

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 03

-----X  
ALLWAYS EAST TRANSPORTATION  
INC.,

Respondent,

Case No.: 03-CA-128669  
03-CA-133868

And

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 445

Charging Party  
-----X

**RESPONDENT ALLWAYS EAST TRANSPORTATION INC.'S  
ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S  
EXCEPTIONS TO ALJ FLYNN'S DECISION AND BRIEF IN SUPPORT OF  
EXCEPTIONS**

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## TABLE OF CONTENTS

STATEMENT OF FACTS.....	1
ARGUMENT.....	22
A. CONTRARY TO GC’S GENERAL EXCEPTIONS 10, 12, 18, 19, 20, 21, 30, 31 AND 52 (AND OTHERS AS SET FORTH BELOW) RESPONDENT IS NOT A CONTINUOUS OPERATION TO THE NATIONAL GIANT DURHAM SCHOOL SERVICES COMPANY.....	23
B. CONTRARY TO GC’S GENERAL EXCEPTIONS 25, 32, 39, 40, 41, 44, 50 51 AND 52 (AND OTHERS AS SET FORTH BELOW) WAPPINGERS FALLS IS NOT AN APPROPRIATE “STAND-ALONE” BARGAINING UNIT.....	36
C. GC’S EXCEPTIONS 17, 53-56 ARE INAPPLICABLE SINCE ALWAYS EAST IS NOT A SUCCESSOR.....	54
CONCLUSION.....	54

## TABLE OF AUTHORITIES

### Cases

<u>Atlantic Technical Services Corporation</u> , 202 N.L.R.B. 169 (1973).....	29
<u>Band-Age, Inc.</u> , 217 N.L.R.B. 449 (1975).....	29
<u>Big Y Foods, Inc.</u> , 238 NLRB 860 (1978).....	38
<u>Border Steel Rolling Mills</u> , 204 NLRB 814 (1973).....	48
<u>Bronx Health Plan</u> , 326 NLRB 810 (1998) .....	35
<u>Budget Rent A Car Systems, Inc.</u> , 337 N.L.R.B. 884 (2002) .....	38
<u>Children’s Hospital</u> , 312 N.L.R.B. 920 (N.L.R.B. 1993) .....	52
<u>Community Hospitals of Central California</u> , 1998 NLRB LEXIS 710, 54 (N.L.R.B. Sept. 18, 1998) .....	52
<u>D&amp;L Transportation, Inc.</u> , 324 NLRB 160 (1997) .....	36, 49
<u>Dattco, Inc.</u> , 338 NLRB 49 (2002).....	23,36,38,39,41, 42,46,48
<u>Dayton Transport Corp.</u> , 270 NLRB 1114 (1984) .....	38
<u>Dean Transportation</u> 350 NLRB 48 (2007) .....	44,51
<u>Esco</u> , 298 NLRB 837 (1990) .....	48
<u>Fall River Dyeing &amp; Finishing Corp. v. NLRB</u> , 482 U.S. 27, 36-41 (1987).....	22, 23,36,42
<u>Florida Steel Corporation</u> , 235 N.L.R.B. 1010 (N.L.R.B.1978).....	
<u>Hilander Foods</u> , 348 NLRB 1200 (2006) .....	36
<u>Howard Johnson Co. v. Hotel Employees</u> , 417 U.S. 249 (1974) .....	23
<u>Int’l Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. NLRB</u> , 604 F.2d 689 (D.C. Cir. 1979) .....	53
<u>International Security Services, Inc.</u> , 406 U.S. 272 (1972) .....	24
<u>J&amp;L Plate, Inc.</u> , 310 NLRB at 429.....	36
<u>Lincoln Park Zoological Society</u> , 322 NLRB 263 (1996) .....	53
<u>Lincoln Private Police, Inc.</u> ,189 N.L.R.B. 717 (1971) .....	24
<u>Louis Pappas' Resturant</u> , 275 NLRB 1519(1985) .....	35
<u>Marine Spill Response Corp.</u> , 348 N.L.R.B. 1282 (N.L.R.B. 2006).....	37,41
<u>Marion Power Shovel Co.</u> , 230 N.L.R.B. 576 (N.L.R.B. 1977).....	52
<u>Massillon Hospital Association</u> , 282 N.L.R.B. 675 (N.L.R.B. 1987) .....	43
<u>Mavis Tires Supply Corp.</u> , 2004 NLRB LEXIS 471 (2004). .....	37,41,48
<u>Mayfield Holiday Inn</u> , 335 NLRB 38 92001), enforced, 333 F.3d 646 (6 <sup>th</sup> Cir. 2003).....	49,53
<u>Montauk Bus Company</u> , 32 NLRB 1128 (1997).....	27,28,35,50
<u>Murphy v. Allways East Transportation, Inc.</u> , 14-cv-8570 (S.D.N.Y. 2014).....	42,44
<u>Nazareth Reginal High School</u> , 283 NLRB 763 (1987) .....	53
<u>Nova Services Company</u> , 213 N.L.R.B. 95 (1974) .....	28
<u>Novato Disposal Service</u> , 328 NLRB 820 (1999).....	38
<u>NLRB v. Burns Int’l Sec. Servs., Inc.</u> , 406 U.S. 272 (1972).....	24,35
<u>NLRB v. Burns International Security Services, Inc.</u> , 406 U.S. 272 (1972) .....	24
<u>NLRB v. DeBartelo</u> , 241 F.3d 207 (2d Cir. 2001) .....	35
<u>NLRB v. South Harlan Coal, Inc.</u> , 844 F.2d 380 (6 <sup>th</sup> Cir. 1988).....	35
<u>P.S. Elliott</u> , 300 NLRB 1161(1940).....	49
<u>Petrie Stores Corp.</u> , 266 NLRB 75 (1983).....	47
<u>Prince Telecom</u> , 347 N.L.R.B. 789 (2006).....	38
<u>R&amp;D Trucking Company</u> , 327 NLRB 531 (1999) .....	36,38

<u>Radio Station KOMO-AM</u> , 324 N.L.R.B. 256 (N.L.R.B. 1997).....	52
<u>Standard Dry Wall Products, Inc.</u> , 91 N.L.R.B. 544 (N.L.R.B. 1950).....	43
<u>Temco Aircraft Corp.</u> , 121 NLRB 1085, 1088 (1958) .....	54
<u>Trane</u> ,339 NLRB 866 (2003).....	48
<u>Tree-Free Fiber Co., LLC</u> , 328 N.L.R.B. 389 (1999).....	29
<u>United States v. Spruill</u> , 808 F.3d 585 (2d Cir. Conn. 2015).....	32
<u>Van Lear Equipment, Inc.</u> , 336 NLRB 1059 (2001) .....	29,38,39,43
<u>Victor’s Café</u> , 321 N.L.R.B. 504 (N.L.R.B. 1996).....	43
<u>Waste Management Northwest</u> , 331 NLRB 309 (2000).....	48
<u>Waste Mgmt. of Wash, Inc.</u> 331 NLRB 309 (2000).....	38,49
<u>Williams Motor Transfer, Inc.</u> , 284 N.L.R.B. 1496 (1987) .....	24
<b>Statutes</b>	
29 U.S.C. § 158 (a)(5).....	23

## TABLE OF EXCEPTIONS

### Exceptions

Exception 1 .....	27
Exception 2 .....	25,26
Exception 3 .....	31
Exception 4 .....	25,26,28
Exception 5 .....	40,49,50
Exception 6 .....	42,46
Exception 7 .....	42,46
Exception 8 .....	42,46
Exception 9 .....	41,46
Exception 10 .....	23,24,30
Exception 11 .....	42
Exception 12 .....	23,26,30,33
Exception 13 .....	30,31
Exception 14 .....	30,34
Exception 15 .....	25,30
Exception 16 .....	43
Exception 17 .....	54
Exception 18 .....	23,24,30
Exception 19 .....	23,36,30
Exception 20 .....	23,24,30
Exception 21 .....	23,30,33,35
Exception 22 .....	34
Exception 23 .....	25
Exception 24 .....	24,27
Exception 25 .....	36,51
Exception 26 .....	28
Exception 27 .....	30,32
Exception 28 .....	26,30
Exception 29 .....	30,33
Exception 30 .....	23,24,30
Exception 31 .....	23,24,30
Exception 32 .....	36
Exception 33 .....	42
Exception 34 .....	43
Exception 35 .....	44,45
Exception 36 .....	43
Exception 37 .....	48
Exception 38 .....	42,46
Exception 39 .....	36,41
Exception 40 .....	36
Exception 41 .....	29,36,38,41,51
Exception 42 .....	49,50

Exception 43.....	40
Exception 44 .....	39,36
Exception 45 .....	40
Exception 46.....	41
Exception 47 .....	49,50
Exception 48 .....	41
Exception 49.....	52
Exception 50 .....	36
Exception 51 .....	36
Exception 52.....	23,36
Exception 53 .....	54
Exception 54 .....	54
Exception 55.....	54
Exception 56.....	54

## STATEMENT OF FACTS

### HISTORY: TIME-LINE

Allways East Transportation, Inc. (“Respondent” and/or “Allways East”), is a school bus company specializing in the transportation of special education/needs children to and from various special education schools primarily in Westchester and Dutchess Counties. Tr. 793-74.<sup>1</sup> Judith Koller (“Judy”), President, and Marlaina Koller (“Marlaina”), her daughter and Vice President, operate the company. *Id.* Allways East has to date, always remained a family run non-union company. Tr. 708 and 793. Respondent’s headquarters prior to and in April/May 2014<sup>2</sup> was, and still is, located at 870 Nepperhan Avenue, Yonkers, New York, (“Yonkers yard”) wherein out of this yard, there were approximately 233 of the company’s 317 driver and monitor employees performing school bus services for Westchester county schools and performing school bus services for Dutchess county schools at Allways East’s yard in Wappingers Falls. Tr. 14, 630-631 795 and 879. The Company’s remaining 84 driver and monitor employees performed school bus services approximately between fifty and sixty miles away at the Company’s Dutchess County yard located at 228 Myers Corners Road, Wappingers Falls (“Wappinger Fall’s yard”) starting in April 2014 for primarily the Dutchess County Department of Health. GC-6B;<sup>3</sup> Tr. 14, 630-631 795, 833 and 879.<sup>4</sup>

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<sup>1</sup> “Tr.” reference is to pages from the trial transcript.

<sup>2</sup> General Counsel fails to state anywhere in his Exceptions or Supporting Brief that the parties stipulated “that the operative date for determining successorship has been established is April 22, 2014.” Tr. 11. As of the week ending, May 1, 2014 the “full complimentary of Respondent’s Wappingers Falls employees were employed.” GC-6B.

<sup>3</sup> “GC” reference is to General Counsel exhibits marked at trial and “R” reference is to Respondent exhibits marked at trial.

<sup>4</sup> In addition, Allways East employs approximately another 17 employees at the Yonkers yard in the positions of office manager, fleet/maintenance manager, operations manager, payroll personnel, dispatcher/drivers and clerical staff and mechanics. Tr. 804, 823-24, 880 and 942-43. There are two (2) dispatcher/drivers who report to the Dutchess yard and there are no managers, payroll personnel, or clerical staff that report to the Dutchess yard. Tr. 699. Judy, Marlaina and the managers periodically visit Dutchess but primarily all of the company’s operations (Westchester County and Dutchess County work) are managed from the Yonkers yard. Tr. 291, 796, 823-24, 883, 961-962 and 984.

Until April 2014, Respondent had no presence whatsoever in Dutchess County. Tr. 629 and 795. Prior thereto, in or about mid-year in 2012, Respondent submitted a bid in response to a portion of school bus routes within a RFP put out by the Dutchess County Department of Health (“Dutchess County DOH”) that pertained to school bus transportation for special education/needs school children in Dutchess County. Tr. 636 and 806. The Respondent’s bid was rejected by the County. Id.

In or about mid-January 2014, Respondent was contacted by Dutchess County DOH and advised that Durham School Services (“Durham”) the previous bus company who was awarded, among other bus contracts/routes, the RFP school bus routes mentioned herein-above, was disqualified by the Dutchess County DOH for rampant insufficient and poor service; and as such, their Dutchess County special education/needs transportation contract was terminated. Tr. 636-37 and 805. Accordingly, Dutchess County DOH, as set forth in the contract termination letter issued to Durham, terminated the Durham special education/needs transportation contract due to:

a result of multiple counts of the failure to perform using standards of care and in strict compliance with all applicable federal, state and local laws, regulations and procedures...

R. 20.<sup>5</sup>

Accordingly, Dutchess County DOH was presented with a dire situation wherein they were compelled and required to terminate the contract with Durham in the middle of the school year with a reliable and proficient special education/needs school bus contractor who would run their operation not in the same way as Durham, and to enter into a new contract with Dutchess County DOH to ensure safe, timely, legally compliant and reliable transportation for these children. Id.; Tr. 636-37. Transportation for special education/needs school children is a highly specialized service of

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<sup>5</sup> Prior to terminating the contract, Dutchess County DOH placed Durham under strict operating requirements, as set forth in the attachment to the February 28, 2014 termination letter which said operating requirements were not imposed on Allways East. R-20.

transportation which is not and cannot be performed by many school bus companies. Tr. 643. Realizing the exigent circumstances confronted by Dutchess County DOH, Allways East agreed to enter into a contract with the Dutchess County DOH to provide special education/needs school bus transportation, commencing its operations mid school year in or about April 2014 leaving only approximately five (5) weeks to get ready and prepare for startup. R-20; Tr. 11, 797 and 808-09. Certainly one cannot operate a stand-alone appropriate bargaining facility within five (5) week's time – It could only operate in conjunction with the Allways East main headquarters in Yonkers.

