

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL
NO. 1498 (JEFFERSON PARTNERS L.P.)

Respondent

and

RAYMOND JONES

Charging Party

Case 18-CB-086687

ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS

Submitted by:

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I. STATEMENT OF THE CASE

This case was heard by Administrative Law Judge Ira Sandron in Minneapolis, Minnesota, on February 13 and 14, 2013, on charges filed by Charging Party Raymond Jones (“Jones”), an individual, against Amalgamated Transit Union Local No. 1498 (“Respondent”). The judge issued a decision in this case on April 4, 2013, in which he concluded that Respondent breached its duty of fair representation by arbitrarily processing Jones’ July 2010 grievance regarding his C Mechanic bid and arbitrarily misleading him into believing that his grievance was scheduled for arbitration. However, the judge also concluded that General Counsel¹ did not prove the underlying merits of the grievance. General Counsel filed timely Exceptions and a Brief in Support of Exceptions on May 2, 2013. General Counsel’s Exceptions are limited to the judge’s decision related to the underlying merits of Jones’ July 2010 grievance.

Respondent filed Cross-Exceptions to the Decision of Administrative Law Judge Ira Sandron² and Respondent’s Brief in Support of Local Union’s Cross-Exceptions³ on May 16, 2013. Respondent’s Cross-Exceptions are limited to the judge’s decision relating to Respondent’s arbitrary processing of Jones’ grievance and the finding that Respondent misled Jones. On May 24, 2013, General Counsel filed a motion to strike Respondent’s Cross-Exceptions and Supporting Brief in whole or in part. The Board has not yet ruled on General Counsel’s motion to strike. The Answering Brief will address those portions of the Cross-Exceptions and Supporting Brief that are not included in the motion to strike to the extent they raise discernible arguments made by Respondent.

¹ This case was brought on behalf of Acting General Counsel Lafe Solomon, referred to herein as General Counsel.

² Herein referred to as Cross-Exceptions.

³ Herein referred to as Supporting Brief.

The judge properly found that Respondent violated its duty of fair representation in the processing of Jones's grievance and that Respondent arbitrarily misled Jones regarding the status of his grievance. The evidence and arguments which establish that the judge's conclusions are correct are summarized below and organized as follows. First, the brief addresses Respondent's contention that the charge is time-barred. Second, this brief shows that the judge properly granted General Counsel's motion to amend the complaint at trial. Third, the brief addresses the bulk of Respondent's remaining Cross-Exceptions which essentially argue that the judge's factual conclusions are not supported by the record evidence. However, as demonstrated below, most of the judge's factual findings to which Respondent excepts are based on the testimony of *Respondent's own witnesses*. Finally, Respondent's Cross-Exceptions 12 through 17 consist of Respondent's objections to the judge's legal conclusions which are fully supported by the record currently before the Board. The facts in support of those legal conclusions are discussed in relation to the Cross-Exceptions addressed herein.

II. CROSS-EXCEPTION 1: JONES' CHARGE IS NOT TIME BARRED

In Cross-Exception 1 Respondent incorrectly argues that Charging Party Raymond Jones' charge is time barred by the statute of limitations period specified in Section 10(b) of the Act. (CEX p.2-4.)⁴ Section 10(b) states, “. . . 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 . . .” The Board has consistently held that, “the 10(b) period commences only when a party has *clear and unequivocal notice* of a violation of the Act;” through either actual or constructive knowledge. *A & L Underground*, 302 NLRB 467, 469 (1991)(emphasis added); *John Morrell & Co.*, 304 NLRB 896, 899 (1991) (10(b) period begins when the charging

⁴ References to the Respondent's Cross-Exceptions will be designated as “CEX p. __,” references to the Transcript will be cited as “Tr. __,” the Administrative Law Judge's Decision will be designated as “ALJD p. __, lines __,” and references to General Counsel's exhibits will be “GCX __.”

party knew or should have known of the violation). The 10(b) period begins to run when the charging party first has “knowledge of the facts necessary to support a ripe unfair labor practice.” *Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.)*, 344 NLRB 366, 368 (2005) (finding that the charge was time barred because the union told the charging party it was abandoning his grievance outside of the 10(b) period); see also *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 995 (1986) (finding no clear and unequivocal notice because although the union failed to return calls, the charging party received “contemporaneous assurances” through conversations with union officials regarding the processing of his grievance). Constructive knowledge can be shown where a violation could have been discovered through the exercise of due diligence. *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992). Critically, Respondent has the burden of showing that the Charging Party had clear and unequivocal notice of the violation, a burden that Respondent cannot meet in this case. *A & L Underground*, 302 NLRB at 469.

