

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Michael Lopez
(Petitioner)

and

Lamons Gasket Company,
a Trimas Company
(Employer)
and

Case No. 16-RD-1597

United Steel, Paper and Forestry
et al. Union (USW)
(Union)

PETITIONER MICHAEL LOPEZ'S
CITATIONS OF SUPPLEMENTAL AUTHORITY

In this case, the Board is deciding whether to reverse Dana Corp., 351 NLRB 434 (2007), and thereby halt secret-ballot elections sought by unions or employees in the wake of suspicious card check recognitions.

Petitioner Michael Lopez hereby files two Citations of Supplemental Authority:

1) Ocean Enterprise 589, Case No. 5-RD-1496 (Regional Director's Decision and Direction of Election dated March 28, 2011). In this case, affiliates of three large international unions, Teamsters, UNITE HERE and Operating Engineers, are voluntarily participating in a Dana decertification election in order to unseat an incumbent union, UFCW Local 27, which was "voluntarily recognized" based upon a neutrality agreement and "card check." These unions' voluntary participation in a Dana decertification shows

that union opposition to the rule in Dana Corp. is hypocritical. By their participation, these three unions inherently recognize the unfair manner in which employees' rights are abused by collusive neutrality agreements and the dubious "card check" recognitions that follow. If this citation had been available, it would have been cited repeatedly in Mr. Lopez's Brief on the Merits in Opposition to the USW's Request for Review at pp. 7-13.

2) MV Public Transportation, 356 NLRB No. 116 (March 22, 2011). In this case, it was held that an employee's right to challenge an illicit "voluntary recognition" did not begin to run until the posting of a Dana notice, since it was only then that the employees had any inkling that their rights had been violated. This shows the important role that Dana Corp. plays in notifying employees of their rights when faced with collusive union and employer conduct and suspect card check recognitions. If this citation had been available, it would have been cited repeatedly in Mr. Lopez's Brief on the Merits in Opposition to the USW's Request for Review at pp. 14-16 and 27-31.

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Supplemental Citation of Authority to be filed electronically with the National Labor Relations Board's Office of the Executive Secretary and with NLRB Region 16 through the NLRB's e-filing program.

I further certify that I caused a copy of this document to be served by e-mail on the following parties:

Brad Manzolillo
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and

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Dated: April 4, 2011

/s/ Glenn M. Taubman

Glenn M. Taubman
Attorney for Petitioner

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

OCEAN ENTERPRISE 589, LLC, d/b/a
THE CASINO AT OCEAN DOWNS¹

Employer

and

Case 5-RD-1496

RENEE GULINO, AN INDIVIDUAL²

Petitioner

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 27³

Union

and

UNITE HERE, LOCAL 7, AFL-CIO;
INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 37, AFL-CIO; and
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 355, AFL-CIO,
JOINT UNIONS

Intervenor

DECISION AND DIRECTION OF ELECTION

Renee Gulino, an individual, filed a petition under Section 9(c) of the National Labor Relations Act,⁴ as amended, to decertify the United Food and Commercial Workers, Local 27 as the collective-bargaining representative of employees of Ocean Enterprise 589, LLC, d/b/a The

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ The name of the Union appears as amended at the hearing.

⁴ Hereinafter referred to as the Act.

Casino at Ocean Downs.⁵ UNITE HERE, Local 7, AFL-CIO, the International Union of Operating Engineers, Local 37, AFL-CIO, and the International Brotherhood of Teamsters, Local 355, AFL-CIO intervened as joint unions (“Joint Unions”). A hearing on the petition was held before an officer of the National Labor Relations Board⁶ and, following the hearing, the parties submitted briefs.

Three issues have been presented:

- (1) Does the petition raise a question concerning representation where the Employer voluntarily recognized the United Food and Commercial Workers, Local 27 pursuant to a neutrality agreement signed by both parties, the Employer posted a *Dana Corp.*⁷ notice to employees, and the instant petition was filed within forty-five days following the posting of the *Dana Corp.* notice?
- (2) Is the intervention of UNITE HERE, Local 7, AFL-CIO, the International Union of Operating Engineers, Local 37, AFL-CIO, and the International Brotherhood of Teamsters, Local 355, AFL-CIO, as a joint union, appropriate?
- (3) Is UNITE HERE, Local 7, AFL-CIO estopped from intervening in this matter because it entered into a neutrality agreement with the Employer stating that it would not file a petition with the Board and providing for arbitration of disputes concerning the neutrality agreement?

After carefully considering the evidence and arguments made by the parties at the hearing and in the briefs, I find, for the reasons discussed below, that: the petition does raise a question concerning representation; the petition is not barred by the Employer’s voluntary recognition of the United Food and Commercial Workers, Local 27; the Joint Unions are proper intervenors; UNITE HERE, Local 7, AFL-CIO is not estopped from intervening in this matter; and an election should be conducted.

⁵ Hereinafter referred to as the Employer.

⁶ Hereinafter referred to as the Board.

⁷ 351 NLRB 434 (2007).

I. STATEMENT OF FACTS

The Employer is a Maryland limited liability company with an office and place of business in Berlin, Maryland, and is engaged in the business of gaming. Since January 1, 2011, the Employer, in conducting its operations, has derived gross revenues in excess of \$500,000. During that period of time, the Employer, in conducting its business operations, purchased and received at its Berlin, Maryland facility, goods valued in excess of \$5,000 directly from points outside the State of Maryland.⁸

In February of 2009, the Employer applied for a video lottery operation license from the State of Maryland that would allow it to operate slot machines at a casino in Berlin, Maryland. The Maryland statute authorizing the granting of licenses requires applicants to demonstrate that they have “entered into a labor peace agreement with each labor organization that is actively engaged in representing or attempting to represent video lottery and hospitality industry workers within the State.” MD Code SG § 9-1A-07(c)(7)(v).

Two unions contacted the Employer and requested labor peace agreements. The first was United Food and Commercial Workers, Local 27.⁹ On September 1, 2009, the Employer and UFCW Local 27 signed a Memorandum of Agreement. It provides, in part, that the Employer would take an approach of neutrality with respect to unionization of its employees at The Casino at Ocean Downs and would give the Union access to its employees and employee lists. Furthermore, if the Union informed the Employer that it had obtained signed authorization cards from at least 50% of the bargaining unit and the sufficiency of the cards was validated by a neutral third party, the Employer agreed to voluntarily recognize UFCW Local 27 as the

⁸ The parties agreed, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

⁹ Hereinafter referred to as UFCW Local 27 or the Union. The parties agreed, and I find, UFCW Local 27 is a labor organization within the meaning of Section 2(5) of the Act.

collective-bargaining representative of its employees and negotiate in good faith a collective-bargaining agreement with the Union. The agreement also contained the following language:

Neither Ocean Enterprise nor Local 27 will file, or cause to be filed, a Petition with the National Labor Relations Board for any election in connection with any demand for recognition provided for in this Agreement. Local 27 and Ocean Enterprise will not file any charges or objections with the National Labor Relations Board in connection with any act or omission occurring within or arising out of the context of this Agreement; arbitration as provided herein shall be the exclusive remedy.

The Employer submitted its agreement with UFCW Local 27 to the State of Maryland as evidence of its compliance with the statutory requirement concerning labor peace agreements.

The second union to contact the Employer about a labor peace agreement was UNITE HERE, Local 7, AFL-CIO.¹⁰ The contact occurred in September of 2009, after the Employer had signed a labor peace agreement with UFCW Local 27. The Employer and UNITE HERE, Local 7 negotiated about the language of a labor peace agreement. Discussions broke off in December of 2009 when the Employer informed UNITE HERE, Local 7 it would not accept a labor peace agreement materially different from the one it had entered into with UFCW Local 27.

On September 23, 2009, the Employer received a license to operate 800 video lottery terminals and, thereafter, began renovating its Berlin, Maryland facility to create The Casino at Ocean Downs.

In October and November of 2010, the Employer started interviewing and hiring employees to work at the casino. It conducted three orientation sessions in December of 2010. Pursuant to the terms of its labor peace agreement with UFCW Local 27, the Employer gave UFCW Local 27 employee lists and granted it access to employees at the orientation sessions.

¹⁰ Hereinafter referred as UNITE HERE, Local 7. I find UNITE HERE, Local 7 is a labor organization within the meaning of Section 2(5) of the Act.

In November of 2010, UNITE HERE, Local 7 again contacted the Employer about signing a labor peace agreement. It requested that the labor peace agreement jointly include UNITE HERE, Local 7, the International Union of Operating Engineers, Local 37, AFL-CIO,¹¹ and the International Brotherhood of Teamsters, Local 355, AFL-CIO.¹² The Employer refused and stated that if any other unions wanted labor peace agreements, they should contact the Employer. On December 21, 2010, UNITE HERE, Local 7 signed a labor peace agreement with the Employer. An Employer representative signed the agreement the following day. The agreement contained the same terms as the Employer's agreement with UFCW Local 27, including a neutrality agreement, card check, voluntary recognition, and language concerning the filing of petitions, charges, or objections with the Board. The Employer provided UNITE HERE, Local 7 with the employee list and access to employees at an orientation session on December 22.

Shortly thereafter, UFCW Local 27 informed the Employer it had obtained signed authorization cards from a majority of employees. On December 29, 2010, the Employer and UFCW Local 27 submitted the cards and payroll records to a neutral third party, who validated the cards and affirmed UFCW Local 27's majority status. The Employer voluntarily recognized UFCW Local 27 as the collective-bargaining representative of employees in the following bargaining unit:

All full-time and part-time employees, including slot department (slot techs and slot service ambassadors), food and beverage (servers, cashiers/hostesses, bartenders, stewards, lead stewards, dining room attendants, bar backs, cooks, beverage servers), floor attendants, player services (cage cashiers, main bank cashiers, hard count clerks, soft count clerks, EVS attendants (housekeeping), facilities technicians, HVAC technicians, electricians, plumbers, groundskeepers,

¹¹ I find the International Union of Operating Engineers, Local 37, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

¹² I find the International Brotherhood of Teamsters, Local 355, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

warehouse receiving leads and warehouse receiving attendants, but excluding supervisors, professional employees and guards as defined by the National Labor Relations Act.¹³

The Casino at Ocean Downs opened to the public in January of 2011.

On January 13, 2011, the Employer posted Board notices, as set forth in the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007), informing employees of its voluntary recognition of UFCW Local 27, the employees' rights to a secret ballot election, and the filing of a decertification petition within a 45-day time period from the date of the notice posting.

No collective-bargaining agreement is currently in effect between the Employer and UFCW Local 27.

On February 23, 2011, Renee Gulino filed the instant petition to decertify UFCW Local 27.

II. DISCUSSION

UFCW Local 27 and the Employer make three arguments concerning the petition. First, they argue the petition fails to present a question concerning representation and that voluntary recognition should bar processing of the petition. Second, they argue that intervention by the Joint Unions is inappropriate because a representative of each union was not present at the hearing and because the evidence does not establish that the three unions are ready and willing to jointly represent employees in the bargaining unit. Finally, they argue that UNITE HERE, Local 7 is estopped from jointly intervening in this matter because it signed a labor peace agreement with the Employer.

In *Dana Corp.*, 351 NLRB 434 (2007), the Board modified its recognition bar doctrine to limit the circumstances in which elections were barred following an employer's grant of

¹³ The parties agree, and I find, that this is an appropriate unit within the meaning of Section 9(b) of the Act. At the time of the hearing there were approximately 70 employees in the bargaining unit.

voluntary recognition to a union. The Board held that neither voluntary recognition itself, nor a contract between a union and an employer pursuant to voluntary recognition, will bar a petition for a decertification election unless the affected employees are provided with adequate notice of their right to file a decertification petition within 45 days and 45 days has passed from the posting of that notice. *Id.* at 434-435. The Board made it clear that “[i]f a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, it shall be processed.” *Id.* at 434.

UFCW Local 27 and the Employer contend the Board should overrule its decision in *Dana Corp.* and return to prior law holding that an employer’s voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union for a reasonable period of time. In the alternative, they argue that processing of the petition should be stayed until the Board issues its decision in a case currently pending before it involving reconsideration of the *Dana Corp.* decision: *Lamons Gasket Co.*, Case 16-RD-1597.

