

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

ALLWAYS EAST TRANSPORTATION, INC.

and

**Cases 03-CA-128669
03-CA-133846**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445**

**GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(a) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits these Exceptions to the Decision of Administrative Law Judge Susan A. Flynn (ALJ), dated November 12, 2015, in the above-captioned cases.

Exception 1:

The ALJ's finding that Allways East Transportation, Inc. (Respondent) was required by the contract to lease property in Dutchess County as a "satellite" yard and operated the Wappingers Falls facility as a satellite yard. (ALJD 2:44-45, 3:7, 9:10, 12:40).¹

Exception 2:

The ALJ's characterization of the drivers and monitors hired by Respondent as "new" and characterization that "some" had worked for Durham. (ALJD 3:8, 3:14-15, 3:29-30).

Exception 3:

The ALJ's failure to find that the applicants for the driver and monitor positions requested to be assigned to the same routes, children, and teams they had been assigned to at Durham. (ALJD 3:21-26).

¹ Throughout these Exceptions, the following reference will be used: (ALJD __:__) for the Administrative Law Judge's Decision at page(s): line(s).

Exception 4:

The ALJ's finding that all former Durham employees who accepted positions with Respondent quit Durham when offered employment with Respondent. (ALJD 3:31-32).

Exception 5:

The ALJ's failure to provide for and consider the legal significance of the timeframe for the finding that Respondent "shuttled 8 to 10 drivers and monitors between Yonkers and Wappingers Falls on a daily basis." (ALJD 3:35-36).

Exception 6:

The ALJ's finding that no supervisors or managers are assigned to Wappingers Falls, that managers from Yonkers are responsible for operations at Wappingers Falls, and the ALJ's failure to find that Respondent's President, Judith Koller, was stationed in Wappingers Falls during the relevant time period of April and May 2014. (ALJD 4:7, 4:11-12, 4:36-37, 5:43, 7:27-28, 9:10).

Exception 7:

The ALJ's characterization of Aldo Leon and Carlos Rivera as "driver/dispatchers." (ALJD 4:7-8).

Exception 8:

The ALJ's finding that all hiring, firing, and discipline decisions are made by Judith and/or Marlaina Koller, in Yonkers, and that no one at Respondent's Wappingers Falls location has input into hiring, firing, or disciplinary decisions. (ALJD 4:40-41, 11:5-6).

Exception 9:

The ALJ's finding that all payroll, human resources, and labor relations services are performed in Yonkers. (ALJD 4:41).

Exception 10:

The ALJ's failure to find that the businesses of Durham and Respondent are essentially the same. (ALJD 5:9, 7:2-9).

Exception 11:

The ALJ's characterization of all 19a training being conducted at Yonkers without noting that it is merely conducted in the city of Yonkers, not at Respondent's Yonkers facility. (ALJD 5:15-16, 10:7-9).

Exception 12:

The ALJ's finding that the terms and conditions of employment for employees who formerly worked at Durham changed significantly. (ALJD 5:23-24).

Exception 13:

The ALJ's finding that most employees have modified or altogether different routes than at Durham. (ALJD 5:26-27, 7:36).

Exception 14:

The ALJ's finding that employees used to go to the Durham base on a daily basis to drop off their paperwork, whereas at Respondent, that is now done weekly. (ALJD 5:34-35, 7:42-43, 7:45-46).

Exception 15:

The ALJ's finding that the employees use different buses and equipment at Respondent than they did at Durham. (ALJD 5:38-39).

Exception 16:

The ALJ's failure to discuss or analyze who terminated Sherry Siebert in the context of the agency status of Aldo Leon or Carlos Rivera. (ALJD 6:3, 9:31-32).

Exception 17:

The ALJ's finding that Sherry Siebert did not seek union representation and did not notify the Union of her termination. (ALJD 6:4-5).

Exception 18:

The ALJ's finding that, under *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the business of Respondent and Durham is not essentially the same. (ALJD 7:1).

Exception 19:

The ALJ's finding that, under *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the employees of Respondent are not doing essentially the same jobs in the same working conditions. (ALJD 7:2-3).

Exception 20:

The ALJ's finding that, under *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), Respondent does not have the same production process, procedures, and products, and basically the same body of customers. (ALJD 7:5-6, 7:35-36).

Exception 21:

The ALJ's failure to give proper weight to working conditions through the "eyes of the employees," as required under *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), and her failure to note that Respondent did not produce any driver or monitor as a witness to testify that their jobs had significantly changed. (ALJD 7:1-9).

Exception 22:

The ALJ's failure to give proper weight to the business importance of the drivers and monitors being familiar with the children and parents. (ALJD 7:11-19).

Exception 23:

The ALJ's finding that monitors use "specialized equipment." (ALJD 7:17).

Exception 24:

The ALJ's failure to consider that a change of supervisors is not dispositive of a successor analysis under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). (ALJD 7:23-24).

Exception 25:

The ALJ's finding that "Durham had two sites, in Poughkeepsie and Red Hook." (ALJD 7:24-25).

Exception 26:

The ALJ's conclusion that after Durham lost the contract with Dutchess County, its operations continued virtually unchanged at its Poughkeepsie and Red Hook facilities. (ALJD 7:29-31).

Exception 27:

The ALJ's reliance on where the buses are parked overnight at Respondent compared to Durham. (ALJD 7:38-39).

Exception 28:

The ALJ's conclusion that drivers and monitors have different work hours at Respondent than they had at Durham. (ALJD 7:39-40).

