

A.J. Myers and Sons, Inc. and Amalgamated Transit Union, Local 1738, AFL–CIO, CLC. Case 06–CA–119505

March 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On October 3, 2014, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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 and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A.J. Myers and Sons, Inc., Kittanning, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Emily M. Sala, Esq. and *Patricia J. Daum, Esq.*, for the General Counsel.

Kenneth S. Kornacki, Esq. and *John B. Bechtol, Esq.* (*Metz Lewis Brodman Must O’Keefe LLC*), of Pittsburgh, Pennsylvania, for the Respondent.

Timothy G. Hewitt, Esq., of Latrobe, Pennsylvania, for the Charging Party.

DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves an employer that provides bus transportation for several school districts in western Pennsylvania. For the 2013–2014 school year, the Employer was awarded a contract to provide schoolbus transportation for the Latrobe, Pennsylvania-area school district. In previous years the Latrobe schools had been serviced by another bus transportation employer. This predecessor employer serviced the Latrobe school district with union represented employees who worked at the predecessor’s

¹ Regarding the Respondent’s argument that there was insufficient continuity in the business to render the Respondent a successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), Member Miscimarra agrees that the judge properly found that the instant case is factually distinguishable from *Nova Services Co.*, 213 NLRB 95 (1975); *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), enf. sub nom. *Machinists v. NLRB*, 498 F.2d 680 (D.C. Cir. 1974); and *Lincoln Private Police, Inc.*, 189 NLRB 717 (1971). However, Member Miscimarra does not adopt or rely on the judge’s commentary that these cases depart from the Board’s successorship doctrines or should be deemed inapplicable because they were decided prior to *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

bus terminal in Latrobe. In order to service its new contract with the Latrobe schools, the new Employer hired almost exclusively from the predecessor’s union represented bargaining unit. The new Employer purchased a terminal near the predecessor’s terminal and within the school district. The employees it hired to service the school district reported to work at this new terminal. At the request of the school district, to the extent possible, the employees drove the same bus routes that they had driven for the predecessor employer.

The Government alleges that the new Employer is a successor employer with an obligation to recognize and bargain with the Union as the representative of the bargaining unit of employees servicing the school district from the new terminal. The new Employer rejects this claim and has refused to recognize or bargain with the Union, contending that it is not a successor employer and that the unit is not appropriate for bargaining. The new Employer also claims that it was not required to honor the Union’s bargaining demand based on its claim that the Union originally sought recognition and bargaining for a unit of employees larger than that alleged appropriate by the Government, and one in which only a minority of predecessor employees worked.

As discussed herein, I find that under existing precedent, there can be little doubt but that the new Employer is a successor employer with an obligation to recognize and bargain with the Union as representative of the terminal’s employees. As further discussed herein, the precedent also compels rejection of the Employer’s claim that the Union’s bargaining demand was deficient. In short, I find merit in the Government’s allegations in all respects.

STATEMENT OF THE CASE

On December 23, 2013, the Amalgamated Transit Union, Local 1738, AFL–CIO, CLC (the Union) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (the Act) by A.J. Myers and Sons, Inc. (A.J. Myers), docketed by Region 6 of the National Labor Relations Board (the Board) as Case 06–CA–119505. Based on an investigation into the charge, on April 30, 2014, the Board’s General Counsel, by the Acting Regional Director for Region 6 of the Board, issued a complaint alleging that A.J. Myers violated the Act. A.J. Myers filed an answer denying all alleged violations of the Act.

A trial was conducted in this matter on July 23, 2014, in Pittsburgh, Pennsylvania. Counsel for the General Counsel and counsel for A.J. Myers filed excellent posttrial briefs in support of their positions by August 26, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

A.J. Myers is a corporation with its headquarters located in Kittanning, Pennsylvania. It is engaged in furnishing school student transportation services to school districts located in western Pennsylvania, including the Greater Latrobe Area School District. In conducting its operations, during the 12-month period ending November 30, 2013, A.J. Myers derived gross revenues in excess of \$250,000 and during this same period in conducting its operations purchased and received

goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. At all material times A.J. Myers has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

Respondent A.J. Myers is in the business of contracting with school districts for transportation of students to and from school and for other school-related events. The Company currently operates a total of approximately 500 buses from six terminals, and serves a number of school districts in the Greater Pittsburgh region of Pennsylvania. According to counsel's representation, this Employer has had no collective-bargaining history with any union in the 65-year history of the Company.

In or about November 2012, the Latrobe school district notified A.J. Myers that it was the successful bidder for and was being awarded the contract to provide student transportation beginning with the 2013–2014 school year. Effective on or about July 1, 2013, A.J. Myers entered into a 7-year contract with the Latrobe schools to provide student transportation services through 2020. This contract was for regular schoolbus service transporting children from home to school and back. It did not include special needs services or services for parochial schools.

For a number of previous school years, transportation for the Latrobe school district was provided by First Student Inc. (First Student). The record suggests that First Student's contract also included special needs and parochial school services for the Latrobe district.

First Student operated a terminal located on Route 981 in Latrobe, from which it serviced the Latrobe school district. Pursuant to a representation election and Board certification, the Union (and/or its predecessor) has represented employees working at the Route 981 terminal since 1996, originally for an employer (or perhaps two) that preceded First Student. The Union and First Student were parties to a collective-bargaining agreement—in effect from August 15, 2010, to August 14, 2013—covering the terms and conditions of employees working at the Route 981 facility, as well as a yard located in Greensburg, Pennsylvania, and a “small park” in the Jeanette, Pennsylvania area.¹

¹ The union recognized bargaining unit set forth in the labor agreement was as follows:

All full-time, and Regular part-time bus Employees, Spare bus Employees, Van Employees, Utility Worker, and Monitors, employed by the Employer at its Latrobe facility, 5947 Route 981, Latrobe, Pennsylvania, 15650, and all other facilities under the direction of or replacement of the Latrobe facility; excluding mechanics, dispatchers, laborers, office clerical employees, guards, professional employees, supervisors as defined in the act, for the purpose of Collective Bargaining in respect to rates of pay, wages, hours of employment, and all other conditions of employment and agrees to deal with it as hereinafter provided.

During the time that First Student maintained the contract to provide transportation services for the Latrobe school district, the employees providing this transportation worked from First Student's Route 981 facility.²

The record is not specific, but approximately 150 employees worked under the First Student labor agreement covering the Route 981 facility and the associated Greensburg yard and Jeanette park. By way of comparison, the Jeanette park had approximately eight buses. The Route 981 facility had approximately 100 buses.

At the request of the Latrobe school district, near the end of the 2012–2013 school year, A.J. Myers provided job applications to the school district which provided them to the First Student drivers transporting the district's students. That summer A.J. Myers received those applications back from prospective drivers and conducted interviews. Approximately “70-plus” First Student employees left First Student—approximately 51 were hired by A.J. Myers and the remainder, quit or retired, or otherwise moved on.

There was no interruption in school transportation services provided to the Latrobe schools between the time that it was serviced by First Student and July 1, 2013, when A.J. Myers entered into the contract and commenced provision of services to the school district.

As of about August 19, 2013, A.J. Myers had hired nearly all of the employees that it would need to service its contract with the Latrobe School District, including supervisors, bus operators and mechanics. Of the approximately 52 operators hired to service its contract with the Latrobe schools, all but 1 had worked as a bargaining unit driver for First Student at the Route 981 terminal during the previous school year. Six additional drivers were hired in fall 2013 and winter 2014. Five had previously worked for First Student at the Route 981 terminal. In addition to the drivers, two mechanics have been employed since at least November 2013. There is also office staff performing general office work and work related to bus dispatching.

