its bold refusal to comply with the ALJ's order that it produce original records -- not summaries or compilations -- which was sought by Counsel for the General Counsel and granted by the ALJ to clarify any ambiguities in the payroll records resulting from Rapacioli's testimony. (R. MV Br. at 9-10). Respondent MV also makes much of the fact that it produced numerous other documents, which contained employee complement data. However, the General Counsel is not obligated to simply rely upon such summaries without being given an opportunity to examine the documents from which they were procured. See FEDERAL RULES OF EVIDENCE, Rule 1006. Moreover, despite what Respondent MV represents in its brief (R. MV E. #3; R. MV Br. at 10), the ALJ did not discredit all of Rapacioli's testimony as a result of his testimony regarding the payroll records. The judge simply found his credibility diminished. (ALJD at 2, n.2).

b. Payroll Records

According to the September 11, 2008, Certification, there were 22 Unit employees on the payroll when Respondent MV extended recognition to Respondent 707.

The record evidence is that drivers were classified under the “job code” 610 on the first set of payroll records. (GC Ex. 31). When drivers are in training, under the column, “earnings” the designations “reg trng” or “ovt trng” appear. Beginning with the payroll record with a check date of September 26, 2008, trainee drivers are classified under job code 156610. (Tr. 352). On the first set of payroll records only drivers designated as being in “reg trng” under the earnings column, are classified under the regular driver job code of 610. The payroll records reflect the following regarding the rise of the employee complement:

<u>Check Date</u>	<u>Drivers</u>	<u>Mechanic/Utility</u>
9/12/08	18	n/a
9/26/08	42	n/a
10/10/08	79 (55 working by 10/2/08)	n/a
10/24/08	97	n/a
11/7/08	125	n/a
11/21/08	119	n/a
12/5/08	133	n/a
12/19/08	144 (130 working by 12/12/08 -- see 1/2/09 payroll)	12 (9 working by 12/12/08 - see 1/2/09 payroll)

It is important to note that on the payroll records for check date **September 12, 2008**, there are 17 or 18 drivers who were hired prior to September 12, 2008: Jamelia Alleyne, Ronald Bertinelli, Arleen Crupi, Jose David, Maria Del Valle Osman, Christopher Dotts, Anthony Giambrone, Margaret Hicks, Elizabeth Kelly, Anthony King, Ronald Meisels, Anthony Miceli, Michael Murphy, Anthony Palamara, Alexander Peter,

Stephen Rebracca, Moses Roberts and Syed Ali. Michael Murphy appears with the pay code for drivers, "610," but is paid \$7.50 more per hour, and on the next set of records is classified as a road supervisor, thus an inference should be drawn that he was not a driver in training during this period of time, but was a supervisor. All of these drivers were designated as being in training during this payroll period. By the next payroll period, with a check date of **September 26, 2008**, four employees who were on the first payroll record as employed prior to September 12, 2008 -- Dotts, Giambrone, Miceli and Peter -- were no longer employed, and Michael Murphy was classified as a road supervisor. Again, all drivers during this payroll period were still designated as being in training. By the payroll with a check date of **October 10, 2008**, two more employees who were on the first payroll record as employed prior to September 12, 2008, were no longer employed -- Robert Meisels and Margaret Hicks -- and one employee, Jamelia Alleyne, was working as a dispatcher. By the payroll with a check date of **October 24, 2008**, one more employee -- Anthony King -- who was on the first payroll record as employed prior to September 12, 2008, was no longer employed. By the payroll with a check date of **November 7, 2008**, one more employee -- Elizabeth Kelly -- who was on the first payroll record as employed prior to September 12, 2008, was no longer employed. By the payroll with a check date of **November 21, 2008**, two more employees -- Arleen Crupi and Anthony King -- who were on the first payroll record as employed prior to September 12, 2008, were no longer employed. Thus, of the 17 or 18 employees on the first set of payroll records, by the payroll with a check date of **December 19, 2008**, only six (not including Michael Murphy) are still on the payroll, one of whom (Jamelia Alleyne) was working in a non-Unit position as of the payroll period with an ending

date of October 10th. Thus, out of the roughly 156 Unit employees employed at the time of the execution of the collection bargaining agreement, and out of the 309 employees employed by the end of November 2009, only six employees were given a voice in deciding whether they wanted Respondent 707 to represent them.

From mid-December 2008, when the collective bargaining agreement was executed, through November 2009, the Unit continued to grow:

<u>Date</u>	<u>Drivers</u>	<u>Mechanics/Utility</u>
1/2/09	164	13
1/16/09	188	15
1/30/09	212	16
2/28/09 ⁸	253	26
3/31/09	235	26
4/30/09	237	27
5/31/09	240	29
6/30/09	249	29
7/31/09	269	29
8/31/09	257	29
9/30/09	266	29
10/31/09	279	28
11/30/09	280	29

⁸ The records reflecting Respondent MV's February through November 2009 payroll calculate the number of employees employed in the two pay periods for each month together, rather than separately for each pay period.

In addition, Respondent MV was operating at least 160 shifts by mid-January 2009. (GC Ex. 4). The record evidence shows that vehicles were assigned to Respondent MV in line with the projections outlined by General Manager Rapacioli in his ramp-up chart. (See GC Ex. 24 and 28).