As of the date I am issuing this decision, the Board has not overruled or modified *Dana Corp.* Thus, *Dana Corp.* governs here. The instant petition was timely filed within the 45-day period following the Employer’s posting of the notice. It was supported by at least a 30 percent showing of interest. As such, the petition raises a question concerning representation and an election is appropriate.¹⁴

The second issue presented concerns the appropriateness of intervention by the Joint Unions. UFCW Local 27 and the Employer note that representatives of the International Union of Operating Engineers, Local 37, AFL-CIO, and the International Brotherhood of Teamsters,

¹⁴ UFCW Local 27’s Motion to Dismiss Petition of Food and Commercial Workers Union, Local 27 and Motion in the Alternative to Stay Proceeding is hereby denied.

Local 355, AFL-CIO, did not attend the hearing. They argue UNITE HERE, Local 7 did not present evidence that it was authorized to act on behalf of the other unions. The record, however, shows that Roxie Herbekian entered an appearance at the hearing on behalf of the Joint Unions and that she made a motion to intervene on behalf of the Joint Unions. I find that Ms. Herbekian attended the hearing as a representative of the Joint Unions, that she properly made a motion to intervene on behalf of the Joint Unions, and that no additional evidence of her authority to act on behalf of the Joint Unions is necessary.

UFCW Local 27 also contends that intervention by the Joint Unions is inappropriate because the evidence fails to demonstrate the unions are ready and willing to jointly represent the Employer's employees. In support of this argument, UFCW Local 27, in its post-hearing brief, cites the Board's decision in *Automatic Heating & Service Corp., Inc.*, 194 NLRB 1065 (1972), and *Hydroscience, Inc.*, 227 NLRB 1002 (1977).

The Board has held that the filing of a joint petition establishes a *prima facie* showing of the intent to represent employees on a joint basis for the entire unit sought. *Utility Services, Inc.*, 158 NLRB 592 (1966). No additional evidence is needed to establish intent. However, the *prima facie* showing may be rebutted by other evidence. In *Automatic Heating & Service Corp., Inc.*, 194 NLRB 1065 (1972), testimony by representatives of the joint unions established that each of the unions intended to bargain solely for the employees within its jurisdiction as if they constituted separate units. That is not the case here. Ms. Herbekian's motion to intervene on behalf of the Joint Unions establishes the *prima facie* showing of intent to represent the employees on a joint basis. No evidence in the record contradicts this *prima facie* showing.¹⁵

¹⁵ In its brief, UFCW Local 27 points to Ms. Herbekian's testimony that the three unions "didn't know what [they were] going to do at that point" (Tr. 121:17-18) and "had not figured out whether [they were] going to proceed together or apart" (Tr. 121:22-24). This testimony concerns events in December of 2010 when UNITE HERE, Local 7 signed a labor peace agreement with the Employer, after the Employer refused to sign an agreement with all

The final issue presented here concerns whether UNITE HERE, Local 7 is estopped from intervening because it signed a labor peace agreement with the Employer. In support of this argument, UFCW Local 27 and the Employer cite *Verizon Information Systems*, 335 NLRB 558 (2001). They contend the labor peace agreement between UNITE HERE, Local 7 and the Employer provides for the resolution of representation and unfair labor practice disputes outside of the processes and jurisdiction of the Board.

In *Verizon Information Systems*, an employer and union agreed on a procedure for voluntary recognition outside of the Board's processes. The agreement gave the union rights to information about employees it was seeking to organize, access to the employees on the employer's premises, employer neutrality during the organizing campaign, and assurances of prompt voluntary recognition upon a showing of majority status. 335 NLRB at 560. The agreement further stated that disputes concerning the appropriate unit for bargaining would be decided by an arbitrator and that the arbitrator's decision would be final and binding. *Id.* at 558. When the employer and union could not agree on the scope of the bargaining unit, the union filed a representation petition with the Board. *Id.* at 560. The Board held that the agreement barred the representation petition and that the union could not invoke those elements of the agreement that benefitted it while circumventing others. *Id.* The Board, however, narrowly tailored its decision and said it was a "determinative fact" that the union had filed the petition. *Id.* "[W]e are not finding that the Agreement bars an election petition filed by another union or an unfair labor practice charge filed by an employee." *Id.*

This case squarely fits into the exception identified by the Board in *Verizon Information Systems*. UNITE HERE, Local 7 did not file the instant decertification petition. Rather, it was

three unions as joint representatives. The testimony is irrelevant to the issue of joint unions' intent to represent the employees on a joint basis at the time the motion for intervention was made in this proceeding.

filed by an employee who is not a party to the labor peace agreement. The plain language of the labor peace agreement provides that UNITE HERE, Local 7 will not “file, or cause to be filed, a Petition with the National Labor Relations Board for any election . . . and will not file any charges or objections . . .” As *Verizon* demonstrates, the board will enforce waivers of a signatory party’s right to file a petition where such waivers are express, clear, knowing, and unmistakable. See *Northern Pacific Sealcoatings, Inc.*, 309 NLRB 759 (1992); *Lexington House*, 328 NLRB 894 (1999). In the instant case, however, it is undisputed that Local 7 did not file a petition with the Board, and there is no evidence – or even suggestion – that it caused the Petitioner to file her petition herein. Thus, the express and unmistakable terms of the labor peace agreement were not violated by Local 7’s intervention in this proceeding. Just as UFCW Local 27, which also signed the labor peace agreement, may appear on the ballot and potentially enjoy Board certification in the event it obtains a majority of the votes cast in the election, so too may the Joint Unions (including UNITE HERE, Local 7). To bar Local 7 from the ballot while allowing UFCW Local 27 potentially to obtain a Board certification would not be consistent with the plain language of the labor peace agreement, and would improperly restrict employees’ choice in the election and be contrary to the purposes and policies of the Act. In sum, I find that the labor peace agreement signed by the Employer and UNITE HERE, Local 7 neither bars the employee petition or prevents the Joint Unions (including UNITE HERE, Local 7) from intervening in this matter and likewise obtaining Board certification, if appropriate.¹⁶

¹⁶ Accordingly, UFCW Local 27’s Motion to Bar Intervention by the Joint Petitioners, which the Employer joined, is hereby denied.

III. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.¹⁷
3. The United Food and Commercial Workers, Local 27 is a labor organization within the meaning of Section 2(5) of the Act.
4. UNITE HERE, Local 7, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
5. The International Union of Operating Engineers, Local 37, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
6. The International Brotherhood of Teamsters, Local 355, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
7. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
8. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

¹⁷ The parties stipulated that the Employer is a Maryland limited liability company with an office and place of business in Berlin, Maryland, and is engaged in the business of gaming. Since January 1, 2011, the Employer, in conducting its operations, has derived gross revenues in excess of \$500,000. During that period of time, the Employer, in conducting its business operations, purchased and received at its Berlin, Maryland facility, goods valued in excess of \$5,000 directly from points outside the State of Maryland.

All full-time and part-time employees, including slot department (slot techs and slot service ambassadors), food and beverage (servers, cashiers/hostesses, bartenders, stewards, lead stewards, dining room attendants, bar backs, cooks, beverage servers), floor attendants, player services (cage cashiers, main bank cashiers, hard count clerks, soft count clerks, EVS attendants (housekeeping), facilities technicians, HVAC technicians, electricians, plumbers, groundskeepers, warehouse receiving leads and warehouse receiving attendants, employed by the Employer at its Berlin, Maryland facility but excluding supervisors, professional employees and guards as defined by the National Labor Relations Act.

9. UNITE HERE, Local 7, AFL-CIO, International Union of Operating Engineers, Local 37, AFL-CIO, and International Brotherhood of Teamsters, Local 355, AFL-CIO, as Joint Unions, are an Intervenor.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Food and Commercial Workers International Union, Local 27, or by UNITE HERE, Local 7, International Union of Operating Engineers, Local 37, AFL-CIO, and International Brotherhood of Teamsters, Local 355, AFL-CIO, as Joint Unions, or Neither.** The date, time, and place of the election will be specified in the notice of election that the Regional Office will issue subsequent to this Decision.

A. *VOTING ELIGIBILITY*

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of issuance of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who

have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of the issuance of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.) Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, 8th Floor, Baltimore, MD 21202, on or before **April 4, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlr.gov,¹⁸ by mail, by hand or courier delivery, or by facsimile transmission at (410) 962-2198. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of

¹⁸ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.

this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **April 11, 2011**, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could

¹⁹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

/s/ Wayne R. Gold

Dated: March 28, 2011

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street, 8th Floor
Baltimore, MD 21202

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

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|---|------------|
| OCEAN ENTERPRISE 589, LLC, D/B/A THE CASINO AT OCEAN DOWNS | Employer |
| and | |
| RENEE GULINO, AN INDIVIDUAL | Petitioner |
| and | |
| UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 27 | Union |
| and | |
| UNITED HERE, LOCAL 7, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 37, AFL-CIO; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 355, AFL-CIO, JOINT UNIONS | Intervenor |

CASE NO. 5-RD-1496

DATE OF MAILING March 28, 2011

AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION

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(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

REGULAR MAIL

Mr. Joe Cavilla
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Ms. Renee Carmela Gulino
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| | |
|--|---|
| Subscribed and sworn to before me on March 28, 2011. | DESIGNATED AGENT <i>Nirvan Brown</i> NATIONAL LABOR RELATIONS BOARD |
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MV Public Transportation, Inc. and John D. Russell and Local 1181-1061, Amalgamated Transit Union, AFL-CIO and Eric Baumwoll
Local 707, International Brotherhood of Teamsters and John D. Russell. Cases 29-CA-29530, 29-CA-29544, 29-CA-29619, 29-CA-29760, and 29-CB-13981

March 22, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On June 7, 2010, Administrative Law Judge Michael A. Rosas issued the attached decision. Respondents MV Public Transportation and Local 707, International Brotherhood of Teamsters (Local 707), each filed exceptions¹ and a supporting brief, the General Counsel and Local 1181-1061, Amalgamated Transit Union, AFL-CIO (Local 1181), each filed answering briefs, and Respondent MV Public Transportation filed a reply brief. Local 1181 filed cross-exceptions and a supporting brief, Respondent MV Public Transportation filed an answering brief, and Local 1181 filed a reply brief. Finally, the General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as

¹ Respondent MV Public Transportation does not except to the judge's finding that it violated Sec. 8(a)(2) and (1) of the Act by directing and urging its employees and applicants for employment, as a condition of employment, to sign cards authorizing Local 707 to represent them or have dues for Local 707 deducted from their salary. It also does not except to the judge's finding that it violated Sec. 8(a)(1) of the Act by: (1) photographing employees as they engaged in lawful union activity; (2) directing an employee to retrieve her signed authorization card from Local 726, International Union of Journeyman and Allied Trades (Local 726), confiscating it, and ripping it up; and (3) threatening an employee with discharge because he supported Local 1181 and prohibiting him from speaking about Local 1181.

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents assert that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the entire record, we are satisfied that the Respondents' contentions are without merit.

modified, to modify his remedy,³ and to adopt the recommended Order, as modified and set forth in full below.⁴

In affirming the judge's rejection of the Respondents' Sec. 10(b) defense, we agree with his finding that the Sec. 10(b) period began on or after October 5, 2008, when employees first learned of Local 707's representative status. Because the charge was filed on March 31, 2009, less than 6 months after October 5, 2008, the Respondents' Sec. 10(b) defense fails. Consequently, we find it unnecessary to pass on the judge's alternative basis for rejecting the Sec. 10(b) defense.

We correct the judge's inadvertent error in stating that Respondent MV Public Transportation's "ramp-up" chart listed 11 service vehicles in operation on October 1, 2008. The chart actually lists 8 service vehicles in operation on that date.

In finding that Respondent MV Public Transportation prematurely recognized Respondent Local 707, the judge applied the well-established two-prong test articulated in *Hilton Inn Albany*, 270 NLRB 1364 (1984), which requires that at the time of recognition the employer must: (1) employ a substantial and representative complement of its projected work force; and (2) be engaged in normal business operations. We agree with the judge's findings that the Respondent did not satisfy either prong of the test.