Exception 29:

The ALJ's finding that even the General Counsel's witnesses testified to significant changes in their working conditions with Respondent as opposed to Durham. (ALJD 8:15-17).

Exception 30:

The ALJ's failure to find that the evidence on production processes, procedures, and products, and the body of customers introduced at hearing is insufficient to defeat a finding of substantial continuity between Respondent and Durham. (ALJD 8:19-24).

Exception 31:

The ALJ's finding that there is no substantial continuity of operations between Durham and Respondent. (ALJD 8:26-27).

Exception 32:

The ALJ's failure to acknowledge that the burden in opposing the appropriateness of a single-facility unit is a difficult burden to overcome. (ALJD 8:32-37).

Exception 33:

The ALJ's failure to address whether Aldo Leon and Carlos Rivera are agents under Section 2(13) of the Act, and her finding that they are not supervisors, do not fire employees, and do not make managerial decisions or exercise substantial judgment. (ALJD 9:16-17, 9:17-18, 9:39-41).

Exception 34:

The ALJ's rejection of General Counsel Exhibit 15 as a statement against interest by Respondent concerning local autonomy of Wappingers Falls. (ALJD 9:8-36).

Exception 35:

The ALJ's failure to note, analyze, and give proper weight to the statements against interest by Respondent's witness Mary Ann Coe concerning the agency status of Aldo Leon and Carlos Rivera. (ALJD 9:8-36).

Exception 36:

The ALJ's failure to make a negative credibility finding on Marlaina Koller in regards to General Counsel's rejected Exhibit 15. (ALJD 9:8-36).

Exception 37:

The ALJ's finding that the drive from Wappingers Falls to Yonkers usually takes 45 minutes and is 54 miles. (ALJD 9:13-14, 12:46-47).

Exception 38:

The ALJ's finding that Leon and Rivera merely handle dispatching duties and drive when needed. (ALJD 9:20).

Exception 39:

The ALJ's conclusion that Wappingers Falls is not a functioning stand-alone facility operating independently of Yonkers and that there is no local autonomy in operations there. (ALJD 9:38-39, 10:17, 12:22-23).

Exception 40:

The ALJ's placement of too much weight on the centralization of operations and similarity of job skills and functions between Yonkers and Wappingers Falls and placement of too little weight on local autonomy, limited one-way interchange, distance, wage rates, and bargaining history. (ALJD 10:1-17).

Exception 41:

The ALJ's analysis of the Wappingers Falls facility under *In Re Dattco, Inc.*, 338 NLRB 49 (2002), *Dean Transportation, Inc.*, 350 NLRB 48 (2007), and *Van Lear Equipment, Inc.*, 336 NLRB 1059 (2001). (ALJD 10:1-6, 11:20-24, 11:27-33).

Exception 42:

The ALJ's conclusion that there was significant interchange between Respondent's Yonkers and Wappingers Falls facilities initially. (ALJD 11:37, 12:26-27).

Exception 43:

The ALJ's failure to note, analyze, and give weight to the fact that the drivers and monitors from Wappingers Falls have generally never been to the Yonkers location and generally have no knowledge of the individuals who work there other than Vice President Marlaina Koller. (ALJD 12:16-23)

Exception 44:

The ALJ's finding that the Wappingers Falls facility has a community of interest with Yonkers. (ALJD 12:17-19).

Exception 45:

The ALJ's finding that the Yonkers and Wappingers Falls facilities operate under the same wage structure. (ALJD 12:19).

Exception 46:

The ALJ's finding that Yonkers exercises central control over the daily operations and labor relations at the Wappingers Falls facility. (ALJD 12:21-22).

Exception 47:

The ALJ's finding that "numerous" Yonkers drivers and monitors temporarily worked at the Wappingers Falls facility at the beginning of the contract. (ALJD 12:27-28).

Exception 48:

The ALJ's finding that all employees at both Yonkers and Wappingers Falls work for the same supervisors and managers. (ALJD 12:38, 12:42-43).

Exception 49:

The ALJ's failure to weigh bargaining history as a meaningful successor factor as required under *Children's Hospital*, 312 NLRB 920 (1992) and *Radio Station KOMO-AM*, 324 NLRB 256 (1997). (ALJD 13:2-3).

Exception 50:

The ALJ's finding that Wappingers Falls is not an appropriate separate bargaining unit. (ALJD 13:5).

Exception 51:

The ALJ erred in her finding that Respondent met its high burden to overcome the presumption that a single-facility unit is appropriate. (ALJD 13:5).

Exception 52:

The ALJ's conclusion that Respondent is not a successor to Durham. (ALJD 13:10-11).

Exception 53:

The ALJ's conclusion that Respondent had no obligation to recognize and bargain with the Union. (ALJD 13:13-15).

Exception 54:

The ALJ's conclusion that Respondent had no obligation to notify the Union of its decision to terminate Sherry Siebert and no obligation to respond to the Union's information requests. (ALJD 13:14-16).

Exception 55:

The ALJ's conclusion that Respondent did not unlawfully change the wage rates of employees. (ALJD 13:16-17).

Exception 56:

The ALJ failed to address whether Sherry Siebert was entitled to search for work expenses, and the ALJ failed to find that she was entitled to those expenses. (ALJD 2-13).

DATED at Albany, New York this 21st day of December, 2015.

Respectfully Submitted,

/s/ John J. Grunert

JOHN J. GRUNERT

/s/ Charles M. Guzak

CHARLES M. GUZAK

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