

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

ALL AMERICAN SCHOOL BUS CORP., ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP.,¹ BOBBY'S BUS CO. INC., BORO TRANSIT, INC., B-ALERT INC., ATLANTIC ESCORTS INC., CITY WIDE TRANSIT, INC., CANAL ESCORTS, INC., CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO. INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION CORP. (AND ITS ALTER EGO HOYT TRANSPORTATION CORP., DEBTOR IN POSSESSION), IC ESCORTS, INC., KINGS MATRON CORP., LOGAN TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT INC., LORISSA BUS SERVICE INC., MOUNTAINSIDE TRANSPORTATION CO., INC., PIONEER SCHOOL BUS RENTAL, INC., PIONEER TRANSPORTATION CORP., RAINBOW TRANSIT INC., AMBOY BUS CO., INC., RELIANT TRANSPORTATION, INC., RPM SYSTEMS INC., SCHOOL DAYS INC. and TUFARO TRANSIT CO. INC.

and

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

Cases 29-CA-100827; 29-CA 100830; 29-CA-100833; 29-CA-100862; 29-CA-100863; 29-CA-100864; 29-CA-100865; 29-CA-100874; 29-CA-100876; 29-CA-100879; 29-CA-100885; 29-CA-100887; 29-CA-100892; 29-CA-100895; 29-CA-100914; 29-CA-100916; 29-CA-100918; 29-CA-100920; 29-CA-100923; 29-CA-100926; 29-CA-100930; 29-CA-100933; 29-CA-100935; 29-CA-100961; 29-CA-100962; 29-CA-100966; 29-CA-100967; 29-CA-100969; 29-CA-101009; 29-CA-101013; 29-CA-101014; 29-CA-101019; 29-CA-101030; 29-CA-101033; 29-CA-101036; 29-CA-101069; 29-CA-101072; 29-CA-101073; 29-CA-101083; 29-CA-101084; 29-CA-101087; 29-CA-101089; 29-CA-101092; 29-CA-101096; 29-CA-101101; 29-CA-101105; 29-CA-101108; 29-CA-101110; 29-CA-101111; 29-CA-101139; 29-CA-101146; 29-CA-101153; 29-CA-101155; 29-CA-101158 and 29-CA-101161

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Dated at Brooklyn, New York
this 6th day of December, 2013

¹ Atlantic Queens Bus Corp., Atlantic Escorts, Inc., Amboy Bus Co., Inc. (the Atlantic Companies) have filed a petition in the Bankruptcy Court for the Southern District of New York seeking to reorganize under Chapter 11 of the Bankruptcy Code. The Atlantic Companies continue to operate as a debtor in possession of its estate.

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I. STATEMENT OF THE CASE

On June 10, 2013, the Regional Director for Region 29 issued a Consolidated Complaint and Notice of Hearing in the instant cases filed by Local 1181-1061, Amalgamated Transit Union, AFL-CIO (the Union), among others which subsequently have been severed, against All American School Bus Corp., et al.,² (the Respondents). On June 20, 2013, the Regional Director for Region 29 issued an Order Severing Cases and Amendment to Consolidated Complaint (Complaint). A hearing before Administrative Law Judge Raymond P. Green was conducted from July 22 through 26, and 29 through 31, 2013. On September 20, 2013, the Administrative Law Judge issued a Decision and Recommended Order (the Decision) in the above-captioned cases finding, *inter alia*, that there was no impasse in bargaining and that the Respondents violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally putting into effect their Best and Final Offer (BFO) made on March 19, 2013.

On October 29, 2013, Respondents filed the following exceptions to the Decision: the Administrative Law Judge erred in finding that the Most Favored Nations (MFN) clause was not critical to all Respondents, that the Administrative Law Judge relied on speculation rather than evidence in finding that the MFN clause was not critical, that the Administrative Law Judge found that the MFN clause was not critical by improperly attributing statements of some Respondents' agents to all Respondents, and the Administrative Law Judge ignored or minimized bargaining concerning the MFN clause.

