

**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

Case 06-CA-200465

THOMAS McCOMAS, an Individual

and

Case 06-CA-198911

NICHOLAS CODY DOVE, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
OPPOSITION TO MOTION TO DISMISS THE CONSOLIDATED COMPLAINT**

On November 8, 2019, the Regional Director issued a Consolidated Complaint (“the Complaint”), which set forth a series of allegations against CM Energy, GP, and its subsidiaries CM Energy Holdings, LP, CM Energy Facilities, LP and CM Energy Operations, LP (collectively, “the Respondent”). On December 20, 2019, the Respondent filed a Motion to Dismiss (“the Motion”) with the National Labor Relations Board (“the Board”), urging dismissal of the Complaint under Section 10(b) of the National Labor Relations Act (“the Act”). The Counsel for the General Counsel submits this Opposition to the Motion pursuant to Section 102.24(b) of the Board’s Rules and Regulations, and, for the reasons set forth below, maintains that the Motion should be denied.

I. The Complaint Should Not be Dismissed.

a. Applicable Legal Standard

To be clear, under Section 10(b) of the Act, “no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” Notwithstanding the literal language of Section 10(b), the Supreme Court has long since made clear that Section 10(b) permits litigation of certain unfair labor practice allegations that were not raised in a timely charge:

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge....What has been said is not to imply that the Board is ... to be left *carte blanche* to expand the charge as they might please, or to ignore it altogether.... [But] the Board is not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.

NLRB v. Fant Milling Co., 360 U.S. 301, 308-309 (1959) (footnotes, citations, and internal quotations omitted).

To that end, Congress did not intend unfair labor practice charges to be held to the same “standards applicable to a pleading in a private lawsuit.” *NLRB v. Fant Milling Co.*, 360 U.S. at 307. Rather, the purpose of the unfair labor practice charge is to initiate the Board’s investigatory processes, and not necessarily provide a full accounting of the allegations leveled against a party. *Id.* The filing of charges often functions as a means for obtaining early and concise position statements and evidence from parties. See *Hospital & Service Employees Union v. NLRB*, 798 F.2d 1245, 1249 (9th Cir. 1986); 29 C.F.R. § 101.4. Complaints, if issued, give notice of the substantive issues underlying a charge. *Service Employees Union*, 798 F.2d at 1249; 29 CFR § 102.15.

Accordingly, the threshold inquiry is whether there is an operative charge that encompasses the allegations contained in the Complaint. *See Reebie Storage and Moving Co., Inc. v. NLRB*, 44 F.3d 605, 608 (7th Cir. 1995) (“critical to the determination of whether allegations in a complaint are closely related to those in the [unfair labor practice charge] is a comparison of legal and factual bases of allegations.”).

Here, such a charge exists, and all allegations in the Complaint stem from, or relate back to, timely filed charges.

b. *The Complaint Complies with the Requirements of Section 10(b) of the Act.*

Here, the allegations are that the Respondent assumed a portion of the coal operation at Coal Mountain, West Virginia on January 27, 2017. Thereafter, the Complaint alleges that the Respondent failed and refused to hire Charging Party Dove and Charging Party McComas because of their activities on behalf of the United Mine Workers of America, District 17, AFL-CIO (“the Union”) and in an effort to avoid a successor bargaining obligation with the Union. Finally, the Complaint alleges that the Respondent has failed and refused to bargain with the Union as a successor employer.

First and foremost, the Board’s investigatory processes were set in motion well-within the six-month period following the Respondent’s commencing operation at Coal Mountain. The Union filed a charge in Case 06-CA-202855 on July 21, 2017, Charging Party McComas filed a charge in Case 06-CA-200465 on June 12, 2017, and Charging Party Dove filed a charge in Case 06-CA-198911 on May 16, 2017.

Further, both Charging Party Dove and Charging Party McComas filed First Amended Charges in their respective cases around October 5, 2017, but which were nonetheless timely filed. In these amended charges, the charging parties named the Respondent as the correct

employing entity. These charges alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire them. As such, the Respondent's refusal to hire the discriminatees constituted a continuing violation and would not act as a bar under Section 10(b). *La-Z-Boy Tennessee*, 233 NLRB 1255 (1977) (finding an employer's refusal to hire to be a continuing violation, and leaving the determination of the actual date of the unlawful refusal to hire to be determined at the compliance stage). In this case, the Respondent continued hiring mechanics at Coal Mountain in February and July 2017.¹ With that, the amended charges were certainly well-within the required 10(b) period.

Importantly, the Union's original charge, filed against the Respondent within the six-month period after the Respondent began operation at Coal Mountain, asserted that the Respondent, in conjunction with others, failed and refused to bargain with the Union. Though this was later amended, these allegations form the basis of the Complaint here today.

