



United States Government

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

July 12, 2017

Catherine O'Hagan Wolfe  
Clerk of the Court  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

Re: *NLRB v. Allways East Transportation, Inc.*  
Board Case Nos. 03-CA-128669 and 03-CA-133846

Dear Ms. Wolfe:

I am enclosing a copy of the National Labor Relations Board's application for enforcement of its order in this case. Within 40 days of the Court's docketing of this application, I will file the agency record and a certified list of its contents.

Please serve a copy of this application on the Respondent, Allways East Transportation, Inc., whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of

any correspondence the Court sends to counsel in this case. The Board attorney directly responsible for this case is Ruth Burdick (202) 273-7958.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Linda Dreeben".

Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Encls.

SERVICE LIST

NLRB v. Allways East Transportation Inc.  
Board Case Nos. 03-CA-128669 and 03-CA-133846

Mariaina Koller  
Allways East Transportation, Inc  
870 Nepperhan Ave  
Yonkers, NY 10703  
Elmira, NY 14901

Respondent

Daniel E. Clifton, Esquire  
Lewis, Clifton & Nikolaidis, P.C.  
350 350 West 31<sup>st</sup> Street  
Suite 401  
New York, NY 10001-5013

Charging Party's Counsel

Lori Polesel, VP/Business Agent  
Local 445, International Brotherhood  
of Teamsters  
15 Stone Castle Road  
Rock Tavern, NY 12575-5025

Charging Party

Charles P. Roberts III, Esquire  
Constangy, Brooks, Smith &  
Prophete, LLP  
100 N. Cherry Street, Suite 300  
Winston-Salem, NC 27101

Involved Party's Counsel

Cal Schmidt, Manager, Labor and  
Employee Relations  
Durham School Services/Stock  
Transportation/ Petermann  
4300 Weaver Pkwy Suite 100  
Warrenville, IL 60555-3920

Involved Party

Paul J. Murphy  
NLRB Region 3  
Niagara Center Building  
130 South Elmwood Avenue  
Suite 630  
Buffalo, New York 14202-2465

Regional Director

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS )  
BOARD )  
                                  ) Petitioner )  
                                  ) )  
                                  ) v. )  
                                  ) )  
ALLWAYS EAST TRANSPORTATION, )  
INC. )  
                                  ) Respondent )

APPLICATION FOR ENFORCEMENT  
OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Allways East Transportation, Inc., on May 11, 2017, in Board Case Nos. 03-CA-128669 and 03-CA-133846, reported at 365 NLRB No 71. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in Wappingers Falls, New York.



---

Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 12th day of July 2017

STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS )  
BOARD )  
                                  ) Petitioner )  
                                  ) )  
                                  ) v. )  
                                  ) )  
ALLWAYS EAST TRANSPORTATION, )  
INC. )  
                                  ) Respondent )

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's application for enforcement of its order in this case is being served today by e-mail upon the following counsel:

Mariaina Koller  
Allways East Transportation Inc  
870 Nepperhan Ave  
Yonkers, NY 10703



\_\_\_\_\_  
Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
Washington DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 12th day of July 2017

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Allways East Transportation, Inc. and International Brotherhood of Teamsters, Local 445.** Cases 03–CA–128669 and 03–CA–133846

May 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE  
AND MCFERRAN

On November 12, 2015, Administrative Law Judge Susan A. Flynn issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The main issue presented in this case is whether the Respondent is a successor employer and, therefore, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. The General Counsel further alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the wage rates of employees, terminating an employee without providing notice and an opportunity to bargain to the Union, and failing to respond to the Union's request for information. The judge found that the Respondent is not a successor employer and accordingly dismissed the complaint in its entirety.

Contrary to the judge, we find that the Respondent is a successor employer and, consequently, that it violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. We also find that it violated Section 8(a)(5) and (1) by failing to respond to the Union's information request. However, we conclude that the Respondent did not unlawfully unilaterally change the wage rates of employees. Nor did the Respondent have a duty to bargain with the Union prior to terminating an employee under the circumstances presented here.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The 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. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. SUCCESSORSHIP

A. Facts

Since October 2009, the Union has represented a unit of school bus drivers and monitors<sup>2</sup> employed by Durham School Services in Poughkeepsie, New York.<sup>3</sup> These employees provided transportation services for general and special education students in Dutchess County. In early 2014,<sup>4</sup> the Dutchess County Department of Health (the "DCDOH") rescinded the portion of the contract pertaining to the transportation of special education students from Durham and awarded it to the Respondent. It further requested that the Respondent assume operations as soon as possible, due to Durham's poor performance.

In order to satisfy the DCDOH's request for expedited action, the Respondent leased a facility in Wappingers Falls, New York. This facility was located 54 miles from the Respondent's headquarters in Yonkers, New York, and 8 miles from Durham's facility in Poughkeepsie. Unlike the Respondent's Yonkers facility and Durham's Poughkeepsie facility, the facility leased in Wappingers Falls did not have a maintenance yard; the Respondent's yard in Yonkers was tasked with maintaining the buses at both locations. To service the new routes in Dutchess County, the Respondent also purchased a fleet of new buses, which were generally of the same type and size as those used by Durham.

The Respondent's president, Judith Koller, and her daughter, Vice President Marlaina Koller, held a job fair to recruit new drivers and monitors. The DCDOH encouraged the Respondent to hire drivers who were familiar with the special education students and routes in Dutchess County, and provided it with a list of drivers and monitors who had worked for Durham and their corresponding bus routes. Selected applicants were then interviewed by Vice President Koller, at which time the prospective employees' wages were discussed.<sup>5</sup> Ultimately, the Respondent hired 82 school bus drivers and monitors, of whom 62 had previously worked for Durham. Upon hire, the Respondent gave employees its employee handbook. The drivers were assigned bus

<sup>2</sup> Monitors assist bus drivers by helping students during transport.

<sup>3</sup> Durham also rented a farm field in Red Hook, New York, where approximately five to seven drivers parked their buses overnight. Durham maintained a trailer with a table and chairs for the drivers on that property. The unit description in Durham's collective-bargaining agreement with the Union references both the Poughkeepsie and Red Hook locations.

<sup>4</sup> All further dates are 2014 unless otherwise indicated.

<sup>5</sup> Wages were matched or increased from Durham, although they were lower than wages the Respondent paid to its drivers in Yonkers.

routes similar to those they had driven with Durham,<sup>6</sup> and some retained the same monitor.

On April 16, the Union, asserting that the Respondent was a successor to Durham, requested in writing that the Respondent recognize and bargain collectively with it for those drivers and monitors based in Wappingers Falls. The Respondent did not respond to that demand and has not recognized or bargained with the Union at any time since.

The Respondent began operations in Dutchess County on April 22, after the students' spring break. There was no hiatus in operations after the transfer of work from Durham. From April 22 until the end of the school year in June, additional drivers and monitors were needed in Wappingers Falls, so the Respondent shuttled 8 to 10 drivers and monitors daily from its headquarters in Yonkers to Wappingers Falls.

Beginning April 22, President Koller worked at the Wappingers Falls facility 4 to 5 days per week to oversee operations and train the dispatchers based there. Toni-Ann Francisco, the Respondent's office manager in Yonkers, similarly worked at the Wappingers Falls facility every day for the first 2 weeks of the Respondent's operation there, during which time she fine-tuned the drivers' routes. In addition, the Respondent promoted two drivers from Yonkers to dispatcher positions and permanently assigned them to Wappingers Falls. The dispatchers relay information between drivers, parents, teachers, and management in Yonkers. The dispatchers also ensure that all routes are covered daily, assigning drivers to cover routes due to unexpected absences, and receive requests for leave, which are then transmitted to other individuals for a final decision. Several employees testified that they consider the dispatchers to be their immediate supervisors.<sup>7</sup>

After the Respondent determined that close supervision was no longer needed at the Wappingers Falls facility, President Koller and Office Manager Francisco returned to their offices in Yonkers, where the Respondent's management personnel are permanently based. All firing, hiring, and discipline is done by either the president or vice president. All payroll and human resources functions are conducted in Yonkers. Monthly attendance sheets and daily Department of Transportation reports from both locations are retained there too.