All of these employees work out of a terminal on property A.J. Myers purchased for its new Latrobe school contract, at 163 Menasha Lane, Latrobe, Pennsylvania, in 2013. This new A.J. Myers terminal is approximately 2.6 miles from the First Student Route 981 terminal. A.J. Myers purchased buses for the new terminal through a schoolbus dealer that it works with and began receiving the buses in June 2013. The buses were a different make than the First Student buses.

As of the time of the hearing, A.J. Myers maintained six bus terminals. It is standard business practice for A.J. Myers to open a new terminal when it secures a new school contract, as it did in the case of the Latrobe school district contract. At the hearing, William Myers, A.J. Myers' part-owner and secretary-treasurer, agreed that one of the reasons for the separate terminals is to maintain a location close to the school district for

² In addition, employees working under this labor agreement provided transportation for the Greensburg Salem school district, the Jeanette City school district, Seton Hill University, an area Catholic school, as well as servicing approximately five to eight special needs contracts that First Student maintained.

which service is provided. Each of the facilities maintains busdrivers and mechanics who report to that terminal. Each terminal maintains its own buses and other equipment. Each terminal has its own terminal manager and assistant manager, or administrative assistant.

With the exception of the Latrobe terminal, A.J. Myers has operated these terminals for many years. As the brochure from the company website introduced into evidence demonstrates, each terminal is dedicated to servicing a different school district with which A.J. Myers has a transportation contract. As set forth on its website, on a page reproduced and entered into the record, A.J. Myers maintains the following schoolbus terminals, each generally dedicated to the servicing of a school district for which A.J. Myers transports students. (The year A.J. Myers began operating each terminal is also listed below.):

Kittanning Terminal (servicing Armstrong School District) in Kittanning, Pa., Armstrong County. (1950).

Export Terminal (servicing Franklin Regional School District) in Export, Pa., Westmoreland County. (1983).

Mars Terminal (servicing Mars Area School District) in Valencia Pa., Butler County. (1984).

Harmony/Zelienople Terminal (servicing Seneca Valley School District), in Harmony, Pa., Butler County. (1991).

Turtle Creek Terminal (servicing Woodland Hills School District) in Turtle Creek, Pa., Allegheny County. (1995 or 1997).

Latrobe Terminal (servicing the Greater Latrobe School District) in Latrobe, Pa., Westmoreland County. (August 2013).

As stated, the Company's website lists each terminal and the school district with which it is affiliated, and for each terminal, lists the names, telephone and fax numbers, and addresses of the manager and assistant manager/administrative assistant at each location.

In terms of approximate driving distances from the Latrobe terminal: the Mars terminal is 51 miles; the Harmony/Zelienople terminal is 64 miles; the Turtle Creek terminal is 33 miles; the Export terminal is 17 miles. The record evidence shows that the Kittanning terminal is a 45-minute to 1 hour drive from the Latrobe terminal.

The A.J. Myers Latrobe terminal consists of two garages, a bathroom, a driver's room, offices, a van shop, and a wash bay. The First Student terminal had similar facilities. The Latrobe terminal manager is Tom Oleyar. Oleyar, who worked as the main dispatcher for First Student at the Route 981 facility, is responsible for overseeing day-to-day operations at the Latrobe terminal. Michelle Murphy is the assistant manager. She worked as a driver and trainer at First Student's Latrobe facility. Oleyar and Murphy serve as dispatchers, and occasionally a driver named Diane Poche assists them in the office. For the Latrobe employees, there is no opportunity to choose regular runs out of other A.J. Myers' terminals other than the Latrobe facility. As with First Student, in addition to the employee's regular runs, employees can pick up additional "charter" work for the Latrobe school district—transporting students to sporting events, or band events. This charter work is voluntarily, and employees can choose it in order of seniority, each week.

Charter work from other A.J. Myers' terminals is generally not available to the Latrobe employees.

As is typical, the Latrobe school district supplies the routes needed for the work to A.J. Myers. In addition, the Latrobe school district transportation director asked the A.J. Myers Latrobe terminal manager to keep drivers on the previous routes to "make the transition smoother." A.J. Myers concurred in this request. An A.J. Myers employee working at the new Latrobe terminal testified that the routes under A.J. Myers for the Latrobe school district are "similar" to what they were the year before under First Student.

A.J. Myers and the drivers driving the Latrobe school district are required to take steps to insure that the drivers' regular daily routes for the school district are not impinged upon by other work opportunities. The contract between the Latrobe schools and A.J. Myers requires that drivers not accept charter routes unrelated to the Latrobe school district if it will interfere with their regular daily routes. In addition, based on its contract with the school district, A.J. Myers is required to enforce the school district's policies, such as its no smoking policy on or around schoolbuses at anytime. The terminal manager is the primary person charged by A.J. Myers with ensuring compliance with these district requirements.

A.J. Myers' central office is maintained at its Kittanning location. In his testimony, Secretary-Treasurer William Myers stressed that "[i]t's all one company, and everything comes from the terminals to the central office at Kittanning." Budgeting is centralized at Kittanning, and bills, including insurance are paid there for all the terminals. However, records are maintained distinguishing the expenses for each terminal. While William Myers stressed in his testimony that company policies, including personnel policies, emanate from the central office in Kittanning, and that the terminals "work as a team," he also testified that "[t]he terminal managers are given a lot of latitude." He testified that the terminal managers are expected to communicate among themselves to make sure all required services are provided to customers. Myers testified that terminals are "told from the very get-go . . . if you need extra help for any given day or if you're short on drivers, you are to work within the other terminals." Payroll work is done by each terminal and then turned into a payroll service for completion. Purchasing necessary to maintain the fleet is done by the individual terminal, but overseen by the main office in Kittanning. Prospective employees submit applications at the terminal at which they seek to work, not at the Kittanning main office. When the Latrobe terminal began operations, the drivers hired by A.J. Myers at the Latrobe terminal were working, generally, under the same terms and conditions that A.J. Myers applied to its drivers in its other terminals. However, drivers are paid differently based on the terminal at which they work:

Latrobe—\$70 for up to 5.5 hours (a morning and afternoon run, or \$35 if the driver makes only a morning or an afternoon run).

Franklin Regional—\$68 for up to 5 hours (a morning and afternoon run, or \$34 if the driver makes only a morning or an afternoon run).

Woodland Hills—\$15/hour (no daily rate) (4–5 hours in a typical day).

Mars—\$59.50 for up to 5 hours (a morning and afternoon run, or \$29.75 if the driver makes only a morning or an afternoon run).

Seneca Valley—\$59.50 for up to 5 hours (a morning and afternoon run, or \$29.75 if the driver makes only a morning or an afternoon run).

Kittanning—\$58 for up to 5 hours (a morning and afternoon run, or \$29 if the driver makes only a morning or an afternoon run).

At the hearing, A.J. Myers went to some lengths to document the instances where a driver assigned to one terminal performed work typically carried out by another terminal. However, in all, the evidence shows that during the 2013/2014 school year there were approximately 30 instances (i.e., days) of Latrobe terminal-stationed drivers making a trip that would normally be the responsibility of another location. Approximately 20 of those 30, involved 2 employees stationed at the Latrobe terminal who were concurrently employed by both the Respondent and Myers Coach Line, the separate but commonly owned coach line operated by the Myers family. Both appear to have been employees of Myers Coach Line before and at the time they were employed by A.J. Myers. The 20 runs at issue that they made from the Latrobe terminal were for Myers Coach Line, so it is unproven how that translates into employee interchange outside of normal assignments. In addition, in approximately 12 instances, a driver from a terminal other than Latrobe—in 10 of the instances it was an employee from Turtle Creek—performed a run usually the responsibility of a Latrobe terminal employee. There was also a field trip on May 29 to the Johnstown Flood Museum in which two drivers from the Franklin terminal transported Latrobe school students.

