

**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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IN OPPOSITION TO RESPONDENTS' EXCEPTIONS**

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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. PRELIMINARY STATEMENT

On June 10, 2013, the Regional Director for Region 29 issued a Consolidated Complaint and Notice of Hearing in the instant cases, alleging, *inter alia*, that Respondents failed to bargain in good faith by unlawfully declaring impasse and unilaterally implementing their Best and Final Offer (BFO) made on March 19, 2013. 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 (the ALJ) was conducted from July 22 through 26, and 29 through 31, 2013. On September 20, 2013, the ALJ issued a Decision and Recommended Order (the Decision) finding *inter alia*, that Respondents had not reached an impasse in bargaining with Local 1181, Amalgamated Transit Union, ALF-CIO (the Union), and that the Respondents violated Section 8(a)(1) and 5 of the Act by unilaterally implementing their final offer. (Decision at 21.)

The ALJ's recommended Order provides that Respondents shall cease and desist from "(a) prematurely declaring an impasse in bargaining, (b) unilaterally changing employee wages, hours and other terms conditions of employment in the absence of a valid impasse in bargaining, and (c) in any like or related manner interfering with, restraining or coercing employees in the rights guaranteed them by Section 7 of the Act." The Order further provides, among other things, that Respondents resume bargaining with the Union, and rescind all changes made to employees' terms and conditions of employment. The Order also directs Respondents to post notices reflecting the relief ordered, including a notice posting for Pioneer Transportation's violation of Section 8(a)(1)² of the Act.

² The Respondents have not excepted to the Judge's decision regarding the allegation that Pioneer violated Section 8(a)(1) of the Act by threatening employees with reprisals if they engaged in union and/or protected concerted activity, and on November 22, 2013, the Board approved Counsel for the General Counsel's Motion to Sever Case

II. RESPONDENTS' EXCEPTIONS

Respondents except to ALJ Green's finding that their declaration of impasse was unlawful. Respondents argue that ALJ Green erred by concluding that a lawful impasse was not reached because the inclusion of a "Most Favored Nations" (MFN) clause in a successor collective bargaining agreement was not, in fact, "critical" to Respondents reaching agreement with the Union. In that regard, Respondents further argue that the ALJ engaged in speculation in finding that the MFN clause was not "critical" to Respondents, improperly credited evidence concerning statements made by certain of Respondents' agents that the MFN was not important to them, and ignored record evidence concerning the MFN issue. Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits its Answering Brief in Opposition to Respondents' Exceptions.

III. STATEMENT OF THE FACTS²

The New York City Department of Education, (DOE), contracts with transportation providers, including the Respondents, for school bus services. (Tr. at 79-81.)³ During the collective bargaining sessions at issue, the Union represented about 8,800 drivers, shop employees and matron-attendant escorts working for Respondents. (GC Ex. 2; Tr. at 82-83.)⁴ The Respondents bargain together, submit one proposal and are represented for bargaining purposes by the same attorney, Jeffrey Pollack, who was the main spokesperson at the bargaining sessions. (Tr. at 80, 83.) Historically, the Union has signed separate but identical collective bargaining agreements, herein called CBAs, with each Respondent. (Tr. at 82.) Michael

29-CA-100899 from the instant cases. Also on November 22, 2013, the Board issued an Order adopting the findings and conclusions of ALJ Green as contained in his Decision and ordered Respondent Pioneer to comply with the action set forth in ALJ Green's recommended Order.

² 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.

³ 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.

⁴ Tr. at 83, Line 9: "880" is in error. The number was testified to be 8,800.

Cordiello, the President of the Union, was the spokesperson for the Union at the bargaining sessions. (Tr. at 80.) Richard Gilberg, attorney for the Union, was present at all of the bargaining sessions except for January 8, 2013. (Tr. at 503-04.)