B. The Record Evidence Supports ALJ Rosas' Finding That Employees Employed by Respondent MV Learned of the Recognition No Earlier Than October 5, 2008

Respondents have both excepted to ALJ Rosas' finding that that the unlawful recognition allegations in the Complaint are not time barred.⁹ Specifically, Respondents argue that following the recognition on September 12, 2008, employees were immediately informed of the recognition by "postings" in the drivers' room and by Respondent 707 business agent Pacheco. (R. MV Br. at 12; R. 707 Br. at 6). As found by ALJ Rosas, however, Section 10(b) did not begin to run on the unlawful recognition charges filed by Charging Party Russell (29-CA-29530 and 29-CB-13981) until a substantial and representative complement was employed by Respondent MV, or in the alternative on October 5, 2008, when, as credited by ALJ Rosas, general manager Rapacioli testified that he posted the Dana Notice.¹⁰ (See ALJD at 19). As ALJ Rosas found, the record evidence does not establish that notices regarding the recognition were posted in September 2008 or, if they were posted, that they were posted in such a way that they were apparent to Unit employees. The testimony presented by Respondents' witnesses on this issue -- two managers currently employed by Respondent MV (Rapacioli and dispatch manager Anthony Ranieri), Respondent 707 business agent

⁹ (R. MV E. #10,11,12, 14; R. 707 E. #1, 2, 3).

¹⁰ Respondent MV incorrectly states in its Exceptions that ALJ Rosas found that it did not post the Dana notice. (R. MV E. #10). Moreover, complying with the Dana procedures has no bearing on the lawfulness of the underlying recognition, as Respondent MV suggests. (R. MV Br. at 7, n.3).

Danny Pacheco and current employee Maria Del Valle Osman -- is ambiguous and inconsistent. Respondents have the burden of proving this affirmative defense, and they have not done so.

For example, both Danny Pacheco and Rapacioli testified that following the execution of the Recognition Agreement, they *both* were the individuals who posted the Certification (GC Ex. 8(b)). Rapacioli testified that in late September 2008 (Rapacioli testified that it was towards the “late, late September. I’m confused with the date. I’m not sure if it was 15, 20, whatever, but it was late September), after the recognition,” he posted a bulletin board in the driver’s room at the LaSalle Street trailer. (Tr. 420-421). On the bulletin board he testified that he posted: 1. a handwritten sign that Respondent 707 was representing “all hourly paid employees”¹¹; and 2. the certification (GC 8(b)). He also testified that he posted the Dana Notice on October 5, 2008. (Tr. 423). Rapacioli testified regarding the bulletin board and the drivers’ room where he posted these and other notices that:

I tried to keep that room as organized as possible. I used to visit once in a while. I also had a bulletin board. I had another bulletin board. I had a tape designated where bulletins should be and the information should be, but it was out of control. Everybody put own, their own stuff up, including some driver’s notices, or trips, and all that. So there was paper all over the place. I didn’t like it, but that’s the way it was.

(Tr. 421). After Rapacioli was questioned by counsel, Judge Rosas asked the following questions, and Rapacioli provided the following answers:

ALJ Rosas: Okay. I just have one question, sir, about the bulletin board. You were initially asked by your attorney about the bulletin board, that you observed when it went up, that papers were out of control on the bulletin board, do you recall—

¹¹ Respondent MV did not introduce in evidence the handwritten letter regarding the recognition about which Rapacioli testified. Moreover, if this was the message written on the letter it would not be correct because Respondent 707 had been recognized only as the representative of the drivers.

A.: Not on the bulletin board. Around the room.

ALJ Rosas: Around the room?

A: Around the walls in the room.

ALJ Rosas: When you say around the walls in the room, were they on the other bulletin boards or just on the wall.

A: No, they were on the wall. We didn't have that many, had one bulletin – two bulletin boards. When the bulletin board becomes kind of crowded, people stop putting tape and notice in other place. I designated another area, use the tape, say, hey we put them in here, we don't put them all over the place. But that you don't know how to place or you couldn't want next to it.

(Tr. 462-462).

Respondent 707 business agent Pacheco testified that following the recognition, *he* was the one who posted the Certification on the wall in the drivers' room at the LaSalle Street facility, "by the wall bulletin board," where there were "a lot of papers. (Tr. 547, 571). Pacheco also testified that he posted the Recognition Agreement (Tr. 548; J. Ex. 2), as well as a Region 29 docket letter (issued in 29-VR-13) dated September 18, 2008 (GC Ex. 13) on the wall in the drivers' room. (Tr. 549). In a position statement dated August 4, 2009, to the Board in support of its position that a notice was posted regarding the recognition, Respondent 707 states that it believed the September 18, 2008, docket letter from Region 29 was posted in the drivers' room, without stating that any other documents were posted. The only reference to Respondent 707 in this general docket letter from Region 29 is under the "cc" at the bottom of the page. The letter acknowledges that the Region was notified of a voluntary recognition, without indicating who the parties are or the unit at issue. It also requests certain information and provides the name of the Board agent assigned to the case. The letter is not addressed to or cc'd to any employees. (GC Ex. 34).¹²

¹² The Board has held that position statements submitted in the course of an unfair labor practice investigation are admissible. In Re. Roman, Inc., 338 NLRB 234 (2001).

Despite the fact that after Rapacioli testified, Pacheco testified that he too posted GC Ex. 8(b), he also testified that he did not see two copies of this document posted. (Tr. 573). Pacheco testified that he also spoke with employees who began working after the recognition took place and told them about the recognition. Pacheco did not testify as to which employees he spoke with, and Osman was the only other employee witness employed in September 2008, who testified that she spoke with Pacheco about the recognition at that time. Osman's testimony should not be relied upon on this, or any other disputed factual matter for the reasons set forth infra.