It was initially believed that the contract with Dutchess County consisted of the transportation of approximately fifty-two (52) special education/needs school routes, requiring the immediate employment of at least fifty-two (52) drivers and fifty-two (52) matrons certified and trusted to transport the special education/needs children within their schools in Dutchess County. Tr. 633. However, upon commencement of operations, Respondent had to reformulate all the routes and create approximately 65 routes. R-14-15; Tr. 42.

In order for Allways East to adhere to its contractual commitment and obligations to Dutchess County DOH and due to the fact that it was not taking over any part of Durham's operation (facility, equipment, records, etc.), it went right into action including but not limited to: 1) purchasing 50 plus new buses, equipment and child safety seats; 2) leasing property within Dutchess County to set up a satellite yard and insuring same under the Company's existing liability insurance policy;<sup>6</sup> 3) purchasing all new special needs equipment and apparatus for the buses; 4) interview, certify, train, test, hire or transfer approximately from Yonkers 85 employees to responsibly service the routes, 5) formulate, organize and create the proper route schedules which were different than Durham's routes as Durham's routes were insufficient, improper and poorly maintained; 6)

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<sup>6</sup> However, all maintenance work on the buses were transported back to Yonkers for repair work. Tr. 821-22, 866, 881, 909-11, 924 and 927. The Wappingers Fall's yard has no maintenance facility and no mechanics. Id.

distribute Allways East company policies (for both Yonkers and Wappingers Falls, which were the same) and different than Durham's to and meet with the employees to review Allways East procedure, work rules and code of conduct; 7) schedule physicals conducted by Allways East Yonkers physician and collect results; 8) have Yonkers based 19-A personnel ensure the employees are current with and/or provide 19-A required school bus training and/or certification; 9) cover the new employees under the existing Company's workers compensation insurance plan and 10) cover the new buses under the existing Company Federal and State DOT Registration (one Federal and State DOT number for Yonkers and Wappingers Falls); 11) size up and issue Company uniforms to the new hires, and 13) register and insure all new buses under the existing (Yonkers) Company's insurance. Tr. 652, 795, 351-52, 390, 443, 458, 564, 817, 821, 832-33, 851, 908, 922, 927, 948, 951-52, 955-56 and 1001-1002; GC-6B and R-36.

There was no "continuous operation" by Allways East of the Durham operation, as during the set up process and upon commencement of operations at the Wappingers Falls yard:

The Respondent had no contact at all with Durham!

The Respondent never met with Durham.

The Respondent did not enter into any contract for sale with Durham.

The Respondent did not purchase any stock from Durham.

The Respondent did not purchase any assets from Durham.

The Respondent did not acquire or transfer any routes from Durham.

The Respondent was not assigned any routes or rights from Durham.

The Respondent did not enter into any assumption of routes or work with Durham.

The Respondent did not purchase or lease or use any buses from Durham.

The Respondent did not purchase or lease or use any equipment from Durham.

The Respondent did not purchase or lease or use any real estate property from Durham.

The Respondent did not receive any employee personnel files from Durham.

The Respondent did not receive any records or files of any kind from Durham.

The Respondent did not receive any route sheets or information from Durham.

The Respondent did not receive any children/parent information from Durham.

The Respondent did not hire any Durham employees as managers or supervisors.

The Respondent did not utilize the same fueling stations or fueling protocol as Durham.

The Respondent did not utilize the same route and/or left/right sheets as Durham.

The Respondent did not utilize the same mode of communication of drivers and monitors.

The Respondent did not utilize the same pick up or order schedule as Durham.

The Respondent did not utilize the same recording of time worked as Durham.

The Respondent did not pay the same wages as Durham.

The Respondent did not implement the same Company handbook as Durham.

The Respondent did not implement the same Company policies as Durham.

The Respondent did not implement the same code of conduct as Durham.

Id.; Tr. 432, 641-42, 811-12, 822, 905 and 983.

On or about, April 22, 2014, Respondent commenced special education/needs school bus transportation in Dutchess County. Tr. 11 and 434. At the time that Durham was terminated by Dutches DOH and lost the special education/needs routes and during the time period of the hearing, Durham continued to provide school bus transportation to schools within Dutchess County including but not limited to Dutchess County BOCES, Duchess County Preschool, Spackenkill Central School, Rhinebeck Central School District, Ulster County Preschool and Rondout Valley Central School and retained drivers who previously drove on the lost special education/needs routes of Dutchess County

DOH. Tr. 858-859 and 973-974. Durham drivers were told at the time that the Dutchess DOH contract was terminated that they would not lose their jobs as a result. Tr. 382. Furthermore, during the time period of the hearing, Durham continued to actively recruit and solicit Respondent drivers to quit Allways East to drive at Durham. Tr. 858-859, 973; R-29-30.

Durham is a national Union bus company which maintains a Dutchess County presence with a bargaining unit as stated by Union representative Lori Polesel at trial, consisting of two Dutchess County locations/yards, one in Poughkeepsie and the other in Red Hook, and as stated above, performing work for numerous school districts. Tr. 258, 972-74; GC-7. The Poughkeepsie office is the main headquarters that continues centralized control over daily operations of both its yards. Id. All Human Resources, payroll, 19A verification, storage of personnel files, billing and vehicle repairs are done in the main office in Poughkeepsie. Tr. 974. Similar to Respondent's two yards in Yonkers and Wappinger Falls, Durham also maintains employee interchange of drivers and monitors between its Poughkeepsie and Red Hook yards. Tr. 976.

The Red Hook facility employs a dedicated supervisor, Frances Leary, who is located in Poughkeepsie. Tr. 973-74. The Red Hook facility and Leary, as its supervisor, are responsible for servicing its school bus transportation obligations under its Rhinebeck contract. Tr. 973 and 975-76. The Union and Durham employees would visit this facility regularly as it was part of the Durham bargaining unit including drivers who reported their daily. Tr. 260-261 and 1007.

Both Durham locations are unionized as a single bargaining unit inclusive of drivers, monitors and dispatchers. Tr. 258, 480, 576 and 977; GC-7. Each of the Durham dispatchers were union members, until MaryAnn Coe voiced her dissatisfaction with the Union and filed as a Beck objector. Tr. 576. As a dispatcher, Ms. Coe opened the office every morning, covered routes with temporary drivers for those out on leave and answered the phones and radio. Tr. 978. Further, the

Durham dispatchers drove buses in addition to dispatching. Tr. 261-63 and 573-74. Moreover, according to the Durham employee roster, no employee was designated or classified as dispatcher, thus all the Durham dispatchers were included in the Union bargaining unit and covered under the Durham union collective bargaining agreement.<sup>7</sup> Tr. 480, 576 and 977; R-3; GC-7. The dispatchers at Durham performed the same job functions and duties as the dispatchers at Allways East. Tr. 261-63, 480, 573-74, 576 and 977-78. Respondent had no contact whatsoever with Durham and in fact did not engage in any communication or coordination with Durham regarding the Dutchess County DOH routes. Tr. 811-12, 822, 905 and 1001-1002.

EMPLOYEES: HIRING PROCESS AND EMPLOYEE INTERCHANGE

As part of the hiring process of drivers, monitors and dispatchers to service the Dutchess County DOH contract, Dutchess County DOH recommended that the Respondent should hire certain applicants familiar with Dutchess County. Tr. 812-814, 874-875 and 644.

In addition to the multiple pre-contract obligations required of Allways East referred to herein-above, Respondent organized and held a job fair in Dutchess County during various days from March 8, 2014 through March 16, 2014 since the contract with Dutchess County DOH did not come with drivers and monitors . R-7; Tr. 635 and 814. Respondent never contacted Durham regarding Durham's former employees. Tr. 811. No employee was hired directly from Durham. The job fair was conducted by President Judith Koller and Vice President Marlaina Koller, along with management staff from the Yonkers office. Tr. 635 and 814. At the job fair, Marlaina provided the applicants with a brief summary of the non-union Company's 23 year history. Tr. 344, 430 and 985-86.

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<sup>7</sup> Although the CBA, Article 34, specifically excludes Dispatchers, the record clearly indicates Dispatchers were part of the bargaining unit at Durham.

Respondent, due to the exigent and emergency circumstances surrounding the mid-term school year start up interviewed and hired applicants inclusive of former Durham drivers and monitors to maintain some consistency for the special education children and because they needed to hire whomever was available as soon as possible due to time constraints; but, also hired applicants who had not formerly worked for Durham, in addition to transferring, both permanent and temporary employees, and integrating them from its Yonkers main yard. Tr. 721 and 833-34. Allways East was not required to hire former Durham employees; nor were former Durham drivers or monitors promised or guaranteed employment by Respondent. Tr. 721, 344 and 348. Moreover, Durham was actively attempting to retain its employees notwithstanding the loss of a portion of its school bus transportation work in Dutchess County and advised drivers that it had jobs for them and that they would not lose their jobs. Tr. 382.

In order to be considered for employment with Respondent, applications were instructed to submit an application at the job fair. Tr. 343 and 815. No one was “guaranteed employment” or was “transferred with the contract” to Allways East. Tr. 721, 344 and 348. Marlaina and Judy then reviewed the applications at the Yonkers Office and after said review, informed the potential candidates to report to its Wappingers Falls satellite yard on April 7, 2014. Tr. 826-27. On April 7, pursuant to DOT regulations, the applicant drivers were required to undergo a medical physical conducted by its Yonkers yard physician in addition to the completion of all other Respondent necessary pre-hire paperwork which was maintained at the Yonkers yard. Tr. 344, 351 and 537-40. All hiring decisions were conducted by Marlaina and Judy. Tr. 816 and 826-27. Upon the successful passing of the medical physical and completion of the Respondent’s pre-hire paperwork, applicants were hired and were issued the Company-wide handbook, used for both Yonkers and Wappingers Falls. Tr. 351. Marlaina also approved new hire “park out” requests, permitting the driver to park the

bus at his/her residence overnight. Tr. 463. Counsel for the General Counsel's ("GC") witness Heidi Rodegerdts testified that no one was hired at the job fair. Tr. 461. Rodegerdts further testified that it was much later subsequent to the job fair, that she received a phone call from the Respondent in Yonkers, informing her that she was hired. Tr. 461.

Counsel for the General Counsel's other witness Lavander Cave testified that the Allways East hiring process consisted of six (6) phases over a five to six (5-6) week time span. Tr. 556, 561 and 584. The 1<sup>st</sup> phase consisted of the attendance at the job fair. Tr. 557. The 2<sup>nd</sup> phase consisted of a call from the Respondent's Yonkers office approximately one (1) week later that he would receive another call from the Respondent with further information. Id. The 3<sup>rd</sup> phase consisted of a follow up call from Respondent's Yonkers office approximately another one (1) week later scheduling a pre-hire medical physical. Tr. 557-558. The 4<sup>th</sup> phase consisted of taking the medical physical with the Respondent's Yonkers' yard physician, completing the Respondent's pre-hire documentation and getting "sized up" for issuance of Respondent Company uniform. Tr. 559. The 5<sup>th</sup> phase consisted of a "one on one sit down" with Marlaina Koller. Tr. 560-561. The sixth (6) and final hiring phase consisted of the actual hiring approximately five to six (5-6) weeks after the job fair. Id.; Tr. 584. Thereafter, the driver is assigned a route and bus. Tr. 585. Former Durham employees did not retain their seniority as conceded by GC in his brief at page 5.

Once new buses were purchased by Respondent, they were assigned DOT and inventory bus numbers that sequentially followed the numbers of the buses already utilized at the Yonkers yard. Tr. 905. Also, unlike the older buses operated by Durham described by employees as a "big differences" in buses, Respondent's newly acquired buses were not required to be equipped with the "Zonar" technology transportation system and were equipped with new car seats. Tr. 352, 390, 458, 911 and 1001.

In the months of April and May 2014, the Respondent also shuttled on a daily basis approximately 8 to 15 Yonkers drivers and monitors back and forth from the Yonkers yard to the Wappingers Falls yard to both cover Dutchess County routes due to absenteeism and service regularly scheduled routes due to a shortage of drivers and monitors. R-32: Tr. 301, 746-749, 834, 842, 883-84, 888-890 and 896. Other Respondent's Yonkers yard employees elected to reside in a hotel during the week while working in Wappinger Falls performing Dutchess County work Id.; R-24.

During the months of April, May and June of 2014, Respondent's Yonkers yard drivers and monitors Kenie Brito, Rosa Gil, Maritza Sanchez, Marvin Caiche, Juana Lugo, Alfredo Gutierrez, Jose Bueno, Sergio Sanchez, Luis Gomez, Wady Medina, Luis Fernandez, Oliver Anchreun, Jenny Troche, Frank Howser, "Ephram" and others were sent to and/or shuttled to Wappinger Falls on a daily basis to perform the Dutchess County work. Tr. 398 834, 746-749 and 896.<sup>8</sup> The transferred Yonkers yard drivers, on occasion, prepared pre-trip cards recording the work completed under the Duchess DOH Contract. Tr. 883-84; R32.