<sup>6</sup> The number of routes increased from 52 to 65. As a result, some drivers had a different number of stops and/or transported a different number of students. However, any resulting changes were relatively minor, and all routes still served Dutchess County schools.

<sup>7</sup> The Respondent did not hire any former supervisors from Durham.

### B. Analysis

It is well established that an employer is a successor employer, obligated to recognize and bargain with a union representing the predecessor's employees, when (1) there is a substantial continuity of operations, and (2) a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees. See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). The "essence of successorship," however, "is not premised on an identical re-creation of the predecessor's customers and business, but rather, on the new employer's 'conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor' in order 'to take advantage of the trained work force of its predecessor.'" *A. J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7 (2015) (quoting *Fall River Dyeing*, 482 U.S. at 41).

Here, the parties stipulated that the operative date to determine successorship is April 22, when the Respondent began providing transportation services for Dutchess County. The parties also stipulated that, on that date, a majority of the drivers and monitors employed at the Respondent's Wappingers Falls facility were previously employed by Durham. Therefore, there are only two remaining issues to be resolved: (1) whether there is substantial continuity of operations, and (2) whether Wappingers Falls facility employees constitute an appropriate unit for collective bargaining.

The judge found that the differences between Durham and the Respondent precluded a finding of substantial continuity of operations. She further found that the Respondent successfully rebutted the presumption that Wappingers Falls was an appropriate single-facility bargaining unit. Our dissenting colleague agrees with the judge's findings. We, however, disagree on both counts.

With respect to the issue of substantial continuity between predecessor and successor operations, the Supreme Court has identified the following factors as relevant to the analysis: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing*, supra, 482 U.S. at 43. Most importantly, these factors are to be analyzed from the perspective of the employees, i.e., whether they "understandably view their job situations as essentially unaltered." *Id.* (quoting *Golden State Bottling Co.*, 414 U.S. 168, 184 (1973)).

Applying the relevant factors, we find that there is substantial continuity of operations. First, Durham and, later, the Respondent performed the same general business service: providing school bus transportation for the special education students in Dutchess County.<sup>8</sup> The drivers and monitors are doing the same general job: transporting special education students to and from Dutchess County schools by school bus on a predetermined route. In many cases, pursuant to Dutchess County's request, the drivers are paired with the same monitors, drive similar routes, and transport many of the same students. Accordingly, by all evidence, the drivers and monitors are doing the same job as before and without any hiatus in operations, only now their employer is the Respondent, not Durham. See *A. J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7; *Van Lear Equipment, Inc.*, 336 NLRB at 1063–1064; *Montauk Bus Co.*, 324 NLRB 1128, 1135 (1997).

We acknowledge that there are some minor differences in the Respondent's operations and in the employees' terms and conditions of employment. For instance, the Respondent has a new facility, different supervisors, wages, fueling procedures, and employee handbook policies. Nevertheless, from the perspective of the drivers and monitors who had been handling special education

<sup>8</sup> Contrary to the dissent's position, the fact that Durham's business also encompassed providing school bus services for the general school population in Dutchess County has no bearing on the question whether the business of both operations is essentially the same, as the relevant inquiry pertains only to the part of the business taken over by the alleged successor. Under the dissent's view, if a large conglomerate sold off a portion of its business, the new employer would never be found to be a successor, as it would be operating only a distinct part of the seller's overall business. This conflicts with well-established Board law that "the operation of just a portion of a predecessor's business is consistent with successorship." *A. J. Myers*, 362 NLRB No. 51, slip op. at 7–8; accord: *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001); *Bronx Health Plan*, 326 NLRB 810, 812 (1998); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052, 1054 fn. 13 (1976). As the Second Circuit Court of Appeals held in *NLRB v. Simon DeBartelo Group*, 241 F.3d 207, 212–213 (2001), "The Board's holding [ ] is consistent with a long line of Board decisions finding substantial continuity when the successor employer has taken over only a discrete portion of its predecessor's heterogeneous bargaining unit," enfg. 325 NLRB 1154 (1998). Furthermore, contrary to the dissent, the fact that the Respondent specializes in—and may in fact be better than Durham at—providing special education transportation services would have no meaningful significance for employees continuing to do essentially the same job contracted by the DCDOH for the same special education student population as before. They never performed the service of merely transporting general education students from Point A to Point B, as the dissent wrongly presumes. Moreover, the Respondent neither argued nor presented evidence establishing that any of the unit employees whom it hired had ever driven general education routes. Indeed, the record reflects that monitors only served on special education routes, and that the special education drivers received different training from the general education drivers.

transportation for Durham, their job remained essentially unchanged. See *A. J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7 (differences in buses, location, and supervision did not defeat finding of continuity of operations); *Montauk Bus Co.*, 324 NLRB at 1134 (finding substantial continuity despite "some differences in the way Montauk operates and also differences in the wages and terms and conditions of employment"). When viewed from the employees' perspective, these minor operational changes made by the Respondent would not so change employees' job situation "that they would change their attitudes about being represented." *Van Lear Equipment, Inc.*, 336 NLRB at 1064 (internal quotation omitted). Accordingly, we find that there is substantial continuity of operations.<sup>9</sup>

As to the appropriate-unit issue, the Board has long recognized the "presumption that a single plant or store unit is appropriate for purposes of collective bargaining unless it has been so effectively merged into a comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Dean Transportation, Inc.*, 350 NLRB 48, 58 (2007), enfd. 551 F.3d 1055 (D.C. Cir. 2009). The party opposing the single-facility unit has the heavy burden of rebutting its presumptive appropriateness. *Trane*, 339 NLRB 866, 867 (2003). To determine whether the presumption has been rebutted, the Board examines a number of community-of-interest factors: (1) central control over daily operations and labor relations, including the extent of local autonomy, (2) similarity of skills, functions, and working conditions, (3) degree of employee interchange, (4) distance between locations, and (5) bargaining history, if any. *J&L Plate*, 310 NLRB 429, 429 (1993).

We find that the judge improperly analyzed the community of interest between the employees at the Respondent's two facilities without first giving sufficient weight to the presumption that the single facility of former Durham employees at Wappingers Falls was appropriate, before determining whether the Respondent met

<sup>9</sup> That the Respondent set initial terms and conditions of employment for employees providing special education transportation for Dutchess County that contained minor variations from what employees enjoyed under Durham in no way undermines our "continuity of operations" finding. It is well settled that a successor is ordinarily free to set the terms and conditions of employment on which it will hire the predecessor's employees, *Burns*, 406 U.S. at 294–295, thus establishing the baseline for future bargaining with the incumbent union that continues to represent them. The dissent's contrary view that a successor's exercise of this right to make even relatively minor initial changes in terms and conditions of employment, as occurred here, extinguishes the *Burns* continuing bargaining obligation, cannot be reconciled with the balancing of employee, incumbent union representative, and employer rights in the successorship doctrine established by *Burns* and *Fall River Dyeing*.

its rebuttal burden. We emphasize that “[t]he determination of appropriateness of a unit is different in the context of successorship than when determining initially, in a representation case, whether an unrepresented group of employees should be included in a single or multiplant unit.” *Dean Transportation, Inc.*, 350 NLRB at 58. In addition, the single-facility presumption is particularly strong where employees had historically been represented in a single-location unit, as was the case here. *Id.*<sup>10</sup>

In addition, the judge’s analysis of the appropriateness of the single-facility unit of former Durham employees at Wappingers Falls was flawed by her focus on the bargaining history at the Respondent’s preexisting Yonkers location. Thus, the judge relied on the fact that “[t]here is no bargaining history at [the Respondent], as the Company has always been nonunion.” Instead, the judge should have focused on the bargaining history at the predecessor employer, Durham, where the Union had represented the unit in Poughkeepsie since 2009. “[T]his fact alone suggests the appropriateness of a separate bargaining unit.” *A. J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 9 (internal quotations omitted).<sup>11</sup> By examining the bargaining history at the wrong location, and between the wrong parties, the judge failed to give appropriate weight to the presumption of an appropriate unit, and the need for “compelling circumstances” before the significance of bargaining history can be overcome. *Id.*

Examining the remaining community-of-interest factors as of April 22, the relevant date as stipulated to by the parties, we find that the Respondent has failed to meet its heavy burden of rebutting the presumption that a unit based at the Wappingers Falls facility is an appropriate bargaining unit. The judge found that the Respondent’s centralized control over labor relations favors the Respondent’s position, emphasizing that all person-

nel matters and payroll are conducted in Yonkers and that the managers who have the authority to hire, fire, grant raises, and approve leave requests are permanently headquartered there. Although we agree that certain aspects of the Respondent’s operations are centralized, we conclude that there is sufficient local autonomy to find that this factor does not weigh in favor of rebutting the single-facility presumption.

