

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

MERCY, INC. d/b/a AMR LAS VEGAS

and

**Cases 28-CA-241256
28-CA-246344**

**AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES
AFSCME LOCAL 4041 (AFSCME LOCAL 4041,
EMS WORKERS UNITED-AFSCME)**

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (Board), the General Counsel respectfully submits this opposition to the Motion to Dismiss (Motion) filed by Mercy, Inc. d/b/a AMR Las Vegas (the Respondent). Respondent asserts that the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) in this matter should be dismissed for two reasons. First, the length of time that passed between the filing of the underlying unfair labor practice charges and the issuance of the Complaint. Second, the Complaint does not set a hearing date.

Respondent's Motion is without merit and should be denied in its entirety. As explained below, between the time the latest charge was filed and the time the Complaint issued, Region 28 of the National Labor Relations Board (the Region) was investigating additional allegations, and the length of an investigation is insufficient grounds for dismissal of a complaint. Insofar as the absence of a hearing date in the Complaint, the Complaint issued after the COVID-19 pandemic arose, and a hearing date will be scheduled as soon as practicable.

I. PROCEDURAL BACKGROUND

On May 10, 2019, the American Federation of State County and Municipal Employees AFSCME Local 4041 (AFSCME Local 4041, EMS Workers United-AFSCME) (the Union) filed the charge in Case 28-CA-241256, alleging multiple unfair labor practices, which were also the subject of objections filed by the Union in response to the representation election held in Case 28-RC-239046. A Hearing on Objections was held before a Hearing Officer of the Region from May 21 through May 23, 2019. On June 14, 2019, the Hearing Officer sustained some of the objections and recommended that the election be set aside and that a new election be conducted. Neither party filed exceptions to the Hearing Officer's report.

On July 18, 2019, the Regional Director provided the parties with written notice of his determination to hold the representation petition in abeyance, pending the investigation and disposition of the charge in Case 28-CA-241256. Respondent filed a request for review of the Regional Director's action. On August 9, 2019 – prior to the Region's determination of the charge in Case 28-CA-241256 – the Union filed the charge in Case 28-CA-246344 alleging, *inter alia*, Respondent discharged its employees in retaliation for union activity. Investigation of that case was underway when, on December 9, 2019, the Board issued its order denying Respondent's request for review of the Regional Director's abeyance determination. By that time, Respondent had provided its evidence in Case 28-CA-246344. On March 10, 2020, the Regional Director requested from the parties their positions on the appropriateness of injunctive relief in Case 28-CA-246344.

On April 29, 2020 – after reaching a determination on the merits of the charges in Cases 28-CA-241256 and 28-CA-246344 – the Region sent Respondent a pre-Complaint settlement agreement. Respondent responded with a counter-proposal, which, in the Region's

view, did not remedy fully all of the meritorious unfair labor practice allegations.

Subsequently, on May 29, 2020, the Complaint issued.

II. ARGUMENT

The Supreme Court of the United States has held that delay in the investigation of charges may not serve as the basis to dismiss a complaint. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969) (citing *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 698 (1942) and *National Labor Board v. Katz*, 369 U.S. 736, 748 n. 16 (1962)); see also *Ventura Coastal Corp.*, 264 NLRB 291, 297 (1982) (noting in the context of a 19-month delay that dismissal was not appropriate and that the Administrative Procedure Act 5 U.S.C. § 555 provides its own remedy for compelling timely conclusion of administrative proceedings).

The delay in reaching a determination in Case 28-CA-241256 was the investigation and determination of subsequently-filed charge in Case 28-CA-246344. That charge raised multiple allegations, including the August 2019 discharge of two Union-affiliated employees. Those allegations were closely related to the allegations raised in Case 28-CA-241256. Less than 12 months passed between the time the charge in Case 28-CA-241256 was filed and the date that the Region determined the merits of the charges in Cases 28-CA-241256 and 28-CA-246344. While Respondent may have concerns over the delay, Respondent is without knowledge to claim, as it does in its Motion, that the Region took no action at any time during this period. The Region duly reached a determination of the matter and notified Respondent immediately thereafter.

Furthermore, even in Respondent were to demonstrate some wrongdoing inherent in this delay, Respondent is not entitled to dismissal as a remedy. Relying upon the Administrative Procedure Act, as Respondent does in its Motion, Respondent should look to that statute for the appropriate remedy. General Counsel respectfully requests that the Board deny the Motion in this regard.

Respondent also argues as grounds for dismissal that the Complaint failed to schedule a hearing date. The Region did not set a hearing date in the Complaint due to uncertainties about when an unfair labor practice hearing could safely be held. Respondent's Motion argues that it is prejudiced by the Region's failure to schedule a hearing date because the extraordinary circumstances caused by the COVID-19 pandemic place a special burden on Respondent. It is odd that Respondent appears to ignore the fact that the Region must also exercise extreme care due to these same, evolving circumstances. The fact that the Board's Division of Judges has given leave for the Board's Regional Offices to begin scheduling unfair labor practice hearings does not resolve the logistical determinations the Region must make. The Region will schedule a hearing in this matter as soon as practicable and the Region's decision to take special care in proceeding should not be the basis for dismissal of the Complaint. In any event, Respondent points to no authority supporting this proposition. General Counsel respectfully requests that the Motion be denied in this regard.

III. CONCLUSION

Longstanding precedent is clear: Respondent is not entitled to dismissal of the Complaint due alleged delay in the determination of the present cases. Respondent should likewise not receive the unwarranted relief of dismissal because the Region seeks to schedule the hearing for a time when the Region is sure the hearing may be conducted in a responsible

manner. Accordingly, dismissal is not appropriate and the General Counsel respectfully requests that the Board deny Respondent's Motion.

Dated at Las Vegas, Nevada, this 11th day of August 2020.

Respectfully submitted,

/s/ Nathan A. Higley

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS** in *Mercy, Inc. d/b/a AMR Las Vegas* (Cases 28-CA-241256 and 28-CA-246344) was served via E-Gov, E-Filing, and E-Mail, on this 11th day of August 2020, on the following:

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