Accordingly, all of the allegations in the Complaint are contained within timely-filed charges.

c. The Purpose of Section 10(b) Was Effectuated, and the Respondent was Not Prejudiced.

Once more, it is worth reiterating that the Board has accepted that the general policy rationale underlying the requirements of Section 10(b) is "to ensure against the processing of stale claims, to ensure that the Board issues complaints only when charges have been properly filed, and to encourage an early statement of position by the party charged." *Chicago Parking*

¹ An administrative hearing is scheduled to begin on February 24, 2020, where a factual record will be developed. At this time, no testimony has been heard and no documents have been received into evidence. As described below, the Counsel for the General Counsel respectfully requests that the Board deny the Respondent's Motion and permit the administrative law judge to develop the necessary record to establish the factual background in this matter.

Association, 360 NLRB 1191, 1203 (2014) (citing *Buckeye Plastic Molding*, 299 NLRB 1053, 1053 (1990)). Those concerns are met here: a timely-filed charge set the Board’s investigatory processes in motion within the six-month time frame, the Respondent was included from the inception, and the statements of positions were solicited and encouraged from the beginning of the investigation.

Given the Board’s function in protecting the public’s interest in enforcement of the Act, the Board has long noted that it must strike a “balance between the statutory limitations on litigation expressed in Section 10(b) and the need to assure broad leeway for the exercise of the Board’s authority, once properly invoked by the filing of a charge, to advance the public interest.” *The Carney Hospital*, 350 NLRB at 628. With this balancing act in mind, the Board has found that “the General Counsel may properly relax the time provisions of our procedural rules in appropriate cases, for he acts in the public interest and not in vindication of private rights.” *Central Enterprises, Inc.*, 239 NLRB 1270, 1271 (1979). Indeed, despite the Respondent’s contention to the contrary, the requirements of Section 10(b) are not jurisdictional, but are instead are statute of limitations.² Although it is not sufficient to rely on the public interest alone, allowing the Complaint to proceed under Section 10(b) would provide the vindication of public rights.

More still, the Respondent cannot make a colorable argument that it is prejudiced by the inclusion of language in the Complaint that differs now from the original charges. The Respondent had a full opportunity to participate in the investigation over the course of a

² “[T]he proviso to Section 10(b) of the Act is a statute of limitations, and is not jurisdictional.” *Chicago Roll Forming Corp.*, 167 NLRB 961, 971 (1967), enforced sub. nom. *NLRB v. Chicago Roll Forming Corp.*, 418 F.2d 346 (7th Cir. 1969); *Kanakis Co.*, 293 NLRB 435, 443 (1989); *Peng Teng*, 278 NLRB No. 50, fn. 2 (1986) (holding “[t]he Board has long held that the 10(b) provision is a statute of limitations and is not jurisdictional.”).

significant amount of time and was apprised during this investigation of the essential elements of the allegations. The Respondent was able to submit evidence supporting its position as to each allegation in the Complaint, and its arguments were heard on all aspects of the legal theory.

The Board has affirmed that “Where it can be shown (as here) that a respondent had actual notice of a ULP charge within the 10(b) period and that the respondent did not suffer prejudice, the policy reasons for the 10(b) requirement are satisfied because (among other things) the Board's investigation processes still commence in a timely manner, and the party charged has a full opportunity to respond to the [unfair labor practice] charge.” *Chicago Parking Association*, 360 NLRB at 1203. That is precisely the situation here. Accordingly, to dismiss the Complaint under Section 10(b) would be to place form over substance, and the Respondent’s Motion should be denied.

II. The Motion Should be Denied Because it is Not Yet Ripe.

The Respondent’s argument in the Motion is, in essence, that it has met its burden of proving its affirmative defense that the Complaint’s allegations are barred by Section 10(b) of the Act. However, the Respondent makes this argument before the General Counsel has been permitted to put forth any evidence, develop any record, or establish any factual background for showing that the allegations contained within the Complaint are “closely related” to the timely filed charges or the alleged violations were continuing in nature. As such, the Respondent’s Motion is premature at best, as there remain genuine issues of material fact yet to be resolved. Accordingly, the Counsel for the General Counsel respectfully requests that the Motion be denied in its entirety, or, in the alternative, that the Board not issue a Notice to Show Cause and permit the Administrative Law Judge to conduct a hearing and develop a record.

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, I electronically filed the Counsel for the General Counsel's Opposition to Motion to Dismiss the Consolidated Complaint with the National Labor Relations Board's Office of the Executive Secretary, and served a copy of such by electronic mail to the parties listed below:

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