

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 13-CA-171393

Ride Right, LLC,

Respondent,

and

Teamsters Local Union No. 727,

Charging Party.

RESPONDENT'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

Dated: August 17, 2017

Jeremy C. Moritz, Esq.
OGLETREE DEAKINS NASH SMOAK &
STEWART, P.C.
155 North Wacker Drive – Suite 4300
Chicago, IL 60606
Telephone: (312) 558-1220
Facsimile: (312) 807-3619
jeremy.moritz@ogletreedeakins.com

Attorneys for Respondent

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I. INTRODUCTION

Respondent Ride Right, LLC (“Ride Right,” the “Company,” or “Respondent”), pursuant to Section 102.35 of the National Labor Relations Board’s (“NLRB’s” or “Board’s”) rules, and in accordance with the order¹ of the NLRB, submits this brief on a joint stipulated record to the National Labor Relations Board.

II. STATEMENT OF THE CASE

Teamsters Local Union No. 727 (the “Union” or “Charging Party”) filed the underlying unfair labor practice charge in this matter (the “Charge”) on March 8, 2016, against Ride Right. (Joint Ex. 1.) The Charge alleges Respondent has unlawfully (1) “failed and refused to recognize the union as the collective bargaining representative of its employees;” and (2) “failed and refused to bargain in good faith with the union as the collective bargaining representative of its employees.” (*Id.*) The Charging Party claims this alleged conduct constitutes an unfair labor practice under Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (the “Act”). (*Id.*)

On November 23, 2016, the Region issued a Complaint and Notice of Hearing (the “Complaint”). (Joint Ex. 2.) Respondent filed its Answer and Affirmative Defenses to the Complaint on December 6, 2016. (Joint Ex. 3.)

On February 3, 2017, the Region issued an Amendment to Complaint. (Joint Ex. 4.) On February 16, 2017, the Region issued a First Amended Complaint and Notice of Hearing (“FAC”), incorporating the February 3 Amendment to Complaint. (Joint Ex. 13.) Respondent filed its Answer and Affirmative Defenses to the FAC on February 28, 2017. (Joint Ex. 14.)

¹ “Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board,” dated June 13, 2017 (“Board Order”).

Also on February 28, 2017, Counsel for the General Counsel, Respondent and the Charging Party filed a Joint Motion to Submit Stipulated Record to the Administrative Law Judge and Joint Stipulation of Facts. (“Joint Motion.”) On June 13, 2017, the Board issued its order granting the parties’ joint motion to waive the issuance of a decision by an administrative law judge and to submit this case to the Board on a stipulated record for issuance of a decision pursuant to Sections 102.24 and 102.35(a)(9) of the NLRB’s Rules and Regulations. (Board Order.)

III. QUESTIONS INVOLVED

1. Whether Respondent has an obligation to recognize and bargain with the Union as a legal successor to MV Transportation, Inc., such that Respondent’s refusal to recognize and bargain with the Union violates Section 8(a)(5) of the Act. (Joint Motion, p. 6.)

2. Whether Respondent’s actions in February 2016 constituted a withdrawal of recognition in violation of Section 8(a)(5) of the Act. (Joint Motion, p. 6.)

IV. STATEMENT OF FACTS

A. The Parties.

Ride Right is a limited liability company that provides transportation services. (Joint Motion [Stipulation of Facts] at ¶2.) Relevant to the FAC allegations, Respondent operates a facility located in Batavia, Illinois. (*Ibid.*) Mr. Aaron Nickerson holds the position of General Manager at the Company’s Batavia facility. (Joint Motion at ¶19.) Mr. Patrick McNiff has held the position of Respondent’s VP, Paratransit Operations.² (*Ibid.*)

Mr. Brian Balogh is the VP of Transit for Ride Right. (Joint Motion at ¶19.) Mr. Balogh was first hired by Respondent’s parent company in December 2015 for the position of Director

² Since about May 2017, Mr. McNiff has retired and therefore no longer holds the position of VP, Paratransit Operations for Respondent.

of Operations, IL. (Joint Motion at ¶20.) Mr. Balogh became involved in Respondent's Batavia operation around February 2016. (*Ibid.*) He subsequently became Respondent's VP of Transit in or around October 2016. (*Ibid.*) Prior to December 2015, Mr. Balogh was employed with MV Transportation, Inc. ("MV") in the position of Sr. Regional Vice President of Operations, with responsibility for MV's operations pursuant to a contract between MV and PACE Suburban Bus Company ("PACE") at Batavia, Illinois. (Joint Motion at ¶19; Joint Ex. 9.)