Member Becker would no longer apply the "normal business operations" prong of this test. As explained by then-Member Liebman in her dissent in *Elmhurst Care Center*, 345 NLRB 1176, 1179-1180 (2005), the Board no longer applies that prong in determining whether a contract will bar an election. See *General Extrusion*, 121 NLRB 1165, 1167 (1958). So long as a representative complement of employees has been hired, absent a bar resting on their prior choice, employees should be free to decide if they wish to be represented and when they wish to make that decision. If those employees wish to wait until their employer commences normal business operations, they are free to do so. But that choice should be left to employees and not taken from them by the Board. Continued application of the "normal business operations" prong deprives employees of this element of a free choice and is inconsistent not only with *General Extrusion*, but with the development of Board law in other areas as well. See *Management Training Corp.*, 317 NLRB 1355 (1995); *Midland National Life Insurance*, 263 NLRB 127 (1982). Member Becker would therefore abandon that prong of the test.

Because the Respondent Employer failed to satisfy the first, "representative complement" prong of the test, Member Pearce does not need to address the continued viability of the second prong in affirming the judge's conclusion that the recognition of Respondent Local 707 was premature.

Member Hayes adheres to the well-established *Hilton Inn Albany* test, as reaffirmed in *Elmhurst Care Center*, and would therefore affirm the judge's finding of unlawful premature recognition under either prong of that test.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We have also modified the remedy to reflect the Board's usual remedial provisions.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We have also modified the judge's recommended Order to more fully reflect the violations found and to comport with the Board's usual remedial provisions. We shall also substitute a new "Notice to Employees" as well as a new "Notice to Members," both of which will reflect the Board's modifications to the Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following as new Conclusions of Law 5 and 7:⁵

"5. By executing a collective-bargaining agreement with Local 707 on December 12, 2008, which agreement contained a union-security clause, notwithstanding the fact that Local 707 did not represent an uncoerced majority of the Company's employees, the Company violated Section 8(a)(1), (2), and (3) of the Act."

"7. By photographing employees as they engaged in lawful union activity; directing an employee to retrieve her signed authorization card from Local 726, confiscating it, and ripping it up; and threatening an employee with discharge because he supported Local 1181 and prohibiting him from speaking about Local 1181, the Company violated Section 8(a)(1) of the Act."

AMENDED REMEDY

Having found that Respondent MV Public Transportation has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act and that Respondent Local 707 has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2), we shall order that each Respondent cease and desist and take certain affirmative action to effectuate the policies of the Act.

Respondent MV Public Transportation will be ordered to withdraw recognition from Local 707 and the latter will be ordered to cease accepting recognition from the former unless certified by the Board. Both Respondents will be ordered to cease giving effect to their December 12, 2008 collective-bargaining agreement, including all renewals, extensions, and modifications, and to cancel it entirely. The Respondents will also be ordered jointly and severally to reimburse all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the December 12, 2008 collective-bargaining agreement, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). However, reimbursement shall not extend to those employees who voluntarily joined and became members of Local 707 prior to December 12, 2008. See *Elmhurst Care Center*, 345 NLRB 1176, 1185 (2005).

⁵ We have amended Conclusion of Law 5 to correctly reflect, consistent with the judge's findings, that Respondent MV Public Transportation executed its collective-bargaining agreement with Local 707 on December 12, 2008, not September 12, 2008. We have amended Conclusion of Law 7 to correctly reflect, consistent with the judge's findings, that Respondent MV Public Transportation violated Sec. 8(a)(1) of the Act by directing an employee to retrieve her signed authorization card from Local 726, not Local 1181.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that:

A. Respondent MV Public Transportation, Inc., Staten Island, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Recognizing Local 707 as the exclusive representative of its employees for the purpose of collective bargaining unless and until Local 707 is certified by the Board as the collective-bargaining representative of such employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any effect to its collective-bargaining agreement with Local 707 entered into on December 12, 2008, or any renewal, extension, or modification thereof unless and until Local 707 is certified by the Board as the collective-bargaining representative of such employees; provided however that nothing in this Order shall require any changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

(c) Directing and urging its employees or applicants for employment that, as a condition of employment, they have to sign cards authorizing Local 707 to represent them or have dues for Local 707 deducted from their salary.

(d) Photographing employees as they engage in lawful union activity, prohibiting employees from signing authorization cards on behalf of a union, prohibiting employees from speaking about a union, and threatening employees with discharge for speaking in support of a union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 707 as the collective-bargaining representative of its employees unless and until Local 707 has been duly certified by the Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 707 reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues check-off and union-security clauses in the December 12, 2008 collective-bargaining agreement in the manner set forth in the remedy section of this Decision and Order.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Staten Island, New York facility copies of the attached notice marked "Appendix A."⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent MV Public Transportation's authorized representative, shall be posted by Respondent MV Public Transportation and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent MV Public Transportation customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent MV Public Transportation has gone out of business or closed the facility involved in these proceedings, Respondent MV Public Transportation shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent MV Public Transportation at any time since September 12, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent MV Public Transportation has taken to comply.

B. Respondent Local 707, International Brotherhood of Teamsters, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from and executing a collective-bargaining agreement with MV Public Transportation at a time when it did not employ a representative number of its ultimate complement of unit employees and before it was engaged in normal business operations.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Giving effect to its December 12, 2008 collective-bargaining agreement with MV Public Transportation or to any extension, renewal, or modification thereof unless and until Respondent Local 707 is certified by the Board as the collective-bargaining representative of such employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with MV Public Transportation reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues check-off and union-security clauses in the December 12, 2008 collective-bargaining agreement in the manner set forth in the remedy section of this Decision and Order.

(b) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix B."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent Local 707's authorized representative, shall be posted by Respondent Local 707 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent Local 707 customarily communicates with its members by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director with signed copies of the notice for posting by MV Public Transportation where notices to all employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed by Respondent Local 707 and forthwith returned to the Regional Director.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Local 707 has taken to comply.

Dated, Washington, D.C. March 22, 2011

⁷ See fn. 6, supra.

| | |
|---------------------|--------|
| Craig Becker, | Member |
| Mark Gaston Pearce, | Member |
| Brian E. Hayes, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT recognize or contract with Local 707, International Brotherhood of Teamsters as the bargaining representative of our employees, until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT maintain or give effect to our December 12, 2008 contract with Local 707 or to any renewal, extension, or modification thereof, unless and until Local 707 is certified by the Board as the collective-bargaining representative of our employees; but we are not required to make any changes in wages or other terms and conditions of employment that may have been established pursuant to the contract.

WE WILL NOT direct or urge our employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 707 to represent them or have dues for Local 707 deducted from their salary.

WE WILL NOT photograph employees as they engage in lawful union activity, prohibit employees from signing authorization cards on behalf of a union, threaten em-

ployees with discharge for supporting a union, or prohibit employees from speaking about a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold all recognition from Local 707 as the collective-bargaining representative of our employees.

WE WILL, jointly and severally with Local 707, reimburse, with interest, all our present and former employees for all initiation fees and dues paid by them or withheld from them pursuant to the dues check-off and union security clauses in the December 12, 2008 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 707 prior to December 12, 2008.

MV PUBLIC TRANSPORTATION, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT act as the exclusive bargaining representative of any employees of MV Public Transportation, Inc. unless and until we have demonstrated our majority status and have been certified by the Board.

WE WILL NOT maintain or give effect to the December 12, 2008 contract between MV Public Transportation, Inc. and us or to any renewal, extension, or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce the employees of MV Public Transportation, Inc. in the exercise of the rights listed above, except to the extent that such rights may be affected by an agreement authorized in Section 8(a)(3) of the Act.

WE WILL, jointly and severally with MV Public Transportation, Inc., reimburse, with interest, all present and

former employees of MV Public Transportation, Inc. for all initiation fees and dues paid by them or withheld from them pursuant to dues check-off and union security clauses in the December 12, 2008 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 707 prior to December 12, 2008.

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Nancy Lipin, Esq., for the General Counsel.

H. Tor Christensen, Esq. (Littler Mendelson P.C.), of Washington, D.C., for the Respondent MV Public Transportation, Inc.

George Kirschenbaum, Esq. (Cary Kane, LLP), of New York, New York, for the Respondent Local 707, International Brotherhood of Teamsters.

Richard Brook, Esq. (Meyer, Suozzi, English & Klein, P.C.), of New York, New York, for the Charging Party Local 1181-1061 Amalgamated Transit Union, AFL-CIO.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Brooklyn, New York, on December 8–11, 16–17, 2009, and January 19, 2010. The charge in Cases 29–CA–29530 and 29–CB–13981 were filed March 31, 2009; the charge in Case 29–CA–29760 was filed August 7, 2009; the charge and first amended charge in Case 29–CA–29544 were filed on April 9 and June 9, 2009, respectively; and the charge in Case 29–CA–29619 was filed on May 22, 2009. The complaint issued September 30, 2009.¹

The complaint alleges that MV Public Transportation, Inc. (the Company) violated Section 8(a)(1), (2), and (3) as follows: (1) on or about September 12, 2008, by granting recognition to Respondent Local 707, International Brotherhood of Teamsters (Local 707) as the exclusive collective-bargaining representative of all drivers employed by the Company at its Staten Island, New York facilities; (2) on or about October 20, 2008, by conditioning employment on employees agreeing to sign authorization cards on behalf of Local 707; (3) on or about December 12, 2008, by entering into, and since then maintaining and enforcing, a collective-bargaining agreement, which includes union-security and checkoff provisions, with Local 707 on behalf of the Company's drivers, mechanics, and utility workers. The complaint also alleges complicity on the part of Local 707, who violated Section 8(b)(1)(A) and 8(b)(2) by accepting such recognition at a time when the Company did not employ a representative segment of the ultimate employee complement and was not yet engaged in its normal operations of providing paratransit services, and then entering into, maintaining, and enforcing the aforementioned collective-bargaining agreement.

¹ Unless otherwise indicated, all dates refer to the period between August 2008 and July 2009.

The complaint further alleges that the Company violated Section 8(a)(1) as follows: (1) in or around February by threatening employees with job loss unless they signed a dues check-off on behalf of Local 707; (2) by engaging in surveillance of employees' union activities; (3) directing employees who signed authorization cards for another union to return those cards; (4) threatening employees with reprisals because of their activities on behalf of another union; (5) spat at employees who were engaged in activities supporting another union; and, on or about April 30, by directing employees not to speak about Local 1181 at its facility and threatening them with discharge if they disobeyed that directive.

The Company and Local 707 deny the material allegations in the complaint. In addition, the Company contends that the claim is time-barred pursuant to Section 10(b) because the recognition agreement was signed on September 12 and the charge was not filed until March 31.

In a bizarre twist of events, the Company's general manager responded to the General Counsel's subpoena duces tecum (B-562546) for the Company's payroll records by producing a summary of its database information and then disavowing its accuracy.² The General Counsel responded with another subpoena duces tecum requesting additional documents to clarify the extent of the Company's work force during the term of the Contract. I partially granted the Company's petition to revoke, but required it to produce the union dues remittance form and Form I-9 (Department of Homeland Security, Employment Eligibility Verification) for every employee reflected in the payroll information produced.³ Forms I-9 would have been reliable records, within a 3-day period, as to employee hire dates. The applicable period was from the commencement of operations through July 31.⁴ The Company produced the remittance forms, but refused to produce the Forms I-9, citing unspecified problems or complications if it did—even after I assured the Company that such documents would be placed under seal. The General Counsel then requested an adjournment in order to seek enforcement of the subpoena in United States district court. I denied that request in light of the availability of alternative procedural remedies, including sanctions pursuant to *Banyon Mills Inc.*, 146 NLRB 611, 613 (1964). See also *McAllister Brothers, Inc.*, 341 NLRB 394, 396 (2004).⁵ The General Counsel moved for such sanctions and I grant her application in the following respects: the payroll information produced is deemed accurate as to hiring dates, hours worked, job classifications, and all other information contained therein, except where reliable evidence indicates otherwise; and, to the extent that any such information is uncertain, an inference will be drawn in favor of the General Counsel.