² All American School Bus Corp.; ANJ Service, Inc.; Atlantic Queens Bus Corp.; Bobby's Bus Co. Inc.; Boro Transit, Inc.; B-Alert Inc.; Atlantic Escorts Inc.; City Wide Transit, Inc., Canal Escorts, Inc.; CIFRA Escorts, Inc.; Empire State Escorts, Inc.; Gotham Bus Co. Inc.; Grandpa's Bus Co., Inc.; Hoyt Transportation Corp.; IC Escorts, Inc.; Kings Matron Corp.; Logan Transportation Systems, Inc.; Lonero Transit Inc.; Lorissa Bus Service Inc.; Mountainside Transportation Co., Inc.; Pioneer School Bus Rental, Inc.; Pioneer Transportation Corp.; Rainbow Transit Inc.; Amboy Bus Co., Inc.; Reliant Transportation, Inc.; RPM Systems Inc.; School Days Inc. and Tufaro Transit Co. Inc.

II. ISSUES PRESENTED

1. Whether the Administrative Law Judge erred in failing to find that even if the Most Favored Nation clause (MFN clause) was a critical issue, there was no good-faith bargaining impasse;
2. Whether the Administrative Law Judge erred in failing to find that even if the MFN clause was a critical issue and there was a good-faith impasse over that issue, it did not lead to a breakdown in the overall negotiations; and
3. Whether the Administrative Law Judge erred in failing to recommend in the Recommended Order that all of the Respondents take the following affirmative action: “Make employees whole, with interest, for the loss of any earnings or benefits resulting from any changes in the terms and conditions of employment made after March 10, 2013.”

III. STATEMENT OF THE FACTS³

Counsel for the General Counsel submits this Brief in Support seeking the necessary corrections to the Decision. While the Administrative Law Judge correctly concluded that Respondents violated the Act by prematurely declaring impasse and unilaterally putting into effect their BFO, he failed to reach the legal conclusions that there was no good-faith bargaining impasse over the MFN clause regardless of whether it was a critical issue, and, even if there was a good-faith bargaining impasse over the MFN clause, that it did not lead to a breakdown in the overall negotiations. In addition, although the Decision stated that “the Respondents shall be required to . . . make their employees whole for all monetary losses they have incurred as a result

³ Inasmuch as the Judge correctly outlined the relevant facts with respect to background and events leading up to negotiations, those facts are not repeated herein. *See* ALJD II.a.

of the unlawful unilateral changes,” ALJD at 22:26-27, he failed to recommend in the Recommended Order that all of the Respondents make employees whole, with interest, for the loss and any earnings or benefits resulting from any changes in the terms and conditions of employment made after March 10, 2013. The legal theories discussed below, supported at hearing, and well-established in the record evidence, supports Counsel for the General Counsel’s argument that no good-faith bargaining impasse was reached even if the MFN clause was a critical issue, and even if there was an impasse over the MFN clause and it was found to be critical, it did not lead to a breakdown in the overall negotiations.

A. The Parties Hold Twelve Bargaining Sessions

1. The Parties Met for Their First through Seventh Sessions from October 23, 2012 through February 12, 2013

The parties began meeting to bargain for a successor collective bargaining agreement (CBA) in October 2012 since the existing CBA was set to expire on December 31, 2012. (Tr. at 96; GC Ex. 2.)⁴ However, very little movement occurred in the first seven sessions because of the issue over the Employee Protection Provision (EPP),⁵ and because of the strike over the EPP, which ran from January 16, 2013 through February 15, 2013. (Tr. at 96-129.) If the MFN clause was mentioned in these first seven sessions, it was only briefly as part of a review of Respondents’ proposals. (Tr. at 102, 108, 117, 119, 125, 128.) During most of the first seven sessions, Respondents would state that they were losing money, and the Union would respond that they should then submit to audits of their financial records. (Tr. at 103, 107.) During certain

⁴ References to the official record of the Hearing are abbreviated as follows: “GC Ex.” denotes General Counsel’s exhibits, “Resp. Ex.” denotes Respondents’ exhibits and “Tr. at” denotes references to the transcript of the Hearing.
⁵ In 1979, the DOE, many of the Respondents and the Union entered into an agreement that ended a three-month bus strike which required the DOE to include EPPs in its bids for certain school busing work. (Tr. at 83.) The EPPs established a master seniority list of employees who were laid off due to an operator’s loss of a contract and required operators to hire from that list and to pay employees’ previous wages and pension benefits. (Tr. at 83-84.) The DOE included EPPs in all bid contracts from 1979 through 2012. (Tr. at 85.) On December 21, 2012, Mayor of New York City, Michael Bloomberg, announced that the DOE was putting out a bid on certain routes and it was no longer including EPPs in the bids. (Tr. at 87.)