The Union filed the underlying unfair labor practice charge against Respondent in this matter. (Joint Ex. 1.) Mr. John Coli Jr. is the Union's president. (Joint Motion at ¶22.) Mr. David Glass is a business agent for the Union. (Joint Motion at ¶25.) Mr. Chris Owoyemi is a Union representative. (Joint Motion at ¶38.)

B. MV's PACE Contract at Batavia.

In April 2015, Ride Right was awarded a bid for a PACE contract for transportation services at Batavia. (Joint Motion at ¶6; Joint Ex. 12.) As also indicated above, the Batavia PACE contract was previously held by MV. (Joint Motion at ¶6; Joint Ex. 11, p. 1.)

Prior to Ride Right's assumption of the contract on about June 29, 2015, MV recognized the Union as the collective bargaining representative of MV's full time and regular part time drivers, mechanics and dispatchers who provided services at Batavia.³ (*Id.* at ¶¶7, 10.) MV and the Union were parties to a collective bargaining agreement ("CBA") with a term commencing June 1, 2013 through May 31, 2018. (*Id.* at ¶8; Joint Ex. 8, p. 29.)

On April 13, 2015, MV management (Mr. Brian Balogh) distributed a memorandum to Unit employees regarding the termination of MV's PACE contract at Batavia. (Joint Motion at

³ Individuals who worked as full time and regular part time drivers, mechanics and dispatchers under the collective-bargaining agreement between MV and the Union at Batavia are referenced herein as "Unit employees."

¶20; Joint Ex. 9.) In relevant part, the memorandum informed affected MV employees at Batavia that they had “options for transfer” within MV’s operations, stating:

While I understand that this will be a time of uncertainty regarding the future, I want to assure you that MV values you as an employee. We operate a significant number of services in and around the Chicagoland area and we want you to understand your options for transfer.

We will be at the Batavia office in early May to meet in person with anyone who has any questions about a transfer. We need safe drivers like you, experienced dispatchers and quality maintenance employees at our downtown Chicago (near Midway), Alsip, Melrose Park and Niles divisions. At that time we can prepare the transfer paperwork and make the plans, and discuss wage rates and seniority offered at each of those divisions.

(Joint Ex. 9.) The memorandum also stated that if MV employees wished to continue providing services at Batavia “with the new provider” (*i.e.*, Ride Right), “Representatives from the new provider will be in touch in early May with information on how to apply.” (*Ibid.*)

On May 4, 2015, Mr. Balogh sent an email to the Union regarding, among other things, the termination of MV’s service contracts at Carol Stream and Batavia. (Joint Motion at ¶23; Joint Ex. 10.) Mr. Balogh’s email also informed the Union that MV management (Mr. Brian Jackson and Mr. Balogh) “will be in Carol Stream and Batavia on Thursday and Friday this week to meet with employees to answer any questions they might have about transferring” within MV’s operations, as indicated in Mr. Balogh’s memorandum to MV employees dated April 13, 2015. (Joint Ex. 10; *see also* Joint Ex. 9.)

C. A Majority of MV’s Unit Employees Voted in Favor of Union Deauthorization in an NLRB Election in May 2015.

On May 28, 2015, the NLRB conducted a deauthorization election among the Unit employees of MV in Case 13-UD-151151. (Joint Motion at ¶24.) The certified result of the election was that of approximately forty-nine (49) eligible voters, twenty-nine (29) cast ballots in favor of withdrawing the authority of the Union to require, pursuant to the CBA with MV, that

Unit employees make certain payments to the Union in order to retain their jobs, and fourteen (14) votes were cast against that proposition.⁴ (Joint Motion at ¶24; Joint Ex. 5, p. 1.)

D. Respondent Consistently Declined the Union’s Requests for Recognition and Bargaining Relating to Respondent’s Employees at Batavia.