² The credibility of Quinto Rapacioli, the Company's general manager and the person upon whom the subpoena was served, was necessarily diminished as a result of his production of summary payroll information and then disavowing it as inaccurate. (Tr. 349–350, 447, 475–477.)

³ ALJ Exhs. 1–4; GC Exhs. 30–32.

⁴ Tr. 488, 492.

⁵ Tr. 775.

On the entire record,⁶ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company and Local 1181, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, a domestic corporation with its principal office and place of business in Staten Island, New York, has been engaged in providing paratransit services within New York, New York, where it annually derives gross annual revenues in excess of \$250,000, and purchases and receives at its Staten Island facilities good and materials valued in excess of \$5000 directly from suppliers located outside the State of New York. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Locals 707 and 1181 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

Based in Fairfield, California, the Company is the largest provider of paratransit services in the United States.⁷ Since 2001, the Company has provided paratransit services in Brooklyn, New York, for the New York City Transit Authority (Transit Authority). That operation has grown to encompass 310 routes daily with 251 vehicles and 450 transit professionals.⁸ Since August 2008, the Company has also provided paratransit services to passengers in Staten Island pursuant to a Transit Authority contract.⁹

The Company's general manager is Quinto Rapacioli. During the relevant period of time, John Duncan served as operations manager and Ronald McElhose¹⁰ was employed as a driving instructor. All acted as the Company's statutory supervisors and/or agents.

In late August, the Company began training drivers for its Staten Island operations at 125 Lake Avenue (Lake Avenue facility). Shortly thereafter, it opened offices at 900 South Avenue (South Avenue facility). From September through the spring of 2009, the Company utilized a trailer located at 40 LaSalle Street (LaSalle Street facility) to house a drivers' room, dispatch room, and maintenance area. The Company's vehicles were parked in a yard outside this trailer. After drivers completed training, they reported to work each day at the 40 LaSalle Street facility. In the spring of 2009, the Company moved its entire operation to a larger facility at 1957 Richmond Terrace.

B. *The Company's Bid for the Staten Island Access-A-Ride Contract*

⁶ The General Counsel's unopposed motion to correct the transcript, dated April 1, 2010, is granted and received in evidence as GC Exh. 37.

⁷ GC Exh. 23.

⁸ GC Exh. 23.

⁹ GC Exh. 20.

¹⁰ McElhose was referred to in the testimony by his nickname, "Mack."

In 2007, the Transit Authority sought bids from paratransit providers to provide "Access-A-Ride Paratransit Transportation Service" in Staten Island, New York. The Company and other companies bid for the work, including the incumbent service provider, RJR Paratransit. The Company's bid stated, in pertinent part:

[The Company] 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.

[The Company] is proposing to start with an approximate 150 vehicle fleet for this project. Our startup plan shows that 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 [Transit Authority's] expected growth in the Access-A-Ride service over the next few years. By following this plan, [the Company] would be at the full 300 vehicle operation limit in a three to four year period.¹¹

The Company's proposal included a price summary for the initial 150 vehicles and the expansion of 150 more for a total estimated first year amount of \$21,525,085.¹² The vehicles were to be serviced and stored at the Company's Lake Avenue facility and operated by 237 drivers. The Company also represented that the Lake Avenue facility was capable of supporting such a fleet.¹³

C. *The Company Is Awarded Contract and Prepares to Operate*

By letter, dated August 29, the Transit Authority congratulated the Company on its award for a contract to provide Access-A-Ride services in Staten Island and mentioned transitional issues affecting the employees of incumbent carriers:

As you may be aware, some incumbent carriers are not receiving an award at this time. Employees of these carriers may approach you requesting a position in your organization. We encourage your taking advantage of available and experienced personnel who are dedicated to Access-A-Ride service. We request that you keep in mind that while you are mobilizing and ramping up, New York City Transit will be relying on the on-street service provided by those carriers ramping down. To that end, any transfer of employees must be addressed and handled in an organized and manageable fashion.

¹¹ GC Exh. 21(a) at 48.

¹² GC Exh. 36 at pp. 2 and 8.

¹³ GC Exh. 21(a) at 48, 57.

As such, NYC Transit will work closely with you and help coordinate such transfers so as not to adversely affect the overall program. You, as a carrier, are required to keep NYC Transit informed of the staff you will be hiring. Operator hires must be reviewed by the Standards and Compliance (S&C) Transportation Section. Maintenance personnel hires must be reviewed by the S&C Maintenance Section. All managerial and support staff hires should be reviewed by your assigned NYC Transit Contract Manager.¹⁴

On September 5, the Transit Authority formally accepted the Company's bid and awarded it Contract No. 07H9751 for Access-A-Ride Paratransit Transportation Service (the Contract). The Transit Authority's acceptance was explicitly based on the Company's best and final offer (BAFO) for the "total estimated" amount of \$422,066,234.00. It was final and not conditioned upon any other developments.¹⁵ The Contract terms, consistent with the Company's proposal, included a 10-year term for the operation of 150 vehicles, with an expansion to 300 vehicles. The vehicles were to be leased to the Company by the Transit Authority.¹⁶ Specifically, the Contract's "Vehicle Start Up/Expansion Schedule" required the Company to field 15 vehicles by October 20, and an additional 20 vehicles for each of the next 3 months. Therefore, by January 20, 2009, the Company would have been required to have 75 vehicles in operation. Thereafter, the Contract Schedule required the operation of an additional 10 vehicles per month until 150 vehicles were reached. At such a rate, 150 vehicles would be in operation by September 2009. Once it attained an operational level of 15 vehicles, the Company was required to field an additional 10 vehicles per month until 300 were in operation.¹⁷

By letter, dated September 22, Michael Cosgrove, the Transit Authority's representative, advised Rapacioli that the Transit Authority expected the Company to "maintain the ramp up commitment" in its proposal.¹⁸ Rapacioli responded immediately by submitting a "ramp-up" chart containing the schedule for vehicles in service and total drivers: October 1—11 vehicles, 10 drivers; October 13—11 vehicles, 16 drivers; October 20—15 vehicles, 29 drivers; November 17—35 vehicles, 70 drivers; December 22—55 vehicles, 109 drivers; January 19, 2009—75 vehicles, 148 drivers; February 16, 2009—85 vehicles, 168 drivers; March 16, 2009—95 vehicles, 188 drivers; April 13, 2009—105, 208 drivers; May 11, 2009—115 vehicles, 228 drivers; June 15, 2009—125 vehicles, 248 drivers; July 13, 2009—135 vehicles, 267 drivers; and August 10, 2009—135 vehicles, 267 drivers.¹⁹

¹⁴ CP Exh. 2.

¹⁵ The Company attempted to inject uncertainty as to the award based on letters to a local newspaper urging support for the prior service provider. (R. Exh. 3, p. 2.) However, there was no credible evidence even suggesting that the notice of award/notice to proceed issued by the Transit Authority, the local governmental agency charged with administering the Contract, was anything other than final. (GC Exhs. 20, 22.)

¹⁶ GC Exh. 20, Scope of Work, Attachment 1 at 10.

¹⁷ GC Exh. 20, Attachment 30.

¹⁸ GC Exh. 27.

¹⁹ Although Rapacioli did not clarify the specific categories listed on the chart, it appears that the number of drivers needed to operate in-

D. Start-Up Hiring, Training, and the Recognition

Following award of the Contract, the Company immediately hired driver trainees as required by the Contract. The first group of 22 trainees commenced the 3–4 week long training course on August 28. The initial part of the course consisted of at least two weeks and two days of classroom instruction at the Lake Avenue facility. Around the middle to latter part of September—but after September 12—the trainees reported to the LaSalle Street facility for driving instruction.²⁰ Upon successful completion of the course and certification by the Transit Authority, trainees were eligible to operate a Company vehicle.²¹ However, there is a high turnover and not all trainees completed the course. Of the 22 trainees in the first class, only 11 were certified as drivers.²² By September 26, 42 driver trainees were on the payroll. By that time, however, four of the employees hired prior to September 12 were no longer employed.²³

Pursuant to a September 29 email directive from the Transit Authority, the Company commenced operations by operating eight routes with 11 vehicles on October 1.²⁴ On October 6, the Company publicly announced its successful start under the Contract in a press release, which stated, in pertinent part:²⁵

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.

cluded an additional amount of relief drivers. (Tr. 345.) With respect to the number of vehicles projected, I relied on the information for vehicles in service, rather than vehicles assigned, since the latter statistic is a more reliable indicator of actual operations. (GC Exh. 28.)

²⁰ Neither Rapacioli nor current employee Stephen Rebracca provided specific dates as to when the classroom portion ended and the driving portion began. However, Rapacioli explained that the driving portion would have commenced no sooner than 2 weeks and 2 days after the classroom instruction began. (Tr. 399.) Rebracca testified that he did not report to the LaSalle Street facility for the driving portion of the course until the third or fourth week in September. (Tr. 207, 212.) Based on such testimony, it is clear that employees were not yet engaged in the driving portion of the training course as of September 12.

²¹ The job code for drivers was denoted as "610" on the first set of payroll records, but changed to job code "T156610" by the check date of September 26. (GC Exh. 31; Tr. 352.)

²² I based this finding on the testimony of current employee Stephen Rebracca and Rapacioli, as the dates of hire reflected in the Company's payroll records appeared to lag behind the documented hiring dates. (Tr. 206–210, 399–401, 456–457; GC Exh. 31, Div. 156(8)–(9).) Notwithstanding my aforementioned ruling to draw adverse inferences against the Company regarding the payroll records, the General Counsel and Charging Party did not request that I rely on the payroll record of indicating a work force of 18 driver trainees as of September 12 and assumed, for purposes of their legal arguments, that there were 22 driver trainees in the first class. (GC Br. 28, 4748; CP Br. 3.)

²³ Christopher Dotts, Anthony Giambone, Anthony Miceli, and Alexander Peter.

²⁴ Rapacioli referred to different starting dates, October 1 and 5, but the former appears more compatible with the evidence received. (GC Exhs. 23, 25; Tr. 320, 452.)

²⁵ GC Exh. 23.

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.

The company has operated paratransit services with the MTA since 2001, and currently has a local office in Brooklyn. The initial contract award includes a doubling of the vehicles used to provide service—from 150 to 300.

