UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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,		
and		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and	**Case No.**	**29-CB-13981**
JOHN D. RUSSELL, AN INDIVIDUAL		

RESPONDENT MV PUBLIC TRANSPORTATION, INC.'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. INTRODUCTION

The General Counsel and Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("ATU") make three primary arguments in asserting that the ALJ's decision was correct: (1) that the ALJ correctly drew adverse inferences against MV because it allegedly failed to produce subpoenaed payroll and I-9 forms;[1] (2) that the ALJ correctly held that MV had violated the National Labor Relations Act ("NLRA") by recognizing Local 707, International Brotherhood of Teamsters ("Local 707") because it allegedly did not yet employ a representative complement of employees and was not engaged in normal business operations at the time of recognition; and (3) that the ALJ correctly found that Section 10(b) does not bar consideration of the allegation that MV unlawfully recognized Local 707.

The General Counsel's and ATU's arguments are unavailing. Indeed, as discussed at length in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision, the ALJ's decision can be seen as nothing more than a results-oriented decision that could only be achieved by ignoring undisputed and credible evidence, and long-standing Board authority. First, there is no question that the unfair labor practice charges challenging MV's voluntary recognition of Local 707 were filed more than six months after the date on which the ALJ concluded that MV violated the NLRA. The ALJ's decision was a departure from the plain

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[1] The General Counsel sought to introduce MV's payroll records without any testimony as to the accuracy or source of the hire dates included in the payroll records. Tr. 349–354; 357. MV produced payroll records in response to the General Counsel's subpoena. Tr. 697-9. MV also provided several sets of records in response to a separate request for information showing employee hire dates. Id. MV did not produce the payroll records as responsive to the request for hiring dates, as the hiring dates in the payroll records were inaccurate. Id. The General Counsel called Quinto Rapacioli as a witness, used him to introduce the payroll records into evidence, and never questioned Rapacioli regarding the accuracy of any part of the information in these records. Tr. 349-354, 357. On cross-examination, Rapacioli merely testified that some of the hiring dates in the payroll records were inaccurate – not that the remainder of the data contained in these records was inaccurate. Tr. 446-8. There is nothing to suggest that Rapacioli disavowed the veracity of the information contained in the payroll records – or the payroll records themselves. Thus, it was error for the ALJ to discredit Rapacioli based on this testimony.

language of Section 10(b) and long-standing Board authority requiring such a charge be filed within six months after the grant of recognition. Under the ALJ's analysis, the time at which an unfair labor practice charge begins to run is now a moving target that cannot be determined with any degree of certainty. In addition, the General Counsel and ATU, like the ALJ, ignored credible evidence that at the time MV recognized Local 707, it employed a representative complement of drivers and had a good faith basis for recognizing Local 707 at that time. The ALJ erred and his decision must be set aside.

II. ARGUMENT

A. The Charges Are Time-Barred Under Section 10(b) Of The Act

Section 10(b) of the Act states "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom such charge is made, unless the person aggrieved hereby was prevented from filing such charge by reason of service in the armed forces..." 29 U.S.C. § 160(b). In Local Lodge No. 1424 v. NLRB (Bryan Mfg.), 362 U.S. 411, 423 (1960), the United States Supreme Court established a standard for the Board to follow when considering allegations of unlawful recognition. Specifically, "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." That there can be no valid claim that the allegedly unlawful recognition created a continuing violation under the Act demonstrates that the Section 10(b) limitations period should be measured from the date of recognition.

Under the plain language of Section 10(b), and consistent with the Supreme Court's teachings in Bryan Mfg., which requires the limitations period to begin upon the date of

recognition, the above-captioned charges are time-barred and should have been dismissed outright without any consideration of the underlying merits of the charges. In particular, Local 707 and MV entered into the Recognition Agreement on September 12, 2008. Charging Party John Russell began working for MV in October 2008. However, he did not file the above-captioned charge until March 31, 2009, and it was not served until April 2, 2009. Neither of these dates fall within the six-month period following execution of the Recognition Agreement on September 12. Rather, to be timely, Russell was required to file and serve the charge no later than March 12, 2009, which is within six months of September 12, 2008.