This is out of a total of 52 drivers of the Latrobe terminal working approximately 177 schooldays for the year. That equals to over 9000 day trips a year. Accordingly, out of over 9000 trips, approximately 12 were performed by non-Latrobe based employees of A.J. Myers. As a percentage, between 0.1 and 0.2 percent of the work performed for the Latrobe-school system was performed by A.J. Myers employees stationed other than at the Latrobe terminal. Even including the 20 trips made for Myers Coach Line by the two employees concurrently employed by Myers Coach Line and the Respondent, the 30 trips made through the school year by Latrobe terminal-stationed employees on behalf of other terminals (or entities, i.e., Myers Coach Line) equal approximately 0.3 percent of the Latrobe terminal's workload.

Drivers are paid by their home terminal at home terminal rates, even if they make a run for another terminal.

The Union's Demands for Recognition and Bargaining

On or about October 25, 2013, David Merrill, then acting president and business agent for the Union, sent two certified letters to A.J. Myers directed to A.J. Myers' president, David Myers. One letter was sent to the new Latrobe Menasha Lane location and the other to A.J. Myers' Export, Pennsylvania terminal. Merrill testified that the letters were "restricted let-

ters" that could only be signed for by David Myers. For reasons unexplained in the record, neither letter was signed for and they were returned unopened to the sender approximately 3 weeks later.

Merrill tried again, mailing the same letter by regular first class mail to A.J. Myers at its Menasha Lane location on or about November 25, 2013. This letter was sent from Merrill on union letterhead with a post office box address but no phone number on the envelope. This November 25, 2013 letter from Merrill, and addressed to David Myers at A.J. Myers, congratulated Myers on

winning the contract to operate the transit system of Latrobe Area School District, Westmoreland County Pennsylvania. [The Union] has represented Latrobe School Bus Operators since 1999, and our members look forward to many more years of dedicated service to Latrobe, PA riding public.

[The Union] entered into successive agreements with First Student, Inc., Latrobe, PA. A majority of A.J. Myers and Sons Transportation compl[ement] of Latrobe Area School District Westmoreland County, PA were formerly employed as operators, park outs and monitors by First Student. A.J. Myers and Sons is therefore obligated to recognize [the Union] as the bus operators, part outs and monitors collective bargaining representative, and bargain with [the Union] in good faith. By this letter Local 1738 demands that A.J. Myers and Sons recognize [the Union] as the collective-bargaining representative of all full-time and regular part-time bus operators, park outs and monitors providing transit services in and about Westmoreland, Pennsylvania who are employed by A.J. Myers and Sons Transportation, and further demands that A.J. Myers and Sons provide dates which they and the union can meet to engage in collective bargaining over employees' wages, hours, and terms and condition of employment.

The members at A.J. Myers and Sons Transportation and I look forward to working with you in the course of collative bargaining. Please contact me within seven days so that we can make the arrangements necessary to begin bargaining.

The Union received no response to this letter. William Myers testified that the Employer received this letter. According to Myers, "[w]e determined that we do not fall under those charges by the Union, and we felt especially that ['in and about Westmoreland['] County did not apply here, so I tried to call their local office to talk to them and tell them what our position was on it."³

Rather than responding in writing to the Union, Myers testified that he found a phone number for the Union on the internet and called three or four times a day for 2 or 3 days but it "just kept ringing and ringing." After that Myers said he stopped calling, and abandoned the effort to respond to the Union's

³ Myers' statement that "'in and about Westmoreland' County did not apply here" is a reference to an argument, advanced by the Respondent on brief, that the letter's demand for recognition "in and about Westmoreland, Pennsylvania," constituted an invalid request for recognition in a unit composed of not only the Latrobe terminal, but also the Export terminal, a facility devoted to servicing the Franklin Regional School District. This argument is discussed at length below.

letter or to otherwise “talk to them and tell them what our position was.” Neither Myers nor anyone else from A.J. Myers contacted the Union.

On December 23, 2013, the Union filed its unfair labor practice charge against A.J. Myers alleging that the Employer unlawfully failed to recognize and bargain with the Union. The charge was directed to the Employer at its Latrobe terminal address, listing the location of the dispute as Latrobe, and estimating 60 workers at the location. A copy of this charge was served the same day on the Employer. The charge contained the Union’s phone number and address. The Employer did not attempt to contact the Union in response to this charge.

On April 13, 2014, Merril sent letters to A.J. Myers similar to the ones sent to A.J. Myers in November 2013, but with a change—these letters described the applicable bargaining unit as covering employees employed at 163 Menasha Lane. The letters stated:

Congratulations on winning the contract to operate the transit system of Latrobe Area School District, Westmoreland County, Pennsylvania. Amalgamated Transit Union Local 1738 has represented Latrobe School Bus Operators since 1999, and our members look forward to many more years of dedicated service to The Latrobe School District.

Local 1738 entered into successive agreements with First Student, Inc, Latrobe, PA. A majority of A.J. Myers and Sons Transportation compl[ement] of Latrobe Area School District Westmoreland County, PA were formerly employed as operators, park outs and monitors by First Student. A.J. Myers and Sons is therefore obligated to recognize Local 1738 as the bus operators, part outs and monitors collective-bargaining representative, and bargain with Local 1738 in good faith. By this letter, Local 1738 requests that A.J. Myers and Sons recognize Local 1738 as the collective-bargaining representative of all full-time and regular part-time bus operators, park outs and monitors who are employed by A.J. Myers and Sons Transportation at 163 Menasha Lane, Latrobe, PA 15650, and further requests that A.J. Myers and Sons provide dates which they and the union can meet to engage in collective bargaining over employees’ wages, hours, and terms and condition of employment.

The members at A.J. Myers and Sons Transportation and I look forward to working with you in the course of collative bargaining. Please contact me within seven days so that we can make the arrangements necessary to begin bargaining. I can be reached by telephone at [xxx-xxx]-4738, email at [xxx]@yahoo.com, or at Local 1738, PO Box 128, Latrobe, PA 15650.

This time A.J. Myers responded to the Union. In a letter dated April 25, 2013, William Myers wrote:

A.J. Myers and Sons received your April 13, 2014, letter in which Amalgamated Transit Union Local 1738 (“ATU Local 1738”) claimed it represented “Latrobe School Bus Operators” who drive for contractors that service the busing operations of the Latrobe Area School District (the “School District”). Now that A.J. Myers has secured the School District’s busing contract, ATU Local

1738 requested that A.J. Myers recognize it as the collective-bargaining representative for all bus operators, park outs, and monitors that A.J. Myers employs at its Latrobe location. A.J. Myers respectfully denies your request.

A.J. Myers employs over 470 drivers, all of whom share a community of interests such that it is improper to treat drivers at each individual A.J. Myers location as a separate bargaining unit. Because ATU Local 1738 does not represent a majority of A.J. Myers bus operators’ park outs and monitors, A.J. Myers is not obliged to bargain with the union. On November 30, 2013, ATU Local 1738 made a similar request on A.J. Myers to recognize it as the collective bargaining agent for all A.J. Myers bus operators, park outs, and monitors “in and about Westmoreland Pennsylvania.” A.J. Myers denied that request on the same grounds, and the circumstances have not changed.

The Union did not have further correspondence or contact with A.J. Myers. A.J. Myers continues to refuse to recognize the Union as the exclusive collective-bargaining representative of its Latrobe terminal employees.

Analysis

The complaint alleges that the Respondent’s refusal and failure to recognize and bargain with the Union violates Section 8(a)(5), and, derivatively, Section 8(a)(1) of the Act.⁴

Specifically, the General contends that A.J. Myers is a successor employer to First Student with an obligation under the Act to recognize and bargain with the Union as the collective-bargaining representative of the bargaining unit of its drivers and monitors working at the Latrobe terminal. The Respondent rejects these claims, contending that it is not a successor employer and that the A.J. Myers’ Latrobe terminal employees do not constitute an appropriate unit for bargaining. In addition, the Respondent claims that it does not have to recognize the Union on grounds that the Union’s demand for bargaining was for a unit that encompassed its Latrobe *and* Export facilities, a multisite unit in which the Union cannot claim majority support.