Thus, ALJ Rosas found that documents relating to the recognition were not posted in the drivers' room outside the 10(b) period and, if any such documents were posted, they would not have been reasonably visible to employees in September 2008. (ALJD at 9-10). Indeed, General Counsel's witness Stephen Rebracca, who is a current employee testifying pursuant to the General Counsel's subpoena *ad testificandum*, was in the first class of trainees, beginning his training session on August 28, 2008. (Tr. 206). Rebracca testified that he signed a card for Respondent 707 shortly after he started on August 28, 2008, but he didn't "know what the outcome was of it." (Tr. 215). He testified that he first went to the 40 LaSalle Street facility in around the third or fourth week of September 2008. He testified that at that time he did not recall seeing *anything* posted relating to *any* union in the driver's room at 40 LaSalle Street. (Tr. 214). Rebracca testified that he did see other posters posted at that time in the driver's room, such as safety posters and newsletters, which were posted "almost every other day." (Tr. 214-215). He testified that he "had to look at the board almost every day to see what – you know, to get yourself updated. And this trailer was very small, and it was very tightly spaced." (Tr. 214-215).

Asked on direct examination if he looked at the board to get himself updated, Rebracca testified, "Yes, I did, as much as I could." (Tr. 215). Rebracca testified as follows regarding when he ultimately learned about the recognition:

Q. Directing your attention to October of 2008, did anyone ever tell you whether the union got in, Local 707 of the Teamsters?

A. Not at that time, no.

Q. Did you know?

A. No.

Q. Any other time whether Local 707 of the Teamsters was the representative at MV?

A. Yeah, the early part of November, I heard through drivers that they were going to be our union.

Q. Did any managers tell you that?

A. Not that I can recall, no.

(Tr. 215). Rebracca was shown GC Ex. 8(b) and GC Ex. 13, and testified that he did not recall seeing either document posted in the driver's room.¹³ Employees Muniz, Russell and Eric Baumwoll also testified that when they started working out of the 40 LaSalle Street trailer, they did not see those documents posted either. (Tr. 89-90; 143-144; 215-216; 223).

Witness Maria Del Valle Osman, presented by Respondent 707, was the only other witness employed in the Unit in September of 2008 who testified regarding whether anything regarding the recognition was posted at the LaSalle Street trailer in September of 2008. Respondent MV excepts to ALJ Rosas' failure to credit Osman's testimony. (R. MV E. #4). Osman testified that her first day of training was August 27, 2008, and that in mid-September 2008 she became aware that Respondent MV "employees" were

¹³ Respondent MV creates evidence out of whole cloth when it states that in September 2008 Rebracca "knew that a voluntary recognition agreement was imminent." (R. MV. Br. at 13). The transcript sections to which it cites (pages 207-208) reflect only Rebracca's testimony that 707 representatives told him that if "a majority of the people wanted them as a union to represent us they would" and that he did not know what the outcome of it was. (Tr. 208). Its reference to witness Nilda Muniz having become aware of the recognition in September 2008 (R. MV Br. at 13) is another creation of Respondent MV as Ms. Muniz did not begin working until October 6, 2008. (Tr. 228).

represented by Respondent 707. (Tr. 583). On direct examination, she testified that she saw the Certification (GC Ex. 8(b)) posted in the drivers' room at the LaSalle Street trailer on "maybe the 18th." (Tr. 584). She then testified that she saw GC Ex. 13 on the same bulletin board where she saw GC Ex. 8(b), in mid-September, "I would say around the 18th." (Tr. 565, 585). Finally, she testified that she saw the Dana notice (R. MV Ex. 8) on the bulletin board in the drivers' room at the end of September, early October. (Tr. 586). She also testified that she spoke with Respondent 707's business agent Pacheco in the first few weeks of her employment about the recognition. (Tr. 586-587). For numerous reasons, Ms. Osman's testimony should not to be credited.

After answering all the questions put to her by counsel for Respondent 707 on direct examination, shortly after Counsel for the General Counsel began questioning Osman, she refused to answer any questions, citing her "Fifth Amendment rights." (Tr. 597). Counsel for the General Counsel asked her if she understood that she took an oath to tell the truth in the proceeding, and Osman testified that she understood that. (Tr. 598). When asked by Counsel for the General Counsel whether she was going to continue to answer questions and tell the truth, Osman answered, "I...at this point, I don't wish to do that." (Tr. 598).

Osman was excused, and after discussion between Counsel for the parties and the ALJ, Judge Rosas called Osman to the witness stand and thoroughly explained the concept of invoking the Fifth Amendment. Following this explanation, Judge Rosas asked her if she continued to believe that by testifying her right against self-incrimination would be violated. She said yes. (Tr. 608). Only after Osman was permitted to speak

with counsel for Respondent 707 privately, did she agree to answer questions from Counsel for the General Counsel on cross-examination. (Tr. 610).

Osman testified prior to invoking the Fifth Amendment, that on November 12, 2009, she signed a statement, which was hand-written by counsel for Respondent MV Tor Christensen (Tr. 593-594), which states that “in September, 2008, approximately the 18th, I remember seeing the letter dated September 18, 2008 from Regional Director Alvin Blyer posted on the bulletin board in the trailer at the LaSalle Street location[.]” (R. Ex. 707-1). R. Ex. 707-1 also states, “I also remember the Certification of Card Check posted at the same time.” Id. Osman testified that while Respondent MV’s counsel was writing out the statement for her to sign, Danny Pacheco was either in the same room or nearby. (Tr. 594, 596).¹⁴ After she agreed to continue to testify after invoking the Fifth Amendment, she was asked on cross-examination how in November 2009, she remembered the date on which she saw these documents over a year earlier, Osman testified that she remembered the date was the 18th because there was a document with that date on it. (Tr. 617-618). Osman also testified that prior to signing R. Ex. 707-1, which Mr. Christensen wrote out for her, Christensen showed her the documents about which she testified, and then asked her whether she had seen them. (Tr. 614-615). She also testified that in November 2009, Mr. Christensen showed her three documents (GC Ex. 8(b), GC Ex. 13 and the Dana notice, R. MV Ex. 8), that she told him she had seen all three posted, but he only included two of the documents (GC Ex. 8(b) and 13) in the statement which she signed. (Tr. 625). Curiously, Osman changed her story when questioned by counsel for Local 1181, and said that in November 2009, when Mr.

