Dedicated Services, Inc. *and* Local 1181-1061, Amalgamated Transit Union, AFL–CIO and Local 713, International Brotherhood of Trade Unions International Union of Journeyman and Allied Trades. Case 29–CA–28447

June 27, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On March 4, 2008, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in response to the Respondent's exceptions, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dedicated Services, Inc., Richmond Hill, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT direct or urge our employees or applicants for employment, to sign cards authorizing Local 713, International Brotherhood of Trade Unions International Union of Journeyman and Allied Trades (Local 713) to represent them or authorize dues for Local 713 to be deducted from their salary.

WE WILL NOT inform our employees or applicants for employment that they must sign cards authorizing Local 713 to represent them or to have dues for Local 713 deducted from their salary, in order to be employed by us.

WE WILL NOT recognize Local 713 as the exclusive collective-bargaining representative of our employees at our Richmond Hill facility, at a time when Local 713 does not represent a majority of such employees

WE WILL NOT enter into and enforce any collective-bargaining agreement with Local 713 containing union-security and dues-checkoff provisions at a time when Local 713 does not represent a majority of such employees.

WE WILL NOT enforce and/or give effect to any current collective-bargaining agreement with Local 713; provided, however, that nothing in the Board's Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(2) and (1) by recognizing Local 713, International Brotherhood of Trade Unions International Union of Journeyman and Allied Trades, as the exclusive collective-bargaining representative of the Respondent's employees on February 5, 2007, a time when Local 713 had not obtained any signed authorization cards from employees, and accordingly did not represent a majority of the Respondent's employees. We therefore find it unnecessary to address the judge's discussion of the General Counsel's alternative theory that if Local 713 had obtained cards from a majority of employees those cards were tainted by the Respondent's unlawful conduct.

Additionally, in rejecting the Respondent's accretion defense, we assume without deciding that February 5, 2007, the date the Respondent recognized Local 713, is the operative date for the accretion analysis. We agree with the judge's finding that, as of that date, a lawful accretion had not occurred. We find it unnecessary to consider the judge's view that a later date might be more appropriate for an accretion analysis in this case.

Because the judge found and we agree that Local 713 did not have majority support at the time of recognition, Member Liebman finds it unnecessary to rely upon the judge's discussion of the General Counsel's alternative theory that the recognition was premature and unlawful.

[3] We shall substitute a new notice to conform to the language set forth in the Order.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

conditions of employment that may have been established pursuant to the performance of such collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 713 as the exclusive collective-bargaining representative of our employees, unless and until the labor organization has been certified by the Board as the exclusive representative of such employees.

WE WILL reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of dues-checkoff and union-security provisions of the collective-bargaining agreements between us and Local 713.

DEDICATED SERVICES, INC.

Annie Hsu and *Sharon Chau, Esqs.,* for the General Counsel.
Denise A. Forte and *Scott Trivella, Esqs. (Trivella, Forte and Smith, LLP),* of White Plains, New York, for the Respondent.
Richard Brook (Meyer Suozzi, English, Klein, P.C.), of New York, New York, for the Charging Party.
Brian McCarthy, Esq. (O'Connor & Mangan, P.C.), of New Rochelle, New York, for the Party to the Contract.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 1181-1061 Amalgamated Transit Union, AFL–CIO (Local 1181), on August 13, and October 23, 2007,[1] respectively, the Regional Director for Region 29, issued a complaint and notice of hearing on October 29, alleging that Dedicated Services, Inc. (Respondent) violated Section 8(a)(1), (2), and (3) of the Act, by rendering unlawful assistance to Local 713 International Brotherhood of Trade Unions, International Union of Journeyman and Allied Trades (Local 713), and by recognizing and signing a collective-bargaining agreement with Local 713, containing a union-security clause, even though Local 713 did not represent an uncoerced majority of employees in the unit, and at a time that Respondent did not employ a representative complement of employees and was not engaged in its normal operations. The trial with respect to the allegations in the above complaint was held before in Brooklyn, New York, on December 17. The General Counsel made several amendments to the complaint during the course of the hearing, and Respondent made certain amendments to its answer. Briefs have been filed by the General Counsel, Respondent, and Local 1181, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, is a corporation, with its principal office and place of business at 89-42 129th Street in Richmond Hill, New York, where it has been engaged in providing paratransit services for the city of New York.

Based on a projection of its operations, from February 26, at which time Respondent commenced its operations, to October 25, 2007, a period which will be representative of its operations in general, Respondent in conducting its business operations, will annually provide services valued in excess of $250,000 to New York City, a governmental entity that meets the Board's standard for the assertion of jurisdiction, and will purchase and receive at its Richmond Hill facility goods and materials in excess of $5000 directly from suppliers located within the State of New York, which supplies, in turn, purchased and received the goods and materials directly from outside the State of New York.

Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find, that Local 1181 and Local 713 have been and are labor organizations with the meaning of Section 2(5) of the Act.

II. FACTS

Charles Mattera, the president, sole shareholder, director, and officer of Respondent, is also the president, and sole shareholder, director, and officer of Dedicated Transportation, Inc., a transportation services provider located at 211 Street in Queens Village, New York. Dedicated Transportation has been in business since January 2003, and utilizes ambulettes and vans to provide transportation to the elderly and disabled. This work is essentially the same, as the work performed by employees of Respondent. Employees of both Respondent and Dedicated Transportation are required to have a commercial driver's license, are required to be drug tested, and must take a physical. The vans and equipment used by both companies are similar. However, Dedicated Transportation does not operate pursuant to a contract with the New York City Transit Authority (NYCTA) and does not provide access-a-ride services.

Dedicated Transportation and Local 713 are parties to a collective-bargaining agreement (the agreement) which runs from November 1, 2006, until October 31, 2009. The agreement states that it is between Local 713 "acting for and behalf of itself and the employees covered by this Agreement, now employed or hereafter to be employed by the Employer, Dedicated Transportation Inc."

The recognition clause states that Local 713 has been designated by the majority of employees in the bargaining unit and the unit is subsequently defined as follows:

> Full-time ambulette drivers, mechanics, assistant mechanics, matrons and service persons, excluding all other employees, including executive, managerial and confidential employees, temporary employees, relief employees, watchmen and su-

[1] All dates herein are in 2007, unless otherwise indicated.

pervisors as defined by the National Labor Relations Act (as amended).

Dedicated Transportation employed 38 employees in the bargaining unit covered by the above contract.

In May 2006, Dedicated Transportation submitted a bid to the NYCTA to provide access-a-ride services. Access-a-ride is a service provided by the NYCTA to residents of New York City, wherein elderly and disabled individuals are transported to and from their homes to wherever in New York City the individuals need to go. This service is provided by various contractors, who lease vehicles owned by NYCTA, and provide the employees to drive and maintain the vehicles and transport the individuals to and from their destinations. The NYCTA utilizes a number of different contractors at the same time to perform these services.

In June 2006, Mattera, on behalf of Dedicated Transportation began negotiations with representatives of the NYCTA, concerning the awarding of a contract for these services. During the course of these negotiations, it became clear that Dedicated Transportation would lease up to 50 vehicles from the NYCTA to perform the work required. Dedicated Transportation at the time had 30 vehicles of its own at its facility in Queens Village, New York, and there was no room for expansion at that location. Thus, Mattera decided to lease another facility, in Richmond Hill, in order to store the vehicles to be used for the access-a-ride contract. Mattera notified the NYCTA that Dedicated Transportation had a location that could house 50 vehicles. Mattera signed a document June 8, 2006, stating that Dedicated Transportation would place up to 50 vehicles in service, on various dates, culminating on April 2, 2007.

In early November 2006, Dedicated Transportation was awarded the bid by NYCTA. However, shortly thereafter, at a meeting with NYCTA officials, Mattera was informed that the City did not want their vehicles used for access-a-ride to have the same name on them, as Dedicated Transportation. Therefore, it was suggested by the NYCTA that Mattera form a separate corporation for the access-a-ride contract. Thus, Mattera formed Respondent, and filed incorporation papers on December 14, 2006.

On the very same day, as demanded by the NYCTA, Dedicated Transportation signed a guaranty that if Respondent failed to or was unable to perform the terms of the contract with the NYCTA, that Dedicated Transportation perform such obligations under the contract. I would also note in this regard that in making its bid, Dedicated Transportation was required to submit financial history for 3 years, which is required by the NYCTA, which does not award contracts to start up companies without a financial history or a guarantee from a parent company. Dedicated Transportation also loaned over $300,000 to Respondent, in order to finance the startup of Respondent's operations.