There is no evidence that either Local 707 or MV concealed the existence of the Recognition Agreement from bargaining unit employees, and neither the General Counsel nor ATU cited to any such evidence. Rather, the undisputed evidence demonstrates that immediately after recognition, and continuing through the Dana posting period, MV and Local 707 were completely open and forthright about the status of the recognition proceedings and negotiations for a first contract. The evidence at the hearing proves this point:

- Russell knew that Local 707 existed on his first day of employment in October 2008;
- Danny Pacheco posted Arbitrator Shriftman's certification and the Recognition Agreement in the Drivers' Room on or about September 15, 2008, and immediately began discussing the voluntary recognition with employees;
- Copies of the arbitrator's certification of card check, the Recognition Agreement, and the Regional Director's confirmation of receipt of the Dana notice were posted in the Drivers' Room in September 2008; and
- Employees testified that they knew that MV voluntarily recognized Local 707 in September 2008. Tr. 583:14-23 (Maria del Valle-Osman was immediately aware of

the recognition in the early part of September 2008); 229:15-17: 230:13-15 (Nilda Muniz became aware of the voluntary recognition during her first week of employment with MV); 207:18-208:2 (Stephen Rebracca signed an authorization card and knew that a voluntary recognition agreement was imminent).

Even if the Board were to conclude that the limitations period began to run on September 15, the date on which the Certification and Recognition Agreement were posted, the above-captioned charge remains untimely. See R.J.E. Leasing Corp., 262 NLRB 373 (1982) (Board held that the limitations period under Section 10(b) began to run when employees became aware of the allegedly illegal acts); Texas World Serv. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991). Indeed, the Board has held that the statute of limitations begins to run when "at least one statutory employee was hired or otherwise had notice of the employer's illegal actions." NLRB v. Triple C. Maintenance, Inc., 219 F.3d 1147 (10th Cir. 2000) citing Texas World Serv. Co. v. NLRB, 928 F.2d 1426, 1437 (5th Cir. 1991) (holding that the Section 10(b) period began to run when "charges first could have been brought based upon when the employer first hired employees"). Here, "at least one statutory employee" knew that MV recognized Local 707. If any employee wanted to challenge the recognition agreement, he or she had an affirmative obligation to do so at that time.

Both ATU and the General Counsel assert that Section 10(b) does not bar consideration of the charges against MV, in spite of the fact that the charges were filed more than six months after the date on which the ALJ concluded that MV unlawfully recognized Local 707. In support, they cite the same law in arguing that the instant charges are not time barred. First, they cite the applicable case law which places the burden of showing notice on the party raising the affirmative defense. Next, they cite the standard of "clear and unequivocal notice" to assert that

such notice was not present here and thus that the Charging Parties' failure to act should be excused. ATU extensively cites Dedicated Services, 342 NLRB 753 (2008), to support its position that Section 10(b) does not bar consideration of the unfair labor practice charges filed here, analogizing the facts of that case to the instant case.[2] ATU relies on Dedicated Services in part to reinforce the ALJ's position that the 10(b) period begins to run when the charging party has "clear and unequivocal notice" of the facts giving rise to the charge. However, Dedicated Services is distinguishable and, more importantly, the Board recently decided a case under similar facts to both Dedicated Services and the instant facts which undermines the ALJ's conclusions that the 10(b) period does not begin to run until a later date.

First, Dedicated Services correctly states, "no complaint shall be issued based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The administrative law judge in that case found an exception to this general rule where the employees had notice of the recognition, but such knowledge could not be imputed to the intervening union. Because the intervening union filed the charges in Dedicated Services, the administrative law judge concluded that the union did not have notice of the recognition and, therefore, its charges challenging the recognition were not time barred.