¹⁴ Osman testified that when Christensen wrote out the statement which she signed, she knew that he was the attorney for Respondent MV. (Tr. 612).

Christensen questioned her about the documents posted in the drivers' room, first she described the documents to Christensen from memory, and then he showed her the documents. (Tr. 631-632).

Osman testified that prior to her testifying, she had not spoken to any other employees about what she was going to testify about or about the statement she signed. She also testified that she never told anyone she would get a raise or more hours as a result of her testifying or giving a statement. (R. MV Ex. 707-1; Tr. 619).

John Russell, whose testimony was consistent and credible through direct and cross-examination, testified on rebuttal that after he received a copy of R. Ex. 707-1¹⁵, he asked Osman why she was testifying for Respondent MV since she had been on "their" side the whole time. (Tr. 726). Osman denied to Russell that she had signed any documents. (Tr. 729). Russell testified that Osman said that:

[T]hey had her up in the office, and the -- with Quinto and the lawyers. And she said she never signed anything to say she was testifying. And she said I'm going to go talk to them. That I'm going to withdraw anything, and tell them they weren't allowed to, you know, put my name on the piece of paper -- the documents that I received in the mail.

Q. Did you say anything after she said that?

A. I asked her did the company offer you anything to testify? And she said yes, the company did offer her money and more hours.

Q. Okay. And did you say anything after that?

.....

A. I said you need to tell somebody. You need to either call National Labor Relations Board or, you know, if you do testify on your own behalf. Or you need to tell the judge what has happened. And I mean I can't force you into doing anything, you know, it's up to you. And I pretty much ended the conversation. (Tr. 730-731).

¹⁵ Osman's written statement, in evidence as R. Ex. 1, is attached to Respondent MV's second motion to dismiss and/or for summary judgment. As a party to these matters, Russell received copies of all pleadings and motions.

Thus, Respondent MV's charge that ALJ Rosas demonstrated bias in the case (R. MV Br. at 5, n.2.) by discrediting this witness is hard to fathom. Moreover, Respondent MV's claim that ALJ Rosas drew "all inferences against Respondent and in favor General Counsel" misrepresents ALJ Rosas's Decision. He only drew an adverse inference in favor of General Counsel with respect to any payroll information which was uncertain. (ALJD at 3) as a result of its refusal to comply with a subpoena duces tecum.

Respondent MV also presented the testimony of dispatch manager Anthony Ranieri to testify concerning postings he saw. Ranieri testified on direct examination that in September 2008, when he worked in the LaSalle Street trailer, there were 20 to 25 notices posted on the walls of the trailer. Of those notices, he testified that he remembered that the Certification was posted at the end of September 2008. (Tr. 518-19). On cross-examination, however, Ranieri testimony was inconsistent, vague and confused. When asked whether he had previously given any statements, he denied it. When confronted with a statement which he signed in August 2009 regarding the postings, he changed his testimony, and said he did. (Tr. 524). He testified that a company lawyer asked him to give the statement, but he did not know which lawyer, and he did not know if it was Mr. Christensen, who was sitting less than ten feet from him. (Tr. 525). Frustrated by the questioning as to whether he recalled the name of the lawyer Ranieri testified, "No, if my boss asks me to do something, I do so." (Tr. 525). Questioned again about the statement he signed in August of 2009, in which he stated that he recalled seeing a letter posted in the drivers' room which said that the Teamsters represented the drivers and the mechanics, he testified that he recalled that's what the

letter said. (Tr. 527-528). As set forth above, the Certification about which Ranieri testified on direct does not refer to mechanics.

There is thus ample evidence to support ALJ Rosas' credibility determinations with respect to the testimony of witnesses Maria Del Valle Osman, Anthony Ranieri, Daniel Pacheco and Quinto Rapacioli regarding any notice of the recognition posted in September 2008.

III. ANALYSIS

A. ALJ Rosas Correctly Found That Respondents Violated the Act by Entering Into The Recognition Agreement on September 12, 2008 and Executing a Collective Bargaining Agreement Containing a Union Security Clause on December 12, 2008.

1. The Record Evidence Supports ALJ Rosas' Conclusion that Respondent MV Was Not in its Normal Business Operations and Did Not Employ a Substantial and Representative Complement of Employees When it Recognized Respondent 707 as the Collective Bargaining Representative of its Drivers

The Board in Elmhurst Care Center, 345 NLRB 1176, 1177 (2005), held that:

Where a newly opened business has granted recognition, an issue concerning the timing of recognition can arise. The Board has long balanced competing interests in these cases. On the one hand, the Board seeks to vindicate the right of those employees, already employed, to engage in collective bargaining should they so choose. On the other hand, the Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated full complement of the unit employees -- all of whom will be bound, at least initially by the choice of those who were hired before them.

Where an employer prematurely recognizes a union it is, "improperly precommitting the unhired great majority of employees to a bargaining representative in whose selection this majority had no voice." Lianco Container Corp., 173 NLRB 1444, 1448 (1969).