During the bidding process, Dedicated Transportation submitted its contract with Local 713 to the NYCTA, and made its bid based on the terms of such contract, which Mattera believed would be applicable to the access-a-ride employees. However, Mattera was aware that the other access-a-ride providers paid over $2-per-hour more than the wages provided to its Dedicated Transportation employees. Therefore, Mattera knew that he would have to pay the extra $2 in wages, in order to attract employees, since otherwise such employees would work for one of the other contractors. Mattera informed representatives of Local 713[2] about his desire to pay employees more than the Local 713 contract called for, and they were agreeable to this. Mattera Scalza and Acevedo had previously discussed applying the Dedicated Transportation contract to Respondent's employees, and Mattera had agreed to do so. Nothing was signed or put in writing with respect to this agreement by Mattera.[3]

In December 2006, Respondent began to advertise in the newspaper for employees to perform its access-a-ride work. Riccardo Baerga saw the ad and responded by phone. He spoke to Randy Russo.[4] Russo asked Baerga if he had a CDL, and if so, to fax it to Respondent. Baerga complied with Russo's request. In late January 2007, Russo telephoned Baerga, informed him that his CDL was good and asked if he was still interested in employment. Baerga responded, "Yes." Russo told Baerga that Respondent would be having a training class, starting in mid-February, and asked Baerga to come in and fill out an application. Baerga was told to report to the Dedicated Transportation facility on 211 Street on February 5. Present along with Baerga and Russo were three other men. Russo gave each of the individuals a folder containing an application for employment with Respondent, W-2 forms, letters of reference, agreement to submit to a blood test, and a card for Local 713. The card was entitled "application and check off authorization form." The card by its terms authorizes the Employer to deduct dues from the signer's wages, and be forwarded to Local 713. The card does not expressly authorize Local 713 to represent the signer. One of the individuals asked what the union card was for. Russo replied that it was a union card and that it had to be filled out as part of the application. Russo added that this was the Union that comes with the Company, and this Union was the representative of the employees of the Respondent. Baerga and the other individuals all filled out the documents required, including the union card. Baerga, however, did not fill in the date on his card. Baerga asked one question of Russo about how long the shift would be and what the start time would be. Russo replied that employees would be working Monday through Friday, the shifts would begin between 4 and 6 a.m. and last 10-1/2 hours. Russo also informed the employees that they would be paid $9 per hour during 2 weeks of training, which would start on February 12. Russo added that when they started driving they would receive $11 per hour, with an increase of 25-cents-an-hour after 30 days of driving.

On the very same day that Baerga signed his Local 713 card, Respondent executed a recognition agreement with Local 713. It reads as follows:

[2] The representatives were John Acevedo and Robert Scalza.

[3] The date of this conversation is not disclosed in the record.

[4] It is admitted and I find that Russo was a supervisor and agent of Respondent.

LOCAL 713 I.B.O.T.U. IUJAT,

RECOGNITION AGREEMENT

It is hereby stipulated and agreed this February 5, 2007 by and between Local 713 International Brotherhood of Trade Unions IUJAT, hereinafter referred to as the UNION, and Dedicated Service Inc. hereinafter referred to as the EMPLOYER that:

Whereas, the UNION represents the majority of the access-a-ride drivers, mechanics, helpers and maintenance employees of the EMPLOYER.

Whereas, the EMPLOYER recognizes the UNION as the bargaining representative of its employees.

Whereas, both the UNION and the EMPLOYER are desirous of entering into a Collective Bargaining Agreement.

Now, therefore, in consideration of the mutual convents, and agreements hereinafter contained, it is agreed that :

1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining agent for all its full-time and regular part-time employees. Excluding all office clerical employees and supervisors.

2. The EMPLOYER further agrees to commence negotiations with the UNION Immediately, and said negotiations are to continue until completion.

3. This agreement shall remain in full force and effect from the above cited date, up to and including the 1st day that a fully executed collective bargaining agreement is consummated.

This document was signed by Mattera and Scalza. Respondent signed this document, according to Mattera, after Acevedo informed him that some of the drivers had reached out to him, and he wanted to organize Respondent's employees. Acevedo asked Mattera to sign an agreement for Local 713 to "talk to the people and organize the shop." Mattera states that Acevedo did not have, nor did he show Mattera any signed union cards at the time. In fact, Acevedo told Mattera that he did not have any signed cards at the time. Acevedo informed Mattera that he would go to the classes and speak to the employees.[5]

In Respondent's position, paper submitted during the investigation, it contends that Respondent recognized Local 713, on February 5, based upon the fact that Local 713 had obtained six authorization cards from Respondent's employees. In that regard, the parties stipulated that the only authorization cards that Respondent's employees authorized Local 713 to be their representative, were the six cards attached. These six cards, including Baerga's card, were all identical. (I.e., they were "application and checkoff authorization forms.") As I have related above, Baerga's card was signed on February 5, although it was dated February 1, by someone other than Baerga. Further the date of employment listed on Baerga's card, was February 26, the date that Respondent started servicing clients. The remaining five cards were allegedly signed by Andres Vargas, Annette Brown, Dwight Cockrell, Andrew Cumming, and Tony Tong. No testimony or other evidence was offered by any party as to the circumstances of the signing of these five cards.[6] The cards of Crockwell, Brown, Cumming, Vargas, and Tong were dated February 2. The card for Tong was dated February 1. Crockwell, Brown, Cumming, Vargas, and Tong did not testify, so the record is unclear as to when or how they were hired. Mattera testified that all six of these employees (including Baerga), plus four other employees were hired "in late January or early February, after being interviewed and having their licenses checked." Mattera testified and the payroll records confirm that no unit employee was paid until February 12,[7] the date the training commenced. Crockwell had been an employee of Dedicated Transportation. He asked Mattera if he could work for Respondent, since Respondent's pay scale was going to be higher than that of Dedicated Transportation. Mattera agreed and Crockwell was hired by Respondent.

The payroll records of Respondent reflect that starting on February 12, the first date that any unit members were paid, Respondent employed 10 employees. In addition to the six employees described above, Respondent also employed Barry Jones, Gail McDaley, John Pacheco, and Michael Dougherty. McDaley had, like Crockwell, been employed by Dedicated Transportation, and had asked Mattera to be employed by Respondent, in order to obtain higher pay.

Further, the record reveals that at some point undisclosed by the record, Mattera spoke to Acevedo from Local 713, and they agreed that when employees such as Crockwell and McDaley were transferred to Respondent from Dedicated Transportation, they would continue to receive contractual benefits under the Dedicated Transportation contract, such as medical benefits. Further, according to Mattera, Respondent continued to checkoff dues for these employees, and send same to Local 713, even prior to Respondent signing a contract with Local 713 in May.[8]

As related above, training began on February 12, the first day that Respondent's employees were paid. The training was held at Russo's CDL School in Brooklyn, New York, and lasted for 2 weeks. According to Baerga, there were 12 employees at the training, including himself, but that none of the individuals who were with him on February 5, when he signed his union card, were in the class. Baerga further testified that 1 of the 12 did not pass the road test, so he was not hired when Respondent began servicing clients on February 26, and another individual, decided not to work for Respondent. Baerga did not testify as to the names of the two individuals who participated in the training, but did not start working for Respondent on February 26. During the training sessions, Russo handed out the Local 713 cards that Baerga and some others had previously signed, and instructed them to correct certain mistakes that they had made. The employees complied and returned the cards to Russo.

[5] Neither Acevedo nor Scalza, nor anyone from Local 713 testified in this proceeding.

[6] As I have observed above, neither Scalza, Acevedo, nor any other representatives of Local 713 were called as witnesses.

[7] Russo was paid starting on February 9.

[8] However, I note that the payroll records submitted by Respondent do not reflect any deductions of dues from the salaries of Crockwell or McDaley in February or March.

During the training, the employees were told of their starting date and their shifts by Russo. At one point during the second week of training, Acevedo came to the session, and was introduced by Russo as the "person from the Union." Acevedo explained to the employees benefits and discounts that they would receive from the Union.

The payroll records reveal that during the 2-week training period, starting on February 12, Respondent paid the 10 employees listed above $9 per hour, as Baerga had been informed.

