

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 20-03

November 1, 2019

TO: All Regional Directors, Officers-in Charge and Resident Officers

FROM: Beth Tursell, Associate to the General Counsel

SUBJECT: Deferral of Cases Arising Under *MV Transportation, Inc.*,
368 NLRB No. 66 (2019)

A number of questions have arisen as to whether it is appropriate to defer charges where the allegations implicate issues arising under *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). Accordingly, Regions should be guided by the following instructions:

1. Where a charge alleges a unilateral change and where the new contract coverage standard enunciated in *MV Transportation* would be applicable,¹ Regions should initially determine whether there is an arguable violation of the Act. At this stage, it is unnecessary to assess or otherwise determine whether the contract coverage defense would/should result in dismissal of the charge. An arguable violation may be established by evidence showing a material, substantial and significant change was made to a mandatory subject of bargaining without notice and a meaningful opportunity to bargain.
2. If there is no arguable violation, referred to above, the Region should dismiss the charge. If there is an arguable violation, the Region should defer the charge in accordance with outstanding instructions. Regions should follow the guidance set forth in GC 19-03 (Deferral Under *Dubo Manufacturing, Corp.*, 142 NLRB 431 (1963)). Thus, where the union has filed a grievance and the Region believes there is a reasonable chance the grievance machinery will resolve the dispute or set it at rest, the Region should defer under *Dubo*.
3. Where the union has not filed a grievance, Regions should consider whether deferral would nevertheless be appropriate under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984).² However, where both parties oppose deferral, i.e., the union will not file a grievance voluntarily and the employer will not waive procedural defenses, the Region should not defer the charge. Instead it should complete the investigation, including consideration of any defense that one or more provisions of the collective-bargaining agreement privilege the alleged unilateral action.

¹ If the Region is unsure whether the facts of any given case give rise to applicability of the contract coverage standard, they should submit the case to Advice.

² Consistent with extant guidance, if an employer urges deferral and gives assurances not to raise timeliness or procedural objections to processing and arbitrating a grievance, the union may be required to pursue a grievance or have the charge dismissed.

Upon completion of the investigation, the Region should submit the case to Advice pursuant to outstanding instruction.

4. If the union has filed a grievance but the employer opposes deferral asserting that it has a contract coverage or other defense which the Region should decide, *Dubo* deferral principles still apply even where the employer asserts a procedural or timeliness defense. Thus, Regions should assess whether, notwithstanding the employer's assertion, there is a reasonable chance the grievance machinery will resolve the dispute or otherwise set it at rest. Should the union withdraw the grievance for any reason, as discussed above, the Region should consider whether *Collyer* deferral is appropriate.

If you have any questions regarding this memorandum, please contact your AGC or Deputy in Operations-Management.

B.T.