About 90 to 95 percent of the Respondents have had a collective bargaining relationship with the Union since 1979. (Tr. at 81.) During negotiations for the CBA that expired in 2012, the Respondents asked for the inclusion of a MFN clause⁵ throughout the sessions. (Tr. at 89.) Throughout the sessions, the Union responded negatively to the request and refused to agree to the MFN clause until the last day. (*Id.*) The Union eventually agreed to the MFN clause because it was able to secure other items that it was seeking from the Respondents. (*Id.*) Pollack and Cordiello were the chief negotiators during those sessions as well. (*Id.*)

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.) However, very little movement occurred in the first seven sessions because of the issue over the Employee Protection Provision (EPP),⁶ and because of the strike over the EPP issue, 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

⁵ See Section 51 of GC Ex. 2.

⁶ 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.)

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 of these sessions, Union President Cordiello suggested extending the CBA for a year with the MFN clause, but Pollack rejected this proposal. (Tr. at 103-04.) During the third session on December 11, 2012, Domenic Gatto, the Chief Financial Officer (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 Best and Final Offer. (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 this proposal was made at only the fourth bargaining session, 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 which it had requested. (*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. (Reliant), Mountainside Transportation Co., Inc., and Gotham Bus Co. Inc., (Gotham), had agreed to submit to a review of certain financial documents, and the parties were working out or signing confidentiality agreements, which Respondents wanted signed before the reviews began. (*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 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.)⁷ ALJ Green found that there was no indication that the MFN clause was discussed at this meeting. (Decision at 13.)

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 5:00PM 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 Loner Transit Inc. (Tr. at 508.) The following movement occurred during this session: the

⁷ 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.

Respondents counter-proposed to the Union's proposal that wage increases for new hires be increased by 4% with the proposal that the increases be one-third of CPI, (Consumer Price Index) with a maximum of 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 Employer also proposed the MFN clause remain in the contract without a sunset provision, which the Union rejected because the MNF would not allow them to have flexibility in negotiations. (Decision at 14.)

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 in 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)⁸; the Union

⁸ Tr. at 166, line 16 states "\$4.50" in error. Cordiello testified to \$14.50.

countered regarding wage accruals⁹ that there is one after five years and two after ten years and, rather than no adjustment weeks,¹⁰ 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, an 10(A) regarding loss of work, and on the 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

⁹ See GC Ex. 2, Section 18.

¹⁰ See *id.*, Section 15.

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 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.)

IV. ARGUMENT

Counsel for the General Counsel respectfully request that Respondents' exceptions to the ALJ's decision be denied. Based upon a thorough and detailed analysis of the factual record, the ALJ correctly found that the Respondents violated 8(a)(1) and (5) of the Act when they prematurely declared impasse on March 19, 2013, and subsequently imposed significant wage and benefit cuts on their employees. There is ample record evidence to support ALJ Green's conclusion that the declaration of impasse was premature and unlawful, including evidence of the parties' bargaining history, the Respondents' insistence on obtaining economic concessions throughout bargaining and statements from several agents of Respondents that the MFN was not important to them.

A. The MFN Clause Did Not Cause Genuine Impasse or a Breakdown in Overall Negotiations

Respondents' primary objection to the ALJ Decision is his conclusion that the MFN was not "critical." In that regard, ALJ Green concluded that the MFN clause "was not, from the Respondents' point of view, the crucial bargaining issue that they claimed was necessary in order for them to agree to a new contract." (Decision at 21). The ALJ reached this decision after examining the significant record evidence of what was said at each bargaining session, the numerous statements made by Respondents' agents concerning the need for economic concessions and after weighing the Respondents' stated reasons for the need for the MFN.

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 1084, 1098 (2000). 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.

There is ample record evidence supporting ALJ Green’s conclusion that the MFN was not the impediment to the parties’ reaching agreement nor did it lead to overall breakdown of overall negotiations. Rather, Respondents used the MFN as a smokescreen to create the appearance of impasse while the Respondents’ primary focus in bargaining was to secure greater economic concessions from the Union. For example, the record contains evidence that the MFN was not often discussed at bargaining, that certain of Respondents’ representatives made comments about the MFN’s lack of importance to them, that the MFN had not been triggered in the past, and that Respondents’ main focus was on reducing labor costs. Respondents seize upon the fact that ALJ Green “speculated” about two scenarios which could trigger the MFN clause.