As also related above, Respondent began servicing clients on February 26. For the payroll period ending March 4 (which included February 26), Respondent's payroll records revealed that it employed the 10 drivers who went through the training session, and who were now paid the $11 per hour Baerga had been promised. It also employed a Moses Solomon, who was hired in March at a salary of $13.50 per hour.[9]

The payroll records also reveal that Respondent hired three employees as mechanics, during that week. They were Karanchan Basdeo hired on February 26; Jay Divecha, hired on February 24; and Carlos Martinez, hired on February 20. Basdeo and Martinez were paid $10 per hour and Divecha $18.[10] The payroll records also establish that under the section entitled "management," Respondent in addition to Russo, employed Michelle Hosein starting on February 26, at $17.50 per hour; Muntaz Hosein, starting on February 21, at $22.50 per hour; Dessie Mathews, starting on February 20, at $13.65 per hour; and James McMillan, on February 21, at $13.65 per hour. The payroll records do not reflect, nor was any testimony offered to establish what positions were held by McMillan, Mathews, or the Hosein's. However, Mattera did testify that Respondent employed dispatchers who had not been employed by Dedicated Transportation. Thus, it is likely that some or all of these employees listed as management were dispatchers.[11]

Respondent began its operations during the week on February 26 with 10 vehicles, and Mattera conceded that he expected the amount of vehicles needed and employees hired would increase substantially. Indeed as noted, he had agreed to lease at least 50 vehicles from the NYCTA.[12] During the next payroll period, the week ending March 11, Respondent hired eight new drivers. Thus, for that week Respondent employed 18 drivers.[13] Thus, for that week, Respondent employed 18 drivers and 3 mechanics, as well as the same employees listed above as "management."[14]

Dwain Arietta was employed by TFM another access-a-ride contractor. In late February, he heard from other drivers in the industry, that Respondent, another access-a-ride carrier, would be opening up. He decided to apply and spoke to Russo at the Richmond Hill facility. Russo handed Arietta a folder with various forms to fill out, including a card for Local 713. Russo asked Arietta to fill out the various forms in the folder, but there was no specific discussion about the union card on that day. Arietta filled out some of the forms, but not the union card. Russo asked Arietta when he would be available, and added that Respondent needed experienced drivers. Arietta did not finish filling out the forms and left. He returned several weeks later, in March, along with three other fellow drivers from TCM. On this occasion, Russo again gave Arietta the folder of forms to fill out, including the Local 713 card. Arietta asked about the union card. Russo replied that this is a union card and it's a Union that represents the Company. Russo added that Arietta had to fill out the card, in order to work for Respondent. Russo asked when Arietta would be available to work. Arietta replied that he did not know when he would be able to leave his present job at TFM. Russo told Arietta that he would call. Arietta did not fill out the union card on that day.

In June, Arietta returned to Respondent's facility to see if the job was still available. Russo replied that the job was still open, and again gave Arietta a portfolio of forms, including a union card to fill out. On this occasion, Arietta asked what if he did not want to fill out the card. Russo replied that if he did not fill out the card, he could not work for Respondent. Arietta filled out all the forms, including the union card, and returned them to Russo. He began working for Respondent as a driver in the last week of June.

Arietta informed representatives of Local 1181 that Russo had told him that he needed to sign a Local 713 card in order to work for Respondent, sometime between March and June.

Respondent continued to hire additional employees each week thereafter, as the number of the vehicles leased from the NYCTA increased. On April 30, it hired nine drivers, and two "management" employees, Nicosia and Taewos Phanglym.[15]

On May 1, Respondent and Local 713 entered into a collective-bargaining agreement effective from May 1, 2007, through April 30, 2010. The agreement contains a union-security clause and states that Local 713 has been designated by a majority of Respondent's employees in the unit, and has exhibited to Respondent, "authorization signed by a majority of such present employees of the Employer."

The agreement provides for recognition in the following unit:

[9] The record does not reflect whether Solomon attended any training sessions, or why he was paid $13.50 per hour. It is probable that he was hired with experience as an access-a-ride driver, which also could account for his $13.50 salary.

[10] The record does not reveal whether the three mechanics had any paid training, as was required of the drivers.

[11] During his testimony, Mattera testified that he transferred Charles Nicosia, a maintenance supervisor, from Dedicated Transportation to Respondent, in the same position. However, the payroll records establish that Nicosia was not hired by Respondent until April 25. Thus, Nicosia was not employed by Respondent during its first week of operation, as Mattera seemed to suggest.

[12] Mattera testified that since the routes required employees in the evening and the morning hours, Respondent may need two or three employees to complete a route. Thus, Respondent would need more than 50 employees to drive 50 vehicles.

[13] Employee Michael Dougherty did not appear on the payroll for the week of March 11, or anytime thereafter. Apparently, his employment with Respondent ended during the prior week.

[14] Michelle and Muntaz Hosein, Mathews, McMillan, and Russo.

[15] Phanglym was paid $13.65 per hour. There is no evidence in the record concerning Phanglym's job. Nicosia was a supervisor of the maintenance employees.

> Full-time and part-time Access-A-Ride drivers and mechanics, helpers and maintenance personnel, excluding all other employees, including but not limited to executive, managerial and confidential employees, temporary employees employed for 25 hours or less per week for a period of no more than (90) ninety days, relief employees, watchmen and supervisors as defined in the National Labor Relations Act (as amended).

The agreement signed by Local 713 with Respondent is virtually identical with the contract signed between Local 713 and Dedicated Transportation, in most respects. There are, however, certain exceptions. In addition to the differences in the unit description, there are differences in the seniority, wages, workweek, and welfare fund clauses. With respect to seniority, both contracts define seniority, as "an employee's length of continuous service with the Employer in the bargaining unit." Thus, there is no credit given in the Respondent's contract for service with Dedicated Transportation. The starting wage rate for drivers under the Dedicated Transportation contract has $8.25 per hour. It also provides for a starting wage of $7.25 for matrons, and has no rate listed for mechanics. The agreement also provides for an incentive bonus of 50-cents-per-hour for drivers if they comply with various listed standards. Respondent's contract with Local 713 provides for a minimum starting wage of $11 per hour for drivers, with a caveat that experienced access-a-ride driver's wages may differ according to years worked in the access-a-ride industry. This contract provides for minimum rates for mechanics ($13 per hour), and mechanics and maintenance personnel at $10 per hour. There is no provision for an incentive bonus, as reflected in the Dedicated Transportation contract.

The workweek in the Dedicated Transportation contract is defined as based on 8 hours per day and 40 hours or less if they work less or more if scheduled more. The workweek in Local 713's contract with Respondent, defines workweek as Monday 12:01 a.m. through Sunday 12 p.m., and states that any disputes concerning the number of route hours assigned to a particular route shall not be subject to arbitration. The clause also allows the Respondent to "establish reasonable productivity standards," for which employees could be disciplined, if they fail to meet such standards. The welfare fund clause in the Dedicated Transportation contract mandates contributions for all unit employees who work 30 hours per week or more, and provides for two types of coverages. Plan B, is a single coverage plan which is applicable to employees hired before November 1, 2002, and calls for payments of $200, $205, and $210 monthly for each employee.[16] Plan C, single coverage, which applies to all "new" employees calls for payments of $100, $105, and $110 monthly on the same dates. For new employees, payments are to be made after 90 days of probation of continuous service. Employees are not eligible for coverage until 90 days of contributions are made. Further, the Employer is not required to pay for medical coverage on behalf of an employee who has medical coverage through a spouse or other employment.

[16] The payments are due November 1, 2006, 2007, and 2008, respectively.

Respondent's contract with Local 713 provides for a single plan (plan C), with payments for each full-time employee, of $110, $115, and $120 per month, to be made on September 1, 2007, 2008, and 2009, respectively. Contributions need not be made for employees until they complete a 120-day probationary period, and the employees are eligible for coverage after 4 months of continuous service.

The contract as in the Dedicated Transportation agreement, does not obligate Respondent to make contributions for employees who have medical coverage through a spouse or other employment, but adds a provision not included in the Dedicated Transportation contract, that in the event an employee presents proof of alternate coverage and waives coverage with Respondent, Respondent will pay such employee $50. Further, Respondent's contract with Local 713, unlike the contract with Dedicated Transportation, gives Respondent the "sole and absolute right to provide alternative medical coverage which is equal to or better than what they are currently receiving upon ninety days written notice to the Union."