The payroll records reveal an escalation in operations after October 1 consistent with the Company's proposal.²⁶ By October 10, 79 drivers were on the payroll, including 55 of which were operating routes by October 12. However, two more employees hired prior to September 12 were no longer employed and another was working as a dispatcher.²⁷ By October 24, 97 drivers were on the payroll. However, one employee hired prior to September 12 was no longer employed.²⁸ By November 7, 125 drivers were on the payroll. However, another employee hired prior to September 12 was no longer employed.²⁹ By November 21, 119 drivers were on the payroll. However, another employee hired prior to September 12 was no longer employed.³⁰ By December 5, 133 drivers were on the payroll. By December 19, 144 drivers and 12 mechanics were on the payroll, 139 of which were working by December 12. By then, only 6 of the employees hired prior to September 12 were still employed. By January 2, 2009, 164 drivers and 13 mechanics were on the payroll. By January 16, 188 drivers and 15 mechanics were on the payroll. At that point, the Company was operating at least 160 shifts.³¹

After January 2009, the total number of drivers and mechanics hired each payroll period continued to grow significantly, as follows: January 31: 238 (248 drivers, 18 mechanics); February 28: 279 (252 drivers, 26 mechanics); March 31: 261 (235 drivers, 26 mechanics); April 30: 264 (237 drivers, 27 mechanics); May 31: 269 (240 drivers, 29 mechanics); June 30: 278 (249 drivers, 29 mechanics); July 31: 298 (269 drivers, 29 mechanics); August 31: 286 (257 drivers, 29 mechanics); September 30: 298 (266 drivers, 29 mechanics); October 31: 307 (279 drivers, 28 mechanics); and November 30: 309 (280 drivers, 29 mechanics).³²

The number of vehicles assigned by the Transit Authority to the Company between September 2008 and November 2009, generally reflected the work force in place at the time and the initial projections by the Company—roughly one vehicle for every two drivers: September 2008: 12; October 2008: 22; November 2008: 40; December 2008: 77; January 2009: 89; February 2009: 101; March 2009: 111; April 2009: 119; May 2009: 124; June 2009: 124; July 2009: 125; August 2009: 129; Sep-

tember 2009: 129; October 2009: 129; November 2009: 131; and December 11, 2009: 124.³³

E. The Company's Agreement With Local 707

On August 28, the Company and Local 707 executed a "Card Check and Neutrality agreement for Staten Island, New York" (card-check agreement). Essentially, that agreement required the Company to recognize Local 707 upon a showing that a majority of employees had signed authorization cards or a petition. The applicable employees consisted of "[a]ll full-time and regular part-time drivers in Staten Island, NY, excluding warehouse employees, mechanics and similar maintenance employees office clerical employees, managerial employees, guards, and supervisors as defined by the National Labor Relations Act." An arbitrator from the Federal Mediation and Conciliation Service was required to certify the showing of interest. The Company further agreed to maintain a neutral position as to whether employees were to be represented by Local 707. In exchange, the latter agreed to refrain from negative campaigning against the Company.³⁴

That same day, as employees arrived for training at the Lake Avenue facility, they were met by Local 707's business representative, Danny Pacheco, and several other union officials. The Local 707 representatives solicited membership in Local 707, handed union authorization cards to the employees, suggested they speak among themselves and asked them to return the cards signed if they agreed.³⁵

By letter, dated September 8, Local 707's president, Kevin McCaffrey, informed the Company that it believed that it had "majority status" and requested verification pursuant to the card-check agreement.³⁶ On September 11, Local 707 presented arbitrator Elliot Shriftman with 20 signed authorization cards from among the Company's 22 employees in the unit of drivers employed during the payroll period ending September 13.³⁷ In response, Shriftman certified that Local 707 "was designated by a majority of the Company's employees in the unit as their exclusive bargaining representative for purposes of collective bargaining" (the certification).³⁸ The appropriate bargaining unit (the Unit) was defined as follows:

³¹ Rapacioli testified that the Transit Authority did not adhere to the schedule for vehicle service as set forth in Attachment 30 to the Contract. (Tr. 403, 411-412.) However, the Company's records confirm that the schedule was generally met. (GC Exhs. 24, 28.)

³⁴ Jt. Exh. 1.

³⁵ Rapacioli and Rebracca provided consistent testimony regarding these events. (Tr. 207-209, 417.) The payroll records, however, appeared to lag behind the actual starting date for training since it is not disputed that Rebracca began attending training classes on August 28, although the September 12 payroll record indicates that he was hired on September 5. In fact, that record shows only one employee, Christopher Dotts, hired on August 29, while the rest were formally hired between September 2 and 8. (GC Exh. 31, Div. 156(9).)

³⁶ GC Exh. 19.

³⁷ As noted at fn. 22, although the payroll records indicate that there were 18 driver trainees on the payroll as of September 12, the General Counsel and Charging Party assumed, for purposes of their legal arguments, that the number of cards presented to the arbitrator of September 12 equaled the number of driver trainees on the payroll on that date.

³⁸ GC Exh. 8(b).

²⁶ GC Exh. 31.

²⁷ Robert Meisels, Margaret Hicks, and Jamelia Alleyne.

²⁸ Anthony King.

²⁹ Elizabeth Kelley.

³⁰ Arlene Crupi.

³¹ GC Exh. 4.

³² GC Exhs. 31-32.

All 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 by the National Labor Relations Act.

Following the certification, on September 12, the Company and Local 707 entered into a recognition agreement recognizing the latter as the exclusive collective-bargaining representative of the Company's full-time and regular part-time drivers in Staten Island, but excluding warehouse employees, mechanics and similar maintenance employees, office clerical employees, managerial employees, guards and supervisors as defined in the [Act].³⁹ The Company and Local 707 also agreed to "meet promptly and engage in good-faith negotiations concerning the terms of a Collective-Bargaining Agreement governing the wages, hours and other terms of employment of the employees in the appropriate bargaining unit."³⁹ At this point in time, however, all of the Company's employees were trainees and none had attained the employment status of driver.

The process of obtaining signed union authorization cards brought the issue of labor representation to the attention of most, if not all, of the employees in the first training class. However, they were not kept abreast of subsequent developments by either the Company or Local 707, since neither the certification nor recognition agreement were posted in the drivers' room at the LaSalle Street facility in September.⁴⁰ Even if

those documents had been posted on the bulletin board or walls in the small drivers' room there, they would not have been reasonably visible in September to employees, such as Stephen Rebracca, who was hired on September 5.⁴¹ The bulletin board, as well as the other walls in the driver's room, "was out of control." Employees used the room to post "their own stuff," dispatchers posted "driver's notices and trips" and "there was paper all over the place."⁴²

By letter, dated September 15, Local 707's counsel notified the Board's Region 29 that his client was "voluntarily recognized" by the Company, enclosed a copy of the recognition agreement executed by the Company and Local 707, and requested that Region 29 "provide the necessary Notices so that the Employer may post the Notice of Voluntary Recognition as quickly as possible."⁴³ Pacheco received a response from Region 29 on September 20, but did not post that communication in the drivers' room during September.⁴⁴

On October 2, the Company was notified by Region 29 that it needed to post a *Dana* notice.⁴⁵ On October 5, Rapacioli posted them in the driver's room at the LaSalle facility.⁴⁶ In addition, the Company's employees began learning about Local 707's representative status during training classes beginning on October 6, as training instructor McElhose began to introduce Pacheco to new trainees as their union representative. Employees were then directed to sign authorization cards on behalf of Local 707 and return them immediately. In response to questions as to why the cards needed to be filled out, supervisors explained that they were a condition of employment.⁴⁷ Rapacioli

³⁹ Jt. Exh. 2.

⁴⁰ This finding is based on my determination that Company employees Stephen Rebracca, Eric Baumwoll, and John Russell (Tr. 88–90; 143–144; 206, 215–216) were more credible than Rapacioli, Pacheco, Ranieri, and Osman on this point (Russell did not start work until October 20.) In untangling the conflicting and vague testimony, it was evident that the drivers' room was cluttered with papers posted all over. Rapacioli was unsure of the date, but speculated that he posted the certification and a handwritten note on either September 18 or 20, but contradicted that assertion with an estimate that he posted them in "late, late September." (Tr. 420–421.) Pacheco testified that he posted the certification after the September 12 recognition agreement was entered into, but failed to provide the names of persons with whom he spoke. That assertion also appears to conflict with Local 707's August 4, 2009 position statement that it posted a September 18 docket letter from Region 29 in the drivers' room, but omitted reference to the posting of any other documents. (Tr. 388, 548–549, 573; GC Exhs. 8(b), 13, 34.) Ranieri's testimony was vague and inconsistent, and he was impeached after initially denying having provided a pretrial written statement. (Tr. 518–519, 524–528.) Moreover, the testimony of Osman, an extremely evasive witness who initially invoked her Fifth Amendment privilege against self-incrimination before agreeing to be cross-examined by the General Counsel, was completely devoid of credibility. Thus, I do not credit her assertions as to when she first spoke with Pacheco about Local 707 representation or saw notices posted in the drivers' room. Her direct examination appeared overly scripted, especially with respect to specific dates, and it was evident that her relevant testimony—that she saw the certification, recognition agreement, and *Dana* notice all posted in the drivers' room on September 18, 2008—was based solely on Local 707's counsel having shown her the Regional Director's letter with that date a year later. (Local 707, Exh. 1.) Only after the parties agreed to permit Osman to consult with Local 707 counsel did she agree to be cross-examined. She looked continuously at Pacheco after answering questions, sometimes grinning. (Tr. 584–587,

593–598, 608–610, 614–619, 625, 631–632.) Lastly, Russell, whose testimony I found consistent and credible, testified that Osman admitted to him that she was offered a raise and more hours for testifying on behalf of the Company. (Tr. 726, 729–731.)

⁴¹ Rebracca, a current employee subpoenaed by the General Counsel and the trial's most credible witness, provided spontaneous and consistent testimony. (Tr. 214–215.)

⁴² The collective testimony of Rapacioli, Pacheco, and Ranieri confirmed that the drivers' room walls, including the bulletin board, were covered with many postings. Rapacioli described the situation as "out of control." As such, it was evident that any papers posted in that room were soon covered or lost amidst a virtual paper jungle and, thus, not reasonably visible to drivers entering that room. (Tr. 421, 462–463, 518–519, 547, 571, 573; GC Exh. 8(b).)

⁴³ GC Exh. 35.

⁴⁴ I base this finding on the same reasons stated in fn. 40.

⁴⁵ *Dana* notices are workplace notices provided by the Board notifying employees of their right to file a decertification petition within a 45-day window period, pursuant to the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007).

⁴⁶ As to this particular posting, I found Rapacioli's certainty and spontaneity in describing his response to Region 29's directive that he post the *Dana* notice more credible than the General Counsel's witnesses who did not recall seeing that notice. (Tr. 422–423; R Exh. 8.) Moreover, Rebracca testified that he heard about this development from other drivers in early November, which is consistent with the notice having been posted in October. (Tr. 215.)

⁴⁷ Pacheco did not refute the credible testimony of current driver Nilda Muniz regarding the events of October 6. However, I did not, however, credit her testimony that Pacheco misrepresented the purpose of the authorization cards, since she conceded being told that employees were represented by Local 707. (Tr. 228–231, 238; GC Exh. 15.)

cioli made such statements to a new class of trainees on October 20. During other classes, including the one on November 10, McElhose did the introduction, informed the trainees that they were required to return the completed authorization cards and collected them on behalf of Local 707.⁴⁸

On December 11, the Company's employees ratified a collective-bargaining agreement. The collective-bargaining agreement contains union security and checkoff provisions in Article 3, Sections 3.2 and 3.3, respectively. On December 12, the Company entered into a collective-bargaining agreement with Local 707 as the exclusive collective-bargaining representative of the Company's employees in the following modified contract unit:

All full-time, part-time and casual drivers, mechanics and utility workers working under any Contract between the Company and New York City Transit Authority, excluding office clerical employees, mechanics, utility workers, professional employees, road supervisors, dispatchers, guards and supervisors as defined in the Act.⁴⁹

About 2 weeks after execution of the collective-bargaining agreement, the Company's dispatchers distributed packets to drivers and mechanics. The packets included a letter from Rapacioli, dated December 22, Local 707's union application, a dues-checkoff form, and union benefits package. The letter stated that the materials were distributed at Local 707's request and instructed drivers to return the completed forms to the dispatcher.⁵⁰

By letter, dated December 27, Rapacioli informed drivers that, beginning January 12, 2009, they would be able to select routes, effective January 17.⁵¹ On or before January 12, the Company posted a notice near the door to the driver's room at the LaSalle Street facility.⁵² It stated:

All Employees You must sign the union application in order to pick. Signing is a condition of employment. If you have any questions, contact your union rep or Quinto. Respectfully, John Duncan.⁵³

John Russell was hired by the Company as a driver-trainee on October 20, and remains employed as a driver. He saw the posting in the LaSalle Street facility and asked Duncan, with clear indignation, why employees needed to sign the Local 707

forms. Duncan responded that it was a condition of his employment, since he needed to sign the forms in order to select a route and, if he was not able to select a route, he could be terminated. Russell then took a picture of the notice with his cell phone. Later that day, dispatchers began handing out the union applications and dues-checkoff forms, and they were also placed on a table in the drivers' room for employees to pick up and fill out.⁵⁴

F. Employees Engage in Activity on Behalf of Another Labor Organization

Eric Baumwoll was hired by the Company as a driver-trainee on October 15. However, he was reassigned to a clerical position and never served as a driver. Baumwoll was terminated on December 22.⁵⁵ During late January to early February 2009, Baumwoll and Russell solicited support for Local 726, International Union of Journeymen and Allied Trades (Local 726) near the LaSalle Street facility.⁵⁶ They distributed authorization cards and flyers on behalf of Local 726 and asked employees, as they arrived to or left from work, to return them signed. On one of those occasions, Baumwoll spoke with and obtained a signed authorization card from another driver, Susan Santopaolo, as she left the trailer. Their interaction was observed by Rapacioli, who got out of his vehicle and photographed the encounter. He intercepted her as she was getting in her vehicle and instructed her to retrieve the authorization card. Santopaolo complied, went to retrieve the card and handed it to Rapacioli. Rapacioli immediately tore up the card and approached Baumwoll, cursed and spit at him, vaguely threatened his family and threatened to call the police. Russell observed the entire incident involving Santopaolo, including Rapacioli ripping up the authorization card, but did not observe Rapacioli's subsequent interaction with Baumwoll.⁵⁷

⁵⁴ The credible testimony of Russell, Rebracca, Prestia, and Muniz regarding the posting of these notices and the employee directives was not refuted by Rapacioli. (Tr. 94-96, 216-217, 234-235, 239, 246-249; GC Exh. 5-7.) Osman and Vincent Smaldone, another driver shop steward for Local 707, testified that they did not see the notice posted in the drivers' room. (Tr. 586, 644-645.) I found neither credible, as both failed to observe a notice that Rapacioli did not dispute posting and distributing, yet testified that they observed the earlier postings in September and October. (Tr. 584-586, 643-645; GC Exhs. 8(b) and 13.) Moreover, Smaldone conceded that he was prepared to testify in the presence of Rapacioli, Pacheco, Osman, and Local 707's counsel. (Tr. 655-656, 658.) Osman omitted any reference to that encounter and testified that she was prepared to testify at work while in the presence of Pacheco. (Tr. 593-594.) Moreover, as previously stated, she was not a credible witness.

