United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 12, 2018

TO: Kathy Drew King, Regional Director
Region 29

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: Postmates, Inc. 596-0855
29-CA-204616 596-1683-1000

This case was submitted for advice as to: (1) whether the charge against Postmates, Inc. ("Employer") was properly served by email within the Section 10(b) period, and (2) whether couriers working for the Employer are employees within the meaning of Section 2(3) of the Act, rather than independent contractors excluded from the Act's coverage.

We conclude that the charge was timely filed but not properly served within the Section 10(b) period. Therefore, this charge should be dismissed, absent withdrawal.[1]

FACTS

The Courier on whose behalf the instant charge was filed worked for the Employer from late 2013 until February 17, 2017.[2] On that day, he discovered he had been terminated when he realized he could no longer log into the Employer's app. On August 16, one day before the end of the 10(b) period, the Courier's attorney filed a charge against the Employer with Region 2 via fax, alleging that the Courier was terminated for engaging in protected concerted activities.[3] On that same day, the Courier's attorney attempted to serve the charge on the Employer via hand delivery; however, the Employer's Brooklyn office was permanently closed. The Courier's counsel then emailed a copy of the charge to an Employer email address—

[1] Because we find that the charge was not properly served within the Section 10(b) period, we do not need to address whether couriers working for the Employer are employees or independent contractors.

[2] All remaining dates are in 2017 unless otherwise indicated.

[3] Region 2 forwarded the charge to Region 29 after business hours on August 16. As a result, the date recorded on the charge is August 17.

dispres@postmates.com, which she found in the Terms of Service provided on the Employer's website, https://about.postmates.com/legal/terms. Although the Board's Rules and Regulations provide that service may be made by email "with the permission of the person receiving the charge," the Courier's attorney did not obtain the Employer's permission before serving the charge by email.

On August 18, Region 29 attempted to serve the Employer a copy of the charge via U.S. Mail at the Employer's Brooklyn address, but the charge was returned to Region 29 as undeliverable on October 11. On September 11, the Employer's counsel filed a notice of appearance concerning the charge, but did not indicate how he learned about the charge.

ACTION

We conclude that the charge was timely filed but improperly served, because none of the three attempts at service complied with both Section 10(b) and the Board's Rules and Regulations regarding service. Therefore, the charge should be dismissed, absent withdrawal.

Section 10(b) requires a charge to be both filed with the Board and served on the charged party within six months of the alleged unfair labor practice.[4] Failure to serve a charge within the six-month limitation period results in dismissal of the charge as time-barred.[5] Section 10(b) itself does not specify the permissible means of service or the point in time when a charge is deemed served, but these gaps are filled by the Board's regulations. Section 102.14(a) of the Board's Rules and Regulations provides that the charging party is responsible for "timely and proper service" of a copy of the charge upon the charged party.[6] Such "[s]ervice may be made personally, or by registered mail, certified mail, regular mail, private delivery service, or facsimile," and, "[w]ith the permission of the person receiving the charge, service may be made

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[4] 29 U.S.C. § 160(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]").

[5] *See, e.g., Dun & Bradstreet Software Services*, 317 NLRB 84, 85-86 (1995) (dismissing a charge that was timely filed but not timely served under Section 10(b); charge was mailed to charged party six months and one day after the alleged unfair labor practice), *aff'd sub nom. Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996).

[6] 29 C.F.R. § 102.14(a).

by email or by any other agreed-upon method."[7] The method of service directly impacts the date that the Board will consider the charged party served. Section 102.14(c) states:

> In the case of service of a charge by mail or private delivery service, the date of service is the date of deposit with the post office or other carrier. In the case of delivery by email, the date of service is the date the email is sent. In the case of service by other methods, including hand delivery or facsimile transmission, the date of service is the date of receipt.[8]

In this case, we conclude that the charge was timely filed but was not properly served during the Section 10(b) period. The Section 10(b) period did not begin to run until February 17—the day that the Courier learned of his termination[9]—and the charge was filed with the Region on August 16.[10] Therefore, the filing of the charge was timely. All three attempts at service of the charge, however, failed to satisfy the Board's requirements. The Courier's attempted hand delivery of the charge to the Employer's former Brooklyn address was deficient because the Employer never received a copy of the charge through that method.[11] The Courier's emailing of the charge was invalid because the Board's regulations, which were updated as recently as 2017, explicitly require that charging parties receive permission prior to serving a charge via email.[12] Here, the Courier received no such permission. Thus, although

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[7] *Id.*

[8] 29 C.F.R. § 102.14(c).

[9] *See A & L Underground*, 302 NLRB 467, 469 (1991) (noting the Board's long-settled rule that the Section 10(b) period commences only when a party has "clear and unequivocal notice" of a violation of the Act).

[10] Region 29 dated the charge as August 17 because it was forwarded by Region 2 after business hours on August 16. However, the charge was filed in Region 2 on August 16. *See Earthgrains Co.*, 351 NLRB 733, 733 n.2 (2007) (fact that charge was filed with wrong Regional Office irrelevant, because "where a charge should be filed is essentially a venue matter, and improper venue is not fatally defective").

[11] 29 C.F.R. 102.14(c).

[12] 29 C.F.R. § 102.14(a); *see* 82 Fed. Reg. 11748, 11749 (Feb. 24, 2017) (discussing modernization of regulations and noting that the rules retain the requirement that

service of a charge by email ordinarily is considered to be on the date the email was sent, which was within the 10(b) period, the "date of service" rule only applies where service by email was appropriate and, absent consent, it was not. Lastly, Region 29's mailing failed to satisfy the Board's requirements because the charge was mailed on August 18—just outside the 10(b) period.[13]

Based on the foregoing, we conclude that the charge should be dismissed, absent withdrawal, due to lack of proper service.

/s/
J.L.S.

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"permission be obtained for service by email in case a party does not frequently check email").

[13] *See Dun & Bradstreet Software Services*, 317 NLRB at 85 (concluding that serving a charge six months and one day after the alleged unfair labor practice warranted dismissal).