

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MERCY, INC. D/B/A AMR LAS VEGAS	:	
	:	Case Nos. 28-CA-241256
<i>versus</i>	:	28-CA-246344
	:	
AMERICAN FEDERATION OF STATE	:	
COUNTY AND MUNICIPAL EMPLOYEES	:	
AFSCME LOCAL 4041 (AFSCME LOCAL	:	
4041, EMS WORKERS UNITED-AFSCME)	:	

RESPONDENT’S MOTION TO DISMISS COMPLAINT

As the Respondent in the above-captioned cases, Mercy, Inc. d/b/a AMR Las Vegas (hereafter, “AMR” or the “Company”) hereby moves, by and through the Undersigned Counsel, for dismissal of the Complaint that was issued in these cases on May 29, 2020.

BACKGROUND

On May 10, 2019, the Charging Party, American Federation of State County and Municipal Employees AFSCME Local 4041 (AFSCME Local 4041, EMS Workers United-AFSCME) (hereafter, the “Union”), filed the Unfair Labor Practice Charge in Case No. 28-CA-241256. The Charge set forth various, alleged violations of Section 8(a)(1) of the National Labor Relations Act, as amended (hereafter, the “Act”), and mirrored election objections the Union filed a few days before, specifically, on May 7, 2019, in connection with a related representation

proceeding. See 28-RC-239046.¹ The other Unfair Labor Practice Charge in these proceedings (*i.e.*, Case No. 28-CA-246344) was filed by the Union on August 9, 2019 and amended on September 30, 2019. Here also, the Charge set forth a variety of allegations, such as the allegation the Company terminated two employees in violation of Section 8(a)(3) of the Act.

On July 18, 2019, the Regional Director placed the above-referenced representation proceeding in abeyance due to the Charge the Union filed in Case No. 28-CA-241256. In response, the Company filed a Request for Review (hereafter, the “Request for Review”) with the Board, which was denied by an Order (hereafter, the “Order”) issued on December 9, 2019. In denying the Request for Review, however, the Board also noted as follows:

We are troubled by the processing of the petition and the associated delay. It is peculiar to block a rerun election based on the conduct warranting a rerun election. It is also difficult to understand why there has been no further action by the Regional Director on the unfair labor practice charge since the decision to hold the petition in abeyance, notwithstanding the existence of the Hearing Officer’s Report, which would typically provide a basis for making a merit determination.

¹ A hearing on the Union’s election objections convened on May 20, 2019 and the hearing officer’s report on the objections issued on June 14, 2019. The hearing officer sustained several of the objections and recommended a new election. The Company did not pursue any exceptions to the hearing officer’s report, but the Regional Director is yet to take any action toward a new election. See e.g., Board’s Rules and Regulations, Section 102.69(c) (in the absence of exceptions to a hearing officer’s report, a Regional Director may “decide the matter forthwith upon the record . . .”)

See Order, fn. 1 (emphasis added).

In spite of the Board’s comments, for nearly the next five months, the Regional Director took no action whatsoever to move the unfair labor practice proceedings forward. Finally, on April 29, 2020, without providing AMR with any previous notice a merit determination had even taken place², the Regional Director presented the Company with a proposed settlement agreement. On May 13, 2020, the Company tendered a counteroffer on settlement, which was summarily rejected without any explanation the next day.³

On May 29, 2020, the Regional Director issued a Complaint (hereafter, the “Complaint”) in which he adopted nearly all of the allegations set forth by the Charges. The Complaint was accompanied by a Notice of Hearing but one that did

² See NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (July 2020), Section 10128.2(a) (“[o]nce a merit determination has been made in a case, the Board agent should inform all parties of that determination, . . .”).

³ In response to the rejection of the counteroffer, on May 18, 2020, the Undersigned requested an opportunity to talk by phone with the Board attorney assigned to the case. The Board attorney declined the Undersigned’s request, but invited the Undersigned to advise her of any particular questions, which the Undersigned did *via* e-mail on May 19, 2020. The Undersigned never received a response. On May 21, 2020, the Undersigned sent an e-mail to the Deputy Regional Attorney in which he requested an opportunity to talk by phone. Once more, the Undersigned never received a response. AMR respectfully reserves the right to argue that, based on these and other facts, the Regional Director did not perform on the agency’s obligations related to settlement under the Administrative Procedure Act. See 5 U.S.C. § 554(c)(1) (the Board “shall give all interested parties opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit”).

not include an actual hearing date. Instead, the Regional Director determined that the hearing would take place on “a date to be determined,” and today, more than two months later, the parties inexplicably remain without a date for the hearing.