As of the week ending May 1, 2014, when the full complement of the Respondent's Wappingers Falls yard employees were employed there were 84 drivers, monitors and driver/dispatchers on its employee roster at the Wappingers Falls yard. GC-6B. Not all of the 84 drivers and monitors employed at the Wappingers Falls yard were former Durham employees. Tr. 118-120,

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<sup>8</sup> The limited portion of the Respondent's payroll records entered into evidence by the General Counsel only indicate the permanent employees, Rivera, Leon and Freddie Salazaar who were working at Wappinger Falls. This partial payroll report does not identify those daily shuttled cover and fill in Yonkers yard temporary employees working at the Wappingers Falls yard in the weeks ending April 24, 2014 and May 1, 2014 inasmuch as these drivers and monitors remained on Yonkers payroll. Tr. 746, 833; GC-6A, GC-6B and GC-16-17.

There can be no factual argument whatsoever proffered by the Union that it has any legal union recognizable status for the appropriate bargaining unit of Respondent's integrated Yonkers and Wappinger Falls operation.<sup>9</sup>

INTEGRATION: WAPPINGERS FALLS YARD IS NOT A STAND ALONE OPERATION

Respondent's Wappingers Falls satellite yard is not a functioning "stand alone" single operation separate and apart from Respondent's Yonkers yard and main office.

In April 2014, Respondent's Wappingers Falls satellite yard was up and running. The yard was operated by the owners, managers and supervisors from the Yonkers Office who would travel to the Wappinger Falls yard. Tr. 291, 823-24, 883 and 961-962. Owner Judy Koller, Vice President Marlaina Koller, Operations Manager Elida Wilson, Fleet Manager Frank Ortiz and Office Manager ToniAnn Francisco, all based in Yonkers, are responsible for the day-to-day operation and supervision of the Wappingers Falls yard. Tr. 699 and 823. President Judith Koller, Vice President Marlaina Koller, and the other Management Staff would travel between the two (2) yards. Tr. 824, 796 and 984. Two former bus drivers employed at the Yonkers yard, Aldo Leon and Carlos Rivera, were permanently transferred to the Wappinger Falls yard in April 2014 to perform dispatch and driving duties. Tr. 699, 920-21 and 941-43. This was a promotion only to the effect that they both became full-time employees from part-time employees. Tr. 665-666.

Similar to the logistics of Durham's Red Hook and Poughkeepsie yards, Respondent's satellite yard in Wappingers Falls operates as an extension to the Respondent's main yard and office in Yonkers.

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<sup>9</sup> Indeed, the NLRB was very aware of the massive disdain that a majority of Durham employees had for the Union in 2013 including the filing of a June 5, 2013 RD petition signed by 112 employees with Region 3 of the NLRB. R-44; Tr. 991 and 993. The employees only withdrew the petition due to the Union's coercion and out of fear from a threat made by Carl Stamm, of the Union's International, that if the Union was decertified, Durham would refuse to give any wage increases. Tr. 998. In May 2014, former Durham employees hired by Allways East inquired to the NLRB about filing a petition against the Union's claim of representation, but the NLRB advised them they could not. Tr. 994-995; R-45.

All of the drivers and monitors working in both of Respondent's Yonkers and Wappingers Falls yards are guaranteed a minimum work week of 22.5 hours per week. GC-14; 825 and 868.

All of the Respondent's drivers, driver/dispatchers and monitors are supervised and managed by the Yonkers management staff. R-12; Tr. 291, 699-700, 800, 804, 823-24, 879-881, 918, 938, 947 and 983. In addition to Judy Koller, owner of Respondent, whose permanent office was located in Yonkers, who traveled to Wappingers Falls and would stay at a hotel in Wappingers Falls (just like the temporary drivers and monitors from the Yonkers yard), Marlaina Koller and Elida Wilson also went to Wappinger Falls, all of whom share the same office in Wappingers Falls when they are there. Id.; Tr. 796, 799, 802, 824, 940, 962-63. There was no "local autonomy." Id.

Respondent maintains only one (1) New York State and Federal DOT inspection number for both yards. R-33-34; Tr. 825 and 899.

Respondent maintains only one 19A School Bus Transportation Certification Registration Account/Number for both yards. R-23, R 7-8 and R 25; Tr. 392, 804, 842-44 and 856.

Respondent also utilizes the same 19A Trainer to certify the drivers of both yards. Id.

Respondent conducts all of its 19A training in Yonkers. Id. Respondent provides shuttle transportation for the Wappingers Falls drivers to and from both yards for said training. Id.

Respondent conducts all safety classes as one group, with the Yonkers yard and Wappingers Falls yard training together in one location. Id.; R-25.

Respondent covers the buses from both yards under one (1) insurance policy and all the buses are registered and insured in Yonkers. R-36; Tr. 908

Respondent covers both yards under the same liability insurance policy. R-28; Tr. 851

Respondent covers all employees at both yards under the same workers' compensation policy. Tr. 851.

Respondent utilizes the same parts suppliers under the same accounts for both yards. R37-38; Tr. 911-12 and 914.

Respondent, from its Yonkers yard, provides the same uniforms to the employees of both yards. Tr. 449, 403 and 855-856.

Respondent interchanges vehicles and equipment between the two yards. Tr. 917 and 928.

Respondent maintains a centralized Human Resource Department out of its Yonkers office for both yards wherein all hiring and firing decisions are made, all potential employees must forward applications and appear in Yonkers for the application process; personnel files from both yards are retained and filed in Yonkers; both yards implement the same policies and employee handbooks and both yards pool their employees for mandated drug and alcohol testing. Tr. 794, 817, 820-21, 826-827, 8231-32 and 984; R-23 and GC-14.

Respondent maintains only one (1) maintenance facility, which is at the Yonkers yard. Tr. 821-22, 866, 881, 909-11, 924 and 927. All of the Respondents mechanics are employed at the Yonkers yard and all mechanical servicing and repairs of buses for both yards occurs at the Yonkers yard. Id. There is no maintenance and/or repair facility at the Wappingers Falls yard. Id. The Wappingers Falls drivers or driver/dispatchers will transport the bus (if mobile) to the Yonkers yard for repairs and receive a ride back to the Wappingers Falls yard. Id.

All of Respondent's Company social events (including a brunch for Mother's Day, fishing trip for Father's Day and Christmas party) are organized for and attended by the employees from both the Yonkers and Wappingers Falls yards at the same location. Tr. 391 and 853-854.

Respondent maintains and conducts all of the Company accounting for both yards from the Yonkers yard including the billing, the accounts receivable and accounts payable, and the generation of checks. Tr. 291-94, 798-99, 802, 845, 848, 887-888, 937-938, 949, 951-952 and 955-56.; R-9, R-

27, R-26 and R-41. The creation and modification of the route sheets for both yards are performed by the Yonkers Office Manager Toni Ann Francisco and there is only one payroll for both yards which is generated in the Yonkers office. Id. All monthly attendance sheets, payroll cards and DOT reports (“pre-trip cards”) from Wappingers Falls yard are sent to Yonkers for processing where they are retained and filed along with the same records for the Yonkers yard employees. Id.

Respondent coordinated the same pay increases in September for the drivers and monitors for both yards. Tr. 854-55.

Respondent employs and utilizes the same doctor from Yonkers to conduct the required yearly medical physicals for the employees at both yards, as well as the initial April-May 2014 physicals for Wappingers Falls. Tr. 351 and 852-853.

Respondent maintains a two-way radio system wherein only supervisors/managers for both yards, Judy Koller, Marlaina Koller, Elida Wilson and Frank Ortiz, can listen simultaneously to a dedicated custom radio channel for both the Wappingers Falls and Yonkers buses for both yards. Tr. 918. This channel is for the sole use of upper management as all other employees (drivers and dispatch/drivers) can only listen to one channel, either Yonkers or Wappingers Falls, at a time. Id.

The Wappingers Falls dispatcher/drivers Leon and Rivera, were both former drivers transferred, as part-time to full-time employees, from Respondent’s Yonkers yard. Tr. 699, 920-21 and 941-43. Leon and Rivera received all their instructions and directives from the Yonkers office supervisory and management staff including President-Owner Judy Koller, Vice President Marlaina Koller, Elida Wilson, a/k/a Elida Wulczyn, Frank Ortiz and ToniAnn Francisco, all of whom also travel to the Wappingers Falls yard to supervise both in April and May 2014, up through present day. Tr. 291, 310, 680-81 and 688.

Carlos Rivera and Aldo Leon are the “contact people” in Wappinger Falls for the manager and supervisor staff in the Yonkers headquarters and for the client, Dutchess County DOH, as required by the contract between the parties. Id.; Tr. 706; GC5- See Ex. I, p. 3 para i. Rivera and Leon relayed information to the drivers from their supervisors/managers and Dutchess County DOH. Tr. 665. The Yonkers supervisory management staff advises and instructs all of the Respondent’s dispatchers and dispatcher/drivers, in both Yonkers and Wappingers Falls, Carlos Rivera, Aldo Leon, Marcos Ibarra, Ramona Durant and Domingo Morales, concerning who to assign the routes to. Tr. 310, 939 and 942-43. Also the Yonkers office approves all requests for time off (medical and/or personal) for all employees of both yards. Tr. 296 and 315. Rivera and Leon receive requests for time off which they relay said request to Yonkers for approval. Tr. 296, 315 and 358-60. Neither Aldo Leon nor Carlos Rivera have been issued the authority to grant employee time off without specific direction from the supervisory management staff in Yonkers. Tr. 296 and 315.

General Counsel’s own witness Lavander Cave testified Carlos Rivera and Aldo Leon never specifically addressed anything with him and that they relayed information to him and he relayed information to them. Tr. 551, 559. General Counsel witnesses Heidi Rodegerdts and Janet Hajba testified that their supervisors at the Wappingers Falls yard were Judy Koller and Marlaina Koller. Tr. 357, 444.

If an accident occurs in Dutchess County, the dispatchers/drivers are to contact the supervisors in the Yonkers office. Tr. 288, 300-301 and 881.

Only Marlaina Koller and Judy Koller have the authority to hire, fire or discipline employees for both the Yonkers and Wappingers Falls yards. Tr. 309, 570, 816 and 824. The dispatchers in both the Yonkers and Wappingers Falls yards have no authority whatsoever to hire, discipline or fire

employees. Id.<sup>10</sup> Not one witness testified as to any examples wherein Rivera or Leon hired, fired or disciplined any employee. Furthermore, Rivera and Leon maintain up to date 19A certified school bus licenses and routinely drive school buses every week (similar to the union driver/dispatchers at Durham) covering Dutchess County DOH routes for absent drivers. Id. and 980. Rivera and Leon held no supervisory or authoritative functions. R-23; Tr. 978 and 980.

The Wappingers Falls satellite yard is completely integrated and reliant on the Respondent's main office and yard in Yonkers; thus, Respondent's entire Company of both the Yonkers and Wappingers Falls yards represent one (1) operation for all purposes including union recognition and representation and therefore, Wappingers Falls alone, is not an appropriate stand-alone bargaining unit.

OPERATIONS: NO CONTINUOUS OPERATION FROM DURHAM

Respondent did not take over the same routes as Durham. Tr. 951-952. Durham never provided Respondent with its route sheets, children or parent identification, schools on said routes, pick up/drop off order, special designated wheel chair or other custom requirements for said children and routes. Id. Initially, Respondent's Office Manager, ToniAnn Francisco, (without any assistance from the Wappingers Falls dispatcher/drivers Rivera or Leon), created and constructed the Dutchess County route sheets solely from the incomplete route information provided by the Dutchess County DOH, not from Durham. Id.; Tr. 955-56. Upon review of the routes initially created and formulated by, Francisco, she was required to re-submit the new routes to Dutchess County DOH, with route modifications for children requiring private nurses and wheelchair accessible buses. Tr. 954-955 and 958-959. Upon final route completion and confirmation by Dutchess County DOH, Respondent

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<sup>10</sup> Contrary to the General Counsel's position and pursuant to her own testimony, Rivera and Leon did not terminate General Counsel witness Sherry Seibert. Tr. 312, 409, 609, 857-58, 1005 and 1019. Rivera and Leon merely picked up Ms. Siebert's vehicle at the direction of their supervisor Elida Wilson. Tr. 312 and 609. They informed Ms. Siebert that they were unsure of the status of her employment with Respondent and that she must contact a supervisor. Id. Marlaina Koller ultimately spoke with Ms. Seibert and terminated her employment with Allways East. Tr. 857-58

was performing 65 special education/needs routes, compared to the approximate 52 Durham routes under Durham’s contract with Dutchess County DOH. R-14 and R-15. As enumerated in the chart below, all the routes previously serviced by Durham except one (D1), were modified (some multiple times) during Respondent’s transportation of special education/needs children for Dutchess County DOH. Further, Routes D53 to D74 as well as those routes designated by the letter “A” were added to the Respondent’s Dutchess County routes. Tr. 957.