The stipulated record evidence establishes the following:

On about April 28, 2015, Respondent informed the Union that Ride Right would be meeting with MV employees that weekend regarding the Company’s takeover of operations at Batavia. (Joint Motion at ¶21.) That same day, Mr. Coli requested that Ride Right recognize and bargain with the Union regarding Respondent’s employees at Batavia. (Joint Motion at ¶22.) The stipulated record does not include any evidence to show that Ride Right ever agreed to recognize and bargain with the Union in response to its request.

In the first week of June 2015, Mr. Glass called Mr. McNiff. According to Mr. Glass, Mr. McNiff stated he “wanted to hire the Unit.” Mr. McNiff does not recall making any such statement to Mr. Glass. (Joint Motion at ¶25.)

On June 9, Mr. McNiff emailed the Union and asked how Respondent could recruit additional drivers. Mr. McNiff attached a “Union Contract” driver position flyer to his email. (Joint Motion at ¶26.)

On June 19, 2015, Mr. McNiff emailed the Union seeking clarification relating to wages and seniority for Unit employees under the CBA between the Union and MV. (Joint Motion at ¶27.) On June 23, 2015, Mr. Glass emailed Mr. McNiff with answers to his questions about contractual wages and seniority for MV employees at Batavia. (Joint Motion at ¶28.)

On June 26, 2015, Mr. McNiff and Mr. Glass met at the Batavia facility. Mr. Glass brought a copy of the Union’s CBA with MV. They discussed the CBA and Mr. McNiff asked

⁴ It is unknown how many of these voters were subsequently hired by Respondent. (Joint Motion at ¶24.)

questions about wages and seniority. Mr. Glass gave Mr. McNiff a draft copy of a new collective bargaining agreement and asked Mr. McNiff to sign it, which Mr. McNiff declined to do. (Joint Motion at ¶29.)

On July 6, 2015, Mr. Glass emailed Mr. McNiff as a follow up to their meeting on June 26. (Joint Motion at ¶30.) Mr. Glass asked whether Mr. McNiff had any other questions about the Union's CBA with MV and requested Mr. McNiff let him know when Mr. Glass could come by to get signatures on a proposed collective bargaining agreement with the Union. (*Ibid.*) On July 14, 2015, Mr. McNiff responded to Mr. Glass's email of July 6 by requesting information about the May 2015 deauthorization vote. (Joint Motion at ¶31.)

On July 20, 2015, Mr. McNiff emailed Mr. Glass a copy of the NLRB's Supplemental Decision and Certification of Results of Election for MV in NLRB Case 13-UD-151151, and affirmed his understanding that "the attached means that we will not be collecting or forwarding dues." (Joint Motion at ¶32.)

On September 10, 2015, Mr. Glass emailed Mr. McNiff again regarding getting a signed collective bargaining agreement from Respondent relating to Ride Right's employees at Batavia. (Joint Motion at ¶33.) The stipulated record does not include any evidence to show that Mr. McNiff ever agreed that Ride Right would recognize or bargain with the Union, much less sign a collective bargaining agreement with the Union.

On October 6, 2015, Mr. Coli sent a demand letter to Mr. McNiff stating that Respondent was a legal successor to MV and that, per NLRB law, Ride Right had to maintain the status quo and bargain with the Union. (Joint Motion at ¶34.) The stipulated record does not include any evidence to show that Respondent ever agreed with the Union's claims that Ride Right was obligated to recognize and bargain with the Union as a successor to MV.

On October 9, 2015, the Union sent Respondent a letter stating Respondent had not remitted union dues for the month of June 2015 and demanding payment of the “contractually required union dues.” (Joint Motion at ¶35.) In response to the Union’s demand for dues, on October 15, 2015, Mr. McNiff again emailed Mr. Glass a copy of the NLRB’s Supplemental Decision and Certification of Results in Case 13-UD-151151 and further reminded Mr. Glass that Ride Right did not take over the PACE contract at Batavia until June 29, 2015. (Joint Motion at ¶36.)

On January 20, 2016, Mr. Glass emailed Mr. McNiff requesting dates to bargain a collective bargaining agreement with Ride Right. (Joint Motion at ¶37.) The stipulated record does not contain any evidence to show that Mr. McNiff ever indicated that Respondent would provide any dates for bargaining in response to Mr. Glass’s email.

