THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

LAFAYETTE CITY CENTER
2 AVENUE DE LAFAYETTE
BOSTON, MA 02111
Telephone: (617) 626-7132
Fax: (617) 626-7157
efile: EFileDLR@mass.gov
www.mass.gov/dlr

MAURA HEALEY
GOVERNOR
KIMBERLEY DRISCOLL
LIEUTENANT GOVERNOR
PHILIP T. ROBERTS
DIRECTOR

COMMONWEALTH EMPLOYMENT RELATIONS BOARD
KELLY B. STRONG
MEMBER
VICTORIA B. CALDWELL
MEMBER

October 15, 2024

Christopher Bangs, Esq.
Amalgamated Transit Union, Local 1548
10000 New Hampshire Avenue
Silver Spring, MD 20903

Marielise Kelly, Esq.
Garguil/Rudnick LLP
766 Falmouth Road
Mashpee, MA 02649

Re: **UP-23-10173, Martha's Vineyard Transit Authority**

Dear Attorneys Bangs and Kelly:

The Commonwealth Employment Relations Board (CERB) has reviewed the dismissal that a Department of Labor Relations (DLR) Investigator issued in the above-captioned matter on March 13, 2024. For the reasons set forth below, the CERB affirms the dismissal of the charge

Background

On March 15, 2016, the National Labor Relations Board (NLRB) certified the Amalgamated Transit Union, Local 1548 (Union) as the exclusive collective bargaining representative for all regular full-time and part-time bus operators employed by the Transit Connection, Inc. (TCI), a private transportation company headquartered in Florida. After a strike, the Union and TCI reached an agreement on their first collective bargaining agreement.

Since 2002, the Martha's Vineyard Transit Authority (MVTA) has contracted with TCI to provide public transit services for the towns in Martha's Vineyard. Pursuant to

M.G.L. c. 161B, the MVTA is a public authority empowered to enter into operating agreements with private transportation companies to provide transportation services.[1]

The contract between the MVTA and TCI designates TCI as an independent contractor and gives it the power to:

> . . . manage its business; to determine starting and ending times of employees, consistent with the VTA's scheduled hours of operation, to determine assignments of work and work tasks; to require reasonable overtime; to determine the qualifications and competency of employees; to require reasonable standards of performance; to direct the work force; to determine and re-determine job content; to make and enforce such reasonable rules and regulations, not in conflict with this Agreement, as it may from time to time deem best for the purpose of maintaining order, safety and/or effective operation of its business; to discipline, demote and discharge employees.

The most recent contract between TCI and the MVTA provides that TCI will furnish management services needed for the efficient operation of public transit on Martha's Vineyard, including the supervision and dispatching of all transit services.[2] The contract gives TCI full responsibility for all daily operations while requiring it to be compliant with various MVTA-approved policies including but not limited to, those concerning sexual harassment, equal employment opportunity, and its Vehicle Operator Handbook.[3] The contract also gives the MVTA the right to approve or reject TCI's hire for the General Manager position and the right to do the same for any potential operator hires based upon their driving records. In addition, the contract specifies that certain costs will be directly paid by the MVTA – advertising, recruiting, as well as uniforms and housing for drivers, and requires TCI to obtain authorization from the MVTA for any purchase over $250.

After the Union and TCI's collective bargaining agreement expired in January 2023, the Union and TCI began exchanging proposals for a successor contract in or about December 2022. The circumstances giving rise to the instant charge arose from the spring and summer of 2023 negotiations that preceded the parties reaching a successor

---

[1]Section 25 of Chapter 161B makes clear that the law does not permit transit authorities to directly operate mass transit services.

[2] Notwithstanding this provision, we note that the Investigatory record contains evidence that the MVTA has taken over dispatching duties on occasion.

[3] The MVTA Vehicle Operator Handbook consists of work rules and other policies issued prior to the adoption of the first collective bargaining agreement between TCI and the Union.

contract.[4] In its charge, filed on August 1, 2023, the Union alleged that the MVTA was a joint and/or single employer with TCI and that the MVTA had refused to respond to a demand to bargain the Union had made in June of 2023 and that the MTVA's actions during contract negotiations between TCI and the Union constituted bad faith and regressive bargaining in violation of Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law). The Union's charge alleges that the MVTA was exercising substantial and direct control over collective bargaining and provided examples of statements made and actions taken by TCI during bargaining to support its contentions and that led it to send a demand to bargain to the MVTA.

On August 11, 2023, the DLR informed the parties that due to a question of jurisdiction, it would administratively close the matter and take no further action on the charge unless the NLRB declined to exercise its jurisdiction. On December 14, 2023, the NLRB determined that the MVTA is a political subdivision not subject to its jurisdiction and the DLR docketed the charge the same day.

The MVTA subsequently filed a motion for summary judgment as well as a motion to sever and stay to which the Union objected. The Investigator denied the motion to sever and stay and took the motion for summary judgment under advisement. On February 22, 2024, the Investigator conducted the investigation. At the investigation, the Union presented evidence as to TCI's conduct during negotiations and the degree of control MVTA asserted over it and contended that it established sufficient facts to show that the MVTA was a joint employer with TCI, or in the alternative, a single, public employer subject to the jurisdiction of the DLR under Chapter 150E. The Investigator, in dismissing the charge, found that the MVTA was not a joint employer or a single employer.[5] The Union filed a timely request for review to which the MVTA responded.