The comparison of the modifications between the Respondent and Durham Dutchess County special education/needs routes based on R-14, R-15, R-42 and Francisco’s testimony, are outlined as follows:

<u>ROUTE NO.</u>	<u>ALLWAYS STOPS</u>	<u>DURHAM STOPS</u>	<u>DESCRIPTION</u>
D1	2	2	Same
D2	2	3	One less run than Durham
D3	2	1	One more run than Durham
D4	11	6	Five more routes than Durham and Allways added mid-day
D5	9	7	Two more routes than Durham
D6	1	1	Different Route
D7	6	7	One less stop than Durham and only one stop same as Durham
D8	8	7	One more stop than Durham and two different stops than Durham
D9	NONE	9	
D10	9	6	Three more stops and four different stops than Durham
D11	9	6	Three more stops than Durham and four different stops than Durham
D12	7	5	Two more stops than Durham and four different stops than Durham
D12A	2	NONE	
D13	9	4	Five more stops and all different stops
D14A	4	NONE	
D14	7	6	One more stop. Three of seven stops different stops than Durham

D15	2	1	One more stop. Different stops
D16	10	5	Five different stops
D17	5	6	One less stop. Only two of five stops same as Durham
D18	5	5	One different stop
D19	8	6	Two added stops
D20	7	4	One more stop than Durham and four different stops than Durham
D21	6	4	Two more stops than Durham and three different stops than Durham
D22	4	5	One less stop than Durham
D23	7	8	One less stop than Durham and five different stops than Durham
D24	9	8	One more stop than Durham and two different stops than Durham
D25	7	6	One more stop than Durham and three different stops than Durham
D26	3	4	One less stop
D27	6	5	One more stop than Durham Two different stops as Durham; one is mid-day
D28	3	8	Five less stops
D29	5	9	Four less stops. Two different stops than Durham
D30	10	7	Three more stops than Durham. Only two of ten stops same as Durham
D31	6	5 (D3 1 a.m.& D3 1 MD)	One more stop than Durham and only Two of stops same as Durham
D32	NONE	7	
D33	NONE	5	
D33 MID	NONE	5	
D34	14	7	Seven more stops than Durham and only three stops same as Durham
D35	4	7	Three less stops than Durham
D36	4	5	One less stop than Durham and only two stops same as Durham
D37	11	7	Four less stops than Durham and only five of eleven stops same as Durham
D38	13	8	Five more stops than Durham and only five of thirteen stops same as Durham

D39	8	4	Four more stops than Durham and only two of eight stops same as Durham
D40	4	5	One less stop than Durham and only one stop same as Durham
D41A	4	NONE	
D41	10	9	One more stop than Durham and only three of ten stops same as Durham
D42	NONE	4	
D43	3	6	Three less stops than Durham
D44	7	5	Two more stops than Durham and only three of seven same as Durham
D45	NONE	5	
D46	4	2	Two more stops than Durham and none of the stops same
D47	3	3	One different stop than Durham
D48	NONE	4	
D49	NONE	4	
D50	NONE	5	
D51	NONE	6	
D52	1	1(D52 In & D52 Out)	Different stop
D53	4	NONE	
D54	4	NONE	
D55	7	NONE	
D56	1	NONE	
D57	5	NONE	
D58	2	NONE	
D59	1	NONE	
D60	4	NONE	
D61	5	NONE	
D61A	2	NONE	
D63	5	NONE	
D65	3	NONE	
D66	2	NONE	
D67	6	NONE	
D68	6	NONE	
D69	4	NONE	
D70	2	NONE	
D71	1	NONE	
D74	1	NONE	

R-14-15; Tr.42.

All of the four former Durham employee witnesses that testified on behalf of General Counsel, 1) Janet Hajba, 2) Heidi Rodegerdts, 3) Sherry Seibert and 4) Lavender Cave and Respondent's witness and former Durham employee (dispatcher/driver) MaryAnn Coe performed multiple routes while working for Durham and all five (5) of the employee witnesses did not continue all of the routes during employment by Respondent. Tr. 395-96, 431, 555, 613 and 619-620. Additionally, not all of these former Durham employee witnesses were driving Dutchess County DOH routes when their employment ended at Durham. Tr. 380. For instance, witnesses, Janet Hajba and Heidi Rodegerdts, were not working on a Dutchess County DOH route lost by Durham when they last worked for Durham, prior to employment for Respondent. *Id.* Furthermore, witness Sherry Seibert testified that when she worked at Respondent she only performed one route in the morning, compared to when she was working for Durham when she also drove a midday route and an afternoon route and worked 35-40 hours a week, she had a different monitor and a different route. Tr. 612-13 and 619-20. More importantly, on page 8 of his brief, GC improperly and incorrectly implies that Ms. Seibert continued her Dutchess BOCES run with Allways East. However, Allways East did not perform runs for Dutchess BOCES, as it was a different contract than the contract with the Dutchess DOH. Lastly, witness Lavender Cave was assigned a different route number and route while employed by Respondent compared to his Durham route. Tr. 542 and R-15. Both witnesses Lavander Cave and Sherry Siebert testified that they no longer were assigned the same Durham monitor on their route when employed by Allways East. Tr. 572-573 and 617-618.

Mr. Cave, a former Durham and Dutchess County driver for seven (7) years prior to his employment for the Respondent, testified that the Durham procedures for the pick-up and drop-off of the monitor on his bus was completely different than at Allways East. Tr. 543, 572-573. At Durham, Mr. Cave would pick-up and drop-off the monitor (Kim Dotzi) while on route. *Id.* At

Allways East, Mr. Cave was required to pick-up and drop-off the monitor (Jessica Oakes) at the Respondent's Wappingers Falls yard. Id.

The fueling process and procedures were completely different for drivers working at Durham than while working at Allways East. Tr. 588-590. At Durham, the drivers would fuel up their buses directly at the Durham yard. Tr. 588. However, at Allways East, the drivers were provided with fuel keys encoded in accordance with their social security number and the driver would fuel up their bus at fueling stations designated by Dutchess County DOH. Tr. 588 and 590.

At Durham drivers had two-way radios and when working at Allways East in April to June 2014, drivers used cell phones. Tr. 576.

At Durham, only one-third of the drivers were "park-outs" while at the Wappingers Falls yard almost all of the drivers were "park-outs." Tr. 379-380. While at Durham, General Counsel's witnesses stated they returned to the Durham base (Poughkeepsie) every day – at Allways East, they only went to Wappingers Falls once a week for 10 minutes. Tr. 460.

There was absolutely no continuous operation between Durham and the Respondent. Respondent did not take over Durham's location (as it rented its own facility and Durham continued at its two locations), did not take over Durham's buses or equipment, did not take over or use Durham's parts, inventory, policies, forms, files, employee information, disciplinary information, did not use the same fueling procedures, did not perform the same routes or use the same route sheets, did not allow the same monitor route pick up procedure, did not use the same uniforms, was not a nationwide union company as Durham. Tr. 572-73, 812, 822, 855-56, 905 and 1001-1002. In fact, Durham's Dutchess County DOH union bargaining unit (drivers, monitors and driver/dispatchers) still exists despite losing a portion of its Dutchess County work; and continued to operate in Dutchess County as a single bargaining unit consisting of its two locations in Red Hook

and Poughkeepsie. R-29-30; Tr. 810. Durham advised the drivers who drove routes under the Dutchess DOH contract that even though the contract was terminated, they still had jobs at Durham in the bargaining unit. Tr. 382. No managers or supervisors from Durham were hired at Respondent. The termination/disqualification letter issued to Durham and the attachment to said letter, unequivocally demonstrates that Dutchess County DOH was seeking completely different transportation service and performance from Respondent than it previously experienced with Durham. R-18 and R-20.

### ARGUMENT

Allways East can only be determined a legal employer-successor if: 1) there is “substantial continuity” of operations and 2) a majority of “an appropriate bargaining unit” are the predecessor employer’s employees at a time when the alleged successor has reached a “substantial and representative complement.”<sup>11</sup> Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36-41 (1987). As described in more detail below in Point A, Allways East did not continue the operation of Durham since Allways East did not take over Durhams’s contract, buy, use or take any of Durham’s property or equipment nor continue the same poor service and working conditions that employees had while at Durham. Second, even if it were decided that Allways East continued Durham’s operation, which it did not, as described in more detail below in Point B, Allways East’s Wappinger Falls yard was not an appropriate “stand alone” bargaining unit since Allways East centralized all management, pay structure, rules, policies and working conditions at its headquarters for both facilities in Yonkers and interchanged employees between the facilities, among other factors rebutting the single facility unit. ALJ Flynn did not rely upon one factor or one “main factor” in her

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<sup>11</sup> This determination made by the parties via stipulation which states “that the operative date for determining if successorship has been established is April 22, 2104. Tr. 11.

decision, but rather relied on many factors in finding that Wappingers Falls was not an appropriate stand-alone bargaining unit.

**A. CONTRARY TO GC'S GENERAL EXCEPTIONS 10, 12, 18, 19, 20, 21, 30, 31 AND 52 (AND OTHERS AS SET FORTH BELOW)<sup>12</sup> RESPONDENT IS NOT A CONTINUOUS OPERATION TO THE NATIONAL GIANT DURHAM SCHOOL SERVICES COMPANY**

Section 8(a)(5) of the National Labor Relations Act (the "Act") provides that it is unlawful for an employer to "refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158 (a)(5). Where a union's representation was established under a previous employer, the duty to bargain extends to a "legal successor." In re Dattco, Inc., 338 NLRB 49 (2002) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36-41 (1987)). The Supreme Court in Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987) sets forth the factors to consider in the determination of whether an employer successor situation exists; and, that all of the herein-below factors must be met in order for a legal successor determination:

- a) Whether the business of employers is essentially the same;
- b) Whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors;  
and
- c) Whether the new entity has the same production process, procedures, the same products and, basically, has the same body of customers. See also Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974).

The National Labor Relations Board (the "Board") in its application of determining whether a new employer is a "legal successor " of certain employees who formerly worked for another company,

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<sup>12</sup> Respondent will respond to General Counsel's General Exceptions generally throughout the argument as noted by the argument headers and will specify in the argument itself when it addresses General Counsel's specific Exceptions.

has consistently held that each case is primarily factual and based on the totality of the circumstances presented at each employer. NLRB v. Bur International Security Services, Inc., 406 U.S. 272 (1972). (emphasis added). Of course, even if the above is met, there still must be an appropriate bargaining unit, as will be discussed in Point B below.

In deciding whether a continuous operation exists the Board will take into consideration whether the new employer purchased any of the former employer's assets or property and whether the new employer acquired the majority of the previous employer's clients or business, as opposed to independent solicitation of the clients in a competitive marketplace. Lincoln Private Police, Inc., 189 N.L.R.B. 717, 719-21 (1971). Here, Durham's contract was terminated by their "client," Dutchess DOH, who then decided to enter into a contract with the next highest bidder "in the competitive marketplace," Allways East. In Lincoln Private Police, Inc. the Respondent Employer was not found to be a successor inasmuch as it utilized different uniforms, purchased new vehicles and new equipment, occupied different premises and did not carryover any supervisors from the alleged predecessor (a "factor" considered by the ALJ contrary to **GC's Exception 24**). Id.; Tr. 460, 652, 795, 351-52, 390, 443, 458, 564, 811-12, 817, 821-22, 832-33, 851, 905, 908, 922, 927, 948, 951-52, 955-56 and 1001-1002. Furthermore, in Williams Motor Transfer, Inc., 284 N.L.R.B. 1496 (1987), the Board found that a new employer was not a successor because it merely consolidated the previous employer's operation with "its own terminal and garage on the other side of town and continued to operate under its own name and operating authority," as found here. Id. at 1504.

In her decision, in contrast to **GC's Exceptions 10, 18, 20, 30 and 31** ALJ Flynn correctly decided that Allways East was awarded the contracted work with Dutchess County DOH and did not "take over" the operations of Durham and the operation of Durham and Respondent were "not essentially the same." The contract Durham had with the DOH was not "assigned" or transferred to

Allways East. That contract was terminated and a new contract was signed with Allways East. R-18. Allways East did not purchase any stock or assets, acquire, assign, partner with or talk to Durham regarding anything prior to being contacted by Dutchess County DOH, negotiating with Dutchess County DOH and commencing the emergency route work for Dutchess County DOH. Tr. 652, 795, 351-52, 390, 443, 458, 564, 811-12, 817, 821-22, 832-33, 851, 905, 908, 922, 927, 948, 951-52, 955-56 and 1001-1002. Allways East did not take over any of Durham's property, buses, equipment, employee personnel documents/files (discipline, testing, training, licenses, 19A applications, DOT physicals, payroll or tax information). Id. Allways East was never provided by Durham with Durham's route sheets, names of children, parent contact information, order of child pick-ups, special unique requirements on the bus (such as wheel chair needs, nurse accompaniment etc.) and did not run the same routes as Durham. Id. The evidence at trial clearly indicated that Allways East purchased new buses, equipment and child safety seats since monitors require the use of specialized equipment. Id. and Tr. 798. **(Contrary to GC's Exception 15 and 23)**. The only type of transportation performed by Allways East was special education transportation, as opposed to Durham who also did special education transportation and still did after Allways East commenced work for Dutchess DOH, as well as General Education transportation. Tr. 125, 128, 643 and 973-74. These buses were completely different from Durham's. Id.

Additionally, in GC's **Exceptions 2<sup>13</sup> and 4** and page 17 of his brief, GC argues that ALJ Flynn erred by failing to find that Allways East *intentionally* hired former Durham employees. First, in contrast to **GC Exception 4**, Janet Hajba, a witness for GC, even testified that she left employment with Durham without the intent to take a job with Allways East. Tr. 339. Second, GC fails to include case law utilizing "hiring intent" as a factor. Third, GC purports that what Marlaina

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<sup>13</sup> GC mischaracterizes ALJ Flynn's decision in **Exception 2** since Judge Flynn explicitly stated that Allways East hired 62 out of 82 workers from Durham, and even so she ruled that there was no substantial continuity. See ALJ Flynn's Decision p.3:28-32.

said to the applicants at the job fair was what eventually occurred, which is in fact not the case since after leaving their employment with Durham, the former Durham employees hired by Allways East had to advance through Allways East's application process and, as stated below, the employees' working conditions changed entirely. Tr. 351, 343, 815, 826-27.

