

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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:
MV PUBLIC TRANSPORTATION, INC. :
:
and : Case Nos. 29-CA-29530
: 29-CA-29760
JOHN D. RUSSELL, AN INDIVIDUAL :
:
and : Case No. 29-CA-29544
:
LOCAL 1181-1061, AMALGAMATED :
TRANSIT UNION, AFL-CIO :
:
and : Case No. 29-CA-29619
:
ERIC BAUMWOLL, AN INDIVIDUAL :
:
and :
:
LOCAL 707, INTERNATIONAL :
BROTHERHOOD OF TEAMSTERS, :
Party to the Contract :
:
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LOCAL 707, INTERNATIONAL :
BROTHERHOOD OF TEAMSTERS :
:
and : Case No. 29-CB-13981
:
JOHN D. RUSSELL, AN INDIVIDUAL :
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**REPLY BRIEF OF CHARGING PARTY
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
IN SUPPORT OF CROSS-EXCEPTIONS**

PRELIMINARY STATEMENT

Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("Charging Party" or "Local 1181") respectfully submits this reply brief in support of its Cross-Exceptions to the June 7, 2010 Decision of Administrative Law Judge Michael A. Rosas ("the ALJ").

ARGUMENT

Local 1181's Cross-Exceptions include the following:

Exception 3: The ALJ erred in finding that October 5, 2008 would be an appropriate accrual date for purposes of Section 10(b). (ALJD p. 19, l. 22-23)

Local 1181 filed this Exception because the ALJ would improperly permit the Section 10(b) period applicable to John Russell's charge to commence before Russell had notice of a violation of the Act. The earliest that Russell could have had notice is October 20, 2008, when he commenced employment with MVPT.¹ In support of this Exception, Local 1181 cited Dedicated Services, 352 NLRB 753 (2008), wherein the Board upheld ALJ Steven Fish's rejection of a Section 10(b) defense because the charging party did not know of the violation outside the Section 10(b) period and an employee's earlier knowledge of a violation could not be

¹Local 1181 filed Cross-Exceptions in an abundance of caution and to preserve its positions. Should the Board affirm the ALJ with respect to the accrual date, Russell's charges remain timely filed.

attributed to the charging party. See Local 1181's Brief in Support of Cross-Exceptions at 4-5.

MV Public Transportation's ("MVPT") Answering Brief to Local 1181's Cross-Exceptions does not contain argument but incorporates by reference the contents of its Brief and Reply Brief in support of its Exceptions. MVPT argued in its Reply Brief that Dedicated is distinguishable from this case, among other reasons, because: (1) the charging party in Dedicated was a union whereas the pertinent charging party here is an individual; and (2) the ALJ in Dedicated relied on cases involving charging parties that were incumbent unions. MVPT also argued that United Kiser Servs., LLC, 355 NLRB No. 55 (2010), provides more pertinent guidance than Dedicated. See MVPT Reply Br. at 5-7.

That the charging party in Dedicated was a union is a fact distinction of no significance under Board law. MVPT does not cite any authority in support of its contrary position. Section 102.9 of the Board's Rules and Regulations states that "[a] charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person[,] " (emphasis supplied; footnote omitted), and Section 2(1) of the Act defines "person" to include "one or more individuals" and "labor organizations". Nothing in Section 10(b) or Dedicated suggests that an individual, but not a union,

is barred from filing a charge within six months of receiving notice of a violation of the Act when other individual employees had such notice more than six months before the charge was filed. Last, we respectfully submit that it would be contrary to the Act's purposes to erect higher barriers to the filing of timely charges for individual employees than for other potential charging parties.

MVPT also does not cite any authority in support of its position that Dedicated is distinguishable because the ALJ in that case cited cases involving charging parties that were incumbent unions. MVPT contends that a different rule applies for incumbent unions because, "[w]here the [incumbent] union has not been put on notice of . . . unilateral changes [to the terms and conditions of employment], 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." MVPT Reply Br. at 6. To the extent the Board can discern MVPT's point, Dedicated can not be read so narrowly because Local 1181, the charging party in that case, was not an incumbent union and was not challenging a unilateral change in terms and conditions of employment, but still was held to have timely filed its charge even though individual employees may have known of the employer's unlawful recognition of a union more than six months before Local 1181 filed its charge.

To the extent MVPT asserts that Dedicated does not apply and there is a single Section 10(b) period for all past, present, and future employees which begins when any employees first receive notice of a violation of the Act (here, according to the ALJ, October 5, 2008), MVPT does not cite any authority that in fact supports that assertion. Such a rule would, again, be contrary to the Act's purposes because, at the least, an initial unrepresentative group of employees who know of a violation of the Act and do not file a charge may not prejudice (potentially much larger) groups of later hired employees who would file a charge. For example, existing employees may support a prematurely recognized union and have no interest in filing a charge. Given the potential disparate preferences of employees hired at different times, all charging parties should have the full Section 10(b) period to file a charge at least until a representative complement of employees is hired.

Last, in United Kiser Services, the Board applied the same rules as in Dedicated but reached a different result based on the facts presented. The Board found that Section 10(b) barred a charge because the charging party union had constructive notice of a violation after a visit to the workplace by a union representative more than six months before the charge was filed. See United Kiser Servs., 355 NLRB No. 55, slip op. at 2. Here, Charging Party John Russell had no actual or constructive notice

of a violation at least until he starting training on October 20, 2008.²

MVPT asserts that "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." See MVPT Reply at 7. This assertion is likewise without merit. Whereas the union representative in United Kiser Services would have discovered new employees who were not included in the bargaining unit when he visited the shop if he exercised reasonable diligence, the mere existence of trainees would not provide notice to anyone that MVPT prematurely recognized a bargaining representative of MVPT's employees. In particular, John Russell would have no notice of a violation since he did not commence training until October 20, 2008.

²In United Kiser Services, the Board did not suggest any different principles apply under Section 10(b) to charges filed by unions and individuals.

CONCLUSION

For the foregoing reasons and those set forth in Local 1181's main brief in support of its Cross-Exceptions, Local 1181's Cross-Exceptions should be granted.

Dated: New York, New York
September 8, 2010

Respectfully submitted,

By: /s/Richard Brook

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief in Support of Cross-Exceptions of Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO to be served by e-mail upon:

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this 8th day of September, 2010.

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