On February 11, 2016, Mr. Glass and Mr. Owoyemi met with Mr. Nickerson and Mr. Glass again demanded to set dates for bargaining for Respondent’s employees at Batavia. (Joint Motion at ¶38.) Also on February 11, Mr. Glass sent Mr. Nickerson a follow-up e-mail regarding their meeting that day. (Joint Motion at ¶39.) The stipulated record does not contain any evidence to show that Respondent ever indicated that Ride Right would provide any dates for bargaining in response to the Union’s requests.

On February 17, 2016, Mr. Owoyemi sent Mr. Nickerson a follow-up e-mail from their February 11 meeting. (Joint Motion at ¶40.) The stipulated record does not indicate that Mr. Nickerson responded to Mr. Owoyemi’s email.

On February 23, 2016, Mr. Owoyemi called Mr. Balogh and introduced himself as the new Union representative for Unit employees at Batavia. (Joint Motion at ¶41.) Mr. Balogh responded that bargaining with the Union for the Unit was not necessary. (*Ibid.*)

Also on February 23, 2016, Mr. Owoyemi called Mr. Balogh a second time and stated that if Respondent did not bargain with the Union by the end of the month, the Union would have to file a charge with the NLRB. (Joint Motion at ¶42.) Mr. Balogh said he understood. (*Ibid.*)

E. Respondent's Operations and Work Force at Batavia.

Since about June 29, 2015, Ride Right has continued to operate the business that was formerly performed by MV at Batavia in basically unchanged form and with substantial continuity. (Joint Motion at ¶9.) From June 29, 2015 to the present, Unit employees employed by Ride Right at Batavia have performed essentially the same job functions and provided the same services to customers as they did when employed with MV, including using the same equipment and vehicles and working under the same working conditions. (Joint Motion at ¶43.)

As of about June 29, 2015, when Ride Right assumed the PACE contract, Respondent employed at its Batavia facility a total of thirty-two (32) full time and regular part time drivers, mechanics, and dispatchers, twenty-four (24) of whom were hired as incumbent Unit employees of MV. (Joint Motion at ¶10.)

As of about July 12, 2015, Respondent employed a total of thirty-five (35) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty-four (24) individuals who were former Unit employees of MV. (Joint Motion at ¶11.)

As of about August 1, 2015, Respondent employed a total of thirty-six (36) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty-four (24) individuals who were former Unit employees of MV. (Joint Motion at ¶12.)

As of about September 1, 2015, Respondent employed a total of thirty-three (33) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty-two (22) individuals who were former Unit employees of MV. (Joint Motion at ¶13.)

As of about October 1, 2015, Respondent employed a total of thirty-four (34) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty (20) individuals who were former Unit employees of MV. (Joint Motion at ¶14.)

As of about November 1, 2015, Respondent employed a total of thirty-nine (39) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty (20) individuals who were former Unit employees of MV. (Joint Motion at ¶15.)

As of about December 1, 2015, Respondent employed a total of forty-one (41) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty (20) individuals who were former Unit employees of MV. (Joint Motion at ¶16.)

As of about January 1, 2016, Respondent employed a total of forty-one (41) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty (20) individuals who were former Unit employees of MV. (Joint Motion at ¶17.)

V. ARGUMENT

A. Respondent Did Not Unlawfully Fail to Recognize or Bargain with the Union.

Ride Right was not obligated to recognize the Union when Respondent took over the PACE contract on June 29, 2015 because at that time, Respondent had not completed hiring of a substantial and representative work force for its Batavia operations.

The Board has held:

A new employer has no obligation to recognize and bargain with a union representing a unit of its predecessor's employees, unless the union represents a majority of the new employer's unit employees in a "substantial and representative" work force. In deciding whether a substantial and representative work force existed on a certain date, the Board must "balanc[e] the objective of selection of a bargaining representative by the maximum number of employees with the objective of employee representation as soon as possible." When a new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short time, it is appropriate to delay determining the bargaining obligation for that short period.

Myers Custom Prod., 278 NLRB 636, 637 (1986) (internal citations omitted).

The stipulated record shows that as of June 29, 2015, Respondent employed at its Batavia facility a total of only thirty-two (32) full time and regular part time drivers, mechanics, and dispatchers, twenty-four (24) of whom were former Unit employees of MV. (Joint Motion at ¶10.)