Accordingly, in contrast to **GC's Exceptions 2, 4, 12 and 19**, the employees' working conditions at Allways East changed drastically. Moreover, at Allways East all of the drivers are permitted to take their buses home at night ("park-outs") compared to one third of the drivers at Durham. Tr. 335-36, 355, 365 and 431. The Allways East drivers utilized a different radio communication system than when working at Durham. Id. The Allways East drivers were assigned different monitors than at Durham. Tr. 572-573 and 617-618. At Allways East, the monitors were picked up at the yard. Tr. 572-573 and 617-618. At Durham, the drivers were permitted to pick up the monitor on route. Id.

Contrary to **GC's Exception 28**, not all of the Allways East drivers had the same hours as they had while at Durham. Tr. 612-13 and 619-20. As Janet Hajba, and Heidi Rodegerdts testified, they were working around 20-30 hours a week when they left Durham and worked 40 hours a week when hired by Allways East. Tr. 376, 411. Additionally, Sherry Seibert testified that she had a different schedule and hours when she worked at Durham because when she worked at Allways East she only performed one route in the morning, compared to when she was working for Durham when she also drove a midday route and an afternoon route and worked 35-40 hours a week. Tr. 612-13 and 619-20. Further, the employees, GC's own witnesses, testified that they did different routes at Allways East than they did when they left Durham. Tr. 380, 407, 410-12. Allways East and Durham provided its drivers with completely different fueling procedures. Tr. 588-590. At Allways East, the drivers are given encrypted key codes as opposed to at Durham when the drivers would fuel up at the

Durham yard. Id. Moreover, Sherry Seibert and Lavander Cave both testified that at Allways East they each had different monitors than when working at Durham. Tr. 572-573 and 617-618.

Contrary to **GC's Exception 1**, pursuant to the contract with the Dutchess County DOH, Allways East leased different properties than the Durham locations to operate its routes. Tr. 652-53, 795, 351-52, 390, 443, 458, 564, 817, 821, 832-33, 851, 908, 922, 927, 948, 951-52, 955-56 and 1001-1002. Marlaina Koller was advised by Dutchess County DOH that they wanted a facility in Dutchess County Tr. 652. While at Durham, General Counsel's witnesses stated they returned to the Durham base (Poughkeepsie) every day – at Allways East, they only went to Wappingers Falls once a week for 10 minutes (certainly not enough time to be able to testify about aspects of the Allways East operation- including what Aldo and Carlos did at Wappingers Falls). Tr. 400, 460. Moreover, Allways East implemented a completely different handbook than that used at Durham. GC-14 and R-16; Tr. 404.

Finally, Allways East did not hire any Durham management or supervisory personnel into its management staff. Id. Contrary to GC's argument under **Exception 24**, ALJ Flynn properly utilized the fact that Allways East had different supervisors as one of many, not the “dispositive”, factor in deciding that Allways East was not a successor to Durham. ALJ Flynn stated that the employees' working conditions changed and they had none of the same supervisors. ALJ Decision p. 7:22-24. Accordingly, pursuant to ALJ Flynn's decision at Allways East the employees' wage rates increased, they had different personnel policies and benefits, they had new buses and equipment, they had different routes, the fueling procedures were different, they had a different work location and their supervisors changed. Id. at lines 26-27 and p.5; 23

Moreover, GC's substantial reliance on Montauk Bus Company is flawed and incorrect because in Montauk the alleged successor took over an overwhelming majority of the predecessors

work. Montauk Bus Company, 324 N.L.R.B. 1128, 1135 (N.L.R.B. 1997)(“When Montauk obtained the bid from the Sachem School District, Montauk obtained about 90% of the work previously done by Laidlaw's employees who were physically located in the Bohemia” terminal.”). However, here, Durham’s union school bus operations and bargaining unit remained intact after Allways East agreed to accept the Dutchess County DOH’s emergency plea to contract with them to operate special education routes after the termination of the Dutchess County DOH contract with Durham for unsafe and inefficient special education/needs school bus transportation services R-29-30; Tr. 810. Contrary to **GC’s Exception 26**, Durham continued to employ union drivers and monitors performing within Dutchess County for other clients and also continued to actively solicit Allways East’s employees to quit and either start or return back to Durham. Id. In fact, Janet Hajba, and Heidi Rodegerdts, witnesses for GC, testified that they continued to do their Roundout routes with Durham. Tr. 373, 376 and 412. Durham’s union bargaining unit (drivers, monitors and driver/dispatchers) still existed despite losing a portion of its Dutchess County work; and continued at the time of the trial to operate in Dutchess County as a single bargaining unit consisting of its two locations in Red Hook and Poughkeepsie. R-29-30; Tr. 810. More importantly, in contrast to **GC’s Exception 4 and 26**, in March 2014 Durham informed its drivers that they would not be losing their jobs despite the loss of the Dutchess DOH contract! Tr. 382. In fact, GC admits in page 5 of his brief that Durham did not lay off any employees thus their operation continued virtually unchanged.

The Board has held that if the previous employer in a successor situation still exists at other locations after the new employer takes over a particular location, it is less likely that the new employer will be regarded as a successor. See Nova Services Company, 213 N.L.R.B. 95, 97 (1974). Not only did Durham continue to provide school bus transportation services to Dutchess County post its disqualification of certain special education/needs routes and contrary to GC’s assertion on page

15 of his brief that Allways East employed 75% of Durham's former drivers and monitors, the majority of Durham's 185 driver and monitor Local 445 bargaining unit remained intact at Durham. Tr. 118-120, 225, 810, 858-859 and 973-974; R-3 and R-44. 75% of Dutchess's 185 drivers and monitors, approximately 139, were not, contrary to GC's assertions, employed by Allways East at Wappingers Falls in April and May 2014. In fact of the approximately 84 employees assigned permanently to Wappingers Falls in April – May 2014, only a little more than half were former Durham employees. Tr. 11-12, 651.

The Board has also ruled, that if the size of the company changes from the previous employer to the new employer, then it is less likely that the new employer will be regarded as a successor employer. Tr-Free Fiber Co., LLC, 328 N.L.R.B. 389, 393 (1999); Band-Age, Inc., 217 N.L.R.B. 449, 450 (1975); Atlantic Technical Services Corporation, 202 N.L.R.B. 169, 170 (1973).

In comparison, GC cites cases that are easily distinguishable. In Van Lear Equipment, Inc., 336 NLRB 1059 (2001), the Board only ruled in favor of a single facility presumption where the employees hired by the respondent continued to do the same jobs under the same working conditions utilizing the same production processes, specifically, parking their buses in the same lot that they had while working for the predecessor. **(Contrary to GC's Exception 41)**. In Bronx Health Plan, 326 NLRB 810 (1998), the Board found continuity of operations because the new employer continued the same operation under the same name, in the same location, performing the same services in the same manner, and hired the same employees and supervisors to perform the same duties, none of which is the case here. General Counsel even states in his Supporting Brief that in Bronx Health Plan "all of the successor's unit employees had been employees of the predecessor," which is not true in the present case before the Board.

Contrary to GC's Exceptions 10, 12, 13, 14, 15, 18, 19, 20, 27, 28, 29, 30 and 31 the

Allways East Operation is completely different from Durham:

1) Durham provided school bus transportation for "general education" students, pre-school students and some special education/needs students. Tr. 125, 128 and 973-74. Yet, Respondent only provides school bus transportation for pre-school and special education/needs children. Tr. 643.

2) Durham is a national giant transportation provider. Tr. 971. Allways East is a "mom and daughter" small family run school bus operation servicing Westchester and now recently in Dutchess County. Tr. 793-94.

3) Durham is a multi-state union company operating under a Union collective bargaining agreement maintaining labor relations procedure for daily grievance and arbitration matters, Weingarten rights, union negotiations, shop stewards, dues and other remittance deduction procedures. Tr. 223, 226 and 971. Allways East operates under an "open door" family style policy. Tr. 708 and 793-94.

4) Contrary to GC's Exception 12, 13, 21 and 29, Respondent did not take over nor did its employees perform the same routes as Durham, which alone is a "significant change" in their working conditions. . Tr. 951-952. Initially, Allways East's Office Manager, Toni Ann Francisco, (without any assistance from the Wappingers Falls dispatcher/drivers Rivera or Leon or Durham), created and constructed the Dutchess County DOH route sheets solely from incomplete route information provided by Dutchess County DOH. Id.; Tr. 955-56. As a result, Allways East created entirely new special education/needs routes than were previously followed by Durham. Id.; See the route chart on pages 17-19 of this brief. In addition, Allways East was performing an additional 13 routes more than Durham for the schools. R-14-15; Tr. 42; See the route chart on pages 17-19 of this brief. Respondent was performing 65 special education/needs routes compared to the approximate

52 Durham routes. Id. In fact, all 65 of the Allways East Dutchess County school bus routes were different than Durham's Dutchess routes except for one. Id.; See the route chart on pages 17-19 of this brief. Indeed, all of General Counsel's former Durham driver and monitor witnesses testified, "through their eyes", that at Allways East, they did not continue all of the routes they worked when employed at Durham. Tr. 395-96, 431, 555, 613 and 619-620. Furthermore, contrary to GC's Exception 3, the few employees that GC had testify may have requested the same routes, but as stated above, the routes changed, which is why Allways East could not provide all the same routes to the same employees. This was recognized by the ALJ in her decision at p. 8: 12-13. More importantly, GC only produced 3 out of 85 employees to testify that they requested the same routes and monitors, but this was not the case for all 85 Allways East employees working at Wappinger Falls. In fact, three of GC's witnesses, Janet Hajba, Heidi Rodegerdts and Sherry Siebert testified that they did not do the same route at Allways East that they had done when they left Durham. Tr. 407, 441 and 619-20. According to Janet Hajba, Allways East gave her the route that Durham refused to give her. Tr. 396. Moreover, Lavander Cave testified that he had multiple routes at Durham, D34 and D3, but only had one at Allways East, D4, which was reduced from 11-12 children at Durham to 6 at Allways East. Tr. 555, 565, 568. Lastly, MaryAnn Coe testified that she did not have a specific route while at Durham, but did the D25 and D26 runs at Allways East. Tr. 967-68. Clearly, as the employees testified, in their eyes, that their working conditions changed as they all had different routes at Allways East than they had at Durham.

Additionally, GC argues in his brief with respect to his Exception 13, that there is no way to know that the Durham routes received at trial were the same ones used on the operating date since Mark Nusbaum testified that he only knew they were the routes created before his hire date of August 20, 2014. However, Nusbaum and their General Counsel testified that as representatives of

Durham, they produced route sheets that were in response to Allways East's subpoena requests, which specifically requested:

17. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Poughkeepsie facility from January 1, 2014 to June 1, 2014.

18. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Rhinebeck/Red Hook facility from January 1, 2014 to June 1, 2014.

Tr. 774; R-13. Accordingly, these documents were admitted in the Record and into evidence as the Durham route sheets in operation from January 1, 2014 through June 1, 2014. *Id.* Moreover, Nusbaum testified that a manager, Deb Benewerton, of Durham's Poughkeepsie office provided these documents as they were kept in the normal course of business. Tr. 775-76. Lastly, GC has waived his right to put forth this argument on appeal before the Board since GC withdrew his objections to these documents following the above testimony! Tr. 776; See United States v. Spruill, 808 F.3d 585 (2d Cir. Conn. 2015) ("We have identified waiver where a party asserts, but subsequently withdraws, an objection in the district court.") See also United States v. Weiss, 930 F.2d 185, 198 (2d Cir. 1991) (holding that defendant who withdrew objection to exclusion of documents waived right to appeal exclusion).

5) At Allways East all of the drivers are permitted to take their buses home at night ("park-outs") compared to one third of the drivers at Durham. Tr. 335-36, 355, 365 and 431. Contrary to **GC's Exception 27**, this is clearly an example of a term or condition of work since parking a bus by your house overnight requires permission from your employer and determines where and when a bus is driven. Respondent's employees begin and end their days at their house, instead of at Respondent's facilities. Contrary to **GC's Exception 27**, that ALJ Flynn relied on difference in park-outs between Durham and Allways East, ALJ Flynn used this factor as only one of many factors in

making her decision. See ALJ Flynn's Decision p.7-8 where ALJ Flynn lists the many factors used in making her decision.

6) Again in contrast to GC's Exceptions 12, 21 and 29, the Always East employee working conditions are drastically different than the deplorable working conditions at Durham which ultimately triggered Dutchess DOH's termination of the contract and removal of Durham from the improper routes at issue. R-20. In pertinent part, Dutchess County DOH received 52 complaints concerning Durham, 7 of which were deemed as serious incidents, including but not limited to, late and missed buses, drivers using cell phones while driving, the taking of unauthorized pictures of children, failure to properly buckle a child into his or her car seat, the verbal threatening of a child, the physical restraint of a child, the dropping a child off at the wrong location and multiple missed days due to the lack of drivers. Id. The situation became so severe that Gigi Hanewich, Durham's contact at Dutchess DOH, was spending close to 80% of her time addressing Durham issues and found that Durham's Dutchess County files were incomplete or missing. Id. As stated by GC witness Heidi Rodegerdts, Always East wasn't "gripping us out" of hours like Durham was doing. Tr. 469.

7) Dutchess County did not require Respondent to hold weekly, bi-weekly or for that matter any meetings at all as it had with Durham. Respondent entered as a new company providing different special education/needs school bus transportation services than Durham's negligent, incompetent and unsafe performance. R-20.