Analysis

The charge filed by the Union presents an issue of jurisdiction under Chapter 150E to which we look to CERB[6] precedent rather than that of the NLRB. As a matter of jurisdiction, the Union must show that the MVTA is either a joint employer or a single employer of the operators. Contrary to the Union's contentions, this is not an issue where

[4] In July 2023, TCI and the Union signed a successor collective bargaining agreement effective from July 1, 2023 through June 30, 2026.

[5] In dismissing the charge based upon the entire investigatory record, the Investigator ultimately denied the MVTA's motion for summary judgment.

[6] References to the CERB include its predecessor agency, the Labor Relations Commission.

there is no CERB precedent such that a review of NLRB case law would be warranted.[7] The Investigator's analysis was appropriately grounded in CERB case law, and we affirm her determination that the facts do not support a finding that the MVTA is acting as a joint or single employer of the operators.

As early as 1977, in Hudson Bus Lines, 4 MLC 1630, SI-203 (September 2, 1977), the CERB addressed the issue of its jurisdiction over private contractors providing services pursuant to contracts with a public entity and established criteria for considering whether a School Committee was exercising a sufficient amount of control over a bus contractor such that it was the de facto employer. In Hudson Bus Lines, the issue was whether the bus company was the employer subject to DLR jurisdiction under Chapter 150A or if the employer was the City of Boston and/or its School Committee and Chapter 150E should apply.[8] In determining that Hudson Bus Lines, and not the School Committee was the employer, the CERB held that the most compelling evidence of the bus drivers' status was the contract between Hudson Bus Lines and the School Committee which indicated that Hudson Bus Lines was an independent contractor and that its employees were not to be considered employees of the School Committee/City. Id. at 1635.

In School Committee of Boston v. Labor Relations Commission, 24 Mass. App. Ct. 721 (1987), the Appeals Court reached a similar conclusion with respect to bus drivers employed by two other bus companies who had contracts with the Boston Public Schools to transport students. In this case, the employers and the Boston School Committee had filed a petition for an investigation of a strike under Section 9A of Chapter 150E and were appealing the CERB's dismissal of the petition[9] after the CERB found that the bus drivers did not work for a public employer and there was no jurisdiction under Chapter 150E. In affirming the dismissal, the Court noted that careful government oversight is to be expected with these kinds of vendor contracts, but that the facts do not show "pervasive control" by the public entity. Id. at 728.

The facts in these cases involving Boston school bus drivers and their employers' contracts with the School Committee are strikingly similar to those at issue here. As in these cases, the contract between TCI and the MVTA establishes that TCI is an independent contractor and holds the power to manage the workforce and all aspects of

---

[7] We also note, as did the Investigator, that while the CERB may look to the NLRB for guidance, its precedents are not binding on it. Alliance, AFSCME, SEIU and Luther E. Allen, Jr., 8 MLC 1518, SUPL-2024, 2025 (November 13, 1981).

[8] In Hudson, unlike the circumstances present here, the NLRB had declined jurisdiction over the representation petition filed by the union. In this case, the NLRB had declined to entertain the Union's petition seeking to amend an existing certification to establish the MVTA as a joint employer with TCI.

[9] The underlying decision is Boston School Committee,14 MLC 1181, SI-203 (September 2, 1987).

labor relations – including hiring, firing, supervising, and disciplining employees. Where the CERB has found that a public employer was the joint employer with another entity, it has only done so where the public employer has had substantial control over the employees in question – specifically the power to hire, discipline, fire and to approve wages and benefits. Worcester School Committee, 13 MLC 1471, MCR-3597 (February 17, 1987) (School Committee was found to be the employer of Head Start teachers where it had control over approving all wages and benefits as well as all hiring, firing, and other disciplinary actions.).

While it is true that the contract does circumscribe TCI's authority in many ways, including giving the MVTA veto power over General Manager candidates and the ability to reject employees with poor driving records, along with requiring the adoption of certain MVTA policies, these limitations are similar to those found in Hudson and School Committee of Boston and lead us to the same conclusion -- that the MVTA is not the employer, jointly or singly, under the Law.

The CERB directly addressed the issue of whether a public entity could be considered a joint employer with a private contractor and be subject to DLR jurisdiction in ITT Job Training Services, Inc., 19 MLC 1001, CR-3663 (June 2, 1992). In analyzing whether the U.S. Department of Labor (DOL) was a joint employer of ITT's Westover Job Corps employees, the CERB found that "the appropriate inquiry is whether the government is acting 'in the capacity of an employer' by exercising substantial control directly and on a day to day basis over the employees." Id. at 1026. The CERB then examined the day-to-day interactions between the public entity and the employees and looked to see which entity issues paychecks, hires, evaluates, disciplines, and discharges employees. In determining that the DOL was not a joint employer, such that ITT could be subject to jurisdiction under Chapter 150A, the CERB noted that while the DOL engaged in extensive monitoring of employees' performance, pay, and benefits, and even had the right to approve hires or promotions for certain positions, it did not directly supervise, evaluate, or terminate employees and as such, was not a joint employer. The CERB also found the DOL had eschewed any employment relationship with the ITT staff and found that its only involvement was to insure compliance with its contract with ITT.