The Section 10(b) period in this case never began to run prior to the filing of Jones’ charge on August 6, 2012 as he never received actual or constructive knowledge of a violation of his statutory rights under the Act. Instead, it was the actual filing of the charge which prompted the discovery of Respondent’s arbitrary processing of Jones’ July 2010 grievance over his C Mechanic bid. This is because both Respondent’s President Richard Davis (“Davis”) and Respondent’s attorney Weston Moore (“Respondent’s attorney”) testified that *they* did not have actual knowledge that no arbitration panel was requested from FMCS until around October 26, 2012, over two months after the charge was filed. (ALJD p. 12, lines 13-15, p. 13, lines 22-24; Tr. 235, 319, 324, 326, 329, 332, 348-53). This discovery was the result of an audit conducted by Respondent’s attorney in an effort to determine the status of the grievance in response to Jones’ charge. (ALJD p. 12, lines 1-15, p. 13, lines 22-24; Tr. 235, 250, 319-332, 348-53.) The reason the audit was necessary was, as the judge

found, Respondent's attorney Moore's "utterly chaotic and disorganized system of monitoring arbitrations." (ALJD p. 13, line 12; Tr. 348-50.)

Further, the record evidence establishes that Jones never had actual knowledge of a violation prior to the filing of his charge. Jones never received the Employer's Field Operations Supervisor Sam Howell's October 25, 2010 letter to the Employer stating that it had not received the FMCS panel and that "If we do not receive the panel ASAP we will consider the grievance resolved, as per Article 43.7, which specifically states that failure to meet a timeline will result in forfeiture of the grievance." (GCX 13, Tr. 135, 186-87.) This letter was sent only to Respondent's President Davis, who thereafter failed to ensure that a panel had been selected. (Tr. 226, 228-29.)

In addition, Respondent never communicated to Jones that it would not take his grievance to arbitration. (ALJD p. 9, line 31; Tr. 166.) On the contrary, all indications from Respondent were that it would arbitrate Jones' grievance. (Tr. 138-40, 145-51, 166, 195-96.) Therefore, Jones could not have had actual knowledge that Respondent mishandled his July 2010 grievance prior to the filing of his charge.

Respondent's Cross-Exception 1 wrongly asserts that Jones had constructive knowledge based on two conversations he had with supervisors or managers of the Employer. (CEX p. 2-4.) This assertion is contrary to the judge's findings and the record evidence in this case. (ALJD p. 4, lines 17-24) Specifically, Howell testified that he told Jones, "they [Respondent] had placed it into arbitration, but we have not received any panel pick." (Tr. 242-44, 257-60; GCX 19.) The Judge never found that Jones had notice that a violation occurred based on conversations with supervisors or managers because the statements they made to Jones were contradicted by Davis' repeated reassurances that the grievance was going to arbitration. (ALJD p. 4, lines 17-24; p. 9, lines 21-25; Tr. 138-40, 145-51, 166, 195-96.) Further, the evidence demonstrates that Jones had no specific knowledge of the

arbitration procedures and instead relied on Davis' representations that Respondent would arbitrate the grievance. Jones testified that he was repeatedly told by Davis that the grievance was going to arbitration and that one time, after January 2011 but before his termination in May 2012, he was told that *Respondent was waiting on the Employer to pick the arbitration judge*. (ALJD p. 9, lines 21-25; Tr. 138-40, 145-51, 166.) In addition, all of the evidence shows that Jones continued to pursue his July 2010 grievance over his C Mechanic bid and determine its status through various conversations with Davis and an NLRB Information Officer. (Tr. 157, 162, 194-96.) Thus, Jones acted with due diligence in pursuing his grievance.

Therefore, the judge correctly concluded that Jones' charge was not time barred. Jones had no actual knowledge or constructive knowledge of the violation based on his conversations with supervisors and managers because their statements were contradicted by the repeated assurances of Respondent's President Davis as late as May 2012 that the July 2010 grievance was going to arbitration. (ALJD p. 9, lines 21-32; Tr. 138-40, 145-51, 166.) In fact, both Davis and Respondent's attorney agreed that they did not know that Respondent had forfeited Jones' grievance (because of their grossly negligent handling of that grievance) until October 2012, clearly within the section 10(b) period. (Tr. 324, 332, 347-53.) General Counsel respectfully requests that Respondent's Cross-Exception 1 be rejected by the Board because Respondent has not met its burden of showing that Charging Party Jones had clear and unequivocal notice of a violation of the Act more than six months before filing his charge.

III. CROSS-EXCEPTION 2: THE JUDGE PROPERLY GRANTED GENERAL COUNSEL'S MOTION TO AMEND COMPLAINT AT TRIAL

Equally unavailing is Respondent's argument in Cross-Exception 2 that the judge improperly granted General Counsel's motion to amend the complaint. (CEX p. 4-6.)

