

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

**CM ENERGY, GP AND ITS SUBSIDIARIES
CM ENERGY HOLDINGS, LP, CM ENERGY
FACILITIES, LP AND CM ENERGY OPERATIONS, LP,
SUCCESSORS TO JUSTICE HIGHWALL
MINING, INC.**

and

Case 06-CA-202855

**INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA, DISTRICT 17,
AFL-CIO, CLC,**

and

THOMAS McCOMAS, an Individual

Case 06-CA-200465

and

Case 06-CA-198911

NICHOLAS CODY DOVE, an Individual

MOTION TO DISMISS CONSOLIDATED COMPLAINT

Respondents CM Energy, GP, CM Energy Holdings, LP, CM Energy Facilities, LP and CM Energy Operations, LP move pursuant to Board Rule 102.24(b) to dismiss the Consolidated Complaint in the above-referenced cases. The Respondents state the following in support of their Motion:

On November 8, 2019, Region 6 of the National Labor Relations Board (“NLRB” or “Board”) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Order”) regarding the cases noted above. *See* Exhibit 1. The Order scheduled an ALJ hearing on the Consolidated Complaint (“Complaint”) to begin on February 24, 2020.

I. Cases 06-CA-200465 (McComas Charge) and 06-CA-198911 (Dove Charge)

The Complaint in Case 06-CA-200465 (filed by Charging Party Thomas McComas (“McComas”)) and 06-CA-198911 (filed by Charging Party Nicholas Cody Dove (“Dove”)) should be dismissed for lack of Board jurisdiction.

The Complaint recites that the Respondent¹ began its operations on about *January 27, 2017*. *Id.*, ¶ 6 (a). These Cases involve claims that in connection with doing so, the Respondent discriminatorily refused to hire or consider for hire the individual Charging Parties in violation of Section 8(a)(3). *Id.*, ¶¶ 12-13.

Section 10(b) of the Act, 29 U.S.C. § 160(b), expressly 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 and the service of a copy thereof upon the person against whom such charge is made[.]*” (emphasis supplied).

On its face, the Complaint states that the original charge in Case 06-CA-200465 was filed on June 12, 2017, but that a copy of the charge only was “*hereby served* on the Respondent by U.S. mail *concurrently with this Order* [dated November 8, 2019][.]” *See* Exhibit 1, ¶ 2(a) (emphasis supplied). Likewise, as to Case 06-CA-198911, the Complaint states that the original charge was filed on May 16, 2017 but only was “*hereby served* on the Respondent by U.S. mail *concurrently with this Order* [dated November 8, 2019][.]” *Id.*, ¶ 3(a) (emphasis supplied). Thus, the original charges were indisputably served on Respondents *two and a half years late*—and well after the Board’s six (6) month jurisdictional strictures under Section 10(b). The Cases must be

¹ The Complaint uses “Respondent” as a defined term to refer to all of the separate enterprises filing this Motion. The Respondents deny that they constitute the same or a single corporate entity. To the extent “Respondent” is referenced in this motion, it is only to reflect the terminology utilized in the Complaint.

dismissed on this basis alone. *See, e.g., Dun & Bradstreet Software Servs.* 317 NLRB 84, 85 (1995) (dismissing complaint and finding no Board jurisdiction when underlying charge was served 1 day late).

The Complaint contains other equally fatal defects. For example, the charged parties identified in the original charges—Justice Highwall Mining, Inc., Bluestone Industries, Inc., and Dynamic Energy, Inc.—are *not* the Respondents in this action. *Compare* Exhibit 1 *with* Exhibit 2. The original charges also allege unlawful conduct which occurred *after* the date of the transaction referenced in the Complaint (Exhibit 1, ¶6(a); Exhibit 2), such that the Respondents cannot be liable even under a successor liability theory. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). For all of these reasons, the Board has no jurisdiction and the Complaint must be dismissed as to these Cases.

The Complaint’s theory that the alleged violation in these Cases is “continuing” (Exhibit 1, ¶ 13) cannot save them from Section 10(b)’s dictates.

The Board is clear that “the date of the allegedly unlawful act rather than a proposed effective date [] will trigger the sixth-month period [in Section 10(b)].” *Postal Serv. Marina Mail Processing Ctr.*, 271 NLRB 397, 400 (1984). With the Complaint asserting that the Respondent discriminatorily refused to hire the Charging Parties on about January 27, 2017, the General Counsel cannot avoid dismissal by declaring that such final and unequivocal adverse conduct “continued” into the Section 10(b) period. After all, in the Complaint’s telling, the alleged discrimination that took place on January 27, 2017 was for the purpose of escaping a bargaining obligation. *See* Exhibit 1, ¶ 6(b). As the Complaint posits that any supposed “continuing” discrimination thereafter *was for the same purpose (id.)*, with respect to these Cases, there is only a single six month statute of limitations period that began on January 27, 2017 and ended on June

27, 2017. Otherwise, Section 10(b)'s limitations would have no meaning. *See Postal Serv.*, 271 NLRB at 400 (“Where a final adverse employment decision is made and communicated to an employee -- whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination -- the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.”). Any purported “continuation” of discrimination would have been propelled by the same motivation alleged to have existed as of January 27, 2017.²

As the Board does not have jurisdiction consistent with Section 10(b) to adjudicate these Cases, they must be dismissed.