The facts present in the instant matter establish that the MVTA exercises a lesser degree of control than the DOL did with respect to the ITT staff or Boston school bus drivers. And, as with the DOL and the Boston School Committee, the MVTA's involvement is limited to insuring TCI's compliance with the contract.

As in the cases cited above, the evidence the Union presented concerning the very real and not insignificant limitations placed on TCI by the terms of its contract with the MVTA does not override the fundamental control the contractor has over virtually all aspects of the day-to-day employer-employee relationship. The NLRB's certification of the Union as the exclusive bargaining representative also is an acknowledgment that it is TCI, not the MVTA that has the power over employees' wages, hours, and working conditions – control over employees that is memorialized in the terms of the collective bargaining agreements negotiated between it and the Union.

In its request for review of the dismissal, the Union asserts various errors by the Investigator to support its argument that the MVTA was exercising substantial control and should be found to be a joint or single employer of the bus operators. The Union argues that the Investigator failed to properly weigh all of the facts showing the MVTA had pervasive control over TCI. The Union contends that the Investigator (1) ignored various areas of the MVTA's authority over the employees; (2) unfairly credited the evidence provided by the MVTA General Manager regarding her feedback to TCI regarding negotiations; and (3) failed to consider a second statement by TCI negotiators concerning the MVTA's sway over TCI's collective bargaining proposals. The Union also details an extensive list of facts that it asserts the Investigator failed to make, including areas of MVTA control outlined in the original Request for Proposals and in the current contract between TCI and the MVTA.

Even if we were to agree with all of the Union's characterizations of the record, we do not find that it warrants a reversal of the Investigator's decision to dismiss. The Investigator correctly concluded that the MVTA's relationship with employees does not rise to the level of that of a joint or single employer under the Law given its contract with TCI. Examining the contract between the MVTA and TCI makes clear that TCI is the employer and that the MVTA is only exercising the authority reserved to it by its terms. The case law supports a determination that TCI is the sole employer here even where the MVTA retains a level of control over a range of policies and fiscal decisions. The CERB and the Appeals Court have acknowledged that while there are gray areas in determining the relationship between employees, the vendor, and the public entity, a degree of control is to be expected when a public entity contracts with a vendor to provide public services such as transit. The level of control the MVTA has exercised here, even accounting for the additional facts the Union argues should have been considered, does not create an employer-employee relationship under Chapter 150E between the MVTA and the bus operators represented by the Union.

Where the CERB has repeatedly found that these types of vendor contracts with public entities (with similar degrees of oversight and control), do not create an employment relationship between a public contracting authority and its vendor's employees, evidence of TCI's attempt to use its contractual relationship with the MVTA as part of a strategy during collective bargaining to achieve its bargaining goals does not transform the MVTA into a joint or single employer. As the CERB stated in Hudson, supra, "the most compelling evidence of the status of the . . . drivers is the contract . . . which created the relationship in question." Id. at 1635. TCI is the employer of the operators under the contract and has been recognized as such by the NLRB. The employment relationship between the operators and TCI has extended through a strike and the negotiation of two collective bargaining agreements with the Union. Further, as the Investigator noted, the MVTA has never sat at the bargaining table during the Union's negotiations with TCI. It also has never sought to assert itself as the employer – even during a strike by the operators. TCI's conduct at the bargaining table does not change the relationships among the parties which have been created by a contract which gives TCI day-to-day control over the wages, hours, and working conditions of the operators.

Thus, taking all of the facts set forth by the Union as true, the Union has not established probable cause to show that the MVTA has pervasive control over TCI's employees under the standards set forth by the CERB in Hudson, Boston School Committee, ITT Job Training, and Worcester School Committee. As such, we find that the MVTA is neither a joint employer nor a single employer of the operators represented by the Union.

In reaching this decision not to exercise jurisdiction under Chapter 150E in this case, we note that it does not leave the Union without recourse as the NLRB has jurisdiction over any claims alleging that TCI has engaged in bad faith or regressive bargaining.

Conclusion

For the foregoing reasons, and those stated in the dismissal letter, we affirm the dismissal of the charge.

Very truly yours,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD[10]

KELLY B. STRONG, CERB MEMBER

VICTORIA B. CALDWELL, CERB MEMBER

[10] Former Chair, Marjorie F. Wittner, participated in the deliberation on this case prior to her retirement.

APPEAL RIGHTS

This determination is a final order within the meaning of M.G.L. c. 150E, §11. See Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987). Any party aggrieved by a final order of the Commonwealth Employment Relations Board (CERB) may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. To claim such an appeal, the appealing party must file a Notice of Appeal with the CERB within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.