(Decision at 21). This is nothing but a red-herring. While ALJ Green did discuss the ways in which the MFN might come into play in the future, he clearly relies upon the numerous statements made by agents of Respondents that the MFN was not a “deal breaker” or that important to them. (Decision at 8.)

Counsel for the General Counsel also maintains that the parties had not reached genuine impasse, and that disagreement over the MFN did not result in a good faith impasse or the breakdown of the overall negotiations. As discussed below, at the time the Respondents declared impasse, the parties had only held twelve bargaining sessions, seven of which were before or during the strike, only limited financial reviews had been conducted, and the parties were continuing to make significant movement regarding important issues during the last two sessions prior to the declaration of impasse. Union President Cordiello testified that the Union did not believe that the parties were at impasse at the time it was declared, and even felt progress was being made. (Tr. at 181-82, 514.) The record evidence shows that there was no indication to the Union that the MFN was causing a total breakdown in bargaining.

While the ALJ found that “there was no impasse in bargaining,” his discussion in this regard relates primarily to the fact that the MFN was not, in fact, a “dealbreaker” to Respondents, requiring no further analysis under the standard set forth in *CalMat Co., supra*. Nonetheless, the record evidence also clearly shows that at the time impasse was declared, the parties were making progress on major issues including wages and benefits, and on other issues, the parties were moving to the middle, while audits were still being conducted and the Union was responding to items received during information requests. (Tr. at 181-82). Therefore, Counsel for General Counsel respectfully urges that the Board adopt the ALJ’s ruling and reject

Respondents' exception that the ALJ erred by concluding that disagreement over the MFN did not lead the parties to impasse.

B. The ALJ Properly Relied on Record Evidence in Finding that the MFN was Not Critical

The Respondents except to the ALJ's inclusion of speculation in his decision, arguing that the ALJ did not rely on actual facts to determine that that MFN was not a critical issue to the Respondents. Respondents have mischaracterized the ALJ's Decision and his finding of fact. With regard to the Respondents' stated defense in this matter, ALJ Green commented that it was "Speculative" whether or not events would take place which would lead to the triggering of the MFN, which could result in Respondents being placed in a position whether they could not compete in the industry. Because such future events were speculative, ALJ Green concluded that he would rely on the record evidence of Respondents' agents statements that the MFN was not that important to them, as well as their stated need for substantial cutbacks in wages and benefits, in concluding that the MFN in itself did not lead the parties to impasse. (Decision at 21.) He notes that retention of the MFN would not address the issues the Respondents repeatedly claimed they were worried about such as lower wages and benefits.

Respondents except to this "speculation" on the grounds that it supplants actual evidence. However, this view is incorrect. The Decision's "speculation" and subsequent weighing of the Respondents' defense amounts to a finding of fact that the evidence Respondents presented to support a finding that the MFN was critical was unpersuasive. The discussion of the unlikely scenarios surrounding the MFN's importance was advanced by Respondents throughout the hearing in their efforts to demonstrate the MFN's importance. ALJ Green discussed the MFN and the theories about it which Respondents' proffered at the hearing, and weighed the Respondents' asserted defenses. ALJ Green rejected such theories in favor relying on actual

statements by agents of certain Respondents, in which they stated the MFN was not critical. (Decision at 21.) Instead of relying on this smokescreen, ALJ Green states, “I therefore believe the testimony that certain of the Respondents’ principles told union representatives that the most favored nation’s clause was not really that significant to them.” (Decision at 21.) Thus, ALJ Green concluded that the MFN could not have lawfully led to good faith impasse, or the breakdown of the overall negotiations.

Respondents also argue that the ALJ improperly limited a subpoena to exclude evidence. In efforts to cloud the record, Respondents repeatedly sought to introduce evidence concerning the Union and bus companies operating outside New York City, or concerning the Union and companies which were not a party to these particular negotiations. Respondents issued subpoenas which asked for non-drafted agreements, memorandums of agreement, side letters or other documents outside of the allegations at issue here. The ALJ properly ordered the Union to turn over only relevant information, which included executed agreements between the Union and contractors who won bids covering New York City K-12 Routes, which the Union did.¹¹