⁵⁵ GC Exh. 31, Div. 156(12).

⁵⁶ GC Exh. 2.

⁵⁷ I based this finding on the versions provided by Russell and Baumwoll. Neither provided a specific date as to when the Santopaolo incident occurred, except to state that it occurred between late January and early February 2009. (GC Exh. 2; Tr. 101-108, 128-130, 144-147, 149-150, 159-162.) Moreover, there was controversy over Baumwoll's separation from the Company and Rapacioli's vague contention that Baumwoll served as a spy for another organization while employed by the Company. Nevertheless, Rapacioli essentially conceded that the incident occurred. He testified that he observed Baumwoll hand an authorization card to Santopaolo outside the LaSalle Street

⁴⁸ McElhose was not called as a witness and Rapacioli did not refute the credible and fairly consistent testimony of Russell, Baumwoll, and current driver Sal Prestia regarding those introductions. (Tr. 81-85, 140-142, 243, 249; GC Exh. 16.)

⁴⁹ A handwritten notation on Jt. Exh. 1 indicates that the titles "mechanics and utility workers" should be "removed" from the excluded. The unit set forth in the collective-bargaining agreement is *not* the same unit which Arbitrator Shriftman certified on September 11, 2008, which included only drivers in Staten Island, nor is it the same unit referenced in the *Dana* notice forwarded to Respondent MV by Region 29 on October 2, 2008.

⁵⁰ Rapacioli did not refute Russell's testimony as to the distribution of the union packets. (GC Exhs. 3, 23; Tr. 90.)

⁵¹ GC Exh. 4.

⁵² I base this finding on the credible testimony of Russell, Rebracca, Prestia and Muniz. (Tr. 93-98, 216, 234-235, 247-248.)

⁵³ GC Exhs. 5-6.

G. Rapacioli Threatens Russell with Discharge

At the end of April 2009, Russell went to the South Avenue facility to get a new identification card. While in the facility, he entered a classroom of trainees while they were on a break and expressed his support for Local 1181. The instructor was not present at the time. Russell returned the next day and received a note instructing him to see Rapacioli. After his shift, Russell went to see Rapacioli in his office. In a profanity-laced tirade expressing disdain for Local 1181, Rapacioli warned Russell that

I don't want to hear you ever . . . talking about that union in my building again. If I hear you talking about that in the building again I'm going to fire you. And tell [Local 1181 officials] from Brooklyn to [do something else with themselves]. This is my company.⁵⁸

III. LEGAL ANALYSIS

A. The Unlawful Recognition Charges

The complaint alleges that the Company violated Section 8(a)(1), (2), and (3) of the Act and Local 707 violated Section 8(b)(1)(A) and 8(b)(2) by entering into a recognition agreement at a time when Local 707 did not employ a representative segment of its ultimate employee complement and was not yet engaged in its normal business operations, and then entering into and maintaining a collective bargaining agreement. The Company and Local 707 denied the allegations and assert that the complaint is barred by the statute of limitations set forth at Section 10(b) of the Act.

"An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees." *Garner/Morrison*, 353 NLRB No. 78, slip op. at 6 (2009) (citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961)); *Dedicated Services*, 352 NLRB 753, 761 (2008). Further, by entering into, maintaining, and enforcing a collective-bargaining agreement containing a union-security clause at a time when such a union did not represent an uncoerced majority of employees, the employer violates Section 8(a)(3) of the Act. *Duane Reade Inc.*, 338 NLRB 943, 944 (2003), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004). Similarly, by accepting unlawful assistance from an employer, a union violates Section 8(b)(1)(A) of the Act, *Ladies Garment Workers*, supra. Furthermore, by entering into, maintaining, and enforcing a collective-bargaining agreement with a union-

facility, and then he spoke with Santpaolo and yelled at Baumwoll. I found it less than credible that an employee, who did not testify, would simply approach Rapacioli and express concern that she did something wrong. (Tr. 436-437.) I did not, however, credit vague and undated references by Russell and Baumwoll to other incidents involving Rapacioli.

⁵⁸ The testimony of Russell, Rapacioli, and Training Manager Clarence Smith establishes that Rapacioli met with Russell concerning his classroom solicitation. (Tr. 110-112, 464-465, 732-733.) Rapacioli denied, however, speaking to Russell about unions and insisted he simply told him he would fire him if he ever disrupted a class again. (Tr. 443.) Yet, he conceded that Russell did not disrupt a class, as the instructor was not present, and that he mentioned Russell's statements to the trainees about changing union representation. (Tr. 444.)

security clause at a time when it does not did not represent an uncoerced majority of employees, the union violates Section 8(b)(2) of the Act as well, *Dairyland USA Corp.*, 347 NLRB 310 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008); *Duane Reade*, supra.

In determining whether an employer prematurely recognized a labor organization, the Board applies a two-part test: (1) the employer must employ a substantial and representative complement of its projected work force, that is, the job or job classifications designated for the operation must be substantially filled; and (2) the employer must be engaged in normal business operations. This approach was first articulated in *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984) and reaffirmed in *Elmhurst Care Center*, 345 NLRB 1176, 1177-1178 (2005), which explained the balancing act involved in such situations: "The Board's 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."

1. The employee work force at the time of the recognition

The General Counsel contends that the 22 drivers employed at the time of recognition were neither substantial nor representative of the "the ultimate projected employee complement." The Company's proposed schedule, which was incorporated into the Contract, was expected to reach an operational level of 150 vehicles by approximately September 2009. The General Counsel, however, relies on the fact that the Company was operating 124 vehicles and employed approximately 309 employees as of December 2009. Applying the 30 percent threshold applied by the Board in *General Extrusion*, 121 NLRB 1165 (1958), the General Counsel contends that a substantial and representative amount would be approximately 92 employees—an employment level reached in mid to late October 2008. Alternatively, the General Counsel notes that, even based on the Company's "ramp-up" chart projecting 267 drivers for 150 vehicles, a representative complement would be 80 drivers—an employment level reached after October 2.⁵⁹ The Company contends that it employed a representative complement of its projected work force at the time of recognition because it had "no guarantee, and could have no certainty, that its employee complement would expand significantly beyond the size at the time of recognition."⁶⁰

The Board has frequently relied on *General Extrusion Co.*, 121 NLRB at 1167, for guidance in determining, in an expanding unit situation, whether the Company employed a substantial and representative complement of its projected work force as of the date of the recognition. In that case, the Board held that the minimum workforce threshold was met where "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 where in existence at the time the contract was exe-

⁵⁹ GC Br. 48.

⁶⁰ R. Br. 14.

cuted.” See, for example, *Dedicated Services*, 352 NLRB at 762, where the Board found that the employer did not meet the threshold where, at the time of recognition, it “employed far fewer than 30 percent of its normal complement of unit employees.” In *Hilton Inn Albany*, 270 NLRB at 1366, on the other hand, the judge found that the employer had not employed a substantial and representative complement even though it had hired 33–35 percent of the full work force and 55 percent of the classifications. The judge found that only a small percentage of these employees had performed any work and few had worked more than 8 hours. The Board agreed with the judge and noted that a mere 8 to 15 percent of those employees performed any work or worked for more than 8 hours.

The Company and Local 707 entered into a recognition agreement on September 12. Based on an arbitrator’s certification of authorization cards, the parties assumed, for the purpose of legal argument, that there were 22 drivers on the payroll as of that date. That level of work force amounted to a mere 7.9 percent of the 280 drivers on the payroll as of the date of the hearing. Moreover, no mechanics has been hired by that point and, thus, the other classification ultimately incorporated into the collective bargaining agreement was not yet in existence. Alternatively, the 22 drivers constituted 8.2 percent of the 267 drivers that the Company was expected to ramp-up to within 10 months.⁶¹ Both approaches fall far short of the *General Extrusion* threshold of 80 to 84 drivers that would have been considered a substantial and representative portion of the projected work force.⁶²

Lastly, the Company’s assertion that it was still uncertain on September 12 as to the amount of employees it would be hiring is belied by the terms of the Transit Authority’s acceptance on September 5 of the Company’s bid and award of a \$422,066,234.00 10-year contract to operate 150 vehicles, with an expansion to 300 vehicles. The Start Up/Expansion Schedule set forth a specific schedule that would rise incrementally to an initial operational level of 150 vehicles by September 2009. Although several pleas of support for the prior Staten Island service provider appeared in the local media, there is no credible evidence casting doubt as to the finality of the notice of award/notice to proceed issued by the Transit Authority.

2. Whether the Company was engaged in normal business operations

The General Counsel and Local 1181 also assert that the Company was not engaged in its normal business operations when it recognized Local 707 because, at the time, unit employees were engaged only in training activities. Applying *Elmhurst Care Center*, *Hilton Inn* and *Albany Dedicated Ser-*

vices, they contend that the Company’s normal business operations consist of driving disabled and elderly clients to appointments within New York City. The Company cites *Klein’s Golden Manor*, 214 NLRB 807 (1974), for the proposition that “essential training and preparation constitutes normal business operations.”⁶³

The second prong of the *Elmhurst Care Center* test is premised on the notion that “employees are better able to register their electoral choice when they are actually engaged in the work for which representation is sought.” As such, the Board found that an employer is not engaged in “normal business operations” when the place of employment is not open to the public, employees are “working relatively few hours” and employees’ responsibilities are “limited to training and other tasks in preparation for receiving” customers. 345 NLRB at 1177.

In *Elmhurst Care Center*, *supra*, the employer, a skilled nursing facility operator, and the union executed a collective-bargaining agreement nearly a month before the first patient was admitted to the facility. The nursing staff was participating in training and other preparations to set up the facility to receive patients, such as making beds and setting up equipment. The Board determined that the employer was not engaged in normal business operations at the time the employer voluntarily recognized the union. While the Board admitted that “training may be essential to the operation of the business, . . . it is not the business itself.” The Board balanced the “interests of the first group of employees hired but not yet performing the duties for which they were employed and the interests of the anticipated full complement of unit employees.” “[W]aiting to grant recognition until the facility had opened would have increased the number of unit employees participating in the decision regarding representation while having minimal impact on those employed earlier.” *Id.* at 1178.

