

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

FCA US LLC

Respondent Employer

and

SHERI ANOLICK, an Individual

Case 07-CA-213717

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CA-213746

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CA-213748

Charging Party Keller

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**

Respondent Union

and

SHERI ANOLICK, an Individual

Case 07-CB-213726

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CB-213747

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CB-213749

Charging Party Keller

**GENERAL COUNSEL’S OPPOSITION TO RESPONDENT
UNION’S MOTION TO RECONSIDER**

Pursuant to Section 102.48(c) of the Board’s Rules and Regulations (Board’s Rules) Counsel for the General Counsel (General Counsel) respectfully files this opposition to Respondent Union’s Motion to Reconsider (Motion) filed on September 23, 2020, and re-filed with amended service on September 25, 2020.¹ On August 26, the Board issued an order denying Respondent Union’s Motion to Dismiss, which is the subject of Respondent Union’s Motion. The Motion points to no material error claimed with respect to any finding of material fact as required by Rule 102.48(c). Further, the General Counsel has sufficiently pleaded claims supporting violations of the Act and has presented genuine issues of material fact which are presently before Administrative Law Judge Charles Muhl and which also preclude Respondent Union’s Motion.

I. BACKGROUND

On February 19, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued alleging, in pertinent part, that during contract negotiations, Respondent Employer by its agents, gave assistance and support to Respondent Union in order to obtain benefits, concessions, and advantages for Respondent Employer in the negotiation, implementation, and administration of the collective bargaining agreement, in violation of Sections 8(a)(1) and 8(a)(2) of the Act. The Complaint further alleged that Respondent Union by its agents, received assistance and support from Respondent Employer, in violation of Section 8(b)(1)(A) of the Act. On June 18, an Amended Consolidated Complaint and Notice of Hearing

¹ All dates refer to calendar year 2020, unless otherwise noted. No statement of service was provided with the original motion to determine recipients. The Board’s Rules and Regulations Section 102.48(c)(2) requires that the motion must be filed within 28 days after the service of the Board’s decision or order. Respondent’s Motion is arguably untimely as it was not filed and served within the required 28 days.

(Amended Complaint) issued modifying some aspects of the Complaint including by adding additional alleged agents and clarifying some of the allegations including the applicable collective-bargaining agreements.

On March 4, Respondent Union filed its Answer to the Complaint (Answer) denying the commission of any unfair labor practices. On March 13, Respondent Employer filed a Motion to Dismiss, asserting that the Complaint should be dismissed because the allegations are time-barred under Section 10(b) of the Act. In support of this assertion, Respondent Employer provided the following exhibits: 1) a document titled Chronology of News Reports and Other Information Available to the Charging Parties Prior to July 29, 2017; 2) a class action complaint filed by the Charging Parties on January 26, 2018; 3) the Charging Parties' response to a motion to dismiss the civil suit filed on July 10, 2018; 4) a July 26, 2017, press release from the United States Attorney's Office Eastern District of Michigan regarding the charging of a former Respondent Employer executive and a wife of a former Respondent Union Vice President; 5) a First Superseding Indictment dated July 26, 2017, but which does not disclose the filing date; 6) a document labeled Overlap Between NLRB Charges and Allegations in *Swanigan v. FCA US LLC*, No. 18-cv-10319 (E.D. Mich.); 7) a document dated July 26, 2017 labeled Letter Regarding DOJ Investigation; 8) a July 27, 2017 email from Respondent Employer CEO Sergio Marchionne. On May 5, the Board denied Respondent Employer's Motion to Dismiss, finding "no merit in the Respondent's contentions that the Board lacks jurisdiction over this matter under Section 10(b) of the Act."

On July 27, Respondent Union filed the Motion to Dismiss, asserting that the above-captioned charges were served more than six months after the Charging Parties admittedly had knowledge of their claims, in contravention of the requirements of Section 10(b) of the Act.

Respondent Union claims that the correct date for starting the Section 10(b) period is July 26, 2017, when the Charging Parties assertedly knew facts creating a suspicion sufficient to warrant requiring them to file their unfair labor practice charges, but failed to serve Respondent Union until January 29, 2018. In support of this assertion, Respondent Union asserts that on July 26, 2017, the United States Attorney's Office for the Eastern District of Michigan unsealed the indictment of Alphons Iacobelli (Iacobelli) and issued a press release outlining the charges. Further, on the same date, Respondent Union posted a letter to its membership disclosing the allegations against Respondent Union and Respondent Employer. Further, according to Respondent Union, in a civil lawsuit, the Charging Parties conceded that they were made aware of the facts underlying the charges on July 26, 2018 (sic) when the U.S. Attorney's office made the announcement. Because the Charging Parties did not file and serve their charges on Respondent Union until January 29, 2018, their charges are untimely.