of these sessions, President of the Union, Michael Cordiello, suggested extending the CBA for a year with the MFN clause, but Jeffrey Pollack, spokesperson for Respondents, rejected this proposal. (Tr. at 103-04.) During the third session on December 11, 2012, Domenic Gatto, the Chief Financial Officer, herein called CFO, for Atlantic Queens Bus Corp., Atlantic Escorts Inc. and Amboy Bus Co., Inc., herein called the Atlantic companies, told the Union representatives across the bargaining table that by March 2013, bargaining would be over and the Respondents would give the Union their BFO. (Tr. at 106-07.) Gatto did not explicitly deny making this statement. (Tr. at 1350.)

In January 2013, the Respondents also suggested the use of a mediator. (Tr. at 1176-77.) The Union refused because it was only the fourth meeting, and because the Respondents had not yet responded to the Union's first bargaining proposal. (Tr. at 119-20.) The second time Respondents suggested use of a mediator was on March 2, 2013. (Resp. Ex. 3.) The Union rejected the suggestion since they had yet to receive the results of all of the financial reviews and were still waiting on Respondents to provide all of the information requested in its information requests. (*Id.*)

2. The Parties Met for Their Eighth and Ninth Bargaining Sessions on February 26 and March 5, 2013

During the eighth session, Respondents provided proposals, and the Union countered them. (GC Ex. 12; Tr. at 129-36.) By this session, the Atlantic companies, Reliant Transportation, Inc., herein called Reliant, Mountainside Transportation Co., Inc., and Gotham Bus Co. Inc., herein called Gotham, had agreed to submit to a review of certain financial documents, and the parties were working out or signing confidentiality agreements which Respondents demanded to be signed before the reviews could begin. (*Id.*; Tr. at 136, 506.) Cordiello told Respondents that the Union could move on economics when the reviews were

completed. (Tr. at 130.) The Respondents requested the MFN clause and Cordiello rejected it. (GC Ex. 12; Tr. at 132.) Richard Gilberg, counsel for the Union, testified that at this session, Gatto said across the table that he was going to bargain with the Union until March 5, 2013, “and that was it, you watch.” (Tr. at 507.) Gatto did not explicitly deny this statement. (Tr. at 1350.)

During the ninth session on March 5, 2013, before the parties commenced bargaining, Gatto told Cordiello that “they” were not going to pay the Easter adjustment check. (Tr. at 139-40.) Gatto testified that he did not recall this conversation. (Tr. at 1351, 1393.) However, he admitted he could not afford the Easter adjustment check, particularly in light of damages his companies sustained as a result of Superstorm Sandy. (Tr. at 1351.) In addition, during this session confidentiality agreements for the Atlantic companies were signed. (Tr. at 507.)

Also at the ninth session on March 5, 2013, the following movement occurred: Respondents agreed to pay overtime in the first week if the Union agreed to the number of hours after which overtime would start accruing, and the Union responded that it would provide a counter-proposal after the audits (Tr. at 140, 142); Respondents withdrew the proposal for different wage rates for van and big bus drivers (Tr. at 141); Respondents agreed to add attendants to the “pick of runs” language (*id.*); the Union withdrew its direct deposit proposal (Tr. at 142); Respondents rejected the Union’s proposal of five sick days, and in response the Union proposed an attendance incentive bonus (Tr. at 140, 142); Respondents rejected the Union’s proposal that employees receive a full day’s pay for a charter run, and the Union countered with 85% pay (Tr. at 140, 142-43); Respondents rejected the Union’s proposal for adequate facilities, and the Union countered that Respondents should meet with the Union to keep the facilities to a certain level (Tr. at 141, 143); Respondents countered the Union’s proposal that any backpay owed to employees would be paid at the employees’ return to work

with the proposal that employees would be paid when money was received from the DOE (Tr. at 141, 143); Respondents withdrew their proposal requiring that employees work at least 90% of workdays in the month to receive holiday and school closing pay (Tr. at 141-42); and the Union withdrew its proposal that a failure to comply with an arbitration award waives the no-strike clause. (Tr. at 144.)⁶ If the MFN clause was mentioned, it was mentioned only in the context of the Union responding to Respondents' proposals. (Tr. at 148.)