In determining whether recognition is premature, the Board relies on the following rule:

At the time of recognition (1) an employer must employ a substantial and representative complement of its projected workforce, that is, the jobs or job classifications designated for the operation must be substantially filled, and (2) the employer must be engaged in normal business operations. The Board has not established any mathematical formula or any per se rule for resolving the issue of premature recognition but has evaluated the facts in each case to decide whether employees realistically have had an opportunity to select a bargaining representative.

Elmhurst Care Center, 345 NLRB 1176, 1184 (2005)(where the ALJ with Board approval relied upon Hilton Inn Albany, 270 NLRB 1364, 1365 (1984)). If either one of these prongs is not met, the recognition is premature. Neither prong was met here.

a. The Record Evidence Supports ALJ Rosas' Conclusion That Respondent MV Recognized Respondent 707 When It Was Not in Normal Business Operations

Respondents challenges ALJ Rosas' finding that when the recognition took place, Respondent MV was not engaged in its normal business operations. (R. MV Br. at 9; ALJD at 15-16). Respondents argue that at the time of recognition, employees were engaged in training for the activities which they would perform after their training was completed, namely, driving Access-A-Ride vehicles. (R. MV Br. at 9; R. 707 Br. at 10).

It is well-established that employers may not voluntarily recognize a union before it is engaged in its normal business operations. Hilton Inn Albany, 270 NLRB at 1366 (1984). An employer is not in "normal business operations" when its employees are engaged solely in training for the "principal duties of their positions," and are preparing to engage in the business of the employer. Elmhurst Care Center, 345 NLRB at 1177-78

(nursing home not in normal business operations when no residents had yet been admitted). See Hilton Inn Albany, 270 NLRB 1366 (hotel not in normal business operations when not yet open to the public).

It is undisputed that Respondent MV did not begin providing Access-A-Ride services to the public from its location on Staten Island until October 1, 2008. (See GC Exs. 23, 25, 26; Tr. 212). Respondent MV's September 12, 2008, recognition of Respondent 707 was premature inasmuch as the Unit employees were engaged solely in training activities at that time. See e.g. Elmhurst at 1177 (Board held that at time of recognition employer was engaged in "preparation for the opening of the facility not normal business operations."); Dedicated Services, Inc., 352 NLRB 753,762 (2008) (employer not in normal business operations when its employees were training to provide Access-A-Ride services, but were not actually doing so at the time of recognition.) Indeed, ALJ Rosas found, contrary to Respondent MV's assertions with no record citations, that on the date of recognition, they were still in classroom training and had not yet received training operating vehicles at the LaSalle Street facility. (ALJD at 16; R. MV Br. at 9). Thus, on September 12, 2008, they were not doing the principal work of Respondent MV, that is, driving disabled and elderly clients to appointments within New York City, and the ALJ's findings in this regard were well-supported and should stand.

b. The Record Evidence Supports ALJ Rosas' Conclusion That Respondent MV Recognized Respondent 707 Before It Hired A Substantial and Representative Complement of Its Projected Workforce

The Board looks to General Extrusion, 121 NLRB 1165 (1958), a representation case, for guidance in unfair labor practice cases involving premature recognition where

the question is whether a representative complement of employees was employed at the time of recognition. Hilton Inn Albany, 270 NLRB 1364, 1365, n.10 (1984). In General Extrusion, the Board held that, “if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed,” the collective bargaining agreement will bar the representation election. Id. The Board uses the General Extrusion standard as a guideline in determining whether a substantial and representative complement existed at the time of recognition and does not rigidly apply the test in unfair labor practice cases. A.M.A. Leasing, Ltd., 283 NLRB 1017, 1024 (1987). In Hilton Inn Albany, in discussing the application of this rule, the Board stated that, ultimately, the overall goal is to “accommodate the right of employees who have already been hired to representation without undue delay to the right of employees yet to be hired to have their bargaining representative selected by a substantial and representative complement of employees engaged in the employer’s normal business operations.” Id.¹⁶

The Board generally considers what an employer’s projections were in considering whether recognition was premature because too few employees were employed at the time of recognition. See e.g. Lianco, 173 NLRB 1444 (1969), n.2 (Board looked to the “intent and purpose” of the business and expected employee

¹⁶ In measuring when an employer does employ a representative complement, the same period of time is not always used. For example, in Dedicated, Judge Fish looked to the number of employees employed at the time that the employer operated 50 vehicles, which was the number which it anticipated operating at the time it entered into a contract with the NYCTA, although the Board did not reach the premature recognition analysis and affirmed the decision on the grounds that the employer had no signed authorization cards on the date of recognition.. In Hilton Inn Albany at 1366-67, the Board discredited the employer’s claim that it anticipated a slow start-up, finding no evidence to support this claim, and looked at the employer’s actual hiring pattern which showed a rapid increase in the number of employees following the recognition, and found a representative complement did not exist at the time of recognition.

complement when analyzing sufficiency of complement at recognition as compared to actual or projected full work force.) However, the Board does not require employers to predict with absolute certainty what their futures will hold. Rather, the Board reviews the evidence of what the employer's plan was, in existence at the time of recognition, with respect to hiring under normal conditions. See Cascade General, 303 NLRB 656, 657 (1991), enfd., 9 F.3d 731 (9th Cir. 1993) (Board held recognition premature where employee complement at recognition was not representative of workforce which employer anticipated employing). Here, despite Rapacioli's testimony about his uncertainty as to whether RJR had its contract renewed, Respondent MV was secure enough in its prospects that it went from between 17 and 22 drivers at the time of recognition, to between 133 and 144 unit employees around the time it apparently learned that RJR would not keep any portion of its routes. Thus, even before it claims it knew of RJR's status, Respondent MV grew well beyond the point where 22 employees would have represented 30% of the workforce.