Section 102.17 of the Board's Rules and Regulations permits the amendment of a complaint by General Counsel before, during, or after a hearing, "upon such terms as may be deemed just." Whether to grant a motion to amend a complaint depends on several factors such as whether the charged party lacked notice or was surprised; whether General Counsel offered a valid excuse for failing to make the motion earlier; and whether the matter was fully litigated. *CAB Associates*, 340 NLRB 1391, 1397 (2003) (affirming judge's rulings including those related to General Counsel's motion to amend complaint during trial).

In *CAB Associates*, the judge properly granted General Counsel's motion to amend complaint because the motion "was based in strong part on the evidence of the testimonial admissions adduced from the Respondent's own major witness during the trial. Under these circumstances, there is no basis for a finding of surprise, lack of notice, or prejudice to the Respondent;" and that in its opening statement General Counsel made clear that it was proceeding on the theory and presented evidence related to the theory before the complaint was amended. *Id.* Further, the judge found that respondent's case and defense focused in substantial part on the theory amended into the complaint, the matter was fully litigated, and importantly, that "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.*" *Id.* at 1398 (emphasis added).

This case is factually parallel to *CAB Associates*. The first day of the trial in the instant case consisted of General Counsel's case in chief. On the second day of the trial, Respondent presented its case. It is important to note that Respondent did not cooperate at all with the Region's investigation. (Tr. 335-37.) Thus, the Region was not on notice of Respondent's defense in this case; essentially that it was the conduct of Respondent's

attorney which resulted in the forfeiting of Jones' grievance.⁵ None of the testimony related to Respondent's processing of the July 2010 grievance prior to Respondent's major witness, because none of the prior witnesses had any knowledge regarding this issue. It was not until Respondent called its witness, Respondent's President Davis, and completed his testimony on direct that General Counsel had reason to know of Respondent's defense and then seek amendment of the complaint. General Counsel requested a break immediately after Respondent's direct examination of Davis and upon return, immediately moved to amend the complaint. (Tr. 332-33.) General Counsel sought to amend the complaint in two respects, first to allege in paragraph 6, subparagraph (d) that Respondent "deliberately *or arbitrarily* misled;" and to the remedy section on page 4 of the complaint to allege "As part of the remedy for Respondent's fraudulent concealment *or gross negligence* of its failure to timely process . . ." (emphasis added) (GCX 1(c) p. 3-4; Tr. 333-34.) Adding these four words to the complaint simply added a second legal theory to the same violation already alleged in the complaint and litigated during the trial.

Most critically in this case, as in *CAB Associates*, General Counsel's motion to amend the complaint during the trial was completely based on the testimony of Respondent's President Davis, Respondent's major witness. (Tr. 335-36.) Even Respondent stated at trial in its objection to the amendment, "The amendments appear based largely upon evidence we decided to admit, evidence available because of the defense we provided." (Tr. 334.) Moreover, the charge in this case alleged that Respondent refused to process Jones' July 2010 grievance for "arbitrary or discriminatory reasons or in bad faith" and Counsel for the General Counsel stated in its opening statement, "Respondent handled Mr. Jones' grievance in a grossly negligent manner, failing to schedule it for arbitration and then falsely assuring

⁵ The judge correctly found that both Respondent's attorney and Davis were grossly negligent and therefore arbitrarily processed Jones' July 2010 grievance and that Davis misled Jones regarding the processing of his grievance. (ALJD p. 13, lines 33-40, p. 14, lines 1-5.)

him that the ball was in the Employer's court.” (GCX 1(a); Tr. 14.) Both of these facts demonstrate that the amendments to the complaint reflected the same facts, theory and events. Further, General Counsel made clear in its opening statement that it was pursuing the gross negligence theory in addition to fraudulent concealment. Therefore, there can be no surprise, lack of notice, or prejudice to Respondent.

In addition as in *CAB Associates* and as noted above, General Counsel lacked notice of facts regarding Respondent's processing of Charging Party Jones' grievance because Respondent did not participate in the investigation in this case. Therefore, General Counsel had no knowledge of facts which would allow General Counsel to amend the complaint earlier, as stated by Counsel for the General Counsel at trial.⁶ (Tr. 335.) Directly after the testimony of Davis, General Counsel offered the amendment and therefore there was no added delay which would have caused prejudice to Respondent. (Tr. 332.)

As properly concluded by the judge in deciding to grant the motion, the “. . . underlying evidence in this case is basically the same whether the Complaint is amended or is not, that the amendments do not significantly change the parameters of the legal issues. There may be nuances added, but the basic thrust of the Complaint remains the same.” (Tr. 336-37.) Respondent was then given an opportunity to continue with its direct examination of Davis after General Counsel's motion was granted, which Respondent did. (Tr. 338.) Again, this demonstrates that Respondent had every opportunity to fully litigate the amended theory. At trial Respondent never asked or claimed that it needed additional time to confer with his client, review documents, nor did Respondent seek a continuance or break.