During the March 5, 2013 meeting, Respondents suggested longer bargaining sessions in order to get an agreement. (Tr. at 147, 352, 372-73.) However, the Union refused because bargaining had just begun and because, previously, none of the meetings had lasted until 5:00 PM largely because Respondents arrived late and left well before then. (*Id.*)

Robert "Carter" Pate, Chief Executive Officer of MV Transportation, the parent corporation of Reliant, testified that he did not want to return to the bargaining table after March 5, 2013. (Tr. at 981, 1024.) Pate testified that he told Pollack after the March 5, 2013 meeting, "I'm done, we're done. Give them the best and final. Let's meet tomorrow. I'm done." (Tr. at 1024.) Notably, during this session, Pate stormed out of the bargaining session because he was angry that the Union had not made deeper concessions in wages. (Tr. at 1018, 1040, 1052.) Pate admitted that he never left bargaining over the Union's position on the MFN clause. (Tr. at 1052.)

3. The Parties Met for Their Tenth Bargaining Session on March 11, 2013

During this session, confidentiality agreements were signed for Boro Transit, Inc. and Lonero Transit Inc. (Tr. at 508.) The following movement occurred during this session: the Respondents counter-proposed to the Union's proposal that wage increases to new hires be

⁶ Tr. at 144, line 2 contains an error. Instead of "and we with the first part of it," Cordiello testified that they "withdrew" the first part of it.

increased by 4% with the proposal that the increases be one-third of the Consumer Price Index (CPI), maximum two percent (Tr. at 151); the Respondents countered the Union's attendance bonus proposal with a full school year of perfect attendance for one sick day (*id.*); the Respondents countered the Union's proposal that employees be disciplined for DOE uniform violations rather than fined with the proposal that violations for uniform items not supplied by the Respondents would not be passed to members (Tr. at 152); the Respondents agreed that the parties would meet with the Union to keep up facilities (*id.*); the Respondents countered that backpay of up to two weeks would be paid promptly and the rest paid after the DOE pays Respondents (*id.*); and the Respondents countered the Union's proposal of an eight-hour minimum for dry runs with a four-hour minimum. (Tr. at 153.) After bargaining, the Union met with the auditors to review the results for the Atlantic companies, Reliant and Gotham. (Tr. at 153-54.) The MFN clause was mentioned only when Respondents responded to the Union's proposal that there be no MFN clause. (Tr. at 155-56.)

4. The Parties Met for Their Eleventh Bargaining Session on March 12, 2013 and the Union Made an Information Request for the Costing of Respondents' Proposals

In a letter dated March 12, 2013, the Union requested calculations of the projected savings from all of Respondents' proposals, and requested information regarding how many employees currently benefit from certain benefits. (GC Ex. 17.)

During the eleventh session, the following movement occurred: the Union countered Respondents' previous proposals with a 1½ or 2½ year term depending on when contracts expired (Tr. at 159); the Union countered Respondents' wage proposal of a 14% wage reduction with a 3% wage increase each year (from 3.75% increase the first year, 4% the second, and 4% the third), and the Respondents countered with a 10% wage reduction for drivers and 5% for

attendants (GC Ex. 18; Tr. at 159, 164); the Union agreed to the Respondents' proposal that the welfare and pension benefits should be calculated pro rata during the strike if Respondents hired back all of the employees (Tr. at 159); the Union agreed to an increase of weekly contributions of welfare and pension benefits by employees of \$5/week per year (Tr. at 160); the Union agreed to a one-month moratorium of welfare benefit contributions (*id.*); the Union countered Respondents' proposal of eliminating daily overtime with using 10.5 hours as a regular day instead of the current 10 (GC Ex. 18; Tr. at 161); the Union agreed to the Respondents' proposed language requiring employees to work the last scheduled day before a holiday/school closing and the first scheduled day after the holiday/school closing, as long as there was an exception for medical emergencies, and it agreed to no holiday or adjustment pay for employees on suspension, workers' compensation or disability (Tr. at 161); the Union countered the Respondents' proposal of \$10/hr with \$15/hr for the non-revenue rate (Tr. at 162); the Union agreed to the Respondents' proposal that employees could be required to perform dry runs during guaranteed weeks without any additional pay, and to a four-hour guarantee if the payment was made on the first paycheck of the school year (*id.*); the Union countered the Respondents' proposal that those employees whose license and/or certifications expired who do not return back to work in 6 months have resigned by increasing the amount of time to 18 months (GC Ex. 18; Tr. at 162); the Union agreed to the Respondents' proposal that all proposals apply to shop employees unless otherwise specified (Tr. at 163); the Union agreed to the Respondents' proposal that big bus drivers start at \$14.50/hr and attendants start at \$10.50 but countered \$13.90/hr for van drivers (to Respondents' \$11.50) (GC Ex. 18; Tr. at 166)⁷; the Union countered regarding wage accruals⁸ that there is one after five years and two after ten years, and

⁷ Tr. at 166, line 16 states "\$4.50" in error. Cordiello testified to \$14.50.