Respondents argue that there *was* a substantial and representative complement at the time of recognition.¹⁷ While Respondent MV admits that the number of bargaining unit employees increased after the recognition (R. MV Br. at 7), it contends that it did not *anticipate* the growth in assigned routes and workforce which took place immediately following the recognition. At the time of the recognition on September 12, 2008, according to the Certification there were 22 drivers on the payroll. The payroll records in evidence show that there were 17 Unit employees employed at the time of the recognition. As set forth above, the record evidence is clear that Respondent MV anticipated initially operating with 150 vehicles pursuant to the Contract. At the time of

¹⁷ (R. MV E. #7; R. 707 E. #5,6).

the hearing, Respondent MV had not yet reached this level of operation, operating 124 vehicles as of December 11, 2009. (Tr. 411). The record evidence is that there were 309 unit employees employed during the payroll period with a check date of November 30, 2009. Thus, the ultimate employee complement used to determine whether the number of employees employed at the time of recognition was representative should be no less than the employee complement reflected at that time. Using the formula relied upon by the Board in such cases, 30% of 309 would be 92.7 employees. Respondent MV's payroll records show that there were 92 drivers employed some time in mid-October 2008. Based upon the hire dates set forth in the payroll, the records show that it was likely on or about October 20, 2008.¹⁸ As ALJ Rosas found, the level of the workforce at the time of the recognition therefore constituted a mere 7.9% of the drivers on the payroll as of the hearing date.¹⁹ (ALJD at 14). ALJ Rosas found, in the alternative, that 22 drivers constituted only 8.2% of the drivers projected to be on the payroll in August 2009, when Respondent MV anticipated having 150 vehicles assigned by the NYCTA. Id. (See GC Ex. 28).

For the 22 drivers in training on the payroll on September 12, 2008 -- only 11 of whom made it through the training period and began driving on October 1, 2008 -- to constitute a "substantial and representative complement," one would have to conclude that the ultimate projected employee complement was no more than 74 employees. Even if Respondent MV operated only 50 vehicles, it would *still* employ more than 74 unit employees to operate those vehicles. Rapacioli's own "ramp-up" chart shows that with

¹⁸ Even if the projected ultimate employee complement was closer to the projected number of 267 drivers as set forth in Rapacioli's ramp-up chart as required with 150 vehicles, a representative complement would at a minimum be 80 drivers.

¹⁹ Respondent MV excepts to ALJ Rosas' reference to the hearing date in evaluating employee complement, but provides no legal or factual support for this exception. (R. MV E. #8).

55 vehicles operating, it would need 109 drivers. Respondent MV's projections appear to call for about twice as many drivers as vehicles. Thus, with 50 vehicles, Respondent MV would need approximately 100 drivers. In fact, when Respondent MV operated 50 vehicles on December 11, 2008 (GC Ex. 24), it had approximately 144 drivers and 12 mechanics/utility workers on the payroll.

Moreover, ALJ Rosas was correct in rejecting Respondent MV's arguments that its growth was unanticipated and it had no certainty as to how large its employee complement was likely to be. (R. MV Br. at 7). This argument is simply not supported by the evidence, and Rapacioli's testimony to the contrary further diminishes his credibility, given the documentary evidence which laid bare Respondent MV's clear expectations, as well as the manner in which it ramped up to meet the Contract's demands. Respondent MV's bid documents and the Contract, which incorporates the Price Proposal, show that Respondent MV and the NYCTA had every expectation that Respondent MV would operate with a minimum of 150 vehicles, which would require approximately twice that many drivers; that was Respondent MV's own projection, thus recognizing a union when 22 drivers were in training (only 11 of whom graduate) one week after it received the Notice of Award/Notice to Proceed on a ten year \$422,066,234.00 contract was clearly premature.²⁰

Respondent MV's claim that it was inappropriate for ALJ Rosas to "speculate" that the number of routes would increase is absurd. (R. MV Br. At 8). The plan was in place for Respondent MV to operate at a certain level and it largely stuck to its plan. Certainly most new business enterprises do not know precisely what the future will hold,

²⁰ Given this record evidence, it is simply not credible that Rapacioli was "completely unaware of the number of routes and vehicles that would be assigned to it ..." (R. MV. Br. at 7).

nor are there guarantees that a business will succeed. However, Respondent MV cannot be compared to start-up companies, which hope the public will find their products attractive. Rather, Respondent MV is a nationwide company which maintains contracts throughout the United States, including several with the NYCTA. There is no evidence it has ever lost a contract with the NYCTA. Certainly, in view of the substantial documentary evidence, it is clear Respondent MV knew full well it would employ many more employees than a mere 74.