Finally, Respondent's contract, unlike its agreement with Dedicated Transportation, states that "should the Employer's contract with the New York City NYCTA be terminated for any reason, then this agreement shall automatically be terminated and be null and void. Upon the above occurrence, both parties shall be released of any and all legal liabilities or responsibilities to one another."

For the payroll period ending May 6, Respondent employed 39 drivers 6 maintenance employees, and 9 individuals designated on the payroll as management.[17]

From May through December, Respondent's employee complement continued to increase, as the vehicles and workload increased. For the payroll period ending December 2, Respondent employed a total of 102 employees as drivers and maintenance employees, and 24 employees listed as management.[18] Mattera testified that at the time of the trial (December 17), Respondent employed 96 or 97 employees, and had leased 50 vehicles from the NYCTA. He added that the city has asked Respondent to take 20 more vehicles, approval of which is still pending. Once that approval is obtained, that would necessitate Respondent hiring at least 20 more employees. As I have detailed above, Dedicated Transportation employed 38 employees. Two of these employees (Crockwell and McDale) were transferred over to Respondent, as part of its original crew of drivers.[19] Nicosia, Dedicated Transportation's maintenance supervisor was transferred to Respondent in the same position, in April.

[17] The individuals designated as "management," included Russo, an admitted supervisor, Nicosia who Mattera characterized as the supervisor of the maintenance employees, and seven others for which the record is unclear to their job functions or titles as I have discussed above.

[18] As noted above, as to most of the individuals, the record is uncertain as to their job functions or titles. The December 2 payroll, in addition to Nicosia and Russo, also contained the name of Mattera, who as detailed above is Respondent's president. It also included Crockwell, who was previously employed as a driver. He received $13.65 as a salary and was promoted to the position of dispatcher.

[19] As noted, Crockwell was subsequently promoted to dispatcher.

Mattera testified that as of the date of the trial, there were 7–10 employees who were transferred at their own request from Dedicated Transportation to Respondent. In addition to Crockwell and McDale, Mattera mentioned Keith Stewart. Stewart worked for Respondent in the office as a road supervisor, which entails going around and checking to see that the drivers are doing what they are supposed to be doing.[20] Mattera admitted that there is no day-to-day interchange between the two companies. While as I have indicated above, the work performed by the employees of the two companies is essentially the same (i.e., transporting the elderly and disabled), there are some differences. Respondent leases the vehicles used for the access-a-ride contract from the NYCTA, while Dedicated Transportation uses its own vehicles, Respondent's employees collects fares from it passengers, and have 2 weeks of training, while Dedicated Transportation employees do not collect fares, and have no formal training program.

III. ANALYSIS

A. The 10(B) Issue

Section 10(b) of the Act provides that "no complaint shall be issued based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." However, it is well established that the 10(b) period does not begin to run until the Charging Party has received "clear and unequivocal notice, either actual or constructive" of the violation. *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004); *St. Barnabas Medical Center,* 343 NLRB 1125, 1126 (2004); *Leach Corp.,* 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. (1995); *Amcar Division,* 234 NLRB 1063 (1978), enfd. 596 F.2d 1344, 1351 (8th Cir. 1979). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense. *Broadway Volkswagen,* supra at 1246; *Chinese American Planning Counsel,* 307 NLRB 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993).

In applying these principles to the instant case, Respondent has the burden to establish that Local 1181 (the Charging Party) had clear and unequivocal notice that Respondent had violated the Act, outside the 10(b) period.

In that regard, Respondent correctly asserts that Respondent signed its recognition agreement with Local 713 on February 5, which is more than 6 months from the date of the initial charge, which was filed on August 13. However, that is not the end of the inquiry. Respondent must establish that Local 1181 had clear and unequivocal notice, either actual or constructive, of the violation outside the 10(b) period. In my view, it has fallen far short of meeting its burden in that regard. Respondent has adduced absolutely no evidence that Local 1181 had actual notice of the recognition of Local 713 by Respondent on February 5, or at any other time outside the 10(b) period. (I.e., prior to February 13.) Respondent makes no such contention, but instead argues that Local 1181 had constructive knowledge of the recognition, that required Local 1181 to exercise reasonable diligence. *Ohio & Vicinity Regional Council of Carpenters (Schaefer Group),* 344 NLRB 366, 367–368 (2005). I disagree.

Respondent relies on the evidence that applicants were told to fill out paperwork for employment, including signing a Local 713 card on or before February 5. The evidence in this regard from one witness, Baerga does demonstrate that he, as well as three other applicants were informed by Russo on February 5, that it was a union card, it had to be filled out as part of the application, and that this Union comes with the Company and was the representative of employees of Respondent. However, Respondent adduced no evidence that Baerga informed Local 1181 of these facts at any time outside the 10(b) period. Indeed Baerga credibly testified that he did not inform any Local 1181 representative about his conversation with Russo, until September, well within the 10(b) period.

I therefore conclude that Baerga's knowledge of possibly unlawful acts,[21] cannot be attributed to Local 1181, nor would it suggest to Local 1181 that it needed to exercise any due diligence, since it knew nothing of the conversation between Russo and Baerga. *Broadway Volkswagen,* supra at 1246. (None of the employees informed the Union about unilateral changes in wages and promotions.); *St. George Warehouse,* 341 NLRB 904, 905 (2004) (union not shown to have constructive notice of employer's use of agency employees); *Nursing Center at Vineland,* 318 NLRB 337, 339 (1995) (union did not have constructive notice that employee's bonus had been terminated outside the 10(b) period until employee informed the Union, within the 10(b) period); *Fire Tech Systems,* 319 NLRB 302, 305 (1995) (Although employer told employees outside the 10(b) period that it intended to establish a nonunion operation, insufficient to establish clear and unequivocal notice. Notice to employees, does not constitute notice to the union.); *Brimar Corp.,* 334 NLRB 1035 fn. 1 (2001) (knowledge of alleged unilateral change not imputed to union for 10(b) purposes, even though shop steward was aware of change); *Patsy Trucking, Inc.,* 297 NLRB 860, 862–863 (1990) (Knowledge by union members of unilateral changes, does not constitute notice to the union for purposes of triggering the statute of limitations, citing *Stone Boat Yard v. NLRB,* 715 F.2d 441 (9th Cir. 1983).).

Respondent also relies on the testimony of witness Dwayne Arietta, who was employed as a driver by TFM, another access-a-ride contractor. According to Arietta, in late February he heard from other drivers in the industry that Respondent, another access-a-ride carrier would be opening up. He decided to apply and spoke to Russo at that time. Russo gave Arietta a folder with forms to fill out, including a Local 713 card, but there was no discussion about the union card or the Union on

[20] Mattera testified that Stewart is part of the unit and a union member. His hire date for Respondent was March 5. The record reveals that dues were deducted from his salary for Local 713. The record does not reflect what position Keith Stewart held when he was employed by Dedicated Transportation.

[21] I note that even as to Baerga these facts do not establish clear and unequivocal notice of a violation, vis-á-vis the recognition. The fact that he was told that Local 713 represented the employees, does not automatically establish that the recognition was unlawful, nor would it suggest same to Baerga. Indeed, Respondent asserts that the recognition was lawful, since Local 713 had obtained a majority of cards, and based on an accretion theory. Baerga had no reason to doubt that the recognition may have been lawful.

that day. Arietta returned to Respondent several weeks later, in mid-March, when Russo informed him that he must fill out the Local 713 card in order to work for Respondent, and that the Union represents the Company. Sometime between March and June, Arietta informed a representative of Local 1181 about his conversation with Russo.

Respondent argues that based upon this testimony, as well as Arietta's additional testimony that in late February, when he heard about Respondent opening from other drivers, that "we all know who is opening up," is sufficient to prove constructive knowledge to Local 1181, which required Local 1181 to exercise reasonable diligence, and inquire about Respondent's relationship with Local 713. Once more, I disagree.

First of all, Arietta's testimony indicates that it was not until "late February," that he heard about Respondent opening up. This date is not certain, and Respondent has the burden of proving that it was outside the 10(b) period. Since the 10(b) period starts on February 13, late February could easily have been after that date. Since Respondent must prove that Arietta's or Local 1181's knowledge of Respondent opening up occurred prior to February 13, and it has not done so, its reliance on Arietta's testimony is misplaced.