⁸ See GC Ex. 2, Section 18.

rather than no adjustment weeks,⁹ after one year employees would receive one week's pay for Christmas or Easter, and half a week of pay for both after two years (Tr. at 166); and the Respondents withdrew their proposals on the no strike clause, 10(A) regarding loss of work, and non-revenue rate, which was a proposal that employees would earn a lesser rate for work outside of their route. (Tr. at 100, 165-66; GC Ex. 18.)

5. The Parties Met for Their Twelfth Bargaining Session on March 19, 2013

Cordiello opened the bargaining session by urging the Respondents to continue negotiating, and not to take away the Easter adjustment check, as was rumored. (Tr. at 169.) Then, Cordiello asked for more bargaining dates, and Pollack said that they would look at calendars during the caucus. (Tr. at 171, 510.) By this session, the only financial reviews that the auditors had completed were from the Atlantic companies, Reliant and Gotham, and the Union did not have a chance to analyze these fully by this bargaining session. (Tr. at 153-54, 172.) Cordiello testified that he said at the table that he believed that the parties could reach an agreement in light of the movement over the last two or three sessions compared to the sessions before that. (Tr. at 172.) He testified that he was "very confident" that if the parties worked together, they could reach an agreement. (*Id.*)

The following movement occurred at this session from the Union: it said it would consider a re-opener if the Respondents dropped the MFN clause (*id.*); it countered with a 2% wage increase for the first year, 2% for the second, and 3% for the third (*id.*); and it countered with a 50%/50% split for increases in benefits over 7% in response to the Respondents' proposal of 5% (Tr. at 172-73); it asked for clarification regarding overtime for employees with routes that are far away from Respondents' facilities which results in a large span of non-driving hours for the employees (Tr. at 173); it agreed to the employees being physically present for picking of

⁹ See *id.*, Section 15.

runs if the Respondents removed the two-week notice requirement if they cannot be present (*id.*); it agreed that employees would not receive additional pay during snow days (Tr. at 175); and it withdrew its charters and successorship proposals (*id.*).

After the Union presented its counter-proposals and the parties caucused, the Respondents presented their BFO. (Tr. at 176, 510; GC Ex. 20.) This was the first time that the Union saw this document. (Tr. at 176-77, 513.) Pollack said the parties were at impasse because the Union would not agree to the MFN clause and that the Respondents would be implementing their BFO on March 22, 2013, and the wage reduction would go into effect on April 15, 2013. (Tr. at 179, 511.) Pate testified that the document was planned prior to the beginning of the bargaining session, and was, in his opinion, three weeks late. (Tr. at 1030.) Prior to this session, the Respondents never said that the MFN clause would bring the parties to impasse. (*Id.*) Although Pollack would say during bargaining sessions that the MFN clause was important, most of Respondents' representatives except for Gatto, Pate and Strahl, the President of Pioneer Transportation, told Cordiello in the hallway and/or lobby during negotiations and in his office that the MFN clause was not a deal breaker. (Tr. at 109, 980-1120, 1439.)

Cordiello said that he did not believe the parties were at impasse, and that based on what had transpired over the last few days, he thought they were making progress, including that morning. (Tr. at 180, 511.) He said that there were plenty of open issues, there were many economic issues about which the parties were still negotiating, the Union had yet to see all of the audits promised, and there were outstanding information requests. (Tr. at 511.) He said that the parties should continue to negotiate so they could find an agreement and that there is an agreement somewhere. (Tr. at 180.) He said that there were still issues on which the Union was willing to move. (Tr. at 183.) Cordiello said that he was willing to negotiate with all or any of the

parties sitting across the table individually or collectively, and he was willing to meet at any time. (Tr. at 181.) The Union asked to meet on March 21, 2013, as planned. (*Id.*) Cordiello also said that the Union would be willing to meet with a mediator. (*Id.*)