Although Respondents did not except to ALJ Rosas' findings that Respondent MV violated the Act by its other coercive conduct, General Counsel submits that Respondents' actions cannot be viewed in a vacuum. Specifically, the unlawful recognition and acceptance thereof comes against the backdrop of Respondent MV having: threatened its employees with discharge for supporting Local 1181; directed employees not to speak about Local 1181; photographed employees who it saw soliciting others to support Local 726; directed an employee to retrieve and give to Rapacioli an authorization card for Local 726, which she had just signed, and ripping the card up; directed its employees or applicants for employment, as a condition of their employment, to sign cards authorizing Respondent 707 to represent them; and, informed employees and applicants for employment that they had to sign cards which authorized that dues be deducted for Respondent 707 in order to be employed. As Rapacioli testified, Respondents had an "agreement" that 707 representatives would come to the new facility during the start-up to sign-up drivers. (Tr. 417). Respondent 707 was Respondent MV's preferred union and it made that choice very clear to its employees by forcing them to sign authorization cards when there was no union security clause in effect, and

unlawfully requiring them to sign check-off cards or risk discharge. It explains why Rapacioli threatened Charging Party John Russell with discharge, “in a profanity laced tirade,”²¹ when he heard he been talking about Local 1181 to new trainees, and why he reacted with such hostility to Russell and former employee Eric Baumwoll soliciting cards for Local 726 from MV employees. The recognition was not, as Respondents would like to characterize it, the “good faith” and “lawful peaceful” recognition which Respondents describe (R. 707 Br. at 8; R. MV Br. at 13). As far as Respondent MV was concerned, its employees were going to be represented by 707, and Respondent MV made sure that happened by coercing them into signing cards and threatening their livelihood to prevent them from exercising their right to a choice under the Act.

2. ALJ Rosas Correctly Concluded that Respondents Did Not Meet Their Burden of Proving That the Unlawful Recognition Allegations Are Time-Barred

Section 10(b) states in pertinent part that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” Broadway Volkswagen, 342 NLRB 1244, 1246 (2004). However, “[t]he 10(b) period begins only when a party has ‘clear and unequivocal’ notice of a violation of the Act.” Id. (relying on Desks, Inc., 295 NLRB 1, 11 (1989)). See also Concourse Nursing Home, 328 NLRB 692, 694 (1999) (Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice). A statement of intent to commit an unfair labor practice does not trigger the running of 10(b); rather the limitations period only

²¹ See ALJD at 12.

begins to run when the unfair labor practice *occurs*. Leach Corp., 312 NLRB 990, 991 (1993), enfd., 54 F.3d 802 (D.C. Cir. 1995). Further, “the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b).” Chinese American Planning Council, Inc., 307 NLRB 410 (1992), rev. denied, 990 F.2d 624 (2d Cir. 1993). Section 102.111(a) of the Board’s Rules and Regulations (“Time Computation”) states that the date of the “act, event or default after which the designated period of time begins to run is not included,” in the computation of the designated period of time.

ALJ Rosas’ in-depth discussion concluded that Respondents did not carry their burden of proving that these charges were time-barred. ALJ Rosas found that the earliest date on which it was clear that employees employed at Respondent MV learned, or could have learned, about the recognition, was October 5, 2008, when the Dana notice was posted by general manager Rapacioli. (ALJD at 19). The ALJ further found, in the alternative, relying on Leach Corp., 312 NLRB 990 (1993), that the limitations period here could run from the time when Respondent MV hired a representative segment of the ultimate employee complement. Id. Before that time, there was no evidence that the employees employed could know that the recognition was premature as before that time a ripe unfair labor practice had not developed. Id.

As set forth supra, both Respondents MV and 707 argue that ALJ Rosas erred in concluding that the unlawful recognition allegations are not time-barred here. Respondents’ arguments ignore the record evidence and relevant case law. For example, Respondents argue that the unlawful recognition charges are time-barred simply because they were filed and served more than six months after Respondents entered into their

unlawful recognition. Respondents conveniently ignore the relevant precedent holding that Section 10(b) is triggered only when the aggrieved party receives actual or constructive notice of the occurrence of an unfair labor practice. See e.g. Leach Corp., and Concourse Nursing Home, *supra*. Respondents cite to Local Lodge No. 1424 v. NLRB (Bryan Mfg.), 362 U.S. 411 (1960) (“Bryan Mfg.”) in support of their contention that the unlawful recognition allegations are time-barred. Bryan Mfg., however, relates to a different issue -- whether conduct which is dispositive of whether a recognition is unlawful, which occurs outside the 10(b) period, can be relied upon in establishing an unlawful recognition. Apart from the issue of fraudulent concealment, which is not alleged here, the Court in Bryan did not address or consider the question of when the 10(b) period begins to run where those who are aggrieved did not have actual or constructive notice of a ripe unfair labor practice.²² The theory here is not that the unlawful recognition is a continuing violation, as Respondents argue, but rather that: a. the unfair labor practice was not ripe until the employee complement grew to a substantial and representative complement, which coincided in time with the

²² The cases cited by Respondents in support of their Section 10(b) arguments are inapposite. NLRB v. Triple Maintenance, Inc., 219 F.3d 1147 (10th Cir. 2000) involved an employer’s challenge to a union’s majority status more than six months after the employer recognized the union as the collective bargaining representative of its employees. In discussing the 10(b) issue, the Tenth Circuit noted that “a time limitation is unique to both the employer and the employee,” and that it does not run until the parties have notice of an alleged unlawful recognition. The Tenth Circuit further noted that the 10(b) period could not begin to run in such a case until, at the earliest, an employee was hired or “otherwise had notice of the recognition.” *Id.* at fn.7. The case does not hold that employees in an unlawful recognition case have six months to file a charge from the date the first employee knew of an unlawful recognition. In Texas World Serv. Co., 928 F.2d 1426, 1427 (5th Cir. 1991), the Fifth Circuit held that a charge was not time barred where no one could or would have challenged a previous unlawful recognition until the unfair labor practice accrued, when employees were hired. Texas World Serv. Co. does not hold that the 10(b) period begins as a rule in an unlawful recognition case when an employer first hires employees. Reliance on R.J.E. Leasing Corp., 262 NLRB 373, 381 (1982), is similarly misplaced. In that case, the employer argued that its unlawful pre-hire agreement was executed more than six months prior to the filing of the charges, and thus 8(a)(2) charges should be dismissed. The Board held that the charges were not barred because employees only first learned of the recognition within the 10(b) period. The Board did not hold that the 10(b) period started running against all parties when employees in general became aware of the recognition, or that a later filed charge by an employee would be time-barred.

commencement of Charging Party Russell's employment, or b. Respondent MV's employees could not reasonably have learned of the recognition until, at the earliest, October 5, 2008.

