

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 19, 2010

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Columbus Transit LLC
Case 2-CA-39337

This case was submitted for advice as to whether a Dana¹ notice constituted constructive notice to a third-party union of an Employer's recognition of another union, such that the third-party union's Section 8(a)(2) charge filed more than six months after the recognition was time-barred under Section 10(b). We conclude that it is unnecessary to resolve that issue in this case because the third-party union's withdrawal of its charge, in order to allow an election to proceed, and later re-filing of the same charge after it had won the election, was an abuse of the Board's processes that permits the Region to refuse to reinstate the charge.²

FACTS

On November 10, 2008, the Employer signed a voluntary recognition agreement with IUJAT, Local 713. The Employer began posting the 45-day Dana notice on November 17, 2008.

On December 22, 2008, Transit Workers Union Local 100 filed a petition for an election in the same unit (2-RC-23351) and an unfair labor practice charge (2-CA-39089) alleging that the Employer had unlawfully recognized Local 713 at a time when it did not represent an uncoerced majority and before the Employer had hired a representative complement of employees.

At the R-case hearing, which opened and closed on January 16, 2009,³ the Employer asserted that the holding of an election would be inappropriate, because the Section

¹ Dana Corp., 351 NLRB 434 (2007).

² See *Casehandling Manual, Unfair Labor Practice Proceedings*, §11731.1(c)(2); Fernandes Supermarkets, 203 NLRB 568 (1973).

³ All dates hereafter are in 2009.

8(a)(2) allegation was pending and Local 100 had failed to affirmatively agree that Local 713 could be certified and that it would not seek further action on the pending unfair labor practice charge. The Employer asserted that the Board's blocking-charge policy precluded further processing of the petition pending the final disposition of the related unfair labor practice charge. On February 5, a Decision and Direction of Election issued and, on March 6, an election was held. The ballots were impounded because the Board had not ruled on the Employer's request for review of the DDE.⁴

On March 12, Local 100 submitted a request for permission to withdraw the charge in Case No. 2-CA-39089 and that request was approved on March 16.

On March 20, the Region issued a Supplemental Decision and Order Directing the Opening and Counting of Ballots in Case No. 2-RC-23351. The Supplemental Decision found that the withdrawal of the charge filed in Case No. 2-CA-39089 had rendered moot any question regarding the potential taint from the alleged unlawful Section 8(a)(2) conduct, and that the related holding in the initial Decision and Direction of Election, which directed that any certification which might be issued to Local 713 would be held in abeyance pending completion of the unfair labor practice proceeding, was vacated. On April 8, the Employer filed a request for review of the Supplemental Decision and Order Directing the Opening and Counting of Ballots.

On May 8, prior to a Board ruling on the Employer's pending request for review, Local 100 filed another charge (2-CA-39296) alleging the same violations as in the previously withdrawn charge. Shortly thereafter, Local 100 submitted a request to withdraw that charge, which was approved by the Region on May 13.

On May 28, the Board denied the Employer's request for review, and on June 5, the ballots were opened and counted. The results reflected a determinative number of challenged ballots. On June 8, Local 100 filed the instant charge, and requested that the Region revoke the approval of its withdrawal requests for the charges filed in Case Nos. 2-CA-39089 and 2-CA-39296. The Region has not revoked its approvals of those withdrawal requests. On June 10-12,

⁴ On March 10, Local 713 filed a charge (2-CA-39193) alleging that since on or about February 24, 2009, the Employer had refused, and continued to refuse, to negotiate with Local 713 for an initial contract. On May 29, the Region issued a complaint on that allegation. The trial on that complaint has been postponed indefinitely.

Local 100, the Employer, and Local 713 all filed objections. On July 10, based on a stipulation executed by the parties regarding the ineligibility of three individuals, the Region issued an Order Approving Stipulation on Challenges and Revised Tally of Ballots. The revised tally of ballots showed that a majority of the valid ballots had been cast for Local 100. The objections filed by the Employer and Local 713 have not been resolved.

The evidence adduced during the investigation of initial charge establishes that the Employer granted recognition to Local 713 on November 10, 2008 and that the *Dana* notice was posted on November 17, 2008. There is no contention either that the notice was not posted or that it could not be seen by unit employees. Local 100 asserts it did not receive actual or constructive knowledge of the Employer's recognition of Local 713 until about the middle of December of 2008, within the 10(b) period. The Region notes that, during the R-case hearing in January, 2009, Local 100 learned that the recognition had occurred on November 10, because the *Dana* notice, setting forth the date of the recognition, had been introduced into the record.

During the payroll period when recognition was granted, the Employer employed 11 employees, although in the preceding payroll period it employed 26. The Excelsior list provided in connection with the election contained the names of 52 eligible voters. Arguably, therefore, the Employer did not employ a complement of 30% of its ultimate employee complement at the time recognition was granted.

ACTION

We conclude that the Region should dismiss the reinstated Section 8(a)(2) charge.

Although the Section 10(b) statute of limitations period begins to run when an unfair labor practice occurs, as an equitable principle Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice.⁵ Thus, the Board has held that the 10(b) period does not commence until the charging party has 'clear and unequivocal notice' of the violation.⁶ At the same time, however, the Board has held that there may be constructive notice commencing the 10(b) period when the charging party would have "discovered" the unfair labor

⁵ Mine Workers Local 17, 315 NLRB 1052 (1994).

⁶ Vallow Floor Coverings, 335 NLRB 20 (2001).

practice had it exercised "reasonable diligence."⁷ The Board has also held that the knowledge of bargaining unit employees concerning their terms and conditions of employment may be imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences.⁸ An issue left unresolved by the Board in *Dana* is whether a union, which is simultaneously organizing employees at the time of the alleged unlawful recognition, is charged with constructive notice of the allegedly unlawful minority recognition based on the posting of a *Dana* notice at a facility where it does not represent the employees.

We need not resolve that difficult question here. In *Fernandes Supermarkets*,⁹ the Board dismissed a Section 8(a)(2) complaint that was based on a charge that was substantially identical to an earlier charge that had been withdrawn to permit an election to proceed. The Board held that it

will not countenance a charging party misusing the Board's processes by constantly filing and withdrawing repetitious charges both with and without merit, causing the charging party's representation petition to be alternatively held in abeyance and processed, and then participating in the election, only to refile substantially identical charges after the election is lost.¹⁰

Applying that principle, the Region should dismiss Local 100's charge, which was identical to two earlier charges filed and then withdrawn to allow election ballots to be counted. Thus, Local 100 withdrew the earlier 8(a)(2) charges in order to "accomplish by withdrawal what it [could not] accomplish by a request to proceed,"¹¹ and it should not be permitted to reinstate that charge. Although Local 100 won the election here, unlike the charging party union in *Fernandez*, the same principle should apply where the union strategically withdrew and is now re-filing a charge in order to protect itself against a potentially

⁷ *Oregon Steel Mills*, 291 NLRB 185, 192 (1988).

⁸ *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

⁹ 203 NLRB 568, 569 (1973).

¹⁰ 203 NLRB at 569.

¹¹ *Casehandling Manual, Unfair Labor Practice Proceedings*, §11731.1(c)(2).

adverse resolution of the Employer's/Local 713's objections.¹²

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

¹² [FOIA Exemptions 2 and 5

.] The 10(b) period begins from the date of actual or constructive knowledge of the violation, not from the date of the violation once the party has actual or constructive knowledge of that date. See Metromedia, Inc., 232 NLRB 486, 488, n. 20 (1977) (10(b) period started on the date charging party union learned that employer and another union had entered into a jurisdictional agreement, not the date of the agreement itself).