II. Case 06-CA-202855 (Union Charge)

Case 06-CA-202855, brought by Charging Party International Union, United Mine Workers of America, District 17 (“Union”) must similarly be dismissed because the Board lacks jurisdiction under Section 10(b).

The relevant Complaint allegations are not grounded in a timely charge. On its face, the Union’s original charge—dated July 21, 2017—claims that: (1) Cornerstone Labor Services, Inc. (“Cornerstone”) is a joint venture with CM Energy Holdings, LP “and its subsidiaries;” (2) this purported joint venture became an employer at Coal Mountain, West Virginia, and in its hiring discriminated against former employees of Dynamic Energy, Inc. in violation of Section 8(a)(3); and (3) this purported joint venture refused to bargain with the Union as a successor to Dynamic

² *See also Bryan Mfg. Co. v. NLRB*, 362 U.S. 411, 416-417 (1960). In *Bryan Mfg.*, the Supreme Court underscored that “where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice ... [and] where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.” *Id.* Here, reflecting the Complaint, any “continuation” of alleged discriminatory conduct is grounded in motivation the General Counsel concedes would have been formulated outside of the Section 10(b) period.

Energy, Inc. in violation of Section 8(a)(5). *See* Exhibit 3. The Complaint, however, alleges *none* of those things.

In fact, the theory advanced by the Complaint is wholly different from that set forth in the July 21, 2017 charge. The Complaint asserts that on about January 27, 2017 the Respondent assumed operations of and became a legal successor to *Justice Highwall Mining, Inc.* (“*Justice Highwall*”)—not *Dynamic Energy, Inc.* *See* Exhibit 1, ¶¶ 5, 6(a), 7. The Complaint further contends that the Union had been the collective-bargaining representative of a unit of *Justice Highwall employees*—not *Dynamic Energy, Inc. employees.* *Id.* ¶¶ 15, 16(a)-(b). The Complaint also alleges that if the Respondent had not discriminated against former *Justice Highwall* employees *McComas* and *Dove*, the Respondent would have a successor obligation to bargain with the Union, which it refused to recognize in violation of Sections 8(a)(3) and (a)(5). *Id.*, ¶¶ 6(b), 17(b). *But Justice Highwall is nowhere referenced in the July 21, 2017 charge. See* Exhibit 3. *And Dove and McComas are nowhere referenced in the July 21, 2017 charge. Id.* Simply put, the Complaint does not follow from a timely charge that satisfies Section 10(b).³

Moreover, the Respondent in the Complaint is different than the one in the July 21, 2017 charge. Id.; Exhibit 3. While *CM Energy, GP* and its subsidiaries are the Respondents in the

³ The amended charges do not rescue the General Counsel because they are untimely for the same reasons as are those in Cases 06-CA-200465 and 06-CA-198911—each was filed after the Section 10 (b) period expired. *See* Exhibits 4-6. Further, the First Amended Charge, dated October 6, 2017, does not even name *Dove* or *McComas* and alleges a successor bargaining obligation as to a unit of employees at “*Dynamic Coal, Inc.*”—not *Justice Highwall Mining.* *See* Exhibit 4. The Second Amended Charge, dated February 12, 2018, while finally naming *Dove* and *McComas*, alleges a successor bargaining obligation with respect to a unit of “*Dynamic Coal, Inc.*” employees—not *Justice Highwall Mining.* *See* Exhibit 5. It is not until the Third Amended Charge dated *December 7, 2018* that the Union finally alleges both that *Dove* and *McComas* were not hired or considered for hire to avoid unionization *and* that the Respondent is alleged to be a successor of *Justice Highwall Mining.* *See* Exhibit 6. But just as the individual charges are time-barred, so too is this one.

Complaint, there is no assertion anywhere in the Complaint that Cornerstone is a purported joint venture with CM Energy Holdings, LP “and its subsidiaries.” In fact, Cornerstone is not referenced in the Complaint *at all*. *Compare* Exhibit 1 *with* Exhibit 3.

Accordingly, for the same reasons as the other two Cases, the Complaint as to this Case must be dismissed.

CONCLUSION

The Complaint must be dismissed in its entirety for the above-described reasons.

Respectfully submitted,

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December 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of December 2019, I filed this document with the Executive Secretary of the Board in Washington, DC through the Board's electronic filing system. The undersigned attorney also certifies that a true and correct copy of the foregoing was served on the Regional Director of Region 6 via email to nancy.wilson@nrb.gov, on the Union via email to Charles F. Donnelly (cdonnelly@umwa.org), and on Charging Parties McComas and Dove via email to Samuel Petsonk (sam@petsonk.com).

/s/ Bryan M. O'Keefe

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