As the ALJ in this case correctly found, Dedicated Services is distinguishable from the facts presented here. First, in the instant case, the charge at issue was filed by an employee (as opposed to a union), and the undisputed evidence as outlined above demonstrates that employees had clear and unequivocal notice that MV had recognized Local 707. Whether ATU had notice, or whether notice should have been imputed to it, can certainly be inferred from the fact that the Region dismissed ATU's unlawful recognition charge. In addition, notice to ATU, or the lack

[2] ATU cites Dedicated Services in spite of the ALJ's characterization of that decision as distinguishable and only helpful to provide guidance.

thereof, is completely irrelevant to the issue of whether any employee had notice. Second, the reasoning in the cases on which the administrative law judge relied in support of the Dedicated Services exception to Section 10(b) all involved situations where the union that filed the unfair labor practice charge already represented the employees, and that same union was alleging unilateral changes to the terms and conditions of employment. In other words, the union at issue was not a stranger to the workplace, and the unilateral changes involved employees the union represented.

In the instant case, ATU does not currently represent ***any*** of MV's employees in Staten Island. Further, the significance of notice is entirely different in a case where the company has allegedly made unilateral changes to the terms and conditions of employment. Where the union has not been put on notice of these unilateral changes, it cannot be said to have waived its right to grieve or file charges over those changes. This waiver issue is irrelevant with respect to notice to newly hired employees. Finally, the recognition date at issue in Dedicated Services was prior to the date the company had "trained or even paid" any employees. See Dedicated Services, supra at 760. Under those facts, the administrative law judge held that the date on which regular business operations began was within the 10(b) period – as the issue was not whether the employees had notice of the recognition, but rather the union had notice. Id. By contrast, 22 bargaining unit employees had been hired by Respondent at the time of the card check certification, 20 of whom signed cards authorizing Local 707 to be their collective bargaining representative. In sum, as the ALJ recognized here, Dedicated Services is distinguishable and does not support the moving 10(b) target that now exists after the ALJ's refusal to correctly apply Section 10(b) and Bryan Mfg.

In the recently decided case of United Kiser Services, LLC, the employer employed four

employees represented by the Carpenters and one employee represented by the Laborers. 355 NLRB No. 55 (July 22, 2010). In December 2006, the employer began hiring additional employees to perform a new contract. Around March 1, 2007, the employer recognized the Laborers as the representative for the newly hired employees. No notice was given to the Carpenters. Eventually, on June 19, 2007, the Carpenters' representative noticed the quantity of new employees. The Carpenters sent a letter to the company on July 16, 2007, filed a charge against it on August 21, 2007, and a subsequent charge against the Laborers on October 27, 2007.

The Board dismissed the charges as time-barred under Section 10(b). Citing the "clear and unequivocal" standard, the Board clarified that this burden is met by showing actual or constructive knowledge, and that "***such knowledge may be imputed where the conduct in question was sufficiently 'open and obvious' to provide clear notice.***" Moreover, the Board reiterated that knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence. In that case, the employer had hired approximately 11 employees and that was sufficient to provide notice to the union of the facts giving rise to the charge.

There can be no question that MV's conduct was sufficiently open and obvious to provide clear notice, as in United Kiser Services, or alternatively could have been discovered had any party exercised reasonable or due diligence. The ALJ seems to suggest that by September 30, at least 42 driver trainees were on the payroll. Each was reporting to the Lake Avenue facility for 3-4 weeks of training. Certainly 42 trainees arriving for work on a daily basis for 3-4 weeks is the type of "open and obvious" conduct that starts the 10(b) period for any of those employees wishing to challenge the Recognition Agreement.

The ALJ searched for a method by which to disturb an otherwise lawful and harmonious relationship between MV and Local 707 at a time when the parties believed that MV employed a representative complement. His solution was to discredit all of the witnesses who testified in favor of MV and Local 707, to believe every witness the General Counsel presented, and to throw Section 10(b) out the window. Section 10(b) should not be used to provide employees hired after an alleged unlawful act with an opportunity to challenge that unlawful act merely because the employee did not work for the employer at the time it occurred.