As an initial matter, we note that the president and an office manager were working at the Wappingers Falls facility on April 22. The president oversaw the day-to-day operations of the facility, trained the dispatchers, and had complete authority over personnel matters. The office manager fine-tuned the busing routes. The Respondent also has two dispatchers who are permanently based in Wappingers Falls.<sup>12</sup> On April 22, they were being trained to oversee the daily performance of the drivers and monitors once the president and the office manager eventually returned to Yonkers full time. The dispatchers are responsible for assigning and dispatching spare drivers when regular drivers are unexpectedly absent, and fielding notices of absences and requests for time off. The dispatchers also serve as the primary point of contact for schools and parents. With regard to this authority, several employees testified that they consider the dispatchers to be their immediate supervisors. In circumstances similar to those here, the Board has previously found that a bus facility with management that oversaw day-to-day operations demonstrated “substantial authority of local management.” *Montauk Bus Co.*, 324 NLRB at 1135.<sup>13</sup>

Other community-of-interest factors also support the single-facility presumption. The Respondent’s Wappingers Falls facility is geographically distant, approximately 54 miles, from its Yonkers facility. See *Van Lear Equipment, Inc.*, 336 NLRB at 1063 (distance of 25 miles between facilities, inter alia, supported single-facility presumption). Employee interchange between Wappingers Falls and Yonkers was limited, and in one direction. For the remainder of the 2013–2014 school year, a small number of employees were temporarily transferred from Yonkers to Wappingers Falls to drive an unknown percentage of routes; no employees were transferred, temporarily or permanently, from Wappingers

<sup>10</sup> We disagree with the Respondent and our dissenting colleague that the predecessor Durham unit should be deemed a multifacility unit based on the existence of the Red Hook location in addition to the main facility at Poughkeepsie. No work was based in Red Hook and no managers or dispatchers were stationed there; it was merely a convenient rest stop provided to a small number of employees. For all practical purposes, the Durham unit was a single-facility unit at Poughkeepsie, which strengthens the case for continued representation as a single-facility unit. *Van Lear Equipment, Inc.*, 336 NLRB at 1063; see also *Montauk Bus Co.*, 324 NLRB at 1135 (“there is a strong presumption favoring the maintenance of historically recognized bargaining units” in a successorship case, citing *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114 (D.C. Cir. 1996)). However, even if it were to be characterized as a multifacility unit, we still would find the postsuccessorship unit at Wappingers Falls appropriate based on all of the other circumstances, including the unit’s history of meaningful bargaining.

<sup>11</sup> Unlike our dissenting colleague, we continue to adhere to the Board’s long-held view that collective-bargaining history is an important factor when determining whether a proposed unit is appropriate in successorship cases.

<sup>12</sup> The General Counsel alleges the dispatchers are agents under Sec. 2(13) of the Act. Given our finding above, we find it unnecessary to pass on this allegation because it would not affect our decision.

<sup>13</sup> We disagree with our dissenting colleague’s characterization of the dispatchers as mere conduits for information. Further, to the extent that the record is lacking, as suggested by our dissenting colleague, that failure must be held against the Respondent, which bears the heavy burden of proving that a single-facility unit based in Wappingers Falls is inappropriate.

Falls to Yonkers.<sup>14</sup> There is no evidence of any temporary interchange after that initial period; nor is there any evidence of permanent interchange between the drivers and monitors at the two facilities at any time. See *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999).

The factor regarding similarity of skills and working conditions favors the Respondent's position, as the employees at Wappingers Falls and Yonkers share common skills, are required to possess the same safety certifications, and perform similar functions. We find, however, that this factor is insufficient to rebut the presumption that a unit of drivers and monitors at the Wappingers Falls facility is an appropriate single-facility unit.<sup>15</sup>

### C. Conclusion

Because we find that a unit of drivers and monitors in Wappingers Falls constitutes an appropriate bargaining unit and that there is substantial continuity of operations between the Respondent and Durham, we conclude that the Respondent is a successor employer. We therefore find that the Respondent violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the drivers and monitors employed by the Respondent in Wappingers Falls.<sup>16</sup>

## II. CHANGE TO WAGE RATES

A successor employer is ordinarily free to establish initial terms of employment without first bargaining with the incumbent union, unless it is a perfectly clear successor. *Burns*, 406 U.S. at 294–295. Because there is no allegation that the Respondent is a perfectly clear successor employer under *Spruce Up Corp.*, 209 NLRB 194

<sup>14</sup> Unlike our dissenting colleague, we assign little evidentiary value to this data, given its lack of context. See *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999).

<sup>15</sup> Contrary to the judge and our dissenting colleague, we find that the present case is unlike *Daitco, Inc.*, 338 NLRB 49 (2002), where the Board found that the single-facility presumption had been rebutted. In that case, the Board found a single bus facility to be so completely integrated with several other terminals that it was an inappropriate bargaining unit. In reaching that conclusion, the Board emphasized the highly centralized control over daily operations and the fact that fully one-third of the bus drivers were shuttled from their home facilities to other facilities on a daily basis. Upon arriving at the new facility, drivers were then supervised by managers based at that other facility. Here, by contrast, there was minimal and insubstantial interchange of employees, and the local dispatchers had authority over day-to-day operations at the Wappingers Falls facility, including the ability to reassign drivers to Dutchess County routes based on daily needs.

<sup>16</sup> The transcript reflects that the Respondent may have relocated its facility from Wappingers Falls to Fishkill, New York, prior to the start of the hearing. No party has asked us to modify the unit description to reflect this relocation, and we decline to do so sua sponte based on the record before us.

(1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975), it was free to set the initial wage rates of drivers and monitors.

Although the General Counsel concedes that the Respondent was free to set initial terms, he alleges that the Respondent unlawfully unilaterally changed the employees' wages on or about April 22. The General Counsel's theory for this allegation is not entirely clear, but he appears to contend that when the Respondent set initial terms, it failed to inform the former Durham employees that those terms included changed wages. Therefore, the Respondent's subsequent decision to set a different initial wage rate without first consulting the Union amounted to an unlawful unilateral change. See *301 Holdings, LLC*, 340 NLRB 366, 367 (2003). Even assuming, arguendo, that the General Counsel has articulated a viable legal theory, we find that he has failed to present sufficient evidence in support of it. What little evidence exists on this point supports a contrary finding that employees did know their initial wage rates would be different.<sup>17</sup> We therefore adopt the judge's dismissal of this allegation.

## III. FAILURE TO ENGAGE IN PRE-DISCIPLINE BARGAINING

The Respondent admits that it terminated Wappingers Falls driver Sherry Siebert on May 1, without affording the Union notice and an opportunity to bargain over the decision. Relying on the rationale articulated in *Alan Ritchey, Inc.*, 359 NLRB 236 (2012), the General Counsel argues that the Respondent should have provided the Union with notice and an opportunity to bargain prior to terminating Siebert. Although *Alan Ritchey* was invalidated by the Supreme Court due to the composition of the Board at the time,<sup>18</sup> in *Total Security Management*, 364 NLRB No. 106(2016), the Board held that employers must provide unions with notice and the opportunity to bargain prior to the implementation of all discharges, demotions and suspensions. The Board held, however, that this decision was not to be applied retroactively. As a result, under the circumstances presented here, the Respondent had no duty to bargain with the Union prior to discharging Siebert. We therefore adopt the judge's dismissal of this allegation.<sup>19</sup>

<sup>17</sup> A driver testified that she brought a paystub to her interview and that she understood at that time that she would be receiving a raise. Another driver similarly testified that he brought a pay stub from Durham to his interview and went over "pay stuff" with Vice President Koller.