More importantly, even if it were found that Arietta and or his fellow drivers knew about Respondent opening up prior to February 23, such a finding would not be sufficient to meet Respondent's burden of proof on this issue. As related above, notice to employees is not the same as notice to the Union, and no evidence was adduced that Local 1181 knew about Respondent opening, prior to March, well within the 10(b) period. Respondent argues in this regard, that because Local 1181 represents employees who are employed by access-a-ride carriers, it is deemed to have constructive knowledge of Respondent's opening, and the fact that Respondent had recognized Local 713. Once more, I cannot agree.

Even if I were to find, which I do not for the reasons and precedent cited above, that knowledge of the access-a-ride drivers is attributable to Local 1181, vis-á-vis Respondent's opening up, this fact would not provide any evidence or suspicion that Respondent had recognized Local 713. Thus, even if I were to find that Local 1181 had constructive knowledge that Respondent was opening and hiring employees, that does not suggest that Respondent had recognized Local 713. Therefore, it is not reasonable to require Local 1181 to make inquiries to see if Respondent had recognized Local 713.

Finally, I also note that Respondent recognized Local 713 on February 5, prior to having trained or even paid any employees, and prior to starting its regular business operations on February 26, which is within the 10(b) period. Thus, any conceivable argument that Local 1181 should have discovered Respondent's conduct through reasonable diligence, can only start with that date. Since Respondent has failed to introduce a scintilla of evidence, that Local 1181 knew or should have known, that Respondent had recognized Local 713, outside the 10(b) period, I conclude that it has not come close to meeting its burden of establishing that Local 1181 had "clear and unequivocal" notice of the recognition by Respondent of Local 713, on February 5.

Accordingly based upon the above analysis and authorities, I reject Respondent's 10(b) defense.

B. The Conduct of Russo

I have found above that on February 5, Baerga, along with three other applicants for employment with Respondent, was informed by Russo that a dual-purpose authorization and checkoff card for Local 713 had to be filled out as part of the application, adding that this is the Union that comes with the Company. Baerga, as well as the other applicants filled out the Local 713 card, and returned it, along with the other forms required to Russo. Further, on February 12, during the training program, Russo handed out Local 713 cards to Baerga and others that they had previously signed, and instructed them to correct certain mistakes that they had made in filling out the cards. The employees complied and returned the cards to Russo.

It is clear and I so find, that Russo's conduct described above was coercive, and an unlawful interference with employees right to select their own union representative, and constitutes unlawful assistance to Local 713, in violation of Section 8(a)(1) and (2) of the Act. *Duane Reade, Inc.,* 338 NLRB 943, 944 (2003); *Meyers Transport of New York,* 338 NLRB 958, 970 (2003); *Baby Watson Cheesecake, Inc.,* 320 NLRB 779, 786 (1996); *Fountain View Care Center,* 317 NLRB 1286, 1290 (1995); *Shenandoah Coal,* 305 NLRB 1071, 1072 (1992); and *Davis Supermarkets,* 306 NLRB 426, 453 (1992); enfd. 2 F.3d 1162, 1176 (D.C. Cir. (1993).

Similarly, Arietta was informed by Russo in March and again in June that he (Arietta) had to sign a card for Local 713 in order to work for Respondent. By such conduct, Respondent has further violated Section 8(a)(1) and (2) of the Act.

Respondent argues with regard to Arietta's testimony, that "the statements were made when Dedicated Services was operating under a lawful conclusion that it was a union shop, and as such the Company was operating in accordance with its obligations with respect to same." Once again, I cannot agree.

In March, when Russo made the unlawful comments to Arietta, Local 713 and Respondent had not entered into a contract as yet, so Respondent's implicit argument that all Russo was doing was enforcing the union-security clause, is without merit. The fact that Respondent had recognized Local 713 on February 5, even if lawful,[22] does not permit Respondent to instruct applicants to sign Local 713 cards, or to tell them that they need to sign such cards to work for Respondent. See cases cited above.

While the June conversation was after the contract with a union-security clause was signed, Russo's conduct was still unlawful. Respondent cannot require an employee to sign a union card, in order to work for it. An employee has 30 days to join the Union under the contract. Moreover, since I find below that both the recognition and the signing of the contract with Local 713 were unlawful, Russo's comments to Arietta are clearly unlawful, as well. I so find.

Further, it is well settled that checkoff authorizations must be voluntary, even with a valid union-security clause. Thus,

[22] As I detail below, I find that the recognition was unlawful.

where as here, the employees were told that they had to sign a "dual purpose" card, which authorizes checkoff, in order to be employed by Respondent, such conduct is further violative of Section 8(a)(1) and (2) of the Act. *Service Employees Local 74 (Parkside Lodge of Connecticut),* 323 NLRB 2879, 293 (1997); *Rochester Mfg. Co.,* 323 NLRB 260, 262 (1997); *Zurn Nepco,* 316 NLRB 811, 819 (1995); *Communications Workers Local 1101 (New York Telephone),* 281 NLRB 413, 417 (1986); and *Gloria's Manor Home for Adults,* 225 NLRB 1133, 1143 (1976).

C. The Recognition of and Signing a Contract with Local 713

The complaint alleges and the General Counsel contends that Respondent recognized Local 713 at a time when the Union did not represent an uncoerced majority of employees. The General Counsel relies on Mattera's admission that at the time that he signed the recognition agreement with Local 713, Acevedo told him that the Union did not have any signed cards from employees. Further Acevedo asked Mattera to sign the recognition agreement, so he could "talk to the people, and organize the shop." I agree, and conclude consistent with this admission, that Local 713 had not obtained any signed authorization cards from employees, on or before February 5. I make this finding, notwithstanding the fact that the six cards, which are in the record, all are dated prior to February 5. I rely upon, in addition to Mattera's admission, the credited testimony of Baerga, that he signed his card on February 5, and not February 1, as reflected on the card. Baerga did not fill in the date when he signed his card, so the date was filled in by someone else, probably someone from Local 713. I also rely upon the failure of anyone from Local 713 to testify about how and when the six cards were obtained. In these circumstances, it is appropriate to draw an adverse inference from the failure of any Local 713 representative to testify,[23] and find that their testimony would have been unfavorable to Local 713 (as well as Respondent), concerning this issue of when it obtained the signed cards. *Windsor Castle Health Facilities,* 310 NLRB 579, 585 (1993); and *International Automated Machine,* 285 NLRB 1122, 1122–1123 (1987).

Accordingly, I conclude that Respondent recognized Local 713, on February 5, at a time that Local 713 had not obtained any authorization cards, as well as at a time when Respondent employed no employees. It has therefore violated Section 8(a)(1) and (2) of the Act by recognizing Local 713 in these circumstances, and Section 8(a)(1), (2), and (3) of the Act by subsequently signing a contract with Local 713 containing a union-security clause. *Co-Op City,* 340 NLRB 35, 40 (2003); and *Windsor Castle,* supra.

The General Counsel argues alternatively, that all six cards are tainted by Respondent's unlawful coercion, and that Section 8(a)(2) is violated when an employer recognizes a union, if the union's majority is tainted by unlawful coercion or assistance. In that regard, the General Counsel contends that the evidence is sufficient to conclude that "all or most of the six cards were solicited by Respondent, where it directed applicants and employees to sign the cards and return them to Respondent." I cannot agree with the General Counsel's assessment of the evidence.

The only evidence of such coercion by Respondent is the testimony of Baerga and Arietta. However, Arietta's testimony concerned events subsequent to the recognition, and is not related to any of the six cards. While Baerga did testify to his own card being solicited unlawfully on February 5 by Russo, as I have detailed above, he furnished no testimony concerning any of the other five cards. While Baerga did testify that three other applicants were with him when Russo solicited his card, and were also subject to Russo's unlawful coercion, none of these three applicants were ever hired by Respondent, and they were not among the six card signers.