The Respondents said that it was their BFO, and none of the Respondents responded to Cordiello's offer to continue to negotiate with them. (*Id.*) The Respondents said that they would not be meeting on March 21, 2013, that they were at impasse, and that they would be implementing their BFO. (*Id.*) Pollack handed Cordiello a one to two page document costing their proposals in response to the March 12, 2013, request from the Union, which the Union did not have an opportunity to review prior to the Respondents' declaration of impasse. (Tr. at 181, 512-13; GC Ex. 13.) The Respondents had not produced all of the information requested by the Union by this bargaining session. (Tr. at 181.) The Union estimated that the total time through all the bargaining sessions that the parties discussed the MFN clause was less than an hour. (Tr. at 181, 513.) Union attorney Gilberg testified that, before this day, he did not hear anyone representing the Respondents discuss the MFN clause in the context of impasse. (Tr. at 513.) The Union did not believe that the parties were at impasse because the parties were making movement on all of the major issues such as wages and benefits, there were many items open and withdrawn, and agreements made. (Tr. at 181-82, 514.) On other issues, the parties were moving to the middle. (Tr. at 181.) The Union was still revising proposals in response to the information the Respondents provided. (Tr. at 182.) Gilberg testified that the parties spent far more time talking about various economic proposals, wage cuts, benefit cuts, overtime, wage accruals, wage adjustments, than they ever talked about the MFN clause. (Tr. at 514.) Cordiello believes that significant movement and bargaining did not occur until after the strike ended on February

20, 2013. (Tr. at 182.) Finally, the Union was willing to bargain further and expressed that desire. (Tr. at 514.)

B. Respondents Implement Their Best and Final Offer on March 22, 2013

The Respondents admitted that they implemented all of the proposals in the Best and Final Offer on Friday, March 22, 2013. (GC Ex. 1.) Cordiello estimates that, as a group, the Respondents saved approximately \$8 to 10 million by not paying the Easter adjustment checks. (Tr. at 193.) Other unilateral changes include: 7.5% reduction in wages for drivers and 3.75% reduction in wages for escorts for those employees who are at top pay, a three-month moratorium on welfare contributions, elimination of wage accruals (longevity pay), no additional pay for employees who work on days that schools are closed, elimination of adjustment weeks, elimination of daily overtime and no medical or pension contributions when employees are on worker's compensation or disability. (Tr. at 189-94; GC Ex. 20.)

IV. ARGUMENT

Although the Administrative Law Judge found that Respondents violated Section 8(a)(1) and (5) of the Act by prematurely declaring an impasse on March 19, 2013 based on his ruling that the MFN clause was not a crucial bargaining issue, ALJD at 21:35-41, the Administrative Law Judge failed to find additionally that no good-faith bargaining impasse was reached even if the MFN clause was a critical issue, and even if there was an impasse over the MFN clause and it was found to be critical, it did not lead to a breakdown in the overall negotiations.

Section 8(d) of the Act provides that the obligation in good faith to bargain “does not compel either party to agree to a proposal or require the making of a concession” and therefore a party is not required “to engage in fruitless marathon discussions at the expense of frank

statement and support” of one’s position. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). “The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile . . . Both parties must believe that they are at the end of their rope.” *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.*, 836 F.2d 289 (7th Cir. 1987). The Board does not lightly find an impasse and the burden is on the party asserting it. *L.W.D., Inc.*, 342 NLRB 965, 965 (2004); *CalMat Co.*, 331 NLRB 1084, 1097-98 (2000); *CJC Holdings, Inc.*, 320 NLRB 1041 (1996).

Impasse is not reached if one party remains flexible on certain demands, even if the timetable was unsatisfactory to the other party. *Grinnell Fire Protection System Co.*, 328 NLRB 585 (1999). In addition, impasse on one issue does not suspend the obligation to bargain on the remaining unsettled issues. *Patric & Co.*, 238 NLRB 390 (1980), *enfd. mem.* 664 F.2d 889 (9th Cir. 1981). Impasse is synonymous with deadlock. *Tom Ryan Distributors*, 314 NLRB 600, 604-05 (1994), *enf. mem.* 70 F.3d 1272 (6th Cir. 1995).

The Board has enumerated some of the factors it takes into account in determining whether parties have reached impasse:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 NLRB 475, 478 (1969), *enfd.* 395 F.2d 622 (D.C. Cir. 1968).