As set forth in the cases cited above, the 10(b) period does not begin to run until there is clear and unequivocal notice of a *violation*. As noted in Dedicated Services, Inc., 352 NLRB 753, n.21 (2008), there is an important distinction between knowledge of certain facts, such as an employer's recognition of a union, and knowledge that a *violation* of the Act has occurred. Here, there would have been no reason for any employee who began working for Respondent MV in August or September 2008 to suspect that the recognition was unlawful, even if they were aware of the recognition. The Unit employees could not have suspected that the recognition was unlawful until, at the earliest, a representative segment of the ultimate employee complement was hired. Only then could employees be charged with notice that the initial recognition was premature. Before that time, those employees would have had no way of knowing: a. how many employees were on the payroll at the time of recognition, and b. that Respondent MV intended to hire hundreds more employees within a very short period of time. To charge employees with such notice would turn Section 10(b) of the Act into a weapon in the arsenal of those who violate federal labor law, rather than a shield from stale claims. Most significantly, it would deprive employees of their Section 7 rights to select a union of their own choosing, or to select no union.

ALJ Rosas found that this accrual principle, applied by the Board in Leach Corp., 312 NLRB 990 (1993), enfd., 54 F.3d 802 (D.C. Cir. 1995), was appropriately applied under the facts and circumstances of this case. In Leach, an employer and union were

parties to a collective bargaining agreement covering production and maintenance employees at a facility in Los Angeles. The employer advised the union that it was relocating to a facility in Buena Park for production reasons. The relocation began on July 3rd with 35 employees, and was completed on September 17th, when out of a total of 340 production and maintenance employees, 280 were re-located employees represented by the union. The union asked the employer to recognize it as the representative of the re-located employees beginning the previous April, which the employer refused to do. The union filed a charge in January of the following year alleging an unlawful withdrawal of recognition. The ALJ found that the union's charge was time-barred because Section 10(b) started running when the first 35 employees were re-located in July and the employer refused to recognize the union. The Board reversed, and held that because an employer would be obligated to recognize the union representing re-located employees *only* if the re-located employees constituted a substantial percentage (approximately 40%) of the new employee complement, 10(b) would begin to run "on the date when the transfer process was substantially completed." Leach at 991 (citing Harte & Co., 278 NLRB 947 (1986)). In short, the 10(b) period could only run when an unfair labor practice had occurred. The 10(b) could only begin to run against the union when the facts (the employee complement at the new facility) developed such that a ripe violation existed. The Board held that it was therefore, error for the judge to conclude that prior to the time when the transfer process was complete, "sufficient facts were in existence to sustain a finding of an unfair labor practice." Leach at 991.

As set forth above, the record evidence is clear that Respondent MV anticipated initially operating 150 vehicles pursuant to the Contract. (See e.g. GC Ex. 20, 21(a), 23

& 28). Respondent MV had not yet reached this level at the time of the hearing -- the record evidence is that Respondent MV operated 124 vehicles, and had 309 unit employees at the end of November 2009. Thus, the ultimate employee complement could be no less than the employee complement reflected on the November 30, 2009 payroll. As set forth above, 30% of 309 would be 92.7 employees. Respondent MV's payroll records show that there were 92 employees on the payroll some time in mid to late October 2008. Based upon the hire dates set forth in the payroll, the records show that there were 55 employees hired by October 2, 2008. Thus 10(b) could only begin running when a representative segment of the ultimate employee complement was hired. Since a representative segment was first hired only after October 2, 2008, within the 10(b) period, the unlawful recognition allegations are not time-barred.

Finally, to the extent that Respondents argue that the unlawful recognition allegations are time-barred because of notices posted in the drivers' room in September 2008. ALJ Rosas discredited, for specific and justifiable reasons discussed supra, Respondents' witnesses who testified that notices were posted in September 2008 informing employees of the recognition. (ALJD at 9, n. 40). It is well established that the Board will not overrule an ALJ's credibility determinations unless the clear preponderance of the relevant evidence shows they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3d Cir. 1951). The clear preponderance of the evidence here only supports ALJ Rosas' credibility resolutions. Given that its Respondents' burden to prove its 10(b) defense, the record evidence on the notices which were posted in September 2008, was, for good reason, found not credible, and thus Respondents have not met their burden. The ALJ found that, in the alternative,

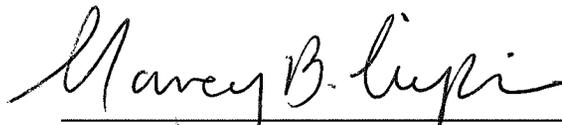
10(b) could begin to run here on October 5, 2008, when the ALJ found that Rapacioli did post the Dana notice in the drivers' room.

For these reasons, ALJ Rosas' ruling that, "the lack of a clear notice posting in September negates application of Section 10(b)" (ALJD at 17) should stand.

IV. CONCLUSION

For the reasons cited above, Counsel for the General Counsel respectfully requests that the Board reject and dismiss each of Respondents' exceptions. It is further urged that the Board adopt ALJ Rosas' findings of fact, conclusions of law, remedy, and order any further remedy deemed appropriate, as modified in limited manner as set forth in Counsel for the General Counsel's Exceptions.

Dated: August 11, 2010.



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