⁶ Although Respondent's attorney made certain representations in its offers of proof during the first day of trial, offers of proof are not evidence and therefore Respondent was not bound to such representations. *Southern Foods, Inc.*, 289 NLRB 152 fn. 2, 4 (1988) (finding Respondent's reliance on offers of proof a reliance on matters not admitted into evidence); *Davis-McKee, Inc.*, 238 NLRB 652, 656 (1978), rev'd on other grounds, *Int'l Molders and Allied Workers Union, Local No. 164 v. NLRB*, 765 F. 2d 858 (1985) (“an offer of proof is not a substitute for evidence”).

However, in its Cross-Exception 2 Respondent argues that it would have changed its preparation for trial had it known the complaint would be amended. (CEX p. 4-6.) These assertions are baseless, as Respondent failed to make the majority of these representations at trial and instead at trial only generally stated that it would have prepared differently. (Tr. 334-35.) Moreover, because the amendment to the complaint was requested as a direct result of the testimony of Respondent's main witness who was presumably testifying truthfully, it is unclear what, if any changes to the testimony Respondent would have made. In addition, Respondent's Cross-Exceptions make reference to documents and testimony it would have presented had it known about the amendments. (CEX 4-6.) However, these assertions are unpersuasive because this same evidence would have supported its defense to the original complaint.⁷ (CEX p. 4-6.) Surely, Respondent would have presented any such documents or testimony, if they existed, to corroborate and substantiate its claims and defenses. For all of the foregoing reasons General Counsel requests that Respondent's Cross-Exception 2 be denied in its entirety because the judge properly granted General Counsel's motion to amend the complaint during the trial.

IV. CROSS-EXCEPTIONS 3 THROUGH 9 AND 10-2: THE JUDGE'S FINDINGS ARE FULLY SUPPORTED BY THE RECORD

In Cross-Exceptions 3 through 9 and 10-2 Respondent disputes the factual findings made by the judge that led to his conclusion that Respondent breached the duty of fair representation. (CEX p. 6-9.) These Cross-Exceptions should be rejected as the judge's findings are fully supported by the record evidence. Further, in most of these cases, the testimony the judge relied on in reaching these findings and conclusions was that of Respondent's own witnesses. This includes direct quotes of the testimony of those witnesses

⁷ Further, without explanation, Respondent failed to provide documents in its possession that would reasonably be assumed to be favorable to its position, despite repeatedly stating at trial that it would be providing documentary evidence. (Tr. 234-37, 319, 326, 349.)

in many cases. [Tr. 302-03 (Davis' only testimony regarding conversations with Jones' was that in late 2010 Jones indicated that he thought he may have been denied the bid due to his race); Tr. 324, 332 (Davis' testimony that he did not know there was a problem with Jones' grievance till October 2012); Tr. 282⁸ (Davis testified, "the only thing that I get on a regular basis would be \$110 a month to house the office at my home"); Tr. 347-51, 353 (Respondent's attorney's testimony that, "ultimately I simply had to do an audit of every single FMCS request for the last 5 years and match every request with a client name . . . And some panels have names on them, but many don't. They might say 'Tire Shop Job' or 'Mileage Grievance' or might refer to the problem and not the employee name; that he first became aware there was no panel for Jones grievance in October 2012, and "When was I first suspicious that there was not an arbitration panel ordered for Mr. Jones? In approximately May of 2012."); Tr. 133-34, 138-51, 166, 184 (Jones' testimony regarding his conversations with Davis about his July 2010 grievance regarding the C Mechanic bid, including that they spoke a few days after his termination on May 19, 2012); Tr. 223-225, 248, GCX 13 and 21 (Howell's testimony that he frequently had to send notification letters to Davis that no panel was received by the Employer, so much so that he created a template letter; no Respondent witness disputed this testimony)] General Counsel respectfully requests that the Board deny each of Cross-Exceptions 3 through 9 and 10-2 in their entirety because the judge's findings are fully supported by the record evidence and not in error.

V. CONCLUSION

For the reasons stated above, General Counsel respectfully requests that the Board reject Respondent's Cross-Exceptions in their entirety because the judge's findings and legal

⁸ Davis's home is located in Independence, Missouri, not Joplin, Missouri as found by the Judge. (ALJD p. 11, lines 25-27; Tr. 282.) To the extent that Respondent excepts to the error in the city, General Counsel does not challenge this Cross-Exception but notes that the inadvertent error had no bearing on any substantive aspect of the judge's decision in this case.

conclusions to which Respondent objects are amply supported by the record and should be adopted.

Dated: May 30, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Acting General Counsel's Answering Brief To Respondent's Cross-Exceptions was filed via e-filing and served on May 30, 2013, by the methods indicated, on the parties whose names and addresses appear below.

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