On August 26, the Board issued an Order denying Respondent Union's Motion to Dismiss. The Board noted that the day of the act or event giving rise to the unfair labor practice is not counted in computing the 6-month 10(b) limitation period (citing *MacDonald's Industrial Products, Inc.*, 281 NLRB 577 (1986) and *Baltimore Transfer Co. of Baltimore City, Inc. (Local 369, Drivers)*, 94 NLRB 1680, 1682 (1951)), and further stated, in relevant part, that

[A]ssuming, *arguendo*, that Respondent is correct and the Charging Parties were on notice of the facts underlying the charges on July 26, 2017, the 10(b) period did not begin to run until July 27, 2017, and the last day of the limitation period was Saturday January 27, 2018. However, Section 102.2 of the Board's Rules and Regulations provides that if the last day of a time period "is a Saturday, Sunday, or a legal holiday," then "the period runs until the next Agency business day." Here,

the next Agency business day was Monday, January 29, 2018. We therefore conclude, contrary to the Respondent, that the initial charges were timely filed and served.

On September 23, Respondent filed its Motion, which it re-served on September 25, asserting that the Charging Parties had actual or constructive notice of their claims on July 26, 2017, but the charges were not served on Respondent Union until January 29, 2018. Respondent further argues that Section 102.2 of the Board's Rules and Regulations does not excuse the Charging Parties' failure to timely serve Respondent Union, and that the statute of the National Labor Relations Act, and not the Board's Rules, is controlling. Respondent cites to no material error claimed with respect to any finding of material fact.

II. ARGUMENT

Respondent Union's Motion Lacks Merit.

Section 10(b) of the Act bars complaint based on an unfair labor practice occurring more than six months prior to a properly filed charge. However, the Section 10(b) period does not begin to run until "the aggrieved party knows or should know that his statutory rights have been violated." *John Morrell & Co.*, 304 NLRB 896, 899 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993) (unpublished decision). Notice of the violation must be "clear and unequivocal," but it can be actual or constructive. *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004). A charging party has constructive knowledge of a violation when it is "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred." *See, e.g., Amalgamated Transit Union Local 1433*, 335 NLRB 1263, 1263 n.2 (2001). Knowledge of the violation is imputed to the charging party "where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *St. Barnabas Medical Center*, 343

NLRB at 1126-27. The party asserting a Section 10(b) defense has the burden of showing such notice. *Id.* at 1127. As noted by the Board in its August 26 Order, Section 102.2(a) of the Board's Rules and Regulations provides that the day of the act or event is not to be included in the time computation. Further, "the last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next Agency business day."

Here, Respondent Union repeats the crux of the argument that it previously made in its Motion to Dismiss, namely that the Charging Parties had actual or constructive notice of their claims on July 26, 2017, but the charges were not served on Respondent Union until January 29, 2018. Respondent further argues that Section 102.2 of the Board's Rules and Regulations does not excuse the Charging Parties' failure to timely serve Respondent Union, and that the statute of the National Labor Relations Act, and not the Board's Rules, is controlling.

The Motion points to no material error claimed with respect to any finding of material fact as required by Rule 102.48(c). Instead, Respondent Union argues that the Board, even while assuming, *arguendo*, that Respondent Union was correct as to the date that the Charging Parties were on notice, based on facts asserted by Respondent Union, that the Board came to the wrong legal conclusion based on the facts provided by Respondent Union in its Motion to Dismiss. The Board's August 26 Order provides no basis to support Respondent's implied assertion that there is a material error with respect to any finding of material fact; there is no finding of material fact upon which Respondent Union can base its motion. Instead, Respondent Union's Motion to Dismiss was denied, without a finding of the underlying material facts, even assuming that the dates provided by Respondent Union in its Motion to Dismiss were accepted *arguendo*. The Board made no finding of material fact as to what date would be controlling to establish the date