I. SUCCESSORSHIP

A. Background

The Board’s successorship doctrine is rooted in the Act’s policy emphasis on industrial peace and stability and the acceptance of a presumption of a union’s majority support as a means to vindicate this policy. As the Supreme Court has explained, “[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). “To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the precondition for service as its exclusive representative.” *Id.* at

⁴ An employer’s violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), *enfd.* 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

785–786. As the Board explained in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001):

Absent specific statutory direction, the Board has been guided by the Act’s clear mandate to give effect to employees’ free choice of bargaining representatives. The Board has also recognized that, for employees’ choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

In *Fall River Dyeing Corp.*, 482 U.S. 27 (1987), the Supreme Court considered the union’s rebuttable presumption of majority support where there has been a change in employer. The Court held that a union’s rebuttable presumption of majority support “continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor.” 482 U.S. at 41 (1972); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

In *Fall River Dyeing*, the Supreme Court recognized that the rationale for the presumption of an incumbent union’s majority support is not only in effect but “particularly pertinent in the successorship situation”:

During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer’s plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members’ rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise’s transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploit-

ing the employees’ hesitant attitude towards the union to eliminate its continuing presence.

Fall River, supra at 41 (footnote omitted).

In addition to recognizing the importance of the presumption of a union’s majority support during this transition period, the Supreme Court also stressed that the Act’s successorship doctrine “safeguard[s] the rightful prerogative of owners independently to rearrange their businesses.” *Fall River*, supra at 40 (internal quotations omitted). As the Court explained, referencing its seminal successorship decision in *NLRB v. Burns*, supra, “the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in hiring.” The result is that

to a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.

Fall River, 482 U.S. at 40–41 (court’s emphasis; footnote and citations omitted).

Accordingly, the Respondent’s bargaining obligation turns on whether a majority of its employees in an appropriate bargaining unit were employed by the predecessor, and if there exists substantial continuity between the enterprises. *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB 814, 815 (2011); *Van Lear Equipment*, 336 NLRB 1059, 1063 (2001).

B. Substantial Continuity

In this case, there is no dispute, and the Respondent concedes (R. Br. at 12 fn. 11), as it must, that a majority—virtually the entirety—of the unit alleged appropriate in the complaint was composed, at all relevant times, of former First Student employees from the First Student Latrobe terminal.

Turning to substantial continuity, with regard to that factor “the focus is on whether there is a ‘substantial continuity’ between the enterprises.” *Fall River*, 482 U.S. at 43.

Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. [Id.]

Most importantly, the question of the substantial continuity of the enterprises is to be analyzed primarily from the “employees’ perspective.” *Fall River*, 482 U.S. at 43. In its analysis, the Board is mindful of whether “those employees who have been retained will understandably view their job situations as essentially unaltered.” *Id.* (internal quotation omitted); *Vermont Foundry Co.*, 292 NLRB 1003, 1008 (1989) (calling this “the core question”); *Derby Refining Co.*, 292 NLRB 1015 (1989), *enfd.* 915 F.2d 1448 (10th Cir. 1990).

In the case at hand, basic and important similarities between the two enterprises are not in dispute and compel a finding of A.J. Myers' successor status.

Thus, the Respondent and the predecessor operate the same general business: bus driving. "While there are some differences in the way [the successor] operates . . . it is self evident that both are involved in the same employing industry and that the employees essentially do the same work. They drive school buses." *Montauk Bus Co.*, 324 NLRB 1128, 1134-1135 (1997) (finding successorship).

The employees possess the same licensing requirements as they did for First Student. And more specifically, the unit in question transports the same body of students for the same customer—the Latrobe school district's students—as did the unit operated by the predecessor First Student. In many cases, pursuant to the school district's request, the A.J. Myers Latrobe terminal drivers are driving the same routes and therefore, the same individual students as they did when they drove for First Student. By all evidence, the employees are doing the same job, in the same manner, as before, without any hiatus in operations (beyond the normal summer break), only now their employer is A.J. Myers instead of First Student. They drive school buses both to and from school for the Latrobe school district from a terminal located in the school district and only a few miles from the First Student terminal at which they previously worked. As before they have an opportunity to do extra charter work, but it is limited to charter work assignments for the Latrobe school district—the employees do not have access to charter work available to the Respondent's employees working from other terminals.

It is true that they drive a different model of bus, but this has not been shown to be of significance to their work or representational desires. See *Van Lear Equipment, Inc.*, 336 NLRB at 1064 (not significant that "under the Respondent, the drivers are driving newer buses than before" and parking them in a different part of the parking lot—more important is that "[t]he bus drivers follow the same 'production processes' and serve the same body of customers in that the drivers continue to drive daily routes taking school children to and from the same . . . schools").

It is true that the Latrobe employees work out of a terminal located 2.6 miles from their old First Student terminal. But this too does not amount to a change likely to affect their work life or the presumption of majority support: "if the succeeding company takes over the operations of the terminal, continues to operate in a similar fashion with a complement consisting of a majority of the predecessor's employees, then a mere relocation of the facility (either before or after the takeover), would not undermine the successorship obligation because there would continue to be a presumption that the Union continues to represent a majority of the work force in the relocated unit." *Montauk Bus Co.*, supra at 1135 (finding successorship where successor schoolbus serviced the predecessor's school contract with drivers from a different terminal located 4 miles from the predecessor's terminal).

The supervision has changed, somewhat—the main dispatcher for the First Student unit is now the terminal manager. A driver/trainer for First Student is now the assistant terminal

manager. But while these familiar faces have new authority and roles, they also held leadership positions at First Student. *Van Lear Equipment*, 336 NLRB at 1064 ("While [the successor's employees] do not have the same supervisor, a former fellow . . . bus driver, . . . has become their supervisor as the Respondent's . . . district supervisor.").

It is hard to see how, from the "employees' perspective" (*Fall River*, supra) A.J. Myers can be anything but a successor. From the employees' perspective, there was no change in the scale of the operation or their job situations that would support the belief "that their views on union representation had changed." *Bronx Health Plan*, 326 NLRB 810, 812 fn. 8 (1998) (explaining that this is the chief issue in determining "substantial continuity"), enfd. 203 F.3d 51 (D.C. Cir. 1999).

In opposition to a finding of successorship, the Respondent stresses that it did not assume the entirety of the work of the First Student bargaining unit, which, in addition to the Latrobe school district, serviced some other schools and was part of a bargaining unit that had auxiliary locations.

The claim miscomprehends the essence of successorship, which is not premised on an identical re-creation of the predecessor's customers and business, but rather, on the new employer's "conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor" in order "to take advantage of the trained work force of its predecessor." *Fall River Dyeing*, 482 U.S. at 41.

Contrary to the assertions of the Respondent, the Board has repeatedly held that the operation of just a portion of a predecessor's business is consistent with successorship—as long as the new unit is an appropriate one (discussed below). *Van Lear Equipment, Inc.*, 336 NLRB at 1064 ("Additionally, even though the Respondent did not take over all the operations and functions of the prior PVSD bargaining unit—the custodians, maintenance workers, and secretaries remained with PVSD—a finding of successorship is not precluded. Indeed, the Board has frequently found substantial continuity where the successor employer has taken over only a discrete portion of the predecessor's heterogeneous bargaining unit."); *Bronx Health Plan*, 326 NLRB at 812 ("It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation."); *Simon DeBartelo Group*, 325 NLRB 1154, 1155 (1998) ("[A] change in scale of operation must be extreme before it will alter a finding of successorship") (internal quotations omitted), enfd. 241 F.3d 207 (2d Cir. 2001); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052, 1054 fn. 13 (1976) ("The successor unit, . . . although a division of the multischool unit existing under [the predecessor], is also appropriate since it may be an independently appropriate unit"), enfd. in relevant part 549 F.3d 873, 876 (2d Cir. 1977).