Similarly, in *Hilton Inn Albany*, 270 NLRB at 1366, the Board found that the employer’s hotel was not in its normal business operations at the time of the voluntary recognition. The hotel was not yet open to the public and the only work being done was the training of cooks and kitchen personnel, and performance of housekeeping duties. By the date of recognition, several categories of hotel workers, including waiters, bus boys and maintenance employees, had not worked at all. The Board also noted that the “size of the employee complement actually working and the number of hours worked increased so rapidly immediately following recognition” that the employer was not engaged in normal business operations, nor had it engaged in full-scale training in preparation for the opening.

Under a different set of facts, the Company’s reliance on *Klein’s Golden Manor*, 214 NLRB 807 (1974) might have merit. In that case, the Board deemed the recognition lawful, even though the employer was still training its workforce, since the employees “were actually performing preparatory services for the employer that were necessary for the operation of that facility.” *Id.* at 813–814. As noted by the dissent in *Elmhurst Care Center*, “the training work in *Klein’s Golden Manor*—in preparation for the facilities opening—was essentially the same

⁶¹ The Board typically applies such an analysis based on the work force amount as of the date of the hearing. However, hearings occur anywhere from several months to years after accrual, while the facts in this case include actual benchmarks as of the date of the unlawful recognition by which the initial ramp-up to approximately 150 vehicles would be achieved by September 2009.

⁶² Utilizing the 18 employees listed on the payroll record, that work force amounted to 6.4% of the 280 drivers on the payroll as of the date of the hearing and 6.7% of those on the payroll within the 10 month ramp-up period.

⁶³ R. Br. 15.

as the work after it opened its doors to patients” and the majority erroneously distinguished that earlier case because, “[i]n both cases, there were no patients at the time of recognition and the employees were engaged essentially in the same type of work before and after opening day.”

Applying the legal principles articulated in *Klein’s Golden Manor* and the dissent in *Elmhurst Care Center*, the training involved at the Company’s facility on September 12 was *not* the same type of work that employees would perform after operations commenced on or around October 1. The type of work that the drivers would perform after October 1 consisted of operating vehicles to transport elderly and disabled passengers in or around Staten Island. On the date that the Company and Local 707 entered into the recognition agreement, however, employees were still in classroom training at the Lake Avenue facility and had not yet received training operating vehicles at the LaSalle Street facility. This nuance is particularly important where, as here, half (11 of 22) of those who began classroom instruction would not successfully complete the rigorous training course.

Based on the foregoing, the Company’s recognition of Local 707 as the labor representative of its employees, and the collective-bargaining agreement that ensued, at a time when the Company did not employ a representative segment of its ultimate employee complement and was not yet engaged in its normal business operations, violated Section 8(a)(2) and (1) of the Act. Having received unlawful assistance from the Company, Local 707 violated Section 8(b)(1)(A) and 8(b)(2). *Dairyland USA Corp.*, *supra*.

B. The 10(b) Defense

Notwithstanding the aforementioned violation, the Company contends that Russell’s unlawful recognition and assistance charges are untimely under Section 10(b) of the Act because they accrued on September 12—the date of recognition—but were not filed until March 31, more than 6 months later. Relying on *Local Lodge No. 1424 (Bryan Manufacturing) v. NLRB*, 362 U.S. 411, *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), *Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991), and *R.J.E. Leasing Corp.*, 262 NLRB 373(1982), the Company insists that the 10(b) period commenced to run when *any* employee received notice of the September 12 recognition agreement, not every time an individual employee learned of the potential claim. The General Counsel, relying on *Dedicated Services*, *supra*, contends that the 10(b) period was triggered on October 20 when Russell commenced employment and learned of the recognition. Alternatively, the General Counsel suggests that the time period commences when: (1) other employees received clear and unequivocal notice of a violation, which could have occurred no earlier than October 2, or (2) a representative portion of the ultimate employee complement was hired. The Charging Party’s alternative theory essentially suggests that the *Dana* notice, which was premised on unlawful conduct and indicated that a charge could not be filed more than 45 days after it was posted, was misleading and should be deemed tolled from the date of posting, October 5, until November 20.

It is undisputed that, on August 28, the Company and the Union executed a card-check and neutrality agreement requiring the Company to recognize the Union as the bargaining representative for unit employees upon a showing of majority status. On September 12, after an arbitrator certified that a majority of the 22 unit employees signed authorization cards for Local 707, the Company and Local 707 entered into a recognition agreement. The Company posted the *Dana* notices on the bulletin board in the drivers’ room on October 5. On October 20, Russell began working for the Company and attended his first training class, during which he learned that the Company recognized Local 707 as the bargaining representative for unit employees.

Section 10(b) of the Act states, in pertinent part, that “no complaint shall be issued based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” However, this limitations period “does not begin to run until the charging party has ‘clear and unequivocal notice,’ either actual or constructive, of a violation of the Act.” *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004), quoting *Leach Corp.*, 312 NLRB 990, 991 (1993). Even if the charging party lacks actual notice of an unlawful recognition, Section 10(b) will still bar a claim outside the statutory period if the charging party had constructive notice of the recognition. *Schaefer Group, Inc.*, 344 NLRB 366, 367–368 (2005) (party charged with constructive knowledge of unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence). On the other hand, “an unfair labor practice charge will not be time-barred if the “delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party.” *A & L Underground*, 302 NLRB 467, 469 (1991). Moreover, the party raising Section 10(b) as a defense has the burden of proving that the complaint is time-barred. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004).

As the charge was not filed until March 31, a straightforward application of the 6-month time limitation would bar any claims that accrued prior to September 30. The first obstacle for the Section 10(b) defense is that neither the Company nor Local 707 provided notice of their September 12 recognition agreement to employees during September. Based on the credible testimony, the notices were not posted on the bulletin board in the drivers’ room during that month. Even if they had been, they would not have been reasonably observable, as the bulletin board and room walls were out of control with papers hanging all over. The lack of a clear notice posting in September negates application of Section 10(b).

Assuming, *arguendo*, that employees did learn of the recognition in September, the issue becomes whether the Company can meet its burden of demonstrating that the 10(b) period began running on September 12 or the day that the first employee learned of the recognition. The cases cited by the Company support the concept that the limitations period begins to run when a party first learns of an unfair labor practice. They are, however, distinguishable. In *Bryan Manufacturing*, 362 U.S. at 419, the Supreme Court held that charges were time-barred where employees filed charges more than 6 months after execution of the allegedly unlawful collective bargaining agreement.

It premised its ruling, however, on a rejection of employees' assertions that ongoing enforcement of the agreement was a continuing violation. In this case, such a concept appears to rule out the Charging Party's tolling theory based on a continuously defective and misleading *Dana* notice. It is, however, the posting of the *Dana* notice on October 5 or Russell's hiring on October 20 that are alleged by the General Counsel as the accrual dates.

NLRB v. Triple C Maintenance, Inc., supra, involved an employer's attempt, 3 years after the fact, to escape from an agreement it entered into with the union. In that case, the Court of Appeals agreed with the Board's interpretation of the agreement as one within the meaning of Section 9(a), rather than Section 8(f), and its preclusion of the employer from challenging the validity of the agreement based on the Section 10(b) limitations. 219 F.3d at 1159. Unlike that employer, who had notice of a potential claim for the 3 year period at issue, the Company's employees in this case were unaware of the recognition agreement until October 5 at the earliest and, in Russell's case, until October 20.

In *Texas World Service Co. v. NLRB*, supra, the Court of Appeals rejected an employer's 10(b) defense, which invoked *Bryan Manufacturing's* proscription against resurrecting an earlier, otherwise time-barred unfair labor practice. The court premised its ruling on the fact that the unlawful recognition of a union occurred at a time when the employer had not yet hired employees and no one could have challenged the agreement. The Board's affirmance of the judge's ruling in *R.J.E. Leasing Corp.*, supra, is consistent with that result. In that case, the judge rejected a Section 10(b) defense to a prehire agreement on the ground that employees first became aware of the disputed agreement well within the 6-months limitation period. 262 NLRB at 381382. Here, again, the Company's employees in this case were unaware of the recognition agreement until October 5 at the earliest.

Dedicated Services, Inc., supra, the primary case cited by the General Counsel and Charging Parties, is distinguishable, but provides guidance. In that case, Local 1181 filed a charge alleging that the employer rendered unlawful assistance to Local 713 and entered into a collective-bargaining agreement with Local 713 at a time when Local 713 did not represent an uncovered majority of employees in the bargaining unit, the employer did not employ a representative complement of employees and was not engaged in its normal operations. At the time of the recognition, the employer had not yet hired any employees. More than 6 months later, Local 1181 filed its charge. The employer claimed that Local 1181, which already represented the employees, had constructive notice of the recognition within the 10(b) period because four job applicants were given union authorization cards and told that Local 713 represented the company's employees. Judge Fish disagreed, holding that knowledge of possibly unlawful acts on the part of any employees was not attributable to Local 1181, which was otherwise unaware of the recognition agreement between the employer and Local 713. He concluded that Local 1181 lacked clear and unequivocal notice outside the statutory period and rejected the untimeliness defense. 352 NLRB at 760.

The Board agreed with Judge Fish that the employer violated Section 8(a)(2) and (1) by recognizing Local 713 as the exclusive collective-bargaining representative of the employer's employees at a time when Local 713 had not obtained any signed authorization cards from employees and, thus, did not represent a majority of the employer's employees. However, the Board sidestepped Judge Fish's cogent analysis of alternative accrual theories raised by the General Counsel, including the notion that a later date might be more appropriate for an accretion analysis.

One possible implication of the Board's avoidance of the 10(b) issues raised in *Dedicated Services, Inc.* is that the Act's limitations provision was tolled as to *any* future charging party *until* it acquired clear and unequivocal notice of the unlawful recognition. Relying on that concept, however, would be perilous since Judge Fish found, and the Board agreed, that notice to employee/members of the union did not constitute notice to the union. In this case, on the other hand, we are dealing with a never-ending potential supply of charging parties in a continuously growing work force. Russell learned of the recognition agreement when he was hired on October 20. He filed his charge on March 31, well within the 6-month period thereafter. The 199 days that elapsed from the date of the recognition agreement (September 12) to the filing of Russell's charge (March 31) was not significantly greater than the 188 days that elapsed during the same period in *Dedicated Services, Inc.*

A reasonable approach in this case is found in *Leach Corp.*, 312 NLRB 990 (1993). That case, which involved a charge for alleged contract repudiation, sheds light on the Board's application of Section 10(b) in situations involving the earliest stages of work force creation. Recognizing that an employer would be obligated to recognize the union representing relocated employees only if the relocated employees constituted a substantial percentage of the new employee complement, the Board held that Section 10(b) would start running on the date when the transfer process was substantially completed. Accordingly, the Board rejected the employer's contention that the limitations period began to run when the first employees were hired, holding that unit employees could not have suspected that the recognition was unlawful until a representative segment of the ultimate employee complement was hired. In our case, it can be argued that, while the Company knew to the extent to which it would hire, there is no proof that employees had similar knowledge as of September 12.

Applying the principles of *Leach Corp.* to the facts here, it is probably a stretch to suggest tolling the statute of limitations until the work force was essentially complete—in this case, by September or October 2009. A more reasonable approach balancing the interests of employees seeking to organize and the proscription against representation based upon union recognition by an unrepresentative minority would deem accrual as of the date when the company hired a representative segment of the ultimate complement. Applying the *General Extrusion* threshold, a representative segment would have been approximately 84 employees (280 x 30%). Such a point was not reached until later in October 2008 when the Company re-

corded a payroll of over 90 employees.⁶⁴ Russell, the Charging Party, was hired around that time—on October 20—and obtained notice of the Company's recognition agreement with the Local 707 on that date. There is certainly no evidence that he obtained knowledge before then.

Assuming, *arguendo*, that the limitations period was not revived on October 20, when Russell was hired and learned of the recognition agreement, an appropriate earlier accrual date would be on or after October 5, when employees learned of Local 707's representative status. Under that scenario, the latest a charge would need to be filed to escape the bar of the 10(b) limitation would be April 5. Since Russell filed his charge on March 31, and the Company received notice of the charge on April 2, the charge was timely filed. Based on the foregoing, the dismissal pursuant to Section 10(b) is denied.