While it is not unlikely that Russo did in fact solicit all the cards in the same manner, as he did with Baerga's and, as well as with Arietta's card after the recognition, I do not find the evidence sufficient to make such a finding. It is the General Counsel's burden to prove that the cards were tainted, and I do not find it appropriate to conclude, that it has met its burden of proving that all six cards were tainted. I note in this regard, that two of the card signers, Crockwell and McDale were already Local 713 members, while employed by Dedicated Transportation, so it is conceivable that Local 713 would have been able to obtain their signatures, without the assistance of Respondent. However, since I have concluded that Baerga's card was tainted and invalid, as a result of Respondent's conduct, his card cannot be counted in determining Local 713's majority status. Thus, that finding reduces Local 713 to five cards, which is not a majority of Respondent's employees as of February 5, even assuming it is concluded that they were hired as of that day. Since Respondent employed 10 employees when it began its training on February 12, Local 713 did not represent a majority of employees in the unit, on February 5, 12, or at any other time. Therefore, the General Counsel is ultimately correct that Respondent recognized Local 713, when the Union did not represent an uncoerced majority of employees, and that this is further support for concluding that Respondent violated Section 8(a)(1) and (2) of the Act, by such conduct.[24]

The General Counsel makes another alternative argument, as reflected in the complaint, that even if Local 713 represented a majority of employees in the unit on February 5, the recognition was premature. The Board has set out the competing principles and the test for deciding this issue:

> Where a newly opened business has granted recognition, an issue concerning the timing of recognition can arise. The Board has long balanced competing interests in these cases. On the one hand, the Board seeks to vindicate

[23] I note that two representatives from Local 713 were in the courtroom throughout the trial.

[24] I make this finding, without concluding, one way or the other whether Respondent is deemed to have hired the employees as of February 5, since it had promised them employment by that date. This conclusion is questionable, since the employees were not paid until February 12 when training began. But for purposes of making my finding, I assume that the employees as Respondent contends, were hired as of February 5. However, as noted, Local 713 still did not represent an uncoerced majority of employees at that time.

> the right of those employees, already employed, to engage in collective bargaining should they so choose. On the other hand, the Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated full complement of the unit employees-all of whom will be bound, at least initially, by the choice of those who were hired before them.
>
> Balancing those two interests, the Board has long held that an employer's voluntary recognition of a union is lawful only if, at the time of recognition, the employer: (1) employed a substantial and representative complement of its projected work force, and (2) was engaged in its normal business operations. See, e.g., *Hilton Inn Albany,* 270 NLRB 1364, 1365 (1984). The test is in the conjunctive: If either prong is not met, a grant of recognition is unlawful. See, *A.M.A. Leasing,* 283 NLRB 1017, 1024 (1987) (a finding that the employer "was not engaged in normal business operations . . . would alone establish a violation"). *Elmhurst Care Center,* 345 NLRB 1176, 1177 (2005).

The Board looks to *General Extrusion Co.,* 121 NLRB 1165, 1167 (1958), a representation case for guidance in unfair labor practice cases involving premature recognition. *Hilton Inn,* supra at 1365. *General Extrusion,* supra, held that an existing contract will bar an election, if compared to the hearing date, the employer employed 30 percent of its employees in 50 percent of the job classifications at the time the contract was signed.

In applying this standard to the facts at hand, I conclude, in agreement with the General Counsel, that Respondent had not met either prong of the test utilized to assess premature recognition.[25]

Taking the second prong first, there can be no question, that Respondent was not engaged in its normal business operations, when it recognized Local 713 on February 5. Indeed, on that date, it was not engaged in any operations, since no unit employees had performed any work for Respondent by that time, and no employee was paid until a week later, when training began. Further, even when the training commenced on February 12, Respondent was still not engaged in its normal business operations. During the 2-week training period, the 10 drivers were engaged in training, and were not performing unit work, but going through a training program, as required by the NYCTA, for all access-a-ride drivers. Further, Respondent had not hired any maintenance employees, dispatchers, or supervisors (other than Russo) at that time. In such circumstances, I find that Respondent was not engaged in its normal business operations until February 26, when it began servicing clients. *Elmhurst Care Center,* supra at 1178–1179; *Hilton's Inn,* supra at 1366; see also *New Concept Solutions, LLC,* 349 NLRB 1136, 1159 (2007).

As noted above, this finding alone is sufficient to conclude that Respondent's recognition was premature and unlawful. *Elmhurst Care,* supra; *A.M.A Leasing,* supra. I also find that the recognition was unlawful, because the first prong of the Board's test has also not been met.

Respondent's complement of 10 employees on February 5, increased gradually each week, as Mattera had anticipated, until it reached 45 employees (drivers and maintenance employees) as of May 1, when it signed a contract with Local 713, and by December 2, it employed 102 employees in these categories.[26]

Therefore, I find that Respondent employed far fewer than 30 percent of its normal complement of unit employees, when it recognized Local 713. Thus as of May 1, when it signed the contract it employed 22.2 percent of unit employees, and by December, by which time it had leased the 50 vehicles contemplated by Mattera, Respondent employed 102 drivers and maintenance employees. Thus, Respondent employed less than 10 percent of its contemplated unit employees, when it recognized Local 713.

Accordingly, I conclude that the second prong of the Board's test for premature recognition has not been met. *Hilton Inn,* supra; *AMA Leasing,* supra; *Cowles Communications, Inc.,* 170 NLRB 1596, 1610–1611 (1968).[27] This finding provides further support for my conclusion that Respondent's recognition of Local 713 on February 5, was violative of Section 8(a)(1) and (2) of the Act.

Respondent argues as its primary defense, that it is a single employer with Dedicated Transportation, and that therefore its decision to recognize Local 713 is lawful, whether or not Local 713 represented a majority or indeed any of its employees, based on the fact that Respondent's employees are an accretion to Dedicated Transportation's existing bargaining unit. *Judge & Dolph Ltd.,* 333 NLRB 175, 180–181 (2001).

I agree with Respondent's initial argument that the evidence demonstrates that Respondent and Dedicated Transportation constitute a single employer under the Act. The companies have the same officers, directors and ownership, *HERE Local 274 (Warwick Caterers),* 282 NLRB 939, 944 (1987), are financially dependent on each other, *Neighborhood Roofing,* 276 NLRB 861, 867 (1985); have common labor relations, and are performing essentially the same work. *Towne Ford Sales,* 270

[25] I emphasize again that in order for the recognition to be lawful, both prongs must be met.

[26] The record also revealed that Respondent employed from 9–24 individuals listed as management on its payroll. The record is uncertain as to the classifications or job titles of most of these individuals, other than a strong inference that some of them were dispatchers. It is unclear if dispatchers are in the unit. I note that the calculations of work force under *General Extrusion,* supra, do not include supervisors or other nonunit personnel. *Permaneer California Corp.,* 175 NLRB 348, 348–349 (1967).

[27] The record as noted is unclear as to the number of classifications hired by Respondent as of February 5. Thus, Respondent "hired" only drivers as of that date. The contract also mentions helpers and mechanics as included in the unit. Clearly, Respondent did not hire any mechanics until it began servicing clients on February 26. The record is silent as to whether Respondent hired any helpers. Mattera did admit that it hired Keith Stewart as a "road supervisor," a classification not specifically mentioned in the contract. He also admitted that Respondent considered Stewart to be a unit member, and the records reveal that dues have been deducted from his salary. Thus it appears that Respondent had not employed 50 percent of the job classifications at the time of the recognition.

NLRB 311 (1984). However, a single-employer finding between the entities does not end the inquiry.

The issue is whether the employees of Respondent constitute an accretion to the unit of Dedicated Transportation employees, represented by Local 713. *Warwick Caterers,* supra. Indeed, this issue would be no different, if the NYCTA had not required Dedicated Transportation to form a new corporation to perform the access-a-ride work, and if Dedicated Transportation had signed the contract with Local 713. The issue still is whether the unit of employees performing access-a-ride work is an accretion to the unit of employees of Dedicated Transportation, performing similar but not access-a-ride work, at a different location. The relevant principles and standards in evaluating the accretion doctrine is detailed by the Board in *Frontier Telephone of Rochester,* 344 NLRB 1270, 1271 (2005):

> The fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.,* 773 F.2d 468, 473 (2d Cir. 1985). However, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. Accordingly, the Board follows a restrictive policy in applying the accretion doctrine. *Safeway Stores,* 256 NLRB 918 (1981); and *Wackenhut Corp.,* 226 NLRB 1085, 1089 (1976). One aspect of this longstanding restrictive policy, which was recently restated in *E. I. du Pont* [*de Nemours & Co.*, 341 NLRB 607 (2004),] has been to permit accretion "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." Supra at 608 quoting *Ready Mix USA, Inc.,* 340 NLRB 946, 954 (2003).
>
> In determining, under this standard, whether the requisite overwhelming community of interest exists to warrant an accretion, the Board considers many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. *E. I. Du Pont,* supra at 608; *Compact Video Services,* 284 NLRB 117, 119 (1987). However, as stated in *E. I. du Pont,* the "two most important factors"—indeed, the two factors that have been identified as "critical" to an accretion finding—are employee interchange and common day-to-day supervision. *SuperValu Stores,* 283 NLRB 134, 136 (1987), citing *Towne Ford Sales,* 270 NLRB 311, 312 (1984). [Footnotes omitted.]