The fact that the First Student unit was a larger unit and somewhat more diverse in its customer base than the A.J. Myers Latrobe unit does not advance the Respondent's case against successorship. See *NLRB v. Simon DeBartelo Group*, 241 F.3d 207, 213 (2d Cir. 2001) ("The Board's holding here is

consistent with a long line of Board decisions finding substantial continuity when the successor employer has taken over only a discrete portion of its predecessor's heterogeneous bargaining unit."); *Bronx Health Plan*, supra (substantial continuity found where successor hired 16 of 3500 of the predecessor's employees (0.5 percent) in just a few of the predecessor's hundreds of job classifications).

Notably, the instant quintessential successorship situation here easily can be distinguished from the only cases relied upon by the Respondent in its brief: *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), enfd. 498 F.2d 680 (D.C. Cir. 1974); *Nova Services Co.*, 213 NLRB 95 (1974); and *Lincoln Private Police, Inc.*, 189 NLRB 717 (1971).

In fairness, these three cases should be overruled by the Board. It has been many years since these cases accurately represented Board policy on successorship. They stand as misleading outliers—repeatedly questioned, distinguished or ignored, and out of line with longstanding Board successorship doctrines. These cases, from the dawn of the Board's successorship doctrine, were issued long before *Fall River Dyeing* ushered in the modern era of successorship precedent stressing that the question of substantial continuity of the employing enterprise is analyzed primarily from the "employees' perspective" and mindful of whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Fall River*, 482 U.S. at 43 (internal quotations omitted). And indeed, without formally being overruled, the vitality of two of these cases (*Atlantic Technical Services*, supra, and *Nova Services*, supra) has been explicitly questioned. See *Simon DeBartelo*, 241 F.3d at 213 fn. 10.⁵ The third (*Lincoln Private Police, Inc.*, supra) was, tellingly, cited by the dissent in both *Burns*, 406 U.S. at 307, and *Fall River Dyeing*, 482 U.S. at 57, and thereafter ignored—the case has not been cited in any published Board decision since 1991.

However, without regard to these cases' vitality, they are distinguishable from the situation at bar here.

Thus, in *Atlantic Technical Services Corp. (ATS)*, 202 NLRB 169 (1973), the Board found that "under the peculiar circumstances here presented," a small contractor employer that assumed the mail and distribution services for the Kennedy Space Center (KSC) from TWA airlines was not a successor employer. In reaching its conclusion, the Board determined that there had been a substantial change in the nature of the employing

industry in large part because the putative successor employed a unit of employees that amounted to less than 4 percent of the unit employed by TWA at the KSC. Moreover, in *ATS*, the Board also relied on the fact that "TWA was a large company engaged primarily in transportation," and "regulated under the Railway Labor Act . . . [with] contracts throughout the country. In contrast, Respondent is a small organization, just recently organized for the purpose of performing small technical support service contracts, whose only contract, as of the time of the hearing in this case, was that involved herein. There is obviously a substantial difference between the employer-employee relationship in a large corporation and that characteristic of a small operation such as Respondent's." 202 NLRB at 170. Finally, the Board in *ATS* questioned the validity of the presumption of majority support in that case because the portion of the former unit assumed by the new employer "was originally accreted to the larger unit" of the predecessor. *Id.*

None of these factors that the Board relied upon to defeat the claim of successorship are at play here. Thus, the proposed A.J. Myers unit represents a significant portion of the First Student unit—far beyond the 4 percent found in *ATS*—as the Latrobe School District that the A.J. Myers unit services represented the major client for the First Student bargaining unit. There is no history of accretion in the predecessor unit—rather, the First Student unit was the product of a Board election and Board certification. See *Bronx Health Plan*, supra at 813, distinguishing *ATS* on these grounds. More generally, A.J. Myers is in the same employing industry as First Student: i.e., student bus transportation. Nothing has changed in that regard. There is no change in legal regime, and no change from a large national transportation employer to a small one-contract technical support service employer as in *ATS*.

Similarly, *Nova Services*, 213 NLRB 95 (1974), is easily distinguishable. That case involved a situation where the new employer assumed the cleaning services for a few banks in the Worcester, Massachusetts area, work which had previously been performed as a part of the predecessor's statewide janitorial bargaining unit. As in *ATS*, supra, the enormous disparity between the predecessor's statewide bargaining unit and the new employer's proposed local bargaining unit led the Board to conclude that substantial continuity in the employing enterprise had not been demonstrated. 213 NLRB at 97. Unlike the situation in *Nova Services*, in the instant case, a substantial portion of First Student's Latrobe-confined bargaining unit was assumed by the Respondent which commenced operation of its own Latrobe terminal as a result of the assumption of the Latrobe school district work.

Finally, the Respondent relies on *Lincoln Private Police, Inc.*, supra, 189 NLRB 717. However that case is also readily distinguishable. The animating factor in the Board's decision was the radical difference in the scope of the bargaining unit between old and new employer which led the Board to conclude that there was not substantial continuity in the employing enterprise. In *Lincoln Private Police*, the predecessor's employing enterprise operated with a union certified as the employees' representative at numerous locations throughout the San Juan metropolitan area. This employing entity was carved up—acquired by a number of guard service companies includ-

⁵ As the court pointed out in *Simon DeBartelo Group*, supra:

In view of this authority, we find unpersuasive respondent's reliance on two other Board decisions, both over twenty-five years old, declining to find successorship in circumstances that were, in some respects, similar to those present here. See *Nova Servs. Co.*, 213 NLRB 95 (1974); *Atlantic Technical Servs. Corp.*, 202 NLRB 169 (1973), enfd. 498 F.2d 680 (D.C. Cir. 1974). The Board has both persuasively explained why those cases are factually distinguishable and pointed out their doubtful precedential value in light of its own subsequent decisions. See, e.g., *Lincoln Park Zoological Soc'y.*, 322 NLRB 265 (distinguishing *Nova Services* and noting that it "is of questionable precedential value since it has been limited to its own facts [by *Hydrolines, Inc.*, 305 NLRB 416, 423, fn. 43 (1991)]," and also distinguishing *Atlantic Technical Services*); *Louis Pappas' Homosassa Springs Restaurant*, 275 NLRB [1519,] 1526 [(1985)] distinguishing *Atlantic Technical Services*).

ing the putative successor—and thus, in *Lincoln*, unlike here “the employing industry in this case has thus been materially fragmented and, in effect, split asunder.” 189 NLRB at 720. Here, First Student’s Latrobe-based bargaining unit was a distinct unit, and part of a larger employer that maintained other facilities. The same is true of A.J. Myers’ Latrobe unit. It is a distinct grouping of employees, and part of a larger employer. Both units work as school bus drivers—the only distinction is that the A.J. Myers unit, to date, sticks to driving the Latrobe school district, while the First Student bargaining unit had additional contracts it serviced. However, no one disputes that the Latrobe school district work composed a significant part of the First Student unit’s work.

The foregoing three cases—distinguishable, and of questionable vitality—are all that the Respondent cites on the issue. In doing so, its brief advances a standard for proving substantial continuity that has long faded from Board precedent, if it ever existed. The Respondent simply ignores the veritable mountain of precedent that demonstrates, on the facts present here, that from the employees’ perspective, there is substantial continuity between the old and new employing enterprise.