The Decision is replete with facts that show that the MFN did not lead to lawful impasse. The ALJ demonstrated this by reviewing nearly every bargaining session and pointing out that the MFN clause was not a topic of discussion at most bargaining sessions. When it was discussed, it was done so in a cursory manner. (Decision at 7-17.) Specifically the ALJ found that the MFN clause was not discussed at bargaining sessions held on December 11, 2012, January 22, 2013, February 5, 2013, February 12, 2013, and March 5, 2013. This resulted in a limited discussion of the MFN which amounted to less than an hour. (Tr. at 181, 513.) It is also replete with statements by the Respondents’ agents which demonstrate that the MFN was viewed

¹¹ See Division of Judges Bench Book §13-100 “Applicable Rules of Evidence, in General”; See also Fed. R. Evid. Rule 403, “Evidence which is not relevant is not admissible.”

as a bargaining chip. The ALJ properly relied on this evidence to determine that the MFN was a distraction from what the Respondents were really seeking: economic concessions.

C. The ALJ did not Improperly Attribute Statements of Certain Respondents to All Respondents

Respondents falsely assert that the ALJ attributed statements of certain employers to all employers. This is simply not true. The ALJ did credit testimony that “*certain* of the Respondents’ principles told union representatives that the most favored nation’s clause was not really that significant to them; that what they really wanted and needed in order to compete with the new comers, were substantial cutbacks in wages and benefits.”¹² (Decision at 21, emphasis added.) The ALJ relied on comments by various agents of individual Respondents who stated explicitly that the MFN was not important to them. He did not attribute those statements to anyone but the agents who made them. He concluded that these comments, coupled with the Respondents’ explanation as to the MFN’s importance, demonstrated that “the most favored nation’s clause was not, from the Respondents’ point of view, the crucial bargaining issue that they claimed was necessary in order for them to agree to a new contract.” (*Id.*)

Respondents at hearing, in their Post-Hearing Brief and again in their Brief in Support of Exceptions assert that comments made by agents of individual Respondents are irrelevant because only one lead negotiator was authorized to speak. (Brief in Support of Respondents’ Exceptions at 28.) . The ALJ addressed this issue, by stating, “[T]o the extent that conversations

¹² The ALJ’s factual findings conclude that Cordiello, “...had private conversations with a number of the contractors who told him, away from the bargaining table, that the most favored nation’s clause was not a deal breaker; that it was a bargaining chip or that it was not that important to them. He testified that among those who told him this were Carter Pate and Adem Adem from Reliant Transportation, Joe Curcio from Empire State Escorts; Ray Fouche from All American School bus; Joseph Termini, Jr., from Gotham Bus; Agostina Vona from Kings Matron Service; Michael Tornabe from Lorissa Bus Service; and Joe Sabatelli. Additionally, union delegate James Hedge testified that he had multiple conversations with Mr. Termini of Hoyt Transportation who said that the most favored nation’s clause was of no concern to him.” (Decision at 8.)

took place between agents of the Union and principles or agents of certain of the Respondents, these are, in my opinion, relevant as they tend to illuminate the actual positions and motivations for each side's respective positions." (Decision at 3, line 12-15.) The ALJ found that agents of at least eleven Respondents made comments directly to Union agents characterizing the MFN as "not a deal breaker; that it was a bargaining chip or that it was not important to them." (Decision at 8.)

The Respondents admit that they did not form a multi-employer group. (Brief in Support of Respondents' Exceptions at 6.) At any time, any Respondent was free to break from the group and negotiate individually. Therefore, the ALJ correctly found that statements made by agents of Respondents, including attorneys, were demonstrative of the bargaining positions of the Respondents, bargaining as a group, insofar as they represented various Respondents' beliefs that the MFN was a bargaining chip and therefore could not lead to good faith impasse or the breakdown of the overall negotiations.

D. Respondents Minimized the MFN in Bargaining, Not the ALJ

In their fourth exception, Respondents argue that the bargaining over the MFN was minimized by the ALJ. Respondents argue that the ALJ "speaks generally of a lack of discussion about the MFN and the Employers' rationale for it." (See Respondents' Brief at 30.) This ignores the Decision's ten page discussion of the negotiations, which is based on testimony as well as the bargaining notes of the individuals present at bargaining. (Decision at 3.) The ALJ's Decision painstakingly recounts the discussions at the bargaining table and the proposals exchanged from October 23, 2012, through the declaration of impasse on March 19, 2013. In recounting the history of bargaining, the ALJ noted that during the third bargaining meeting on December 11, 2012, attorney Pollack's notes did not indicate any discussion about the MFN.