Further, the Board supported by the courts has repeatedly observed that "when the relevant considerations are not free from doubt, . . . it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion. As a general note the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing Unit." *Westinghouse Electric v. NLRB,* 440 F.2d 7, 11 (2d Cir. 1971); *Archer Daniels Midland Co.,* 333 NLRB 673, 675 (2001); *Save-It Discount Foods,* 263 NLRB 689, 693 (1982); and *Westwood Import Co.,* 251 NLRB 1213, 1220 (1980).

Thus, in sum, in order to prevail in its accretion defense, Respondent must demonstrate *both* that its employees have little or no separate group identity, and thus cannot be considered to be a separate appropriate unit *and* the community of interest between the employees and the existing unit, i.e., Dedicated Transportation is overwhelming. *Baltimore Sun v. NLRB,* 257 F.3d 419, 427 (9th Cir. 2001); *Archer Daniels Midland,* supra; and *Safeway Stores,* 256 NLRB 918 (1981).

Here, Respondent has fallen for short of meeting its heavy burden of proving either prong of the *Safeway Stores* test. I note initially that the parties did not treat Respondent's employees as an accretion to its existing unit. There is no after acquired clause in Dedicated Transportation's contract with Local 713. *Judge & Dolph,* supra at 182. Rather, Respondent decided to negotiate a separate contract with Local 713 covering its employees, with several significant differences from the Dedicated Transportation contract.[28] Further, Respondent agreed to recognize Local 713, based on alleged authorization cards, to be obtained by Local 713, and not based on its existing contract covering the Queens Village location of Dedicated Transportation.[29] I, therefore, find that this conduct by the parties substantially detracts from any possible contention that the Respondent's employees were properly accreted to the existing unit. *Paper Products & Miscellaneous Union Local 27 (Combined Container Corp.),* 209 NLRB 883, 887 (1974).

Further, there can be little doubt that Respondent has failed to rebut the presumptive appropriateness of a single-facility unit, and that Respondent's employees may constitute a separate appropriate unit. *Save-It Discount Foods,* supra at 694, 695; *Melbet Jewelry Co.,* 180 NLRB 107, 109 (1969).

The employees of Respondent all work out of the Richmond Hill facility, performing access-a-ride work for the NYCTA, using NYCTA vehicles. They perform no work at Dedicated Transportation's facility, and there is no evidence of any day-to-day interchange or temporary transfers between Respondent's employees and Dedicated Transportation employees. Moreover, there is no evidence that day-to-day supervision of Respondent's employees is performed by anyone other than Respondent's supervisors. I, therefore, conclude that Respon-

[28] These differences included wages, seniority, and health benefits.

[29] As I have found above, although the recognition agreement recited that Local 713 had obtained a majority of authorization cards from employees of Respondent, in fact the Union had not yet obtained any signed cards, and indeed told Mattera that the recognition agreement was merely an agreement to allow Local 713 to organize Respondent's employees.

dent's facility is a separate appropriate unit, and on that basis alone, Respondent's accretion defense fails.

Furthermore, Respondent has also failed to establish the second requirement to find a valid accretion, that Respondent's employees share an overwhelming community of interest with Dedicated Transportation employees. *Frontier Telephone of Rochester,* supra. Many of the same factors described above, in assessing the appropriateness of a single-facility unit where Respondent's employees work, are relevant to this issue as well. There is absolutely no evidence that there is any functional integration between the operations of Respondent and that of Dedicated Transportation. The employees operate separate vehicles, service different accounts, and do not interact with each other in the performance of their duties.

The most important two factors, relied upon the Board in assessing this issue, which are considered to be "critical" to an accretion finding, are employee interchange and common day-to-day supervision. *Frontier Telephone of Rochester,* supra at 1271. Here, Respondent has failed to establish the existence of either factor.[30] As to interchange, there is no evidence of any day-to-day or temporary interchange, i.e., no evidence that Respondent's employees and the employees of Dedicated Transportation ever fill in for each other. *Frontier Telephone of Rochester,* supra. In this regard, the Board regards permanent transfers to be less significant indication of interchange than temporary transfers. Id. at 1272; *Novato Disposal Systems,* 330 NLRB 632 fn. 3 (2000).

As for permanent transfers, Respondent employed two transferees from Dedicated Transportation as part of its initial complement of 10 employees, and there is no evidence of any transfers from Respondent to Dedicated Transportation. There were five and seven additional transferees from Dedicated Transportation to Respondent, but it is questionable whether they should be considered, since they occurred after the recognition. *Frontier Telephone of Rochester,* supra at 1272 fn. 8. In any event, even considering the permanent transfers, they are not substantial considering the number of employees employed by Respondent, and in view of the absence of any temporary transfers. I conclude that the evidence falls well short of establishing significant interchange between Respondent's employees and those of Dedicated Transportation. Id. at 1272; *Judge & Dolph,* supra at 183–185.

The second critical element necessary to find a lawful accretion, common day-to-day supervision, also has not been established. Respondent employs separate supervisors and dispatchers,[31] and the record reveals no evidence of any common supervision between the companies, other than the fact that Mattera is the president of and in overall charge of both entities. However, such overall control by the president, does not establish the day-to-day supervision necessary to find a lawful accretion. *Frontier Telephone of Rochester,* supra at 1272–1273; and *Towne Ford Sales,* supra at 312.

While Respondent is correct that the evidence establishes that the skills, functions, and working conditions of the employees of Respondent and Dedicated Transportation are similar, these facts are insufficient to find a lawful accretion, in the absence of the two critical factors detailed above, temporary interchange and common day-to-day supervision. *Frontier Telephone of Rochester,* supra; *Towne Ford Sales,* supra.

Accordingly, I conclude that Respondent has not established either that its employees cannot be considered a separate appropriate unit, or that the community of interest between its employees and the existing unit of Dedicated Transportation employees is overwhelming. In such circumstances, its accretion defense fails.

Respondent also argues in this regard that a "relatively small group of 10 employees was lawfully accreted into the already existing, larger unit of thirty eight employees, pursuant to the collective bargaining agreement between Local 713 and Dedicated Transportation."

Again, I cannot agree with Respondent's assertion. It is true that the Board has consistently held that accretion determinations are based on facts existing at the time of the accretion, *Frontier Telephone of Rochester,* supra at 1272 fn. 8, or the time that the Union makes a demand for recognition or for inclusion in an existing contract. *Ready Mix USA, Inc.,* 340 NLRB 946, 954 (2003); *Brooklyn Hospital Center,* 309 NLRB 1163, 1182, 1183 (1992); *GHR Energy Co.,* 294 NLRB 1011, 1052 (1989); and *Gould Inc.,* 263 NLRB 442, 446 (1982).

However, these cases arise in contexts different from the instant case, and in my view are not dispositive here. I am in agreement with the General Counsel, that in the circumstances of this case, it is not appropriate to consider the issue of the numbers of employees employed by Respondent vis-á-vis Dedicated Transportation, as of the date of the recognition. Rather, I believe that the significant date in assessing the accretion issue, should be the same date as used for evaluating majority status, when Respondent employed a representative complement of employees. I note that to assess the accretion issue based on the facts solely at the time of the recognition, would not be feasible here, since the recognition was agreed upon, prior to Respondent having started even its training of employees and prior to having paid any employees. Therefore, it would not be possible to evaluate any of the factors, necessary to decide the accretion issue, such as functional integration of operations, interchange, common supervisors, or similar skills and working conditions, unless one considers how Respondent operated its business, subsequent to the recognition. Since as I have detailed above, Respondent did not employ a representative complement until December, when it employed over 100 employees, that is the appropriate date to utilize, to compare the number of employees to the Dedicated Transportation workforce. *Save-It Discount Foods,* supra at 695. (Board relies in part on fact that employer recognized the union and agreed to extend contract to the new store, before a representative complement was employed there, in concluding that no accretion was established.)

[30] I note that Respondent, as the proponent the affirmative defense of accretion, has the burden to establish the existence of facts leading to the conclusion that an accretion is warranted.