8) Always East does not employ any former Durham employees in its management or supervision staff. Tr. 982-83.

9) Always East purchased new buses and those new buses did not utilize the master Zonar operating system (recording hours worked, moving/stop/idle time etc.) utilized in the Durham buses. Tr. 390, 458, 911 and 1001.

10) Allways East does not follow the same corporate procedures and rules of conduct as Durham. In fact all of the Respondents company policies and procedures differ from those at Durham. Durham provided its employees with a sixty four (64) page Company handbook compared to Respondent's nine (9) page handbook. GC-14 and R-16; Tr. 404.

11) Durham is a large, national corporation and union transportation provider with offices and personnel all over the country that work with its local staff. Tr. 114, 120 and 125. Durham's payroll is completed centrally in Chicago, the location of its head office. Tr. 120. Cal Schmidt, a Durham employee, working in Durham's Canada office testified that he is the director of labor and employee relations for the National Express Corporation covering Transportation in Canada, Durham School Services and Petermann in the United States, as well as the National Express Transit Corporation in the United States. Tr. 114. On the other hand, Allways East's is a local New York special education/needs mom and daughter owned and operated school bus company with only one main office in Yonkers and a satellite yard in Wappinger Falls. Tr. 352 and 539.

12) Contrary to **GC's Exception 14**, the testimony from "the eyes of the employees" at trial was that employees at Allways East did not go back to base on a daily basis, as they did at Durham. At Allways East, they only went back once a week for 10 minutes to drop off paperwork. Tr. 363, 400, 413 and 459-60.

13) In response to **GC's Exception 22**, GC provides no law to support the importance of familiarity with the children. Rather, he just states that the ALJ made no mention of this and should have given more weight in deciding on successorship.

As is evidenced from the above and the evidence adduced at trial, Allways East did not maintain and/or continue a legally sufficient "substantial continuity" of the working conditions experienced by the drivers and monitors who formerly worked at Durham in April/May 2014, (the

stipulated timeframe) to rule that a “successorship” exists. Contrary to GC’s Exception 21, ALJ Flynn gave proper weight to the working conditions through the eyes of the employees and did not fail to note that Respondent did not produce witnesses to testify that their jobs have changed. First, it was GC’s burden to show that there was substantial continuity between Allways East and Durham, not Respondent’s. Second, ALJ Flynn gave the proper weight, taking the testimony of 5 former Durham employees, as well as the testimony of others, in ruling that there was no substantial continuity between Allways East and Durham. See ALJ Flynn’s Decision p. 8:22-25.

The cases cited by General Counsel to support successorship are easily distinguishable. See NLRB v. Burns Int’l Sec. Servs., Inc., 406 U.S. 272, 278, 280-281, footnote 4 (1972) (respondent employed a majority of predecessor’s employees, both respondent and predecessor were nationwide organizations and performed the identical services at the same facility); Montauk Bus Company, 324 NLRB 1128, 1135 (1997) (respondent obtained 90% of work previously done by predecessor’s employees, whereas, here it was a small percentage and did not affect staffing at Durham); NLRB v. South Harlan Coal, Inc., 844 F.2d 380, 383-384 (6<sup>th</sup> Cir. 1988) (respondent used same trucking company as predecessor, respondent purchased predecessor’s stock and respondent retained predecessor’s employees without requiring submission of a job application); Bronx Health Plan, 326 NLRB 810, 812 (1998), enforced 203 F.3d 51 (D.C. Cir. 1999) (employees worked for respondent and predecessor, predecessor provided managerial and other staff to respondent and predecessor and respondent were at same location and under same name); NLRB DeBartelo, 241 F.3d 207, 211 (2d Cir. 2001) (respondent’s employees performed the same tasks in the same work unit with the same co-workers in the same facility on the same equipment as for predecessor); Louis Pappas’ Restaurant, 275 NLRB 1519, 1525 (1985) (respondent used same facilities and same equipment as predecessor).

**B. CONTRARY TO GC'S GENERAL EXCEPTIONS 25, 32, 39, 40, 41, 44, 50 51 AND 52 (AND OTHERS AS SET FORTH BELOW) WAPPINGERS FALLS IS NOT AN APPROPRIATE "STAND-ALONE" BARGAINING UNIT**

The presumption that a single facility unit is appropriate is rebutted when the facility is "so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." In re Dattco, Inc., 338 NLRB 49, 49 (2002) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36-41, 107 S. Ct. 2225, 96 L.Ed. 2d 22 (1987)). The Board examines a number of community of interest factors in its "successor employer" analysis of whether a "single-facility" presumption has been rebutted, including: 1) central control over daily operations of labor relations, including the extent of local autonomy; 2) similarity of employee skills, functions and working conditions; 3) the degree of employee interchange; 4) the distance between the locations; and 5) bargaining history, if any exists." J&L Plate, Inc., 310 NLRB 429 (1993); R&D Trucking, Inc., 327 NLRB 531 (1999); D&L Transportation, Inc., 324 NLRB 160 (1997); Hilander Foods, 348 NLRB 1200 (2006). Moreover, the Board in Dattco stated that "each case must be assessed on its own facts, even where, as here, the Board has made previous determinations about other facilities of the same employer." In re Dattco, Inc., 338 NLRB 49, 49 (2002) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36-41, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987)). **(Contrary to GC's Exception 41).**

General Counsel contends that the Wappingers Falls yard is an appropriate "stand alone" bargaining unit. Conversely, Respondent avers, and ALJ Flynn agrees, based on the evidence adduced at trial, that the Wappingers Falls yard must be considered together with the Yonkers yard inasmuch as both Allways East yards function as an integrated single entity and school bus operation.

General Counsel argues that the 84 drivers, monitors and driver/dispatchers (including 22 non-Durham hires) and the 8-25 drivers and monitors from Yonkers who are transported daily and weekly to Wappingers Falls, working at Allways East's Wappingers Falls yard represents an appropriate "stand alone" bargaining unit separate and apart from Allways East's 233 drivers and monitors working out of its Yonkers yard. Tr. 14. However, the controlling facts surrounding the Respondents overall school bus operation (Yonkers and Wappingers Falls yards) support the only logical and practical legal conclusion that the Wappingers Falls yard operation and the 84 permanent employees (drivers, monitors and driver/dispatchers) and 8-25 temporary employees working in said yard are demonstrably merged and integrated into the Respondent's entire school bus operation of 318 total drivers, monitors and driver/dispatchers employed at both of Allways East's yards.

Similar to the facts in this case as outlined *infra*, the Board in Marine Spill, 348 N.L.R.B. 1282 (N.L.R.B. 2006) held that "[t]he common thread in...cases where the single facility presumption was rebutted, in addition to centralized control of labor relations and personnel functions by the new employer among several facilities, was no evidence of local autonomy or day to day local supervision at the predecessor facilities, evidence of common day to day supervision at the different plants, evidence of regular interaction among employees and employee transfers among the facilities including the petitioned for units." Marine Spill, 348 N.L.R.B. at 1287. The Board has denied "successor employer" determinations based on rebutting the single-facility presumption, in cases with fact patterns maintaining a centralized main office such as in Allways East. For example, the Board has held that where all human resources personnel are based in one location, the Employer enforces uniform personnel policies in all of its facilities, the pay scales for all employees are set at one location, and training is conducted centrally, then the single-facility presumption is rebutted. See Mavis Tires Supply Corp., 2004 NLRB LEXIS 471 at \*\*21-22 (N.L.R.B. May 5, 2004) (a local

facility manager that has some day-to-day control over an employee's working conditions such as directing the employee's work and lunch schedule, does not preclude a finding that the single facility presumption is rebutted so long as the local manager's decisions "appear dictated by the Employer's centralized policies"); Waste Mgmt. of Wash., Inc., 331 NLRB 309, 309, 311 (2000) (lack of local autonomy at the second facility where there was no permanent supervisor); R&D Trucking Company, 327 NLRB 531 (1999) (common supervision- no local manager at one of the facilities; frequent interchange); Novato Disposal Services, 328 NLRB 820 (1999) (common supervision of employees at all locations); Dayton Transport Corp., 270 NLRB 1114 (1984) (final authority on all personnel decisions centralized); Big Y Foods, Inc., 238 NLRB 860 (1978) (significant central control of day-to-day labor relations including hiring, discipline and grievance handling); Prince Telecom, 347 N.L.R.B. 789, 792-793 (2006) (Management at the Company's headquarters was responsible for hiring, firing and disciplining and set all of the facilities budgets and pay scales; policies and benefits were uniform throughout the Company and training was centralized.); Budget Rent A Car Systems, Inc.).

Contrary to **GC's Exception 41** and as found by ALJ Flynn, the facts surrounding the Allways East school bus operation are directly on point with the school bus operator in Dattco (and arguably more operationally integrated than Dattco) and with the holdings in Marine Spill and those cases cited above, more so than in Van Lear or Dean Transportation, wherein the Board determined that a single facility was not an appropriate bargaining unit separate and apart from the Employer's overall operation. In Dattco, the bus drivers at both facilities possessed the same skills, certifications and performed the same job duties all under the same working conditions. 338 NLRB at 50-51. Furthermore, the main facility headquarters in Dattco was responsible for assigning routes, hiring, firing, formulating policies and procedures, setting wages and benefits, carrying out labor relations,

payroll, accounting and storing records. Id. Additionally, the Company trained all its drivers at the same facility. Id. Finally, the Board in Dattco ruled that the two employer facilities were considered one unit even though the dispatcher of the facility at issue possessed limited authority directing the drivers, issuing the drivers warnings and communicating with headquarters. Id. In comparison, in Van Lear Equipment, Inc., 336 NLRB 1059 (2001), the Board ruled in favor of a single facility presumption because the Board found that there was no interchange of employees and the local supervisors had significant labor relations authority including interviewing applicants, recommendations for hire, giving oral and written warnings, suspending employees for drug and alcohol, or safety infractions. Id. None of the factors in Van Lear are present here.

As shown with the facts below and in contrast to **GC Exception 44**, none of the factors found in Van Lear, or any other case finding an appropriate stand-alone single facility, are found here since at Allways East there was a community of interest for both the Yonkers and Wappingers Falls yards:

1) provide Yonkers and Wappingers Falls preschool and special education/needs transportation services. Tr. 970;

2) the drivers and monitors at the Wappingers Falls yard maintain and perform the same job duties (driving and/or driving/dispatching or monitor duties), skills (special education/needs services,), certification (19A school bus transportation licenses and DOT certifications & annual physicals) and training (transportation safe driving courses, special education/needs training, emergency responses- all done together at the same facility) as the drivers and monitors at Yonkers. Id.; R-23, R 7-8 and R 25; Tr. 392, 351, 804, 842-44, 852-53 and 856;

3) The Yonkers yard shuttles drivers and monitors to Wappinger Falls on a daily basis to perform cover and route work for Dutchess County during the relevant timeframe,<sup>14</sup> as well as having Yonkers yard drivers and monitors staying at hotels in the area while doing so. **(Contrary to GC Exception 5 finding it within the stipulated “timeframe”)**. R-32: Tr. 301, 746-749, 834, 842, 883-84, 888-890, 896 and 918.

4) GC also argues that the wage structure were not the same for both facilities. However, GC is wrong in how he phrased **Exception 45**. ALJ Flynn stated in her decision that both facilities have same pay scales but did not specify that they had the same pay structure. ALJ p.5:2. Nonetheless, both facilities received the same pay increases at the same time, \$1.00 for drivers and .50¢ for monitors and the office personnel stationed in Yonkers decided who received increases and determined pay scales. Tr. 802, 854-855. Further, there is only one payroll for both facilities which is done at Yonkers. Tr. 845, R-26. More importantly, GC stated in its brief and GC’s witness, Janet Hajba, testified that she received the same pay at Allways East as the Yonkers facility drivers. Tr. 350.

5) Lastly, in **Exception 43**, GC argues the AJL failed to note that drivers and monitors from Wappingers Falls have never been to the Yonkers location or know who works there. However, employees from Wappingers Falls would go to the city of Yonkers for training and social events. Tr. 853-854. Furthermore, GC’s own witness, Lavander Cave, testified that he would speak to Elida and Lori regarding payroll issues, both of whom work out of Yonkers- Tr. 581, 596. GC’s other witnesses, Janet Hajba and Heidi Rodegerdts, testified that they were informed by management in Yonkers that they were hired by Allways East, not someone from Wappingers Falls. Tr. 348 and 448. GC cannot argue that there was not substantial interchange from Yonkers to Wappingers Falls.

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<sup>14</sup> Contrary to GC’s **Exception 5**, as stipulated by the parties, the relevant timeframe is April 22, 2014 and the full complement of employees reached in May 1, 2014. Tr. 11.

There is no legal requirement that the interchange has to operate in both directions- just that it exists. All the witnesses testified to knowing Judy Koller and Marlaina Koller. Tr. 344, 357, 365, 444, 447, 451, 463, 547-48, 580, 609 and 983-84.