Although impasse usually requires an overall deadlock in bargaining, impasse on a single critical issue can also cause such a complete breakdown in negotiations so as to cause impasse.

CalMat Co., 331 NLRB at 1098. The party asserting single-issue impasse must establish the following:

[F]irst, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

Id.

A. The Administrative Law Judge Failed to Find that Even If the MFN Clause Was a Critical Issue, There Was No Existence of a Good-faith Bargaining Impasse

The Respondents' position is that because there was a deadlock regarding the MFN clause, the parties were at impasse. Although the Administrative Law Judge found that the parties were not at impasse because the MFN Clause was not a critical issue, he failed to find that even if the MFN Clause was a critical issue, there was no existence of a good-faith bargaining impasse. ALJD at 21:35-41. The parties' bargaining history shows that in their negotiations for the previous CBA, the parties agreed to the MFN clause at their last session. During these negotiations, there had only been twelve sessions, seven before or during the strike which were unproductive, which left only five productive sessions after the strike. Furthermore, only five limited financial reviews were complete by the declaration of impasse, and the Respondents had just provided a response to the Union's March 12, 2013, request for the costing of their proposals on the day that impasse was declared, March 19, 2013. In addition, the Respondents put their BFO on the table only at the last bargaining session, and announced immediately they were at impasse and shut down further bargaining in the face of the Union's willingness to continue to bargain. They then quickly implemented severe changes in terms and conditions of employment such as not paying the Easter adjustment checks, a 7.5% reduction in wages for drivers and 3.75% reduction in wages for escorts for those employees who are at top

pay, a three-month moratorium on welfare contributions, elimination of wage accruals (longevity pay), no additional pay for employees who work on days that schools are closed, elimination of adjustment weeks, elimination of daily overtime and no medical or pension contributions when employees are on worker's compensation or disability without further bargaining.

Furthermore, Respondents' agents made various statements indicating that implementation of their BFO was based on reasons other than bargaining over the MFN clause. President Cordiello testified that Gatto stated on December 11, 2012, and February 26, 2013, that the parties would implement their BFO in March 2013, which Gatto did not explicitly deny. During those months, it was impossible for Gatto to know the state of negotiations regarding the MFN clause shortly prior to implementation. In addition, Pate testified that he did not want to return to the table after March 5, 2013, and during that session he stormed out because he was angry that the Union had not made deeper concessions on wages, not over the MFN clause. Pate testified that he told Pollack after that meeting, "I'm done, we're done. Give them the best and final." (Tr. at 1024.)

During the last two sessions, there was significant movement regarding important issues: term of the agreement, rates of pay, welfare payments, pick of runs and new hires. There is no evidence that the Union thought that the parties were near impasse, evidenced by their continued movement on key issues and requests for further bargaining and mediation, which were denied by the Respondents. It is important to note that the exact day on which the Respondents implemented their BFO was the day that the Easter adjustment checks were due. Payment of the Easter adjustment checks would have cost Respondents \$8 to 10 million.

Respondents argue that the Union's refusal to agree to longer bargaining meetings shows that the Union was stalling during negotiations. Pollack made his request to meet for longer days

on March 5, 2013, after 8 of the 12 bargaining sessions had taken place, none of which had gone until 5:00 PM largely because Respondents arrived late and left well before then. Therefore, the Union thought the request was unnecessary. It is also important to note that the Union was unaware that impasse was approaching and felt progress was being made at the time.

Respondents also argue that the Union was responsible for the break-down in negotiations because it refused the use of a mediator twice. The first time Respondents suggested the use of a mediator was on January 22, 2013, a mere four meetings into bargaining. Cordiello rejected the offer because Respondents had not yet responded to the Union's *first* bargaining proposal, and he thought it was premature to bring in a mediator. If Respondents are suggesting that the parties were already at impasse at this point, it shows further that their implementation was pre-meditated early on in the negotiations. The Union rejected Respondents' second suggestion of a mediator on March 2, 2013, since it had yet to receive the results of all of the financial reviews, and was still waiting on Respondents to provide all of the information requested in its information requests. However, when the Respondents declared impasse, the Union, hearing for the first time that bargaining was breaking down, suggested using a mediator, which the Respondents then rejected in favor of implementing their BFO. For these reasons and those set forth by the Administrative Law Judge, even if the MFN Clause was a critical issue, there was no existence of a good-faith bargaining impasse over that issue. *Larsdale, Inc.*, 310 NLRB at 1318; *PRC Recording Co.*, 280 NLRB at 635; *Grinnell Fire Protection System Co.*, 328 NLRB 585; *Taft Broadcasting Co.*, 163 NLRB at 478.