In sum, the ALJ's conclusion is at odds with the basic principles of the NLRA, which is to promote labor peace. Certainly, labor peace cannot be achieved when the employer must wait for an extended and indefinite period before it can determine with whom it has an obligation to bargain. Moreover, such an approach only works when applied in hindsight. The employer struggles to identify the time at which a representative complement of employees exists until after the fact. Thus, to apply the ALJ's analysis would not only strip Section 10(b) of its intended meaning, but would create great uncertainty for employers and contradict the Act's intended purpose of achieving labor peace. In fact, this moving target would allow any labor organization to lie in the weeds and convince newly hired employees to challenge something that otherwise would be untimely if any other employee or union challenged it. Thus, consistent with Section 10(b) and the Supreme Court's holding in Bryan Mfg., the date on which the limitations period began to run was the date on which the ALJ concluded that MV allegedly unlawfully recognized Local 707. Accordingly, the charges were time-barred and should have been dismissed.

B. The Voluntary Recognition Did Not Violate The Act

The ALJ erred in concluding that MV unlawfully recognized Local 707 because MV employed a representative complement of its workforce and it was engaged in normal business

operations at the time of recognition. Under the standard set forth in New Concept Solutions, 349 NLRB 1162 (2007): "At the time of recognition (1) an employer must employ a substantial and representative complement of its ***projected*** work force, 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." (emphasis added). Both prongs of that standard are satisfied here.

First, MV employed a substantial and representative complement of its projected work force at the time of recognition. Indeed, MV employed 22 bargaining unit employees when it recognized Local 707. G.C. Ex. 8-b. At that time, MV did not know how many vehicles or routes it would be assigned, and was not armed with this information until December 2008 at the earliest, especially given that MV's competitor was operating 97 buses in Staten Island and was actively seeking to renew its contract with the Transit Authority. Tr. 397-98; 407. Moreover, the Transit Authority was not obligated to follow the ramp-up schedule in the contract. G.C. Ex. 20; Tr. 402. Rather, in spite of the contractual language, it is undisputed that the Transit Authority could remove buses and routes from one carrier and give them to another carrier. Tr. 404. If the contract with RJR had been renewed, which was within the realm of possibility, MV would have been left with only 20 to 30 buses, at most. Tr. 411. There is no record evidence that MV was guaranteed a certain number of routes or buses at any given time, particularly in September 2008. Tr. 404. Accordingly, the ALJ's speculative belief that the number of routes was certain to increase is not supported by any objective evidence. Thus, when Local 707 presented the 22 authorization cards to MV, there existed a representative complement of employees.

Further, at the time of recognition, MV was engaged in full-scale training and preparation, which involved driving the same vehicles to the same locations as when routes

began to be assigned. See Klein's Golden Manor, 214 NLRB 807 (1974) (full-scale training and preparation can constitute "normal business operations"). See also Elmhurst Care Center, 345 NLRB 1176, 1180 (2005) (dissent of Member Liebman). By employing bargaining unit employees, training them to service their customers, and allowing them to drive their vehicles, it is evident that MV was engaged in its normal business operations.

In sum, there is no evidence that the Transit Authority intended to cancel its contract with RJR, or assign any specific number or range of routes and vehicles to MV, or that there was any certainty that the number of MV's routes would increase to more than the 20 to 30 routes it anticipated operating. At the time of recognition, MV employed a representative complement and had no reason to think that its decision to recognize Local 707 was unlawful in any respect.

III. CONCLUSION

Respondent respectfully requests that the Board reverse the ALJ's Decision.

DATED this 25th day of August, 2010.

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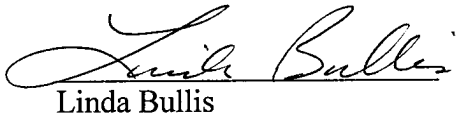

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