At Allways East, in contrast to GC's Exception 9, 39, 41, 46 and 48, its operating facts are the same as to the operating facts in Dattco, Mavis Tires, Marine Spill and the other supporting cases cited by Allways East in that it:

1) Contrary to GC Exception 48, manages and supervises the Yonkers and Wappingers Falls employees from its Yonkers corporate office including the hiring, discipline and firing decisions. R-12; Tr. 291, 699-700, 800, 804, 823-24, 879-881, 918, 938, 947 and 983. The management staff in Yonkers also travels to Wappingers Falls, on a temporary basis, to provide supervision when needed. Tr. 291, 823-24, 883 and 961-962; 2) Contrary to GC Exception 9 and 46, conducts all human resources functions for both the Yonkers and Wappingers Falls yards from the Yonkers corporate office including drafting and distribution of Company policies, regulations and workplace rules which are the same for both locations and very different than Durham's policies and rules. Tr. 794, 817, 820-21, 826-827, 8231-32 and 984; R-23 and GC-14; 3) Contrary to GC Exception 9 and 46, maintains all employee personnel files and employee information for both the Yonkers and Wappingers Falls yards at the Yonkers corporate office including tracking of employees hire date, attendance record, time off days, certifications, licenses and physicals, DOT cards, discipline and discharge documentation. Id.; 4) Contrary to GC Exception 9 and 46, all office, accounting and payroll functions for both the Yonkers and Wappingers Falls yards are maintained, generated and conducted from the Yonkers corporate office including billing, accounts payable, accounts receivable, employee tax forms, pay deductions, payroll cards and wage increases. Tr. 802; 5) generates, maintains and modifies all school bus routes for both the Yonkers and Wappingers Falls

yards from the Yonkers corporate office. Tr. 291-94, 798-99, 802, 845, 848, 887-888, 937-938, 949, 951-952 and 955-56.; R-9, R-27, R-26 and R-41; 6) performs all mechanical services and repairs for both the Yonkers and Wappingers Falls buses at the Yonkers yard (the Yonkers yard is the only one of the two yards with mechanics and a maintenance and repair facility). Tr. 821-22, 866, 881, 909-11, 924 and 927; 7) conducts all group safety training and social events at one venue, in Yonkers, for the employees at both the Yonkers and Wappingers Falls yards. Tr. 391-92, 832-33 and 853-54. Contrary to **GC's Exception 11**, characterizing that the trainings were done at Yonkers without noting that they were not done at the Yonkers facility, all 19-a training for both facilities were done by same trainers in the city of Yonkers. 392, 844, 856. In April-June, Always East never had 19-a trainer in Wappinger Falls. Tr. 799-800. GC misses the point that Yonkers and Wappingers Falls employees had a "community of interest" and did 19-a training as one group.

Regarding **GC's Exceptions 6, 7, 8, 33 and 38**, Judge Roman, who denied GC's 10(j) injunction request in this matter, ruled that the Always East driver/dispatchers at the Wappingers Falls yard (alleged and pled as "agents" in General Counsel's Consolidated Complaint) have limited authority and "lack authority to make hiring, firing, or disciplinary decisions." See GC-1L, wherein Judge Roman's decision can be found in the record cited as Murphy v. Always East Transrtation, Inc., 14-cv-8570, page 6 (S.D.N.Y. 2014) citing In re Dattco, Inc., 338 NLRB 49, 49 (2002) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36-41, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987)); See also Budget Rent A Car Systems, 337 NLRB 884 (2002) (in ruling that the petitioned-for single-facility units were inappropriate the Board found that the branch managers at issue had limited authority in that they scheduled the employees regular working hours but had little to no authority regarding hiring, firing, disciplining, wages and benefits since labor relations were centralized).

More importantly, at the hearing before ALJ Flynn, multiple witnesses for the General Counsel and the Respondent testified that the dispatch/drivers at Allways East have no authority whatsoever to hire, fire or discipline employees. Tr. 309, 570, 816 and 824. Further, contrary to the GC's Exception 16 and as GC admits in his own brief on page 9, GC's witness Sherry Seibert ("Seibert"), in addition to Allways East's Wappingers Falls drivers/dispatchers, Carlos Rivera ("Rivera") and Aldo Leon ("Leon"), all testified that neither Leon nor Rivera terminated or communicated the termination decision to Seibert. Tr. 312, 409, 609, 857-58, 1005 and 1019. In fact, Seibert testified that she was terminated by Marlaina Koller. Id. <sup>15</sup>

Interestingly, General Counsel specifically elected to avoid pleading Rivera and Leon as Section 2(11) supervisors in its Complaint inasmuch as General Counsel was well aware that it could not prove that the Wappingers Falls dispatcher/drivers were supervisors under the Act. Instead,

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<sup>15</sup> GC's Exception 34 must be rejected since ALJ Flynn considered and rejected GC Exhibit-15 at the hearing and instead allowing GC to question the witness, Marlaina Koller, on the document. As per Victor's Café, 321 N.L.R.B. 504 (N.L.R.B. 1996), a case cited by GC, "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." Moreover, an ALJ's credibility finding based on witness demeanor is afforded deference by the Board since "the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified." Standard Dry Wall Products, Inc., 91 N.L.R.B. 544, 545 (N.L.R.B. 1950). Here, contrary to GC's argument on page 31 of his brief, GC-15 is not an attorney admission or position statement. The document is a questionnaire filled out by hand by Marlaina Koller. It is not a sworn statement or an affidavit. Ms. Koller did not even sign the document. Further, all the information needed from the document is evidenced in the 16 pages of transcript in the record as ALJ Flynn had the advantage of observing the witness, Marlaina Koller, testify regarding the document. Tr. 675-691. As Judge Flynn correctly decided, the document should not be included in the record before the Board since GC was given ample opportunity to elicit the testimony from the document at the hearing. Moreover, Judge Flynn stated that the document has "certainly limited probative value," likely based on the fact that Ms. Koller has over 200 pages of live trial testimony where she was subject to direct and cross-examination. Tr. 683, 629-769 and 793-875. Accordingly, GC-15 has even less probative value since ALJ Flynn states that Ms. Koller's written responses on the document were not "really responsive to the questions that were asked," and were answered on July 23, 2014, long past the April 22, 2014 operative date of this case. Tr. 679. In fact, Ms. Koller testified, inapposite to GC-15, that Aldo Leon is not a supervisor or a manager, rather that he is just a contact person. Tr. 680. Additionally, the cases cited by GC are easily distinguishable. In Florida Steel Corporation, 235 N.L.R.B. 1010, 1011-1012 (N.L.R.B. 1978) the Board remanded the proceeding so that the parties would have an opportunity to adduce evidence from the rejected document. However, as stated above, GC had an absolute opportunity to question the witness, Marlaina Koller, on the document. Moreover, in Massillon Hospital Association, 282 N.L.R.B. 675 (N.L.R.B. 1987) the Board ruled that the Respondent never disavowed the rejected document. However, in the present case, Marlaina disavowed the document in her testimony. Tr. 689-91. Lastly, GC's Exception 36 must be rejected since in her the decision, at the pages cited by GC in its Exception, ALJ Flynn did not specify that her findings of fact were based solely on Marlaina Koller's testimony. See ALJ Flynn's Decision p.9:8-36. In reality, Judge Flynn used all the evidence adduced at trial, inclusive of multiple witness testimony and documentary evidence, in deciding that Allways East was not a successor to Durham.

General Counsel pled in its Complaint that Rivera and Leon were Section 2(13) of the Act agents of the Respondent in a desperate attempt to bind Rivera and Leon's actions as an extension of or agent of Management to try to establish "local autonomy" to support an appropriate "stand-alone" bargaining unit finding.

However, with respect to General Counsel's argument concerning the "agent" status of Rivera and Leon, both ALJ Flynn and Judge Roman found that General Counsel's often cited case Dean Transportation, was inapposite to the accurate application of the facts pertaining to the Allways East Wappingers Falls driver/dispatchers whose job functions were limited to merely "relaying" information originated and instructed from Yonkers or relaying information from parents or Dutchess County to Supervisors in Yonkers. See ALJ Flynn Decision at p.4:9; See also GC-1L, wherein Judge Roman's decision can be found in the record cited as Murphy v. Allways East Transportation, Inc., 14-cv-8570, page 6-7 (S.D.N.Y. 2014) citing Dean Transportation 350 NLRB 48 (2007). GC argues that MaryAnn Coe's statement (GC-19) implies that Aldo and Carlos were agents. However, both Janet Hajba, and Heidi Rodegerdts did not testify to the same and as General Counsel's own witness Lavander Cave testified, Rivera and Leon never specifically addressed anything with him and they only relayed information to him and he relayed information to them. Tr. 551, 559. **(Contrary to GC's Exception 35** that the statement at issue should have been given "proper weight"). In fact, in the eyes of Janet Hajba, and Heidi Rodegerdts, Judy and Marlaina were their supervisors as Carlos and Aldo were just dispatchers. Tr. 354-57, 442, 444. It is beyond Respondent, how GC attempts to use the perspective of its two witnesses, Janet Hajba, and Heidi Rodegerdts, when Heidi testified that she has no idea what the other employees do at Allways East and Janet testified that she would only stop in the Wappingers Falls office for 10 minutes once a

week. Tr. 400, 460. There is no way for these employees to know or have a legitimate opinion as to what Carlos and Aldo did on a daily basis.

More importantly, in opposite to page 28 of GC's brief regarding Exception 35, if the Board reviews all the testimony and evidence before it, it would agree with ALJ Flynn's evaluation of MaryAnn Coe's testimony. MaryAnn Coe states in her affidavit and at trial that she would ask Marlaina, not Carlos and Aldo, for time off as Marlaina comes to Wappingers Falls once a week. Tr. 1009-10. Additionally at trial, MaryAnn Coe testified that her affidavit is not discussing what occurred in April or May of 2014, the operative date, but rather what took place at the end of the school year in June 2014. Tr. 1015. Moreover, MaryAnn Coe testified that she never referred to Aldo and Carlos as supervisors. Tr. 1017. Rather, she stated that Aldo was just a driver/dispatcher and that Carlos had the same job duties as Aldo. Tr. 1008-09, 1017. In fact she testified that she did not know whether Carlos had fired anyone and only thought he might have because that was what other employees had told her. Tr. 1018 and 1020. According to Ms. Coe, Carlos and Aldo did the same non-supervisory dispatcher work as she did when she was at Durham which included making and answering calls, calling parents and answering the radio and further stated that Carlos never fired anyone. Id.; Tr. 1010. MaryAnn Coe was part of the bargaining unit in question at Durham as a dispatcher performing these same duties!

More importantly, GC attempts to rely heavily on MaryAnn Coe's affidavit which is littered with hearsay, as she states numerous times how other employees viewed Aldo and Carlos. GC-19. Moreover, MaryAnn Coe uses phrases as "I believe" and states "I am not certain" when prodded by the NLRB to a question about Carlos or Aldo. Id. ALJ Flynn did not believe that the affidavit had probative value since it was taken outside the operative date; its only value being in regard to Sherry

Seibert's termination. Tr. 1016-17. The affidavit of one witness cannot possibly be accepted as the truth for how every single worker working at Wappingers Falls viewed Carlos and Aldo.

Allways East's Wappingers Falls drivers/dispatchers, Rivera and Leon, similar to the Dattco dispatcher staff's limited authority, have no management, supervisory or agent authority. (Respondent's driver/dispatcher have arguably even less authority than the Dattco dispatchers),

Contrary to GC's assertions in his brief on page 27 and Exceptions 7, 8, 9 and 38 and pursuant to ALJ Flynn's decision on pages 4:7-11, 9:5-28 and 10:13-17, Rivera and Leon perform the following duties:

1) only arrange for route coverage in the event that a driver/monitor cannot cover a route; 2) talk with parents regarding absent children due to sickness, late buses and delays due to weather; 3) act as "contact persons" as defined within the transportation contract between Respondent and Dutchess County DOH who are required to merely communicate and convey information to and from the main office in Yonkers; 4) maintain their 19A school bus licenses and annual DOT physicals; 5) actually drive school bus routes every week to cover routes due to employee absences; 6) convey any employee requested time off (if the employees do not contact Yonkers directly) to the Yonkers corporate office; Tr. 288-291, 296, 300-01, 310, 315, 358-60, 486, 508, 680-81, 688, 699, 706, 920-21 and 941-43; GC5- See Ex. I, p.3 para i.

Lastly, GC argues in Exception 6 that there was local autonomy since the President of Allways East, Judy Koller, was stationed in Wappingers Falls. However, Judy was not "stationed" in Wappingers Falls as her main office was in Yonkers. Tr. 796, 799, 802, 824, 940, 962-63. Judy was at the Wappingers Falls location on a temporary basis around April and May 2014. Id. Judy stayed at a hotel while in Wappingers Falls, just like the temporary drivers and monitors from Yonkers, since she did not have a residence, and was not "stationed," in Dutchess County as her home was located in

Greenwich, Connecticut. Tr. 796. Judy's office was in Yonkers as was with all other management-supervisory employees of Allways East. Tr. 962-63. She did not have a permanent office in Wappingers Falls since management, with their permanent offices located in Yonkers, shared one office on a needed basis in the Wappingers Falls location. Id.

The Board in Trane, 339 NLRB 866 (2003) found that the Respondent in that case rebutted the presumption of a single-facility unit. See also Petrie Stores Corp., 266 NLRB 75, 76 (1983). In order to do so, the Board stated that it "has never held or suggested that to rebut the presumption, a party must proffer 'overwhelming evidence...illustrating the complete submersion of the interests of employees at the single store; nor is it necessary to show that the 'separate interests' of the employee were sought out and "obliterated". Id.