(Decision at 8.) Judge Green noted that on January 8, 2013, “According to [Jeff] Pollack’s notes, Cardiello [sic] specifically rejected the most favored nation’s clause. But neither his testimony nor his notes show that there was any further discussion, at this meeting of this clause or any explanation as to why the employers felt that it was necessary.” (Decision at 9.) The ALJ noted that on January 22, 2013, “There was no discussion of the most favored nation’s clause at this meeting.” (Decision at 10.) The ALJ recounted that on February 5, 2013, “There is nothing in any of the bargaining notes to indicate that the most favored nation’s clause was discussed during this meeting.” (*Id.*) Further February 12, 2013, the ALJ noted that “... there was no discussion of the most favored nation’s clause at this meeting.” (Decision at 11.) At the February 26, 2013, meeting:

In response to Pollack’s statement that the Employers needed the most favored nation’s clause, Cardiello [sic] stated that he could not agree to it; that he could never agree to it; and that the Union would have to close its doors if it agreed to it. Although there was some give and take on the most favored nation’s clause, the evidence does not show that either side, at this meeting, expressed why this was so important to them.

(Decision at 12.) Further, the ALJ found that during the March 5, meeting, “There is no indication that the most favored nation’s clause was discussed at this meeting.” (Decision at 13.) The ALJ noted that on March 11, Respondents proposed to continue the MFN, but Cordiello explained that he could not agree to it because “...it would not allow the Union to have flexibility in negotiations with employers who did business outside the DOE area.” (Decision at 14.) The ALJ found that the Union offered to extend the CBA but whether that extension included the MFN was not discussed by the parties. (Decision at 15.)

In his discussion of the final bargaining session on March 19, 2013, the ALJ noted that the Union offered a contract extension for three years without the MFN, but that the bulk of the conversation about the MFN occurred after the best and final offer was delivered to the Union,

The Respondents complain that the Decision somehow minimizes the bargaining over the MFN. However, the ALJ's review of the evidence relating to MFN discussions shows that the MFN was not frequently discussed, and that as late as the last day of bargaining, the Union further compromised on its wage proposal, and stated that it could move more, and agreed to extend the current CBA. The ALJ's view of the bargaining history reflects the minimal emphasis the Respondents placed on the MFN during bargaining and the continued movement up until the date impasse was declared on substantial issues such as wages. The bargaining history the ALJ relied upon in his Decision demonstrates that there was no genuine impasse, and the MFN did not lead to a breakdown in the overall negotiations.

E. Respondents Improperly Rely Upon Documents Not in the Administrative Record as Support for Their Exceptions

Respondents seek to improperly attach documents to their Brief in Support of Exceptions, which were not admitted into evidence and therefore are not part of the underlying administrative record. These documents must be excluded from consideration as the Respondents failed to file a motion to reopen the record in accordance with Section 102.48(d)(1) and (2) of the Board's Rules and Regulations. The "exhibits" attached to the Respondents' Brief and on which Respondents Exceptions rely are not part of the record and are not among the exhibits received in evidence at the hearing, and thus they should be excluded from consideration by the Board. Further, Respondents have failed to show that if the additional evidence was considered, it would have any impact upon the Decision. See *Supply Technologies, LLC*, 359 NLRB No. 38 fn.1 (2012). The documents do not go to the question at the heart of this litigation: whether the parties reached genuine impasse. This was the reason that documents of this nature were excluded in the first place. Counsel for the General Counsel urges the Board to reject any evidence Respondents

have improperly attached to their Exceptions, and consider only the evidence included in the record and subject to scrutiny at hearing.

V. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully request that the Board reject each of Respondents' Exceptions and uphold the Decision.

Dated at Brooklyn, New York
December 6, 2013

Respectfully submitted,



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