C. The Latrobe Terminal’s Appropriateness as a Bargaining Unit

The remaining successorship issue, related to but discrete from the issue of the substantial continuity of the employing enterprise, is the appropriateness of the bargaining unit. This is, indeed, the central thrust of the Respondent’s defense. It argues that the Latrobe terminal employees do not constitute an appropriate unit for bargaining. Rather, the Respondent contends that an appropriate unit must include all of the Respondent’s six bus terminals located in four counties and six towns. It argues that the Board’s “community-of-interest” principles render the Latrobe terminal—the only unit in which the Union may presume majority support—inappropriate for collective bargaining.

The Respondent’s defense is without force.

First of all, the employees servicing the Latrobe school district formed a significant portion of the historic First Student bargaining unit. “Both the Board and the courts have long recognized not only that the traditional factors, which tend to support the finding of a larger or single unit as being appropriate, are of . . . lesser cogency where a history of meaningful bargaining has developed” but also that “this fact alone suggests the appropriateness of a separate bargaining unit” and that “compelling circumstances” are required to overcome the significance of bargaining history.” *Children’s Hospital of San Francisco*, 312 NLRB 920, 929 (1993) (internal quotations omitted), enfd. 87 F.3d 304 (9th Cir. 1996). Indeed, “[u]nits with extensive bargaining history remain intact unless repugnant to Board policy or interfere with the rights guaranteed by the Act.” *SFX Target Center Area Management, LLC*, 342 NLRB 725, 734 (2004), quoting *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (footnote omitted).

The Respondent points out that, in terms of history, the First Student unit included a yard in Greensburg, Pennsylvania, and a “small park” in the Jeanette, Pennsylvania area—in addition to the main Latrobe facility. Based on this, the Respondent

contends that “history” supports a multifacility unit. As the Respondent puts it, “If a multi-location bargaining unit is proper for First Student . . . it is likewise appropriate for A.J. Myers”).

This is far afield. For one thing, as reflected in the First Student contract’s unit description, the main locus of the unit was the Latrobe facility, with the addition of facilities “under the direction of” the Latrobe facility. There was no companywide integration of terminals. But more to the point, collective-bargaining history is relevant to *continuing* historic representation. The Respondent proposes a new merger with five other A.J. Myers’ terminals in four other counties that have no collective-bargaining history with this unit or any unit at all. Bargaining history does not support such a unit.

Putting aside issues of history, the Respondent’s position that the Latrobe terminal unit is inappropriate—and the appropriate unit is a six-terminal companywide unit—also faces the Board’s “long recognized [] presumption that a single plant or store unit is appropriate for purposes of collective bargaining unless it has been so effectively merged into a comprehensive unit, or is so functionally integrated, that it has lost its separate identity.” *Dean Transportation, Inc.*, 350 NLRB 48, 58 (2007), enfd. 551 F.3d 1055 (D.C. Cir. 2009). “The party opposing the single-facility unit has the heavy burden of rebutting its presumptive appropriateness” (*Trane*, 339 NLRB 866, 867 (2003)), a burden that the Respondent acknowledges (R. Br. at 20, fn. 17).

In response to the single-site presumption, the Respondent offers little to counter the presumption of appropriateness of the unit. It asserts (R. Br. at 19) that all six of its terminals are “functionally integrated such that a single-facility unit is inappropriate.” However, the record evidence for this contention is nil.

It argues on brief, as it stressed at trial, that the Kittanning central office maintains central control of the enterprise, and this is true, as far as it goes. But the day-to-day operation of the facility is vested in the terminal managers who, according to William Myers, “are given a lot of latitude.” The terminals do their own payroll, their own purchasing of fleets, they communicate with the school district to which their terminal is assigned, and prospective employees submit applications directly to the terminals. Each terminal has its own wage scale. Employees are hired to work for specific locations. See *Van Lear*, supra at 1063 (noting same and contrasting that situation with facts in case where successorship was not found, e.g., *P.S. Elliott Services*, 300 NLRB 1161 (1990), where employees were “not hired to staff a particular jobsite”).

I do not doubt the power of the owners and top managers in Kittanning over the terminal managers. But the terminal manager manages the terminal. The terminal manager is the primary person charged by A.J. Myers with making sure that there is compliance with each school district’s requirements.

Significantly, the Respondent’s internet page makes the point vividly: it lists each terminal and the school district with which it is affiliated, and prominently lists for the public, for each terminal, the names, telephone and fax numbers, and addresses of the managers and assistant manager/administrative assistant for each terminal. (See GC Exh. 6.) This internet

“brochure” reflects the opposite of a situation where the individual terminal “has been so effectively merged into a comprehensive unit, or is so functionally integrated, that it has lost its separate identity.” *Dean Transportation*, supra.

The situation is far cry from the centralized control of the type demonstrated in the Board precedent to which the Respondent compares itself. See, e.g., *Trane*, supra at 866 (in representation case, single-site presumption rebutted where, among other things, at one of two employing sites there was “no management stationed” there and “no separate supervisor assigned to oversee” employees at the second site, and employees at both locations received their assignments from a common dispatcher located at main facility, and calls to secondary facility were automatically forwarded to primary site dispatcher).

The Respondent places great emphasis on its argument that there is a “high degree” of employee interchange among the terminals. However, the contention does not survive scrutiny. I accept William Myers’ testimony that the terminals “work as a team” and that terminal managers contact other managers to make sure that runs are covered. But in practice, what does it mean?

As summarized above, far less than 1 percent—perhaps 1/5 or 1/10 of 1 percent—of the trips made for the Latrobe School District were made by drivers affiliated with a terminal other than the Latrobe terminal. Perhaps 1/3 of 1 percent of the trips made by Latrobe terminal-based employees were for another terminal, and 20 of 32 of these trips—a decisive majority—were made for Myers Coach Line by two employees whom the Respondent described as being concurrently employed by the Respondent and Myers Coach line. Thus, it has not been demonstrated that these 20 trips were anything other than a Myers Coach Line employee performing a job for Myers Coach Line. Moreover, there is no evidence that any of these instances of interchange involved supervision of the employees by another terminal’s supervisory staff.

This is truly infinitesimal levels of employee interchange, far removed from the quantity or caliber of interchange necessary to provide evidence rebutting the single-facility presumption.⁶

⁶ *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (emphasizing that the number of alleged instances of employee interchange—in that case 200—is “of little evidentiary value” unless placed in context by the percentage of routes and percentage of employees involved in the interchange—“Employee contact of the kind described here may be considered ‘interchange’ where there is evidence that a significant portion of the work force is involved and the work force is actually supervised by the local branch”), citing as examples “the degree of interchange typically present in cases where the Board has found it to be significant,” e.g., *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982) (interchange factor met when 50 percent of work force came within the jurisdiction of other branches on a daily basis and there existed a greater degree of supervision from supervisors at other terminals than from the supervisors at their own terminals); *Dayton Transport Corp.*, 270 NLRB 1114 (1984) (Board found the presumption rebutted where in 1 year there were approximately 400–425 temporary employee interchanges between terminals among a work force of 87, often on trips where more than 450 miles is necessary to complete the job and the temporary employees were directly supervised by the terminal manager from the point of dispatch). See also *P.S. Elliott Services*, 300 NLRB 1161, 1162 (1990) (single-facility presumption

Finally, the Respondent argues that there were over 1100 instances in the 2013–2014 school year of an A.J. Myers (or Myers Coach Line) employee driving a run for a terminal other than the one to which he or she was assigned. But as the Respondent’s counsel conceded at trial (Tr. 125–126) almost none of this involved the Latrobe terminal. It involved drivers for other terminals making a run for another terminal. As such, I agree with the General Counsel that evidence of interchange between terminals *other* than the Latrobe terminal cannot undercut the appropriateness of the Latrobe terminal as a single-site bargaining unit. Indeed, were it true that the other five terminals engaged in extensive employee interchange—from which the Latrobe unit was excluded—it might be said to *reinforce* the case for the appropriateness of the Latrobe bargaining unit. However, in fact, even the 1100 instances of “interchange” unrelated to the Latrobe terminal do not amount to much. Based on the testimony and representations of counsel, 1062 of the incidents of “interchange” are the product of the fact that the Harmony terminal, which services the Seneca Valley school district, regularly used six drivers stationed at three other terminals. But this interchange does not reflect the kind of interchange where a large segment of drivers at any terminal regularly performed work for other terminals. The Harmony terminal employed upwards of 90 drivers and so, using the Respondent’s figures of 177 schooldays, the total number of runs at Harmony terminal would be nearly 16,000 for the school year. In other words, far less than 1 percent of the runs performed for the Seneca Valley school district were performed by employees stationed other than at Harmony.