B. The Administrative Law Judge Failed to Find that Even if the MFN Clause Was a Critical Issue and There Was a Good-faith Impasse over that Issue, it Did Not Lead to a Breakdown in the Overall Negotiations

The Administrative Law Judge failed to address the fact that Respondents did not establish the third element of its defense: that the alleged impasse on the MFN clause led to a

breakdown in the overall negotiations, and that there would be no progress on any aspect until the impasse relating to the critical issue was resolved. The Respondents did not state that the MFN clause would bring the parties to impasse until the last bargaining session, and Cordiello and Gilberg testified that the total time that the parties discussed the MFN clause was less than an hour. The evidence shows vast movement on important issues in the last few sessions despite a lack of agreement on the MFN clause, which was consistent with their bargaining history.

The instant case is distinguishable from *New NGC, Inc.*, 359 NLRB No. 116 (2013), where the Board found that the parties reached single issue impasse. In that case, the union had the opportunity to offer several economic concessions in an effort to induce the employer to change its mind with regard to the 401k plan, when the employer was already aware the plan was likely to result in impasse being declared. *Id.* at 1. Further, Respondents and the union in *New NGC, Inc.* bargained over a 9-month period, and the employer gave the union its BFO in March, and the parties continued to negotiate until *September* when the employer finally declared impasse. *Id.* at 19, 22-23.

Deadlock on and an analysis of the *Taft* factors (including a history of expeditiously negotiating successive agreements, there was nothing the union could offer to break deadlock and movement at the last session was primarily from the union), led the Board to find that the parties reached impasse in *New NGC, Inc.* *Id.* at 1 (citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969), *enfd.* 395 F.2d 622 (D.C. Cir. 1968)). In the instant case, the Respondents are claiming deadlock on only one issue to which the parties agreed in the past at the last session, and *both* parties made significant movement at the last few sessions on other issues. Furthermore, unlike *New NGC, Inc.*, where the employer presented its BFO six months prior to its declaration of impasse, here Respondents provided the Union with its BFO on the same day

that it declared impasse, giving the parties no opportunity to bargain further. Given the above, the preponderance of the evidence shows that Respondents violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse and refusing to bargain.

Therefore, the Decision should be amended to find that a good-faith bargaining impasse was not reached even if the MFN clause was a critical issue, and, even if a good-faith bargaining impasse was found over the MFN clause, it should be found that the MFN clause did not lead to an overall breakdown in negotiations. For these reasons and those set forth by the Administrative Law Judge, even if the MFN Clause was a critical issue and there was an existence of a good-faith bargaining impasse over that issue, bargaining over the MFN Clause did not lead to a breakdown in overall negotiations. *Taft Broadcasting Co.*, 163 NLRB at 478; *CalMat Co.*, 331 NLRB at 1098.

C. The Judge Inadvertently Omitted the Make-Whole Remedy

Although the Decision stated that “the Respondents shall be required to . . . make their employees whole for all monetary losses they have incurred as a result of the unlawful unilateral changes,” ALJD at 22:26-27, the Administrative Law Judge failed to recommend in the Recommended Order that all of the Respondents make employees whole, with interest, for the loss and any earnings or benefits resulting from any changes in the terms and conditions of employment made after March 10, 2013. This appears to be in inadvertent error and therefore it is respectfully requested that this remedy be added to the Order.

V. CONCLUSION

The General Counsel respectfully submits that the evidence shows that even if the MFN clause was a critical issue, Respondents did not meet their burden of proving that a good-faith

bargaining impasse was reached, and even if there was an impasse over the MFN clause, Respondents did not show that the impasse led to an overall breakdown in negotiations. The Administrative Law Judge failed to analyze significant legal issues pertaining to the allegations. Finally, the Administrative Law Judge inadvertently omitted the make-whole remedy from the Recommended Order. The General Counsel requests that the Administrative Law Judge's Decision and Order be amended consistent with the General Counsel's cross-exceptions.

Respectfully submitted December 6, 2013.



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