ARGUMENT

AMR requests the Board dismiss the Complaint on the basis of the Regional Director’s repeated, prolonged and inexcusable failure to prosecute the Complaint. As noted above, the Complaint is based upon one Charge that was filed on May 10, 2019 and another Charge that was filed on August 9, 2019 and amended on September 30, 2019. Thus, by the time the Board issued the Order on December 9, 2019, the proceedings were already the subject of considerable delay, which prompted the Board’s related expression of concern. See Order, fn. 1. Nonetheless, for nearly the next five months, the unfair labor practice proceedings would remain entirely stagnant, and for this, there can be no reasonable excuse. Indeed, the Regional Director’s delay with respect to the Charge that mirrored the Union’s election objections is especially perplexing given the fact that, as of May 22, 2019, the Regional Director had the record from the hearing on the objections, which, as previously noted by the Board, “would typically provide a basis for making a merit determination.” See Order, fn. 1.⁴

⁴ Needless to say, AMR recognizes the fact the virus outbreak has affected the agency’s normal operations. However, the Board did not inform the public of any effect the virus had on the agency before March 12, 2020, and even then, made

The fact the Regional Director finally issued the Complaint on May 29, 2020 is only an illusion of progress, for he did not then, nor has he subsequently yet scheduled the cases for a hearing. Here too, there can be no reasonable excuse for the inaction.⁵ Notably, AMR has been prejudiced by the Regional Director's failure to issue the Complaint in a timely manner, and his ongoing failure to prosecute the Complaint as demonstrated by the absence of a hearing date. Had the Regional Director issued the Complaint and scheduled a hearing based upon an ordinary and reasonable timetable, the hearing undoubtedly would have occurred late last year or early this year, *i.e.*, before the onset of the virus pandemic. As a result of the Regional Director's delay, AMR would very likely face the need to go through a lengthy hearing while simultaneously contending with the ongoing presence and effects of the pandemic. Of paramount significance, AMR, as the country's leading provider of medical transportation services, is directly and substantially relied upon by the Nation to overcome the Coronavirus pandemic.

clear that "the Agency continues to function as normal and will continue its work enforcing the National Labor Relations Act." <https://www.nlr.gov/news-outreach/news-story/nlr-directs-washington-dc-headquarters-employees-to-temporarily-telework>. Accordingly, any contention that the virus outbreak explains the delay with the disposition of the Charges would clearly be a *post hoc* excuse.

⁵ Though unfair labor practice hearings were suspended for a period of time on account of the virus pandemic, on May 15, 2020, the Division of Judges announced that unfair labor practice hearings would resume effective June 1, 2020. <https://www.nlr.gov/news-outreach/news-story/division-of-judges-will-resume-trials-effective-june-1-2020>.

The Regional Director's delay, therefore, would heighten and aggravate the burdens associated with unfair labor practice proceedings, *e.g.*, searching for and producing documents in response to subpoenas, preparing witnesses for their testimony, representatives and witnesses traveling to and attending the hearings, *etc.* These circumstances for AMR, as unfair as they are real, could have easily been avoided had the Regional Director heeded the Board's admonition from December of last year, or at the very least, scheduled a hearing when the Complaint was issued over two months ago.

CONCLUSION

The Regional Director has failed to prosecute the Complaint and otherwise engaged in an abuse of discretion, and to permit the Complaint to proceed under these circumstances would not effectuate the purposes of the Act. Accordingly, AMR respectfully requests that the Board dismiss the Complaint with prejudice.

Dated: Glastonbury, Connecticut
August 4, 2020

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on August 4, 2020, the Respondent’s Motion to Dismiss was served upon the following *via* email:

Judy DaVilla
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Martin & Bonnett, P.L.L.C.
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Dated: Glastonbury, Connecticut
August 4, 2020

Respectfully submitted,

/s/ _____

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