Or, put another way, in context, as discussed by the Board in *New Britain Transportation Co.*, supra, this is not much interchange at all. The situation here is very much like that described by Administrative Law Judge Raymond Green, in reasoning adopted by the Board in *Montauk Bus Co.*:

There is, however, very little interchange of bus drivers from one terminal to another. (From time to time, when a terminal, due to illness or other circumstances runs out of its own reserve drivers, it may use reserve drivers stationed at another terminal.) That is, although the company advises its drivers that it has the right to assign them wherever it wants, the fact is that most drivers stick to the terminals and routes to which they are assigned and this is not unreasonable because routes are more efficiently run by drivers who are familiar with their routes. In my opinion, this lack of substantial interchange of employees between the terminals is a factor favoring a single location unit.

324 NLRB at 1135 (footnote omitted). See also *Van Lear*, supra at 1061 (successorship found, notwithstanding that “drivers were interchanged a total of 1909 times” during school year to cover absences and activity runs at other districts where employer drives buses for six school districts and maintains six district facilities).

rebutted in successor case involving multibuilding cleaning service company where, among other factors “[e]mployees are freely transferred between jobsites and at least 50 percent of the Respondent’s employees have been transferred from building to building”).

In sum, there is no basis for the Board to override the presumptive appropriateness of a single-facility bargaining unit of employees composed of those employed at the Respondent's Latrobe terminal.

II. THE RESPONDENT'S DUTY TO BARGAIN

As discussed above, on October 25, 2013, the Union sent letters by certified mail to the president of the Respondent, at two locations (the Latrobe facility and the Export facility). These were returned unopened to the Union. The General Counsel makes nothing of this, instead, alleging that the Respondent's duty to bargain arose with the Union's subsequent November 25, 2013 submission of the very same correspondence to the Respondent, correspondence which the Respondent admits receiving.

As a general matter, such a demand for bargaining imposes a duty to bargain in—as I have found this to be—a successorship situation.

However, the Respondent advances the position that the Union's bargaining demand was ineffective to create a duty to bargain. According to the Respondent (R. Br. at 18–19), the Union did not seek recognition in the unit alleged appropriate in the complaint in this case, but rather, in a larger unit comprised of the Respondent's Latrobe terminal *and* its Export terminal. The latter services the Franklin Regional School District, a school district with which the Union has never had a relationship. As the Respondent points out, there is (and was) no evidence of majority support for the Union in a unit that included the Export facility. On this basis, the Respondent argues that it has no duty to recognize or bargain with the Union.

A.J. Myers' contention is without merit. For one, the premise is invalid: the record does not demonstrate that the Union sought recognition of a unit that included the Export terminal.⁷

⁷ The Respondent points to the wording of the Union's recognition demand, which requests recognition as representative of the Respondent's employees "providing transit services in and about Westmoreland, Pennsylvania." There is no municipality of Westmoreland in the area, only a county of Westmoreland, which contains both the city of Latrobe and the borough of Export. The Respondent argues this demonstrates that the Union was seeking recognition of a combined unit composed of the Latrobe terminal and the Export terminal, which services Franklin Regional School District.

However, the Union's demand, read as a whole—and in context—does not support the Employer's claim. The Union's letter refers repeatedly to its years of representation of the employees performing transportation services for the Latrobe school system (and nowhere else) as the basis for the employer's duty to bargain. Thus, the Union's letter congratulates the Respondent on "winning the contract to operate the transit system of Latrobe Area School District, Westmoreland County Pennsylvania" and asserts that the Union "has represented Latrobe School Bus Operators since 1999, and our members look forward to many more years of dedicated service to Latrobe, PA riding public." The Union's letter then references its "successive agreements with First Student, Inc., Latrobe, PA" and contends, correctly, that "[a] majority of A.J. Myers and Sons Transportation compl[e]ment of Latrobe Area School District Westmoreland County, PA were formerly employed as operators, park outs and monitors by First Student."

Thus, the letter is studded with references to (and only to) the Union's years of representation of the employees who transport the

At most the evidence supports the conclusion that the Union's demand shows that the Union did not know the contours of the appropriate unit at the time it made its demand.⁸

And, that, is the relevant point. Without regard to what the Respondent argues the demand meant, or what unit the Union intended to describe, it is settled Board precedent that in a successorship situation the union's bargaining demand need not be made with precision. It is the obligation of the Respondent to respond to the Union's demand and seek clarification. A vague, ambiguous, or erroneous unit description in the bargaining demand does not relieve the Respondent of its duty to bargain.

As the Supreme Court has recognized, the rationale for extending the union's presumption of majority support to the successorship situation "is particularly pertinent" because

[d]uring a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. . . . Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members rights and to develop a relationship with the successor.

Fall River Dyeing, supra at 39.

In light of this, the Board has rejected any suggestion, such as that of the Respondent here, that would make the union's bargaining rights—and the successor's legal obligation to bargain—turn on whether the union understood the precise contours of the successor's new operation or the wording to use in demanding bargaining. *Hydrolines, Inc.*, 305 NLRB 416, 420 (1991); *Erica, Inc.*, 344 NLRB 799, 803 (2005), enfd. 200 Fed. Appx. 344 (5th Cir. 2006); *Dean Transportation*, 350 NLRB 48, 49 fn. 5 (2007), enfd. 551 F.3d 1055, 1068 (2009); *Paramus Ford*, 351 NLRB 1019, 1029 (2007).

Board precedent

has provided a union with leeway as to the specificity of its bargaining demand pertaining to the bargaining unit to a successor because of the vagaries inherent in the change of the

Latrobe school district. There is nothing about the Franklin Regional School District, or any school district other than the Latrobe school district. This certainly suggests that the next sentence of the letter, in which, solely on the basis of its representation of First Student's Latrobe school district operators, the Union asserts that the Respondent is obligated to recognize and bargain with the Union as the representative of the Respondent's employees "in and about Westmoreland, Pennsylvania" is not a demand for a unit covering all employees at the Latrobe terminal *and* at the Export terminal.

⁸ Union Representative Merrill's testimony palpably illustrated that uncertainty. He agreed on cross-examination with the Respondent's counsel's vaguely-worded suggestion that Merrill wanted A.J. Myers to recognize the Union with the "same scope of the bargaining unit as was your experience with First Student." This is not, as the Respondent urges, an admission that the demand sought recognition of all A.J. Myers' employees in Westmoreland County. Rather, as Merrill explained on redirect: "[W]e were only looking to seek recognition for the ones that were formerly at the First Student location."

operation as to [the] ultimate unit where bargaining obligation inures to the union.

Specialty Hospital of Washington-Hadley, LLC, 357 NLRB 814, 824 (2011).