However, Respondent's ultimate work force totals forty-one employees – a figure reached on or before December 1, 2015, on which date Respondent employed a total of forty-one (41) full time and regular part time drivers, mechanics, and dispatchers at Batavia, including twenty (20) individuals who were former Unit employees of MV. (Joint Motion at ¶16.) Thus, as of the date when Respondent finally attained a substantial and representative work force (*i.e.*, December 1, 2015), only 48.8% of its employees were formerly represented by the Union under the Union's contract with MV. Accordingly, Respondent is not obligated to recognize or bargain with the Union because the Union does not enjoy majority status among Ride Right's employees at Batavia.

B. Respondent Did Not Unlawfully Withdraw Recognition From the Union.

Respondent denies the allegation that on February 23, 2016, Ride Right unlawfully “withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit.” (FAC, Section VI(b).)

Ride Right has never recognized the Union as the representative of its employees at Batavia. Nor does the FAC even allege that Respondent has ever recognized the Union. The FAC only alleges the Union *requested* recognition. (FAC, Section VI(a).)

The stipulated record contains no evidence whatsoever to support a finding that Ride Right ever recognized the Union. To the contrary, the stipulated record is replete with examples of occasions on which the Union demanded to be recognized – including by demanding that Ride

Right execute a collective bargaining agreement with the Union – followed by Respondent explicitly denying the Union’s requests. Because Counsel for the General Counsel cannot show that Respondent ever recognized the Union, Counsel for the General Counsel cannot establish any withdrawal of recognition in February 2016, as alleged. The Board should dismiss Counsel for the General Counsel’s claim that Ride Right unlawfully “withdrew its recognition of the Union.”

C. Counsel for the General Counsels’ Claims Are Barred By the Applicable Statute of Limitations.

Section 10(b) of the Act provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.”

Under longstanding Board law:

The 10(b) period begins only when a party has “clear and unequivocal” notice of a violation of the Act. The burden of showing a complaint is time barred is on the party raising Section 10(b) as an affirmative defense. This burden is met by showing the filing party had actual knowledge or constructive knowledge of the alleged unfair labor practice more than 6 months prior to the filing of the charge. Such knowledge may be imputed where the conduct in question was sufficiently “open and obvious” to provide clear notice. Similarly, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.

M & M Auto. Grp., Inc., 342 NLRB 1244, 1246 (2004) (internal citations omitted).

As stated above, since at least June 2015 Ride Right unequivocally declined the Union’s demands for recognition and bargaining, including the Union’s requests for a signed collective bargaining agreement with Respondent. Nor does the stipulated record contain any evidence to show Ride Right ever agreed to recognize, bargain, or enter into a collective bargaining with, the Union. Mr. McNiff’s “questions” about the terms and conditions of employment contained in the Union’s CBA with MV do not establish any agreement to recognize or bargain with the Union relating to employees of Ride Right. Respondent’s course of conduct in response to the

Union's demands makes clear that Ride Right has rejected the Union's recognitional and bargaining demands since at least June 2015, well outside of the 10(b) period.

To the extent Counsel for the General Counsel claims the Company has engaged in any violation of the Act based on events occurring prior to September 8, 2015 – including but not limited to a claimed failure to recognize and bargain with the Union – the Board should dismiss all such allegations with prejudice.

VI. CONCLUSION

It is now August 2017. At the height of Respondent's hiring, on or before December 1, 2015, former Unit employees comprised only 48.8% of Ride Right's work force at Batavia. There is no evidence to show the Union has ever enjoyed majority support since that critical date. There is no reason to believe the number of former Unit employees among the Batavia work force has done anything other than continue to erode over the years. Nor is there any rational basis for imposing upon Respondent's present-day employees a union that indisputably lacks majority status.

For all of the foregoing reasons, the Board should dismiss the Complaint against Respondent in its entirety.

Dated this 17th day of August 2017.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: s/Jeremy Moritz_____

Jeremy C. Moritz, Esq.
OGLETREE DEAKINS NASH SMOAK &
STEWART, P.C.
155 North Wacker Drive – Suite 4300
Chicago, IL 60606
Telephone: (312) 558-1220
Facsimile: (312) 807-3619
jeremy.moritz@ogletreedeakins.com

Attorneys for Respondent