Contrary to GC's brief, Allways East's operating facts are similar to the operational facts In Trane:

1) Both employ employees at two facilities who possess identical skills, perform identical functions and identical working conditions; 2) the drivers at both facilities receive the same 19A certification and training; 3) all corporate supervisory functions originate from one central office here, Yonkers, which was responsible for all hiring, discipline and firing decisions; 4) the central office controls the daily operations including all management, administrative, human resource functions, accounting, payroll and retention of all employee and corporate files. Accordingly, the Board in Trane ruled that "[t]he complete absence of any separate supervision or other oversight at the [second] site in these circumstances necessarily leads to the conclusion that the [second] location has no local autonomy apart from [the main office]." Trane, 339 N.L.R.B. 866, 868 (N.L.R.B. 2003).

Moreover, in Trane the Board found that the single-facility unit presumption was rebutted despite the fact that there was a 108 mile difference between the two facilities and a lack of specificity as to the level of interchange between the facilities. In our case, contrary to GC's assertion in his brief regarding **Exception 37**, ALJ Flynn took judicial notice of the distance, as there is between a 50 and 60 mile distance between the yards and daily interchange between the facilities. See also Waste Management Northwest, 331 NLRB 309 (2000) (42 mile difference and minimal interchange rebuts single facility presumption); In re Dattco, Inc., 338 NLRB at 50 (there was a distance of 55 miles between the locations rebuts single facility presumption).

Lastly, Esco, 298 NLRB 837 (1990), a case that General Counsel cites, is not on point. In Esco, the Board found a single facility unit even in the absence of a statutory supervisor at the separate location. Id. However, GC misstates the law and facts established in Esco. The Board in Esco ruled that the single facility presumption was not rebutted even though there was limited authority, not because there was local autonomy. Id. at 840. The Board looked to the other factors such as the lack of interchange and the great distance between the facilities in deciding that the presumption was not rebutted. Id.

Furthermore, in Mavis Tires, the Board in addressing the "relay of information" job function and procedure evident in employer- successor cases, ruled that a local facility manager that has some day-to-day control over an employee's working condition, such as directing the employee's work and lunch schedule, does not preclude a finding that the single facility presumption is rebutted so long as the local manager's decisions "appear dictated by the Employer's centralized policies." Mavis Tires Supply Corp., 2004 NLRB LEXIS 471 at \*23-24 (2004).

Additionally, other cases cited by General Counsel for the proposition that Wappingers Falls is an appropriate single facility unit, are easily distinguishable. In Children's Hospital of San

Francisco, 312 NLRB 920 (1993), there was a merger of two hospitals “akin to that of a stock transfer,” the facility continued to operate as a medical facility in the same buildings as prior to the merger, the facility utilized the same equipment and offered the same services with the same personnel and immediate supervision, and the transaction was nothing more than a corporate name change; by contrast, in the instant matter, there was no purchase, transfer or merger of facilities between Durham and Respondent, and Respondent utilized its own facility, equipment and personnel without the same supervisors. In Mayfield Holiday Inn, 335 NLRB 38 (2001), enforced, 333 F.3d 646 (6<sup>th</sup> Cir. 2003), the respondent purchased/acquired the facility from an entity who purchased it from the predecessor employer; by contrast, in the instant matter, as noted above, there was no sale or purchase by Respondent of Durham’s facility, assets or any of their equipment. Lastly, in D&L Transportation, Inc., 324 NLRB 160 (1997), the Board only found sufficient local autonomy where the facility in question had a local manager responsible for hiring employees, issuing minor discipline and granting time off requests, in addition to a dispatcher. However, here, as stated previously, Allways East did not have a local manager with such responsibilities at its Wappingers Falls facility.

The within matter is analogous to P.S. Elliott where the Board found that the employer rebutted the presumption of a single-facility unit as a result of the personnel matters handled by central corporate location, the employees’ wages were based on the market, the central office handled all labor and employment policies and all employees were to follow the same rules and procedures. P.S. Elliott, 300 NLRB 1161 (1990).

Contrary to GC’s Exceptions 5, 42 and 47, the degree of operational and employee interchange evident between Allways East’s Yonkers and Wappingers Falls yards overwhelmingly suffices to rebut the presumption of an appropriate single-facility bargaining unit. See Waste Mgmt.

of Wash., Inc., 331 NLRB 309, 309, 311 (2000) (the Board reasoned that even though the four or five instances of employee interchange per week was considered "minimal," it did not alter the fact that the single-facility presumption had been rebutted). GC argues that permanent transfers are less significant than temporary transfers, but Allways East had both! The permanent transfers included Carlos, Aldo and Freddie Tr. 833. Additionally, there were a significant amount of temporary transfers including 8 to 15 employees that were shuttled on a daily basis by a Yonkers driver, Marcos Ibarra, and a number of other employees that were stationed in a hotel in Dutchess County for the week. Tr. 746-749, 834-36, 842 and 896. Furthermore, in **Exceptions 5, 42 and 47**, GC argues that the evidence of limited interchange during a startup or busy period is insufficient to disturb the single facility presumption. However, the transfers, both permanent and temporary, were not limited and must be viewed as of the stipulated operative date of April 22, 2014. Tr. 11.

General Counsel's reliance on Montauk Bus Co., would prove to be misguided and flawed. In Montauk Bus Co., relied on heavily by General Counsel, the only driver interchange was from time to time, when a terminal, due to illness or other circumstances ran out of its own reserve drivers, used reserve drivers stationed at another terminal. See 324 N.L.R.B. 1128 (1997). However, in the present case, contrary to **GC's Exceptions 42 and 47**, Allways East shuttled 8 to 15 drivers and monitors to Wappingers Falls on a daily basis to cover and perform Dutchess County work, not when Wappingers Falls ran out of drivers and monitors to cover for illnesses or other unforeseen circumstances. These temporary interchanged drivers and monitors, as well as those who stayed in a hotel in Wappingers Falls, covered routes daily. Accordingly, almost 15% of the workforce (drivers and monitors) at the Wappingers Falls yard consisted of temporary and cover route employees transferred every day from the Yonkers yard or stayed at a local hotel for the week and then returning to Yonkers.

Moreover, General Counsel's reliance on Dean Transportation, 350 NLRB 48 (2007) would prove to be misguided and flawed. The facts in the Dean school bus case are not analogous to the operating facts evident in the Allways East and Dattco operations.

In Dean, the employees at each of its facilities maintained different job skills and worked under dissimilar working conditions. Furthermore, there was "virtually no" interchange between facilities' employees. Moreover, the Dean facilities at issue contained local autonomy inasmuch as it employed its own mechanics, route planners and on-site supervisors who oversaw the dispatchers, drivers and route planners and these supervisors only supervised the facility at issue. Id. at 51-52. At Allways East, there were no mechanics, route planners or on-site supervisors stationed at Wappingers Falls- all were located in Yonkers. Lastly, in Dean there were only two instances of temporary employee interchange between the facilities and the facility at issue employed a substantial number of general education drivers, whereas the other facility employed only special education drivers. Id. at 57, 59. **(Contrary to GC's Exception 41)**.

Finally, it is disingenuous for General Counsel to argue that the Allways East's Wappingers Falls yard is an autonomous appropriate "stand alone" bargaining unit (ignoring the indispensable sister yard in Yonkers) considering its knowledge that Durham operates two yards (in Red Hook and Poughkeepsie) which service different schools, yet considers both yards as one bargaining unit for union recognition purposes, contrary to untrue assertions in **GC's Exception 25**. Tr. 972-74, 976. Under **GC's Exception 25**, GC argues that the Red Hook yard is not considered a facility under Board law, yet he fails to provide any law to the contrary. Rather, GC makes a broad unsubstantiated statement contrary to the fact that Red Hook is one of two yards operating as one bargaining unit exactly like Respondent's Yonkers and Wappinger Falls locations. Like Allways East's Wappinger Yard's facility, the Red Hook yard had its own 12 routes to operate. Tr. 258. Moreover, the Red

Hook facility was specifically mentioned as a separate operating facility that, along with the Poughkeepsie location, made up Durham's multi-facility bargaining unit in the contract with the Union, Local 445. Tr. 258; GC-7. If Red Hook was not a "facility" it would not have been included as such in the CBA. Lori Polesel, the Union representative, even testified that she made separate visits to the Red Hook location. Tr. 224. Further, exactly like the Allways East and Dattco operations, Durham was and still is maintaining centralized control over all daily operations of both of its yards from its Poughkeepsie corporate office where all its local management and supervisors are located. Id.

In his brief and in **Exception 49**, GC contends that bargaining history is an integral part of deciding on the appropriateness of Wappingers Falls as a stand-alone bargaining unit. However, bargaining history is not dispositive but only one of many factors the Board looks at in deciding on the appropriateness of a unit. Community Hospitals of Central California, 1998 NLRB LEXIS 710, 54-56 (N.L.R.B. Sept. 18, 1998)("The Board relied not just on many years of bargaining history between CNA and the predecessor, but also on the lack of significant interchange between nurses on the two campuses, the lack of functional integration between what are essentially two full service acute care medical facilities, and the absence of record evidence of any potential for undue adverse consequences resulting from a labor dispute in this unit.")

More importantly, the cases cited by GC regarding bargaining history are inapposite to this case since those cases contain bargaining histories anywhere from 22 to over 50 years! Radio Station KOMO-AM, 324 N.L.R.B. 256, 262 (N.L.R.B. 1997)("as the exclusive representative of said employees, for, in excess of, 50 years."); Children's Hospital, 312 N.L.R.B. 920, 929 (N.L.R.B. 1993)(The bargaining history was over 46 years); Marion Power Shovel Co., 230 N.L.R.B. 576, 579 (N.L.R.B. 1977) ("Thus the Machinists unit has a history of collective bargaining in the Osgood

plant covering more than two decades.”). Here, however, the bargaining history was over a much shorter period of time. In fact, there was only a CBA in effect from March, 2011 through September, 2012. Another CBA spanning the time frame from September, 2012 through August, 2018 was only signed and ratified in February of 2014. *Id.*; Tr. 276. Moreover, during this time period, September 2012 to February 2014, there was a halt in the bargaining history as the “bargaining unit” went on strike and there was no agreed upon CBA. R-6. Overall, there was only a “bargaining history” spanning 20 months as of April 2014. More importantly, Durham has only been doing the work in question for the Dutchess DOH for under two years, signing a contract with the Dutchess DOH on December 31, 2012 and receiving a termination letter of the contracted work on February 28, 2014. See GC-3; R-18. Therefore there was only a collective bargaining agreement in place for the last two months Durham did work under the Dutchess County DOH contract.

Lastly, GC lists a string cite of cases under his bargaining history argument that are not on point to this case. Nazareth Regional High School, 283 NLRB 763 (1987)(case does not address successorship or the issue of whether bargaining history should be considered in a successorship analysis); Mayfield Holiday Inn, 335 NLRB 38 (2001)(the Board found that the predecessor’s bargaining history was relevant solely due to the fact that respondent failed to provide any evidence, aside from conclusory testimony, that the job duties of predecessor employees changed at all); Lincoln Park Zoological Society, 322 NLRB 263 (1996)(the employees were hired directly from the respondent and the respondent never argued that the predecessor employees changed their job duties); Int’l Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. NLRB, 604 F.2d 689 (D.C. Cir. 1979) (this case is inapplicable to the case at hand since in that case “the terms of employment, governed by the [predecessor’s] agreement and adopted by the Company, continued

unchanged.”); Temco Aircraft Corp., 121 NLRB 1085, 1088 (1958) (there were merely administrative changes made to the predecessor).

**C. GC’S EXCEPTIONS 17, 53-56 ARE INAPPLICABLE SINCE ALLWAYS EAST IS NOT A SUCCESSOR**

Pursuant to ALJ Flynn’s decision and as argued above in arguments A and B, GC’s **Exceptions 17, 53-56** are inapplicable since Allways East is not a successor to Durham and “it follows that [Allways East] had no obligation to recognize and bargain with the Union, no obligation to notify the Union of its decision to terminate Sherry Siebert’s employment and bargain over that decision, no obligation to respond to union information requests, and it did not unlawfully changes wage rates of employees.” See ALJ Flynn’s decision, p.13:13-17. Moreover, GC again misrepresents the record in **Exception 17** since Lori Polesel in fact testified that Sherry Seibert did not seek union representation and did not notify the union of her termination. Tr. 250.

**CONCLUSION**

Respondent respectfully requests that the decision of ALJ Flynn, dated November 12, 2015 be upheld and the Complaint in this matter be dismissed. The ALJ’s finding of fact, analysis and conclusions were all based on evidence adduced at trial and the ALJ applies the appropriate law and correctly distinguished case law relied upon by General Counsel. It is obvious that General Counsel, whether they believed it or not, filed exceptions to every aspect of the ALJ’s decision. However, it is evident from the Decision that Respondent was not a successor to Durham. The evidence and applicable case law clearly support a finding that Respondent was not a continuous operation to Durham and that the Respondent’s Wappingers Falls yard was not an appropriate stand-alone bargaining unit.

Dated: Lake Success, New York  
February 12, 2016

/s/

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**STATEMENT OF SERVICE**

I hereby certify that on February 12, 2016, I electronically filed the Respondent's Answering Brief in Opposition to the Exceptions and Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge in Case 03-CA-128669, et. al, to the Executive Secretary of the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document, via E-Mail, to John Grunert, Esq., Counsel for the General Counsel and Daniel E. Clifton, Counsel for International Brotherhood of Teamsters, Local 445.

DATED at Lake Success, New York this 12<sup>th</sup> day of February, 2016.

Respectfully submitted,

*/s/Jonathan Sturm, Esq.* \_\_\_\_\_

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