Indeed, in contrast to the situation where a union demands initial recognition and bargaining based on a card majority or election, the Board has recognized that “[a] bargaining demand in a successorship situation is made in a different context.” As the Board explained in *Hydrolines Inc.*, 305 NLRB at 420, rejecting an argument remarkably similar to the one advanced by the Respondent here:

When a union demands bargaining based on a card majority, the union is aware of which group of employees it has been organizing and wishes to represent; the employer may not. On the other hand, in a successorship situation, the union, by making a bargaining demand, is attempting to preserve its status as the bargaining representative of an already defined unit, or that portion of the unit which has been conveyed or preserved. The successor, however, may add employees. It may add, eliminate, or change job classifications. It may have plans to expand or change its operations. The union may be unaware, or at least uncertain, as to the successor’s plans for its hiring and operations. Therefore, the union’s bargaining demand may be made before it is clear which of the successor’s employees belong in the unit, and the union cannot be expected or required to take all possible contingencies into account in making its demand to bargain.

As the Board held in *Hydrolines*: “[a]t the very least, the Union’s demand shifted the burden to the Respondent to contact the Union and seek clarification of the bargaining demand.” *Hydrolines*, supra at 420. In the instant case, as in *Hydrolines*, “any doubt that the Respondents had regarding the bargaining unit that the Union sought to represent was removed when the complaint issued setting forth the unit alleged to be appropriate.” *Id.* at 420 fn. 29.⁹

⁹ See also *Erica, Inc.*, 344 NLRB at 803 (“If the Respondent had questions concerning the demand it could have punctually brought those to the attention of the Union.”); *Dean Transportation*, 350 NLRB at 49 fn. 5 (“we do not expect perfect precision from a union bargaining demand in a successorship situation (such as this one), as the union may be unaware or uncertain of a successor’s plans for its hiring and operations. Accordingly, GRESPA’s demand for recognition was not infirm merely because its unit description deviated slightly from that in the complaint. In any event, the appropriate unit was set forth in the complaint, thus removing any doubt as to the identity of the unit sought, and [the respondent] has still refused to recognize [the union]”); *Paramus Ford*, 351 NLRB at 1029 (although bargaining demand contained incomplete description of unit, “as in *Hydrolines*, the Union clearly sought to preserve its status as the former employees’ representative, and also sought to represent the Respondent’s employees. I accordingly find and conclude that on February 2, the Union effectively demanded recognition and bargaining of the Respondent, and that the Respondent made no reply thereto”). See also *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 880 (2d Cir. 1977) (“Petitioner contends that its refusal to recognize the Union was justified because Local 1261 claimed to represent a bargaining unit that included supervisors. Admittedly, this was an inappropriate demand and an order requiring bargaining with such a unit would not be enforced. Nazareth, however,

Thus the Union’s demand, under the conditions of successorship, was adequate. Notably, the Respondent’s argument about the deficiencies in the Union’s demand letter is weaker still—it might even be considered disingenuous—given that it continued to fail to recognize or respond to the Union even after receiving an unfair labor practice charge over the matter December 23, 2013, which not only contained a phone number and address for the Union, but also identified the location of the dispute as Latrobe, at the Latrobe terminal’s address, for a unit of about 60 employees.¹⁰ The Respondent continued to refuse to bargain with the Union, even after April 13, 2014, when the Union altered its bargaining demand to explicitly cover only the Latrobe terminal. Thus, in a very real sense, *any* bargaining demand by the Union was a futile gesture, and it is a red herring for the Respondent to rely upon a lack of clarity in the November 2013 bargaining demand as a defense to its failure to bargain.

What was inadequate was not the Union’s November bargaining demand, but the Respondent’s response to it.

I suppose that had the Respondent written or otherwise contacted the Union in response to the bargaining demand, but been unable to obtain a response from the Union, we would have a situation where, despite a valid bargaining demand, the subsequent lack of bargaining would be excused by the Union’s nonresponsiveness. However, the Respondent’s response to the Union’s bargaining demand was insufficient. That Myers claims he attempted to reach the Union is an implicit demonstration of the reasonableness of the Board’s requirement that a successor not ignore a bargaining demand, even one it believes flawed. But Myers’ claim that he repeatedly called an unknown phone number found on the internet and then abandoned the matter after the phone repeatedly rang without answer, is an inadequate response to a written bargaining demand that contains no phone contact information, but ample information to respond by mail.¹¹

never informed the Union that its refusal to bargain was based upon its belief that the unit was inappropriate and the NLRB’s order has remedied the defective demand by eliminating supervisors from the unit. Under these circumstances the bargaining order should not be denied enforcement”).

¹⁰ By itself, this unfair labor practice charge constitutes a demand for bargaining that was unlawfully ignored. *IMS Mfg. Co.*, 278 NLRB 538, 541 (1986), *enfd.* 813 F.2d 113 (6th Cir. 1987). However, as I find that the failure and refusal to bargain began (and has continued) since November 25, 2013, I do not make an independent finding on the refusal to bargain based on the service of the unfair labor practice charge.

¹¹ While I assume the truth of Myers’ claim that he attempted but was unsuccessful in contacting the Union by telephone, I have my doubts. No record of the calls was introduced. There was no evidence as to what number he called or any reproduction of the internet site from which it came. His claim, in other words, is uncorroborated in any way. The context is an employer that had earlier mailings returned to the union unopened because the employer did not sign for them, and an employer that, upon the failure of its alleged phone calls to contact the Union, did not take the natural next step and write the Union at the address listed on the letter it received from the Union. It similarly made no effort to contact the Union after the unfair labor practice charge—with ample contact information, including a telephone number provided by the Union—was served on it in December 2013. Having said that, assuming the truth of Myers’ testimony about his

Confronted with the November 25, 2013 bargaining demand, the Respondent had a duty—which it failed to satisfy—to contact the Union. Having failed to do so, it cannot take shelter in the claim that the wrong unit was sought by the Union. Accordingly, the Respondent violated the Act as of November 25, 2013, by failing and refusing to recognize and bargain with the Union in response to the Union’s bargaining demand.

CONCLUSIONS OF LAW

1. The Respondent, A.J. Myers and Sons, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Amalgamated Transit Union, Local 1738, AFL AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent, A.J. Myers and Sons, Inc., constitute a unit appropriate for purposes of collective bargaining with the meaning of Section 9(b) of the Act:

All full-time time and regular part-time bus operators, park outs and monitors servicing the Greater Latrobe Area School District from Respondent’s 163 Menasha Lane, Latrobe, Pennsylvania facility and excluding mechanics, dispatchers, laborers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. Since on or about November 25, 2013, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union as the collective-bargaining representative of the above-described unit of employees.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the act by failing and refusing to recognize and bargain collectively with the Union as the collective-bargaining representative of an appropriate bargaining unit of employees, the Respondent shall recognize, and, upon request, bargain with the Union as the exclusive representative of the designated unit of employees (described above), and, if an understanding is reached, embody the understanding in a signed agreement.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer’s facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electroni-

effort to telephone the Union does not affect the analysis or outcome of the case.

cally, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 November 25, 2013. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, A.J. Myers and Sons, Inc., Latrobe, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and collectively bargain with the Amalgamated Transit Union, Local 1738, AFL–CIO, CLC (the Union) as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time time and regular part-time bus operators, park outs and monitors servicing the Greater Latrobe Area School District from Respondent’s 163 Menasha Lane, Latrobe, Pennsylvania facility and excluding mechanics, dispatchers, laborers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) 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) Recognize, and on request, collectively bargain with the Union as the exclusive representative of the above-described unit of employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Latrobe, Pennsylvania, copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 6, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other

¹² 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.

¹³ 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.”

electronic means, if the Respondent customarily communicates with its employees by such means. 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 November 25, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

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 fail and refuse to recognize and bargain with the Amalgamated Transit Union, Local 1738, AFL-CIO, CLC

(the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time time and regular part-time bus operators, park outs and monitors servicing the Greater Latrobe Area School District from Respondent's 163 Menasha Lane, Latrobe, Pennsylvania facility and excluding mechanics, dispatchers, laborers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, collectively bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

A.J. MYERS AND SONS, INC.

The Administrative Law Judge's decision can be found at <http://www.nlr.gov/case/06-CA-119505> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