<sup>18</sup> See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

<sup>19</sup> Although *Total Security Management* is inapplicable with respect to the discharge at issue in this case, which occurred before the Board's decision issued, the decision naturally applies to the Respondent's discretionary disciplinary decisions arising after *Total Security Management* was issued.

## IV. FAILURE TO RESPOND TO INFORMATION REQUEST

On July 18, after discovering that Siebert had been terminated, the Union requested via email a list of all employees who had been terminated since April 22. The Respondent did not reply to the email or provide the requested information. An employer is obligated to provide a union with requested information that is relevant to the union's proper performance of its collective-bargaining obligations. See *Boeing Co.*, 363 NLRB No. 63, slip op. at 6 (2015). The Respondent does not dispute this principle. Instead, it repeats its argument (rejected above) that it had no duty to respond to the information request because it was not a successor employer. The General Counsel contends that, without such information, the Union would not know which employees remained in the bargaining unit, thus preventing it from carrying out its representative duties. We agree with the General Counsel, and find that the requested information is clearly relevant and that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish it to the Union. See *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 882, 901 (1994), *enfd.* in relevant part 96 F.3d 1439 (4th Cir. 1996) (list of all terminated employees relevant and necessary for union to adequately represent employees).

## AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local 445 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent, Allways East Transportation, Inc., constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and monitors employed by Allways East Transportation, Inc. at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

4. Since April 22, 2014, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union as the collective-bargaining representative of the above-described unit of employees.

5. Since July 18, 2014, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union by failing and refusing to fur-

nish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be ordered to recognize and, on request, bargain with the Union as the collective-bargaining representative of the drivers and monitors based in Wappingers Falls. In addition, we shall order the Respondent to provide the Union with the information requested on July 18, 2014.

## ORDER

The National Labor Relations Board orders that the Respondent, Allways East Transportation, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers and monitors employed by Allways East Transportation, Inc. at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

(b) Furnish to the Union in a timely manner the information it requested on July 18, 2014.

(c) Within 14 days after service by the Region, post at its Wappingers Falls, New York facility copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 22, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 11, 2017

\_\_\_\_\_  
Mark Gaston Pearce, Member

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

This case primarily concerns whether Respondent Allways East Transportation (Allways or Respondent) is a successor employer to Durham School Services (Durham). Reversing the judge, my colleagues find that Allways is a "successor" employer that was required to

<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

recognize and engage in bargaining with Local 445 of the International Brotherhood of Teamsters, which previously represented Durham's drivers and monitors. Therefore, my colleagues find that Allways violated the National Labor Relations Act (NLRA or Act) when it failed to recognize and engage in bargaining with Local 445.<sup>1</sup> I disagree with my colleagues because I believe they disregard and misapply a fundamental aspect of successorship law. It is well established that a new employer constitutes a legal "successor," inheriting an obligation to recognize and bargain with the predecessor's union in the absence of an election,<sup>2</sup> only if there is substantial continuity in the business, which must focus on the perspective of employees. *Fall River Dyeing* at 43-44. In this case, I believe the record establishes what the judge properly found: the business as operated by Allways is substantially dissimilar from the operations of the predecessor (Durham). Indeed, these fundamental differences constitute the principal reason Allways was selected to replace Durham as the entity responsible for doing the work at issue here. Therefore, as described more fully below, I believe the judge correctly concluded that Respondent is *not* a successor employer and it has no obligation to recognize and bargain with the Union in the circumstances presented here.

#### Facts

Durham School Services is a large national school bus transportation company. Among Durham's many operations, it provided school bus transportation services for

<sup>1</sup> Because I find that Respondent had no bargaining obligation, I also dissent from my colleagues' conclusion that Respondent unlawfully failed to respond to the Union's July 18 information request, and I concur in their dismissal of the remaining complaint allegations—i.e., that Respondent unlawfully failed to bargain over changes to initial wage rates and unlawfully failed to bargain prior to terminating employee Sherry Siebert. As to the latter allegation, I note that I dissented in *Total Security Management*, 364 NLRB No. 106, slip op. at 17-42 (2016), from the majority's prospective imposition of a new and unwarranted bargaining obligation for discretionary disciplinary actions.

<sup>2</sup> Regardless of whether or not a workforce may have experienced changes involving a transition in employers, the Act provides that a union may secure employer recognition and the right to represent employees by establishing majority support in a Board-conducted election. See Sec. 9 (providing for union representation based on majority support among employees in an appropriate bargaining unit). The Board's successorship cases involve an exception from this general principle where a predecessor's union may automatically represent a new employer's employees, without any election, provided there is substantial continuity in the business, as described in numerous cases that have been decided by the Board, the Supreme Court, and other courts. See, e.g., *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). Cf. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

general and special education students in Dutchess County, New York. In February 2014, the Dutchess County Department of Health cancelled its contract with Durham for the transportation of special education students due to Durham's poor performance. Dutchess County then awarded that contract to Respondent, a small company which specializes in providing school bus transportation services for special education students. Prior to being awarded the Dutchess County contract, Respondent had provided this service only for Westchester County schools.

To prepare for operations in Dutchess County, Respondent leased a facility in Wappingers Falls, which is approximately 54 miles from its Yonkers, New York headquarters and approximately 8 miles from Durham's facility in Poughkeepsie, also in Dutchess County. Respondent also purchased new buses and equipment, conducted a job fair, and hired drivers and monitors. On April 16, the Union requested recognition from and bargaining with Respondent. Respondent did not respond.

On April 22, Respondent began providing transportation services for special education students in Dutchess County. Respondent changed myriad terms and conditions of employment. Respondent also increased the number of routes and altered the stops along many of the existing routes. Respondent's president, Judith Koller, and an office manager temporarily relocated to Wappingers Falls to oversee the initial start of operations. They returned to their permanent offices in Yonkers after 2 weeks. Two Yonkers employees were promoted and permanently transferred to dispatcher positions in Wappingers Falls, where they effectively serve as conduits between management in Yonkers and employees and clients in Dutchess County.<sup>3</sup> In addition, from April 22 until the end of the school year in June, Respondent daily shuttled 8 to 10 drivers and monitors from Yonkers to Wappingers Falls, supplementing the 82 employees permanently assigned to work there. Respondent's management oversees all operations and performs all scheduling, hiring, firing, payroll, and other personnel services. In addition, all bus maintenance is performed at the Yonkers facility, in contrast to Durham's performance of maintenance at its Poughkeepsie facility.

The judge concluded that Respondent was not a successor obligated to recognize and bargain with the Union, and the judge also concluded that Respondent's facility in Wappingers Falls was not an appropriate "stand-alone" bargaining unit. Unlike my colleagues, I believe both of these findings by the judge were correct.

<sup>3</sup> There is no claim that the dispatchers exercise any Sec. 2(11) supervisory authority.

## Discussion

It is well established that the test for determining successorship is: (1) whether a majority of the new employer's work force, in an appropriate unit, are former employees of the predecessor employer; and (2) whether there is substantial continuity between the enterprises. *Burns*, 406 U.S. at 280–281 & fn. 4, and *Fall River Dyeing*, 482 U.S. at 41–43. As my colleagues correctly observe, the record establishes one component of substantial continuity: that a majority of Respondent's employees based at its Wappingers Falls facility were formerly employed by Durham. However, we are still left with two questions: whether there is substantially continuity between Durham's operations and those conducted by Respondent, which must be viewed from the perspective of the employees; and whether it is appropriate to have a bargaining unit limited to Respondent's operations in Wappingers Falls. Like the judge, I believe the record establishes that both of these questions must be answered in the negative.

1. *Significant differences between Respondent's business enterprises and Durham's business enterprises preclude a finding of substantial continuity of operations.* When determining whether there is substantial continuity of operations between a predecessor and purported successor, the Board must consider "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. As noted previously, the Board is required to undertake this analysis from the employees' perspective; specifically, the inquiry is whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Id.* (quoting *Golden State*, 414 U.S. at 184). In this regard, the Supreme Court has stated the "emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Fall River Dyeing*, 482 U.S. at 43–44 (emphasis added).