[31] While the record is unclear whether or not the dispatchers are supervisors under the Act, the record does reveal that Respondent considered them to be part of management, and that dues were not deducted from their salaries for Local 713.

The cases cited above, which appear to be contrary to this finding,[32] all arise in different contexts and are clearly factually distinguishable from the instant matter, since they do not involve prehire recognition, or issues of representative complement. In fact, a close examination of the facts and the Board's reasoning in *Gould,* supra, the case most often cited for the proposition that accretion issues must be decided on the basis of facts on the date of the demand reveals support for my conclusion. *Gould* involved an 8(a)(1) and (5) allegation, where the union, based on an accretion argument demanded that the employer recognize it as the representative of a newly transferred operation into the facility, where the union represented the employees. When the employer first started the new operation at the facility on September 30, 1977 (CFC was the new operation. Die Cast was the existing unit), it employed 7 CFC employees, and 16–20 Die Cast employees in performing work previously performed by CFC employees. At that time Die Cast employed 79 employees in the unit, represented by the union.

During the early months of its operation at the facility, there was significant amounts of interchange and common supervision between the two groups, and the number of hourly employees in Die Cast substantially out numbered the number of hourly employees in CFC.

However, over the next several months, these facts changed, and the employer began hiring more CFC employees. By May 25, 1978, when the union made its demand that the employer recognize it and add the CFC employees to the existing unit of Die Cast employees, there were 148 CFC employees and only 60 Die Cast employees. The employer had also made other operational changes by May 1978, and no interchange had occurred between the groups for over 4 months.

On these facts, the Board rejected the General Counsel's contention that the employer violated Section 8(a)(1) and (5) by refusing to recognize the union as the representative of the CFC employees. The General Counsel argued that since when the employer commenced its operations at the facility, it employed substantially more Die Cast employees than CFC employees, and for the first few months of its operations, there was extensive interchange, common supervision, and integration between the two groups, that the obligation to bargain with the union matured at that time, based on an accretion theory.

The Board disagreed, and concluded that the issue of whether the CFC employees constituted an accretion to the Die Cast unit must be determined on the facts as they existed on the date of the union's demand. The Board reasoned as follows:

> Further, and significantly, by the Union's May 25, 1978, bargaining demand, there were 148 hourly CFC employees and only 60 hourly Die Cast employees. The number of employees the Union desired to add to the certified unit at that time thus overshadowed that existing unit by more than two to one. And the same or a greater ratio of CFC to Die Cast employees continued thereafter until April 1979 when the Die Cast operation terminated.
>
> Consequently whatever indicia of accretion existed at the inception of CFC's Tampa operations are counterbalanced by subsequent events demonstrating the separate identity of Die Cast's and CFC's respective operations. The favorable ratio of Die Cast to CFC employees that initially obtained was reversed after a relatively short period of time. This shift in the comparative sizes of the two operations, together with the development of separate lines of organization and supervision, and the concurrent phasing out of Die Cast and the resulting diminution of its employment complement outweigh the elements which briefly favored a finding of accretion. Id. at 446.

The Board added that "an accretion finding at the point urged by the General Counsel would be premature," Id. and added a footnote emphasizing that "at the time General Counsel claims that an accretion occurred, CFC was operating with a relatively small number of employees in proportion to the size of the complement it employed when the Union demanded recognition and bargaining," Id.

Therefore, I conclude that this reasoning of the Board in *Gould,* supra, supports my conclusion that in the circumstances of this case, the appropriate date to measure which group of employees predominate, in assessing accretion, is the date when Respondent employed a representative complement of employees in December, and not as Respondent contends, on February 5 when its operations had not even begun.

Having so concluded, Respondent employed over 100 employees in the unit at that time, while the unit to which it asserts accretion is warranted, consisted of 38 employees. This factor militates heavily against a finding of accretion. *Renaissance Center Partnership,* 239 NLRB 1247, 1248 (1979); and *Worcester Stamped Metal Co.,* 146 NLRB 1683, 1685–1686 (1964).

I emphasize that notwithstanding my conclusions above, with regard to the appropriate date for measuring accretion here, my ultimate decision would not change. Even if I were to agree with Respondent, that the accretion issue must be decided solely on facts as of February 5, resulting in a finding of accreting 10 employees into a unit of 38, I would still not find the accretion defense to be established.

Thus, the number of employees accreted is but one factor to be considered, and in view of the absence of evidence of the critical factors in assessing accretion, such as interchange and common day-to-day supervision, as well as functional integration, Respondent has not established its defense, even if February 5 is considered the appropriate date for assessing the issue. *Frontier Telephone of Rochester,* supra. (No accretion found, based on absence of interchange and common day-to-day supervision, even though there was evidence of functional integration, both groups worked at the same facility, and at the time of accretion, 120 employees were accreted to existing unit of 600.) Id. at 1293.

Based on the foregoing analysis and authorities, I conclude that Respondent has fallen far short of establishing its accretion defense. Since it is clear based on my findings above, that Respondent prematurely recognized Local 713, at a time when Local 713 did not represent an uncoerced majority of employees, it has thereby violated Section 8(a)(1) and (2) of the Act.

[32] *Frontier Telephone,* supra; *Brooklyn Hospital,* supra; *Ready Mix,* supra; *GHR Energy,* supra; and *Gould,* supra.

Further, when Respondent executed collective bargaining with Local 713 on May 1, containing a union-security clause, it has violated Section 8(a)(1), (2), and (3) of the Act. I so find.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 731 and Local 1181 are labor organizations within the meaning of Section 2(5) of the Act.
3. By directing and urging its employees or applicants for employment to sign cards authorizing Local 713 to represent them and authorizing dues for Local 713 to be deducted from their salary, and by informing its employees and applicants for employment, that they had to sign such cards in order to be employed by it, Respondent has violated Section 8(a)(1) and (2) of the Act.
4. By recognizing Local 713 as the collective-bargaining representative of its employees, on February 5, 2007, notwithstanding the fact that Local 713 did not represent an uncoerced majority of Respondent's employees, Respondent has violated Section 8(a)(1) and (2) of the Act.
5. By executing a collective-bargaining agreement with Local 713, on May 1, which agreement contained a union-security clause, notwithstanding the fact that Local 713 did not represent an uncoerced majority of Respondent's employees, Respondent has violated Section 8(a)(1), (2), and (3) of the Act.
6. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully recognized and entered into a collective-bargaining agreement on May 1, 2007, I shall recommend that Respondent withdraw and withhold all recognition from the Local 713 as a collective-bargaining representative of its employees, and order Respondent to cease applying to its employees the terms of the collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement,[33] unless or until the Respondent Union is certified by the Board as such representative.

I shall also recommend that the Respondent reimburse its employees, present and former, for dues and initiation fees involuntarily exacted from them as a result of the unlawful application of the union-security clause in the Respondents' collective-bargaining agreement, with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[33] Nothing in this decision should be construed as requiring Respondent to rescind benefits conferred as the result of the unlawful application of contract provisions to them, see, e.g., *Frontier Telephone of Rochester,* supra at 1278 fn. 24; *Kaiser Foundation Hospitals,* 343 NLRB 57, 58 (2004).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Dedicated Services, Inc., Richmond Hill, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing or urging its employees or applicants for employment, to sign cards authorizing Local 713, International Brotherhood of Trade Unions International Union of Journeyman and Allied Trades (Local 713) to represent them or authorizing dues for Local 713 to be deducted from their salary.

(b) Informing its employees or applicants for employment, that they had to sign cards authorizing Local 713 to represent them or to have dues for Local 713 deducted from their salary, in order to be employed by Respondent.

(c) Recognizing Local 713 as the exclusive collective-bargaining representative of its employees at its Richmond Hill facility, at a time when Local 713 does not represent a majority of such employees.

(d) Entering into and enforcing collective-bargaining agreements with Local 713 containing union-security and dues-checkoff provisions.

(e) Enforcing and/or giving effect to the collective-bargaining agreement with Local 713; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms and conditions of employment that may have been established pursuant to the performance of that collective-bargaining agreement.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 713 as the exclusive collective-bargaining representative of its employees, unless and until said labor organization has been certified by the Board as the exclusive representative of such employees.

(b) Reimburse, with interest as provided in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of dues-checkoff and union-security provisions of the collective-bargaining agreements between the Respondent and Local 713.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Richmond Hill, New York facility, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."