of actual or constructive knowledge for any of the Charging Parties to determine the 10(b) issue. The Board correctly rejected Respondent Union's argument - even assuming that it used Respondent Union's preferred date of July 26, 2017. Respondent Union's reliance upon *Machinists Local Lodge 1424 v NLRB (Bryan Manufacturing)*, 362 U.S. 411, 429 (1960), is misplaced. Unlike the current case which would only stray near the 10(b) date if the Charging Parties were found to have knowledge on July 26, 2017, in *Machinists*, the relevant issues were charge allegations filed ten and twelve months after the relevant events. *Id.* at 414. Here, if there were a surviving issue of when the Charging Parties had actual or constructive knowledge of the unfair labor practice, this would be an issue before the Administrative Law Judge as part of the underlying proceeding. However, the Board reached the correct conclusion when it rejected Respondent Union's arguments even based, *arguendo*, on Respondent Union's provided dates. The Board has already considered and rejected Respondent Union's arguments, and should do so again. The Board has denied motions for reconsideration where the moving party has merely disagreed with the Board's order without meeting any of the other criteria for filing a motion for reconsideration. *Pressroom Cleaners*, 361 NLRB 1166, 1166 (2014); *Phoenix Coca-Cola Bottling Co.*, 338 NLRB 498, 498 (2002).

Contrary to Respondent Union's assertions, July 26, 2017, is not the controlling date for determining when the Charging Parties had actual or constructive knowledge of the unfair labor practice. It was not until the public release of Iacobelli's plea agreement, which was filed on January 22, 2018, that evidence emerged establishing that the corruption constituted unfair labor practices. In his plea agreement, Iacobelli pleaded that the *purpose* of the bribes was to give Respondent Employer an advantage in bargaining and contract negotiation, and this admission is critical to the determination that the concealed payments violated Section 8(a)(1) of the

Act. Without knowing the underlying purpose, it was impossible for the Charging Parties or the General Counsel to determine whether the payments constituted unlawful interference with employees' representation, unlawful assistance, or was in furtherance of some goal unrelated to the Act, (for example, hush money to cover up a safety concern with Respondent Employer's vehicles). *Cf. Leach Corp.*, 312 NLRB 990, 991 (1993) (where, in a case involving the transfer of employees from one facility to another, the Board began the running of the 10(b) period only upon completion of the transfer process—the earliest point at which the Union in the case could have had clear and unequivocal notice of a violation), *enforced*, 54 F.3d 802 (D.C. Cir. 1995).

Thus, even considering the fact that two of the Charging Parties filed charges prior to the release of Iacobelli's plea, which does not appear to be alleged in the Motion or the Motion to Dismiss, is of no consequence because the July 2017, indictments merely raised a suspicion of corruption; they did not suggest that any particular unfair labor practices had been committed. Furthermore, Iacobelli's plea agreement also made clear that Respondent Employer transferred money directly into Respondent Union's coffers, purportedly as UAW-Chrysler Skill Development and Training Program d/b/a UAW-Chrysler National Training Center (NTC) salary reimbursements. Prior to this admission, there was no evidence available to the Charging Parties that Respondent Employer unlawfully assisted Respondent Union by making concealed payments directly to the Respondent Union as an organization. These pieces of information, which did not come to light until January 2018, when Iacobelli's plea agreement was filed in the criminal court docket, made a critical difference in the determination that the charges were meritorious. *Cf. Morgan's Holiday Markets*, 333 NLRB 837, 837, 841 (2001) (subsequently discovered evidence supporting existence of alter-ego relationship that came to light after charge was dismissed did not toll 10(b) period because there was adequate evidence available at the

time of dismissal). Thus, the 10(b) period did not begin until at least January 22, 2018, placing the charges well within the statute of limitations.

The evidence presented at hearing will establish that Respondent Union has violated Section 8(b)(1)(A) of the Act as alleged. Notwithstanding the number of exhibits which may affect an Administrative Law Judge's decision, there likely remains some disputes which will turn on the credibility of witnesses, and can which only be resolved by an Administrative Law Judge after a full hearing of the evidence submitted by the parties. Consequently, Respondent Union's Motion should be denied.

III. CONCLUSION

As discussed, Respondent Union's Motion is without merit. Based on the foregoing, in addition to the reasons relied upon by the Board in denying Respondent Union's Motion to Dismiss on August 26, the General Counsel respectfully requests Respondent Union's Motion be denied.

Dated at Detroit, Michigan, this 7th day of October 2020.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

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AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO RESPONDENT UNION’S MOTION TO RECONSIDER, dated October 7, 2020 by e-file to:

Office of Executive Secretary/Board

I further certify that on October 7, 2020, I served the above by **electronic mail** or **facsimile** upon the following persons:

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October 7, 2020

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Date

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/s/ Larry A. Smith

Signature