My colleagues find that Respondent and Durham "operate the same general business service," with only "some minor differences in the Respondent's operations and in the employees' terms and conditions of employment." It is true that the former employer and new employer both engaged in the business of transporting cer-

tain school students from point A to point B (i.e., driving students “to and from Dutchess County schools by school bus on a predetermined route”). If one defines the business operations in these simplistic terms, as my colleagues apparently do, there might be sufficient business continuity to support a finding of successorship.

However, the record fundamentally contradicts a suggestion that Respondent’s operations involve this type of “substantial continuity” with the work performed by the predecessor, Durham. And the dissimilarities are especially prominent when one focuses on the perspective of employees, which is required under *Fall River Dyeing*. The business at issue here clearly does not involve merely transporting students from point A to point B. For one thing, the operations undertaken by Allways involve a special category of students. As stated above, Durham provided school bus transportation services for general and special education students. In contrast, after initially awarding both types of work to Durham, the Dutchess County cancelled the contract giving Durham the work associated with transporting special education students. In contrast to Durham’s general bus transport operations, Allways specializes in providing transportation services only for special education students.

These facts establish, as a preliminary matter, that the operations at issue here clearly involve more than merely moving students from point A to point B. If this were the case, then Durham—which was first awarded contracts to provide transportation for general education and special education students—would have retained its contract for transporting special education students, and the instant controversy would never have arisen. Instead, Dutchess County officials found that Durham did not satisfactorily perform the work of transporting special education students, which prompted the county to cancel the contract and to give this work to Allways. Consequently, Durham remained responsible for transporting general education students (basically moving them from point A to point B), and Allways—which specialized in transporting special education students, and which previously had bid only for the “special education” transportation work—was belatedly assigned to do this work, and this work only. If there was nothing materially different about the work associated with transporting special education students, there would have been no reason for Allways to specialize in transporting special education students, or for Dutchess County officials to reassign this work to Allways. Thus, Allways did not simply take over this discrete portion of the contract from Durham; it provided a different type of service to the special education students covered by that portion of the contract.

Moreover, when one evaluates the perspective of Respondent’s employees who commenced their responsibility for transporting special education students on April 22, working out of Respondent’s new facility in Wappingers Falls, nearly everything about their jobs had changed. One cannot improve on the judge’s careful, detailed description of the record evidence regarding the many changes in operations, regarding the transporting of special education students, that were obviously evident to Respondent’s employees. Thus, the judge found:

While both companies provide school bus transportation services, Durham provides bus transportation for general education and special needs children, while the Respondent provides transportation only for special needs children. The Respondent took over the special education contract, a portion of the services Durham provided, and continues to provide, to Dutchess County. *All of the Respondent’s drivers must be trained and certified to transport special needs children, which is more skilled than driving a regular education bus. Further, special needs children require monitors on their buses, who utilize specialized equipment and are trained in dealing with special needs children, their various conditions, and the myriad issues which may arise on the buses.*

Those drivers and monitors who were hired by the Respondent that had previously worked for Durham continued to provide school bus transportation for special needs children in the same area, but *their working conditions had changed and they had none of the same supervisors.* The local facility was in a *different location.* While Durham had two sites, in Poughkeepsie and Red Hook, *the Respondent opened a new facility in Wappingers Falls.* *The wage rates were different, the work rules and policies had changed, and the supervisors had changed.* *All the Respondent’s supervisors and managers are at Yonkers; none are assigned to Wappingers Falls,* while Durham had supervisors at the Poughkeepsie facility. Durham had a maintenance department in Poughkeepsie; *the Respondent’s [maintenance department] is in Yonkers.* After Durham lost this contract, its operations continued virtually unchanged at its Poughkeepsie and Red Hook facilities.

Although the Respondent assumed responsibility to provide school bus transportation for special needs children in Dutchess County, *it took over only the contract, not any portion of Durham’s operations. The drivers’ processes and procedures are materially different from Durham’s. Most of the routes changed, being either modified somewhat or*

*changed completely.* There are more routes than under Durham. *Drivers pick up the monitors at home or the monitors come to the driver's house, rather than joining them at the facility, as with Durham. Most buses are parked overnight at the driver's home, rather than at the facility, as with Durham. Drivers and monitors have different work hours than at Durham; they could have split shifts and different numbers of routes. Fueling is done at the county lot by credit card, rather than at the facility, as with Durham.* Employees used to go to the Durham base on a daily basis, where they would drop off their paperwork; *that is now done weekly, when they pick up their paychecks.* Employees would also go to the Durham base during the day, between runs, often in order to obtain additional hours, to see if any runs were available that day. *That is unnecessary with the Respondent, as employees have full schedules.* Employees communicate with two dispatchers at Wappingers Falls, who are different from the dispatchers at Durham.

The Respondent had no contact with Durham, either before or after starting to service Dutchess County in April 2014. *It did not take over any of Durham's facilities, it did not purchase any buses or equipment from Durham.* It did not obtain any information regarding routes or employees or any other matter, nor did it obtain any records of any kind from Durham. *It did not step in and take over Durham's operations; it merely took over the Dutchess County contract for special education children, operating completely independently of Durham.* It did not simply begin transporting students on the same routes with the same drivers and monitors. *New routes had to be configured, old ones modified, and the total number of routes increased from 52 to 65. Although some Durham employees were hired, the Respondent's hiring process was not pro forma; the Respondent conducted a genuine application and hiring process.* It did not contact Durham in order to obtain recommendations about employees. Some employees were assigned similar routes as they had with Durham, but *virtually all routes were changed in some respect.*

Even the witnesses called by the General Counsel, who had worked for both Durham and the Respondent, testified to significant changes in their working conditions with the Respondent, including having different routes, different numbers of routes, and different numbers of hours.

In sum, many changes occurred, including leasing property, purchasing new buses and equipment,

developing new routes, changing old routes, hiring new employees, and imposing new policies and procedures. Even viewed solely from the employees' perspective as urged in Fall River, above, it was clear that there was a new employer, that they were working under new rules and procedures, for different supervisors, and the operation was not merely a continuation of Durham's.<sup>4</sup>

In short, not only was the essential part of Respondent's business unique (involving particularized needs associated with an exclusive focus on special education students), virtually everything associated with Respondent's business changed from what had previously been done by Durham, and these changes were unquestionably substantial from the perspective of employees. The record contradicts any suggestion that Respondent's employees occupied "essentially the same jobs after the employer transition" or that they would have "understandably view[ed] their job situations as essentially unaltered."<sup>5</sup> *Fall River Dyeing*, 482 U.S. at 43 (citation omitted).<sup>5</sup> Accordingly, the Board cannot reasonably find that substantial business continuity existed in the instant case to support a conclusion that Respondent was a "successor" obligated to recognize and bargain with the Union in the absence of an election.

2. *The Wappingers Falls facility is not an appropriate bargaining unit because of Respondent's highly centralized control over daily operations.* The appropriateness of a bargaining unit limited to Respondent's Wappingers Falls facility presents a closer question in this case. Although the Board applies a rebuttable presumption that single-facility bargaining units are appropriate, I believe the judge applied the correct analysis and properly found that this presumption has in fact been rebutted by Respondent. Therefore, separate from the question of business continuity, the bargaining unit's inappropriateness independently warrants a conclusion that Respondent did not unlawfully fail to recognize and bargain with the Union in the instant case.

When determining whether an employer has rebutted the presumption favoring a single-facility bargaining unit, the Board examines a number of factors involving the extent to which included and excluded employees share a community of interest: (1) central control over

<sup>4</sup> Judge's opinion, *infra*, slip op. at 16 (emphasis added).