C. Coercing Employees to Sign Authorization Cards and Dues-Checkoff Forms

An employer violates Section 8(a)(1), (2), and (3) of the Act when it requires employees to sign union authorization cards as a condition of employment at a time when there is no lawful union-security clause in effect. It is also a violation of Section 8(a)(2) of the Act to require employees to sign a checkoff card even where a valid union-security clause exists. *Dedicated Services, Inc.*, 352 NLRB at 760.

On October 20, the Company directed its employees to sign authorization cards on behalf of Local 707. Rapacioli introduced Pacheco, Local 707's representative, to the trainees, authorization cards were passed out and they were directed to sign the cards as a condition of their employment. Although there was credible evidence that the Company supervisors exerted the same pressure on October 6 and November 10, the pleadings were not conformed to such evidence at trial. Accordingly, I do not incorporate them into my conclusions of law.

Additionally, in a letter, dated December 22, Rapacioli instructed all employees to complete Local 707's membership application and return it to the dispatcher. In January, the Company posted a sign in the drivers' room at its LaSalle Street facility instructing all employees to sign Local 707's application in order to pick up their schedules and specifically stating that "[s]igning is a condition of employment." Supervisor Duncan reiterated this requirement when asked about it by Russell and added that any employee who did not comply would not be permitted to select a driving route and, thus, "could be terminated." Later that day, dispatchers began handing out the union applications and dues checkoff forms, and they were also placed on a table in the drivers' room. Under the circumstances, by forcing employees to sign Local 707's authorization cards and membership applications, the Company violated Section 8(a)(2) and (1) of the Act.

D. The Company's Response to Union Solicitation Outside Its Facility

On several occasions in late January or early February, Russell and Baumwoll were soliciting on behalf of Local 726 in

front of the Company's LaSalle Street facility. Rapacioli saw them speak with another driver, Susan Santopaolo, who signed an authorization card for Local 726 and handed it to Baumwoll. Rapacioli called her over and directed her to retrieve her card. Santopaolo complied and handed the card to Rapacioli, who proceeded to rip it up. I did not, however, rely on the testimony of nonemployee Baumwoll that Rapacioli also spat at him and threatened to call the police and inflict unspecified harm upon his family. Russell, the only employee involved in the concerted activity, apparently did not observe those particular actions and statements, and they are not actionable here.

An employer's mere observation of open, public union activity on or near its property is not unlawful. *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000). By April, however, Baumwoll was no longer an employee or an applicant seeking employment with the Company. His activity was solely as an advocate for Local 1181. While the evidence reveals that Russell was in the vicinity, there is no credible evidence established that he or any other employee observed or heard about Rapacioli's subsequent interaction with Baumwoll. Accordingly, that portion of the April incident does not constitute a violation of Section 8(a)(1). See *Wackenhut Corp.*, 348 NLRB 1290, 1290 (2006), citing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94-95 (1995).

There was credible evidence, however, that Russell observed the earlier portion of this incident. He observed Rapacioli take photographs as he and Baumwoll solicited support for Local 1181. In doing so, Rapacioli tended to intimidate Russell, a current employee, and instilled fear of future reprisal if he continued to engage in such behavior. *In re Orland Park Motor Cars, Inc.*, 333 NLRB 1017, 1041 (2001); *Athens Disposal Co.*, 315 NLRB 87, 98 (1994). Similarly, by directing Santopaolo to retrieve her authorization cards from the union and then proceed to rip it up, he coerced or restrained Santopaolo and Russell from exercising their rights under Section 7 of the Act in violation of Section 8(a)(1). *Don Thomas Bus Co.*, 2006 WL 839168 at 9 (Mar. 28, 2006).

E. The Company's Prohibition Against Union Solicitation in April 2009

In April, Russell was at the Company's South Avenue facility on administrative business and took the opportunity to approach trainees in a classroom during a break. He advocated on behalf of Local 1181. MacElhose, the instructor, was not present at the time, but a trainee subsequently passed along Russell's comments to Rapacioli. Russell was called into Rapacioli's office the next day and admonished for speaking to the trainees on behalf of Local 1181. Rapacioli expressed his animosity toward Local 1181 and threatened to discharge Russell if he ever did it again in the Company's facility.

An employer may forbid union solicitation during worktime, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. *Our Way*, 268 NLRB 394 (1983). Accord: *Jay Metals, Inc.*, 308 NLRB 167 (1992). However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. . . . *Jensen Enterprises*, 339 NLRB 877, 878 (2003). Further, in considering whether com-

⁶⁴ GC Br. 54-56.

munications from an employer to its employees violate the Act. "the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

In this case, the credible evidence establishes that the trainees were not in the midst of instruction or any other type of work activity when Russell addressed them. The instructor was not present and they were on a break. Nor was there evidence that the Company had a rule prohibiting nonwork-related conversation during instructional breaks or any other time while employees were elsewhere in the facility. As such, Rapacioli's statement conveyed the message that Russell was prohibited from speaking about Local 1181 to anyone—*anywhere* in the building and at *anytime*, even outside the classroom. It would not "have been understood as merely curbing social discussions during a busy period." See *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006). Under the circumstances, the Company's discriminatory prohibition on union discussion while employees were on a break in the training room or anywhere else in the facility, and threatening to discharge an employee if he did it again, violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 707 and Local 1181 are labor organizations within the meaning of Section 2(5) of the Act.

3. By directing and urging its employees or applicants for employment on October 20, 2008 to sign cards authorizing Local 707 to represent them as a condition of employment, and by informing its employees and applicants for employment on December 22, 2008 and early January 2009 that they had to sign such cards in order to be employed by it and authorizing dues for Local 707 to be deducted from their salary, the Company violated Section 8(a)(2) and (1) of the Act.

4. By recognizing Local 707 as the collective-bargaining representative of its employees, on September 12, 2008, at a time when the Company did not employ a representative segment of its ultimate employee complement and was not yet engaged in its normal business operations, the Company violated Section 8(a)(2) and (1) of the Act.

5. By executing a collective-bargaining agreement with Local 707 on September 12, 2008, which agreement contained a union-security clause, notwithstanding the fact that Local 707 did not represent an uncoerced majority of the Company's employees, the Company violated Section 8(a)(1), (2), and (3) of the Act.

6. Having accepted unlawful recognition from the Company on September 12, 2008, receiving unlawful assistance from the Company on October 20, 2008, and entering into and maintaining the aforementioned collective bargaining agreement, Local 707 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.

7. By photographing employees as they engaged in lawful union activity, directing an employee to retrieve her signed authorization card from Local 1181, confiscating it and ripping it up, and threatening an employee with discharge because he

supported Local 1181 and prohibiting him from speaking about Local 1181, the Company violated Section 8(a)(1).

8. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Company and Local 707 have engaged in certain unfair labor practices, I shall recommend that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Company unlawfully recognized and entered into a collective-bargaining agreement on September 12, 2008, I shall recommend that the Company withdraw and withhold all recognition from Local 707 as a collective-bargaining representative of its employees, and order the Company and Local 707 to cease applying to their employees and members the terms of the collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement,⁶⁵ unless or until Local 707 is certified by the Board as such representative. I shall also recommend that the Company and Local 707 be ordered jointly and severally to reimburse their employees and members, present and former, for dues and initiation fees involuntarily exacted from them as a result of the unlawful application of the union-security clause in the collective-bargaining agreement entered into between the Company and Local 707, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). However, reimbursement shall not extend to those employees who voluntarily joined and became members of Local 707 prior to September 12.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁶

ORDER

A. The Respondent, MV Public Transportation, Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees or applicants for employment, that they had to sign cards authorizing Local 707 to represent them or to have dues for Local 707 deducted from their salary, in order to be employed by the Company.

(b) Recognizing Local 707 as the exclusive collective-bargaining representative of its employees at its Staten Island facility, at a time when Local 707 does not represent a majority of such employees.

⁶⁵ Nothing in this decision should be construed as requiring the Company to rescind benefits conferred as the result of the unlawful application of contract provisions to them, see, e.g., *Frontier Telephone of Rochester*, supra at 1278 fn. 24; *Kaiser Foundation Hospitals*, 343 NLRB 57, 58 (2004).

⁶⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Entering into and enforcing collective-bargaining agreements with Local 707 containing union-security and dues-checkoff provisions.

(d) Enforcing and/or giving effect to the collective-bargaining agreement with Local 707; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms and conditions of employment that may have been established pursuant to the performance of that collective-bargaining agreement.

(e) Photographing employees engaged in union activity, prohibiting employees from signing authorization cards on behalf of a union, and threatening employees with discharge for speaking in support of a union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 707 as the exclusive collective-bargaining representative of its employees, unless and until said labor organization has been certified by the Board as the exclusive representative of such employees.

(b) Reimburse, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of dues checkoff and union-security provisions of the collective-bargaining agreements between the Company and Local 707.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Staten Island, New York facility, copies of the attached notice marked "Appendix A."⁶⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and for-

mer employees employed by the Company at any time since September 12, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

B. The Respondent, Local 707, International Brotherhood of Teamsters, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accepting recognition from, and executing a collective-bargaining agreement with the Company at a time when the Company does not employ a representative number of its ultimate complement of unit employees and before it is engaged in its normal business operation.

(b) Giving effect to the September 12, 2008 collective-bargaining agreement between the Company and Local 707, or to any extension, renewal, or modification thereof.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act..

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Company reimburse, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), all present and former members for all initiation fees, dues and other moneys paid by them or withheld from them pursuant to the terms of dues checkoff and union-security provisions of the September 12, 2008 collective-bargaining agreement between the Company and Local 707. However, reimbursement shall not extend to those employees who voluntarily joined and became members of Local 707 prior to September 12.

(b) Post at its Staten Island, New York business office and other places where notices to members are customarily posted, copies of the attached notice marked "Appendix B."⁶⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by an authorized member of Local 707, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C. June 7, 2010

⁶⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁶⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF
 THE NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT direct or urge our employees or applicants for employment, to sign cards authorizing Local 707, International Brotherhood of Teamsters (Local 707) to represent them or authorize dues for Local 707 to be deducted from their salary.

WE WILL NOT recognize Local 707 as the exclusive collective-bargaining representative of our employees at our Staten Island facility, at a time when Local 707 does not represent a majority of such employees.

WE WILL NOT enter into and enforce any collective-bargaining agreement with Local 707 containing union-security and dues-checkoff provisions at a time when Local 707 does not represent a majority of such employees.

WE WILL NOT enforce and/or give effect to any current collective-bargaining agreement with Local 707; provided, however, that nothing in the Board's Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms and conditions of employment that may have been established pursuant to the performance of such collective-bargaining agreement.

WE WILL NOT photograph employees engaged in union activity, prohibit employees from signing authorization cards on behalf of a union, and threaten employees with discharge for speaking in support of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 707 as the exclusive collective-bargaining representative of our employees, unless and until the labor organization has been certified by the Board as the exclusive representative of such employees.

WE WILL reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of dues-checkoff and union-security provisions of the collective-bargaining agreements between us and Local 707.

MV PUBLIC TRANSPORTATION, INC.

APPENDIX B
 NOTICE TO MEMBERS
 POSTED BY ORDER OF
 THE NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government
 FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union.
- Choose representatives to bargain on your behalf with your employer.
- Act together with other employees for your benefit and protection.
- Choose not to engage in any of these protected activities.

WE WILL NOT act as the exclusive bargaining representative of any employees of MV Public Transportation, Inc. unless and until we have demonstrated our majority status and have been certified by the Board.

WE WILL NOT maintain or give effect to the September 12, 2008 contract between MV Public Transportation, Inc. and us or to any renewal, extension or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce the employees of MV Public Transportation, Inc. in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent such rights may be affected by an agreement authorized in Section 8(a)(3) of the Act.

WE WILL, jointly and severally with MV Public Transportation, Inc., reimburse, with interest, all present and former employees of MV Public Transportation, Inc. for all initiation fees and dues paid by them or withheld from them pursuant to the terms of dues-checkoff and union-security provisions in the September 12, 2008 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 707 prior to September 12, 2008.

LOCAL 707, INTERNATIONAL BROTHERHOOD OF
 TEAMSTERS