<sup>5</sup> The cases cited by my colleagues—namely, *A. J. Meyers & Sons, Inc.*, 362 NLRB No. 51 (2015), *Van Lear Equipment, Inc.*, 336 NLRB 1059 (2001), and *Montauk Bus Co.*, 324 NLRB 1128 (1997)—are distinguishable from the situation presented here. None of those cases involved the fundamental change to the essence of the business that occurred here, nor did the employees in those cases experience such significant changes to their terms and conditions of employment.

daily operations and labor relations, including the extent of local autonomy, (2) similarity of skills, functions, and working conditions, (3) degree of employee interchange, (4) distance between locations, and (5) bargaining history, if any. *J&L Plate*, 310 NLRB 429, 429 (1993). Considering these factors, I agree with the judge's finding that the Wappingers Falls facility is not an appropriate single-facility bargaining unit. In the context of Respondent's operations, which involve the Wappingers Falls facility and the Yonkers location, the record establishes that Wappingers Falls has "been so effectively merged into a comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Dean Transportation, Inc.*, 350 NLRB 48, 58 (2007), enfd. 551 F.3d 1055 (D.C. Cir. 2009).

For several reasons, I believe my colleagues erroneously conclude that Respondent's Wappingers Falls facility is an appropriate bargaining unit.

First, the factor of central control over daily operations overwhelmingly favors finding a single-facility Wappingers Falls unit inappropriate. All hiring, firing, scheduling, route assignments, payroll, human relations, accounting, and purchasing services are performed in Yonkers. Although the majority makes much of the fact that Respondent's president and an office manager were present in Wappingers Falls for the first 2 weeks of the operation, they acknowledge that this was a temporary measure. Those individuals returned to Yonkers, where they are permanently headquartered. In my view, the brief, temporary presence of the president and office manager does not demonstrate any local autonomy in Wappingers Falls operations. Quite the opposite, it is instead strong evidence of the high degree of centralized control that Yonkers management at all times maintained over operations at both facilities. After the departure of the president and the office manager, the two dispatchers permanently transferred from Yonkers are nominally the only managerial presence at the Wappingers Falls facility, but they simply act as conduits through which the school district, parents, employees, and management in Yonkers can pass information. For instance, they receive requests for time off from employees and relay those requests to management in Yonkers, which then determines whether to grant the requests. The only authority they appear to exercise on their own is the reassignment of drivers to cover routes due to unexpected absences. However, the record is devoid of evidence as to how frequently they exercise this limited authority. The majority cites no case,<sup>6</sup> and I know of none, in which the

Board has found that such limited local autonomy supports a separate, single-facility unit. In short, at no time since the commencement of Wappingers Falls operations has that facility functioned without daily oversight from Yonkers-based management.

Second, as my colleagues concede, the factor of similar skills, functions, and working conditions also strongly supports a finding that the Wappingers Falls facility has been functionally integrated with the Yonkers facility. The drivers and monitors at each facility provide the same specialized service in transporting special education students, which, as stated above, is fundamentally different than the transportation of general education students. This work requires all of Respondent's drivers to have identical training and certifications, including specialized safety training to work with special education students. This training takes place for all drivers at the same time, at the same location in Yonkers, and from the same trainer. The drivers and monitors also utilize the same skills and equipment. Cf. *School Bus Services*, 312 NLRB 1, 5 (1993) (paratransit drivers' skills and working conditions "sufficiently diverse" from school bus drivers to rebut a conclusion that a unit of all drivers at a single location was an appropriate unit), enfd. 46 F.3d 1143 (9th Cir. 1995). Likewise, the employees at each facility are covered by the same policies in Respondent's employee handbook and are on the same wage scale. Further, all maintenance work for buses used by employees at both facilities is performed at the yard in Yonkers.

Third, the Durham unit's history as a multifacility bargaining unit likewise supports Wappingers Falls' integration with the Yonkers facility, or, at the very least, does not lend support to finding it to be an appropriate single-facility unit. The majority unpersuasively characterizes the Durham unit as a single-facility unit. It cannot be ignored, however, that the bargaining unit description in the parties' collective-bargaining agreement specifically covered the employees located at the facilities in Poughkeepsie and Red Hook, New York. More to the point, and unlike my colleagues, I do not believe that a union's previous representation of employees at a particular location or locations favors a single-location unit in a successorship case because that is precisely the question being evaluated. Nor do I believe that it favors a single-location unit where, as here, myriad business changes may diminish the relevance of the union's pre-transition representation of employees at a particular location.

---

there is no evidence that the dispatchers here have any responsibility for day-to-day operations or scheduling. Even assuming the dispatchers exercise the authority as described by the majority frequently, it simply cannot rise to the level of "substantial authority of local management." *Id.*

<sup>6</sup> My colleagues rely on *Montauk Bus Co.*, 324 NLRB at 1135, to support their finding of local autonomy. Unlike that case, however,

Finally, I disagree with my colleagues that the factor of employee interchange supports Wappingers Falls as a single-facility bargaining unit. When Respondent commenced operations on April 22, which the majority states is the relevant date for examining the community of interest factors, Respondent could not perform its work for Dutchess County from Wappingers Falls without the temporary presence of senior management from Yonkers, the permanent transfer of Yonkers employees to fill dispatcher positions, and the daily shuttling of 8 to 10 drivers and monitors (10 to 12 percent of the total work force) from Yonkers to Wappingers Falls. Ultimately, however, even if I agreed with my colleagues that the employee interchange factor supports a single facility presumption, I believe that this one factor is substantially outweighed by the other three community-of interest-factors. The record conclusively demonstrates that the Wappingers Falls facility has been effectively merged and functionally integrated with Respondent's headquarters in Yonkers such that it has lost its separate identity.<sup>7</sup>

Overall, I find this case is strikingly similar to *Dattco*. There, the Board found that the employer was not a legal successor because the bus terminal at issue was not an appropriate single-facility bargaining unit. The Board noted the "highly centralized control over daily operations, and uniform working conditions, functions, and skills." 338 NLRB at 51. The Board also observed that "[h]iring, written discipline and suspension, and termination decisions are made at headquarters. Time off is granted by managers at headquarters. Payroll and personnel functions are carried out at headquarters." *Id.* As a result of this central control, the local terminal manager had little autonomy. Although the level of employee interchange involved is arguably less here than in *Dattco*, overall the strong factual similarities between that case and this support finding that Wappingers Falls is not an appropriate single-facility bargaining unit.<sup>8</sup>

<sup>7</sup> I believe the factor of geographic distance is neutral in the instant case. The Board has found employers to be a successor employer with facilities a closer distance than the 54 miles in this case, *D&L Transportation*, 324 NLRB 160 (1997) (18 miles between facilities), but has also found that employers have successfully rebutted the single-facility presumption despite a further distance than at issue in this case, *Dattco, Inc.*, 338 NLRB 49, 50 (2002) (55 miles between facilities).

<sup>8</sup> As similar as this case is to *Dattco*, the facts regarding the appropriateness of the bargaining unit are quite unlike those of *A. J. Myers*, which is relied on by my colleagues. Unlike this case, the Board in *A. J. Myers* found that the single-facility presumption was not rebutted based on significant local autonomy vested in the terminal manager and different working conditions for each location, among other things. 362 NLRB No. 51, slip op. at 9-10.

### Conclusion

For the above reasons, consistent with the judge's decision in this case, I believe the record establishes that Respondent is not a legal successor to Durham. Therefore, I believe the Board cannot reasonably conclude that Respondent had a duty to recognize and bargain with the Union. Accordingly, and because the remaining complaint allegations are dependent on an obligation to bargain, I would affirm the judge's dismissal of the complaint in its entirety.

Dated, Washington, D.C. May 11, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local 445 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an under-

standing is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers and monitors employed by Allways East Transportation, Inc. at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on July 18, 2014.

ALLWAYS EAST TRANSPORTATION, INC.

The Board's decision can be found at [www.nlr.gov/case/03-CA-128669](http://www.nlr.gov/case/03-CA-128669) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*John Grunert, Greg Lehmann, and Charles Guzak, Esqs.,* for the General Counsel.

*Richard I. Milman, Ira D. Wincott, and Jonathan Sturm, Esqs. Marshall M. Miller Associates, Inc.,* for the Respondent.

*Daniel E. Clifton, Esq. (Lewis, Clifton & Nicolaidis, P.C.),* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Poughkeepsie, New York, on December 15–16, 2014, March 30–April 1, 2015, and April 22–23, 2015. The Charging Party Union filed the charges on May 15 and August 1, 2014, respectively, and the General Counsel issued the complaint on September 30, 2014.

The complaint alleges that the Respondent is a successor employer that has failed and refused to recognize and bargain with the Union, and that it unilaterally changed the wage rates of unit employees. It further alleges that the Respondent terminated an employee without affording the Union prior notice and an opportunity to bargain, and failed and refused to respond to the Union's request for information. The Respondent's answer denies all material allegations.

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case,<sup>1</sup> including my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, Allways East Transportation, Inc., is a corporation that provides schoolbus transportation for special education and special needs children in Westchester and Dutchess Counties, New York. It is headquartered in Yonkers, New York, with a secondary place of business in Wappingers Falls, New York, at the relevant time period. In the 12 months preceding September 30, 2014, the Respondent derived gross revenues in excess of \$250,000 at its Wappingers Falls facility, and purchased and received at that facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of New York. Accordingly, I find, and the Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

Allways East Transportation, Inc. (the Respondent), is a relatively small school bus transportation company, headquartered in Yonkers. It was founded by Judith Koller and her now-deceased husband. Judith is now president of the Company, and her daughter, Marlaina Koller, is vice president. The Company specializes in transporting special education and special needs students. At the relevant time, the Company employed approximately 233 drivers and monitors in Yonkers, where it provided services for Westchester County. There are approximately 17 other employees at Yonkers, including an office manager, fleet maintenance manager, operations manager, mechanics, payroll staff, clerical staff, and dispatcher/drivers. The Company has always been nonunion.

Prior to April 2014, Durham School Services, a large national company, had provided school bus service for special education and special needs children in Dutchess County, as well as for general education children. In 2012, the Respondent had submitted a bid to provide school bus service for special education and special needs children in response to a Request for Proposal by the Dutchess County Department of Health. The Respondent lost that bid; however, Dutchess County contacted the Respondent in early 2014 and requested that it take over the contract almost immediately, during the spring term, due to poor performance by Durham. Although the Respondent had little time to prepare, it agreed to begin service in April 2014. Dutchess County terminated the contract with Durham by letter dated February 28, 2014.

With Durham, there had been 52 routes for those special education and special needs children. The Respondent had to

<sup>1</sup> The Respondent filed an unopposed motion to correct the transcript. The motion is granted.

purchase the buses and equipment to service those routes, as well as hire drivers and monitors. Subsequently, when the Respondent evaluated the routes, it was determined that 65 routes were necessary. Additionally, the Respondent was required by the contract to lease property in Dutchess County as a satellite yard.

#### *B. Preparations to Service Dutchess County*

Before taking over this Dutchess County contract, the Respondent had serviced only Westchester County schools. It had approximately 5 weeks to prepare to begin providing service for Dutchess County. It purchased new buses and new equipment including child safety seats. It leased property in Dutchess County as a satellite yard, a requirement of the contract. It modified its insurance and workers' compensation policies to cover the new facility. It hired new drivers and monitors<sup>2</sup> for the Dutchess County routes.

The Respondent participated in a job fair at a Poughkeepsie hotel on 2 weekends in March 2014 in order to recruit needed drivers and monitors. Judith and Marlaina Koller were present, along with management from Yonkers. Marlaina made a presentation about the Company and answered any questions. Interested applicants submitted applications. Some applicants had worked for Durham; others never had, but may have worked for another bus company. Dutchess County had recommended that the Respondent hire drivers and monitors who worked for Durham, who were familiar with the children, their parents, and teachers, and the routes, since the children were special needs students. Those individuals were instructed to note that experience on their applications.

Subsequently, Judy and Marlaina reviewed the applications. Physical examinations were then scheduled for the candidates selected as drivers, conducted on April 7 by its Yonkers' physician at the new Wappingers Falls facility. Additional paperwork was also completed by the selectees at that time. Successful candidates were then interviewed by Marlaina. Upon hire, employees were notified of their routes and provided the company policy handbook. Park-out requests<sup>3</sup> were also approved.

On April 22, 2014, the Respondent began transporting Dutchess County special education and special needs students. As of the week ending May 1, 2014, there were 82 new drivers and monitors assigned to the Wappingers Falls facility, as well as two driver/dispatchers who transferred from Yonkers when promoted. Of those 82 new hires, 62 had worked for Durham when hired by the Respondent and quit when offered employment with the Respondent.

Despite hiring those new drivers and monitors, the Respondent had an insufficient number of drivers and monitors for the Dutchess County routes, so the Respondent shuttled 8 to 10 drivers and monitors between Yonkers and Wappingers Falls, on a daily basis. Additionally, some Yonkers drivers and moni-

tors preferred to stay at a local hotel while temporarily working on the Dutchess County routes.

Some, but not all, drivers and monitors who had worked together as a team at Durham were assigned to work together by the Respondent. Some, but not all, drivers and monitors who had worked at Durham were assigned by the Respondent to the same or similar routes as they had at Durham. Some drivers and monitors who had worked at Durham had a different number of daily routes assigned by the Respondent.

No supervisors are permanently assigned to Wappingers Falls. The two driver/dispatchers, Aldo Leon and Carlos Rivera, perform dispatcher duties and drive buses when needed. They relay information between bus drivers and parents or teachers, and to management in Yonkers. In addition, when an employee calls out on a given day, the dispatchers find an available driver or monitor to cover for them, or drive the route themselves. The various managers from Yonkers are responsible for operations at Wappingers Falls. Initially, Judith, Marlaina, and Operations Manager Elida Wilson came to Wappingers Falls fairly frequently to oversee the new facility. Fleet Manager Frank Ortiz and Office Manager ToniAnn Francisco came to Wappingers Falls as needed. Eventually, such close supervision was no longer necessary and management now oversees the facility primarily from their offices in Yonkers.

#### *C. Union Contact with the Respondent*

Durham employed approximately 185 full-time and part-time drivers and monitors in Dutchess County. They are unionized, members of International Brotherhood of Teamsters, Local 445 (the Union). Durham and the Union entered into collective-bargaining agreements, the most recent of which was effective from September 2, 2012, to August 31, 2018.

Since Durham continued to provide general education school bus transportation services for Dutchess County after the Respondent took over the special education and special needs contract, the Union continued to represent the drivers and monitors employed by Durham. Further, it believed it continued to represent unit members who were now employed by the Respondent. To that end, the Union (Business Agent Lori Polesel and Secretary/Treasurer Adrian Huff) called Marlaina and had a brief conversation, to introduce themselves and request a meeting. The Union then emailed Marlaina on March 10, 2014, proposing dates for such a meeting. Then, on April 16, 2014, it sent her a letter requesting that the Respondent recognize the Union as the collective-bargaining representative of the drivers and monitors, and bargain collectively with the Union. The Respondent did not respond. On May 14, Polesel and Huff went to Yonkers to try to meet with Marlaina but were told she was not there.

#### *D. The Respondent's Operations*

All of the Respondent's managers are assigned to, and work from, the Yonkers facility. They go to Wappingers Falls as needed, such as for weekly delivery of paychecks.

All hiring, firing, and discipline decisions are made by Judith and/or Marlaina, in Yonkers. All payroll, human resources, and labor relations services are performed in Yonkers. All personnel files are maintained in Yonkers. Wappingers Falls' monthly

<sup>2</sup> Monitors are aides who work as a team with the busdriver. They assist the children in boarding and disembarking, ensure the students' safety on the bus, and handle health and behavioral situations that may arise during transport. To that end, they develop relationships with the children and their parents.

<sup>3</sup> When a driver keeps the bus at his/her residence overnight, rather than parking it at the Company's facility, it is called a park-out.

attendance sheets, payroll cards, and DOT reports (daily pretrip cards completed by drivers) are sent to Yonkers for processing and retention. All employees are subject to the same employee policies and handbook. All drivers and monitors are guaranteed a minimum workweek of 22.5 hours. They are paid according to the same pay scales and receive the same benefits. All accounting, billing, and ordering of supplies and equipment is done in Yonkers. Bus routes are created and modified in Yonkers, and route assignments are made in Yonkers.

There is one maintenance facility, in Yonkers, for all maintenance, servicing, and repairs. An employee at Wappingers Falls does minor servicing such as refilling vehicle fluids and washing windows. Drivers or driver/dispatchers bring the buses down to Yonkers unless the vehicle is disabled. In such instances, repairs may be made at a local service station.

There is one State and Federal DOT inspection number for both yards, and one 19a school bus transportation certificate registration account for both yards. The Respondent has one insurance policy for all buses, at both sites, and all are registered and insured in Yonkers. There is one liability insurance policy and one OWCP policy.

The same 19a trainer is used to certify drivers at both yards, and all 19a training is conducted at Yonkers. The Respondent shuttles Wappingers Falls drivers to Yonkers for that training. All safety classes are conducted as one group at Yonkers. The same doctor is employed for all drivers' annual physicals, as well as for prehire physicals. Employees from both facilities are pooled as one group for random mandatory D&A testing. All social events are for employees at both locations, and are held in the Yonkers area.

#### *E. Employees' Terms and Conditions of Employment*

The terms and conditions for employees who used to work at Durham changed significantly. They are subject to new personnel policies and different benefits. Wages were increased for most. There is no seniority with the Respondent, and they did not receive credit for their service at Durham. They have new buses and new equipment. Most have modified or altogether different routes than at Durham.

Almost all of the Respondent's drivers have park-outs; at Durham, only about one-third did. The drivers pick up their monitors at the monitor's home, or the monitors drive to driver's house. At Durham, most drivers picked up the monitors at the base. The fueling procedures are different. At Durham, buses were refueled at the base, while the Respondent provides drivers with keys encoded with their social security number to fuel at county fueling stations. At Durham, drivers returned to the base every day, and often between routes; at Respondent, there is no reason to come to the facility except once a week for about 10 minutes, to pick up their paychecks and drop off paperwork.

The employees utilize different buses and equipment, communicate with different dispatchers, report to different supervisors, and have a different work location than with Durham. Some employees transport some of the same students, on similar routes, but, although this was a midsemester change, the routes were modified and some new routes added.

As there are no local supervisors, requests for leave are

communicated to the dispatchers. They note the requests on a board, for the supervisors.

#### *F. Termination of Sherry Siebert and Request for Information*

Sherry Siebert was a driver for the Respondent, who had previously worked for Durham. On July 18, 2014, she was fired. She did not seek union representation and did not notify the Union of her termination. When the Union learned of her firing, Polesel contacted Marlaina via email. (GC Exh. 9(e).) She requested that Marlaina provide her with information about all terminated employees and requested to meet and discuss those actions. Marlaina did not respond.

Neither Marlaina nor Judith nor anyone else on behalf of the Respondent has ever contacted the Union regarding these matters, nor have they responded to the Union's requests to bargain or provide information.

### III. LEGAL STANDARDS AND ANALYSIS

#### *E. Respondent's Motion to Dismiss the Complaint*

The Regional Director for Region 3 filed a petition for preliminary injunction pursuant to Section 10(j) of the Act in the Federal District Court for the Southern District of New York, that was denied by Judge Nelson Roman on December 1, 2014. The General Counsel has appealed that determination to the Second Circuit Court of Appeals, where it is pending.

The Respondent filed a Motion to Dismiss the instant complaint on the basis that Judge Roman's decision precludes Board jurisdiction over the matter, since he ruled that the Respondent is not a successor employer and had no obligation to recognize or bargain with the Union. The Respondent contends that Judge Roman's findings are conclusive as a matter of res judicata and estoppel.

Judge Roman's rulings are not binding on me, as the issues before me are not the same issues presented to Judge Roman, and different standards apply. The cases cited by the Respondent are not on point; no case was cited that addresses a similar situation, and I have found none.

The motion to dismiss the complaint is denied.

#### *B. Is the Respondent a Successor Employer?*

It is well settled that a successor employer is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations between the two, and if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a "substantial and representative complement." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *In re Dattco, Inc.*, 338 NLRB 49 (2002).

#### *Is There Substantial Continuity of Operations?*

In order for a new employer to be a successor, there must be substantial continuity of operations, as evidenced by all three of the following factors:

1. The business of both employers is essentially the same;

2. The employees of the new company are doing the same jobs in the same working conditions under the same supervisors as the predecessor; and

3. The new entity has the same production process, procedures, and products, and basically the same body of customers.

*Fall River Dyeing Corp.*, supra at 43.

I find that none of these factors has been met.

While both companies provide school bus transportation services, Durham provides bus transportation for general education and special needs children, while the Respondent provides transportation only for special needs children. The Respondent took over the special education contract, a portion of the services Durham provided, and continues to provide, to Dutchess County. All of the Respondent's drivers must be trained and certified to transport special needs children, which is more skilled than driving a regular education bus. Further, special needs children require monitors on their buses, who utilize specialized equipment and are trained in dealing with special needs children, their various conditions, and the myriad issues which may arise on the buses.

Those drivers and monitors who were hired by the Respondent that had previously worked for Durham continued to provide school bus transportation for special needs children in the same area, but their working conditions had changed and they had none of the same supervisors. The local facility was in a different location. While Durham had two sites, in Poughkeepsie and Red Hook, the Respondent opened a new facility in Wappingers Falls. The wage rates were different, the work rules and policies had changed, and the supervisors had changed. All the Respondent's supervisors and managers are at Yonkers; none are assigned to Wappingers Falls, while Durham had supervisors at the Poughkeepsie facility. Durham had a maintenance department in Poughkeepsie; the Respondent's is in Yonkers. After Durham lost this contract, its operations continued virtually unchanged at its Poughkeepsie and Red Hook facilities.

Although the Respondent assumed responsibility to provide school bus transportation for special needs children in Dutchess County, it took over only the contract, not any portion of Durham's operations. The drivers' processes and procedures are materially different from Durham's. Most of the routes changed, being either modified somewhat or changed completely. There are more routes than under Durham. Drivers pick up the monitors at home or the monitors come to the driver's house, rather than joining them at the facility, as with Durham. Most buses are parked overnight at the driver's home, rather than at the facility, as with Durham. Drivers and monitors have different work hours than at Durham; they could have split shifts and different numbers of routes. Fueling is done at the county lot by credit card, rather than at the facility, as with Durham. Employees used to go to the Durham base on a daily basis, where they would drop off their paperwork; that is now done weekly, when they pick up their paychecks. Employees would also go to the Durham base during the day, between runs, often in order to obtain additional hours, to see if any runs were available that day. That is unnecessary with the Respond-

ent, as employees have full schedules. Employees communicate with two dispatchers at Wappingers Falls, who are different from the dispatchers at Durham.

The Respondent had no contact with Durham, either before or after starting to service Dutchess County in April 2014. It did not take over any of Durham's facilities, it did not purchase any buses or equipment from Durham. It did not obtain any information regarding routes or employees or any other matter, nor did it obtain any records of any kind from Durham. It did not step in and take over Durham's operations; it merely took over the Dutchess County contract for special education children, operating completely independently of Durham. It did not simply begin transporting students on the same routes with the same drivers and monitors. New routes had to be configured, old ones modified, and the total number of routes increased from 52 to 65. Although some Durham employees were hired, the Respondent's hiring process was not pro forma; the Respondent conducted a genuine application and hiring process. It did not contact Durham in order to obtain recommendations about employees. Some employees were assigned similar routes as they had with Durham, but virtually all routes were changed in some respect.

Even the witnesses called by the General Counsel, who had worked for both Durham and the Respondent, testified to significant changes in their working conditions with the Respondent, including having different routes, different numbers of routes, and different numbers of hours.

In sum, many changes occurred, including leasing property, purchasing new buses and equipment, developing new routes, changing old routes, hiring new employees, and imposing new policies and procedures. Even viewed solely from the employees' perspective as urged in *Fall River*, above, it was clear that there was a new employer, that they were working under new rules and procedures, for different supervisors, and the operation was not merely a continuation of Durham's.

I find that there is no substantial continuity of operations between Durham School Services and the Respondent.

Is the Respondent's Wappingers Falls Facility an Appropriate Stand-Alone Bargaining Unit?

Although a single-facility unit is presumptively appropriate for collective bargaining, that presumption is rebuttable. The presumption is lost when the single facility is so effectively merged into a more comprehensive unit, or is so functionally integrated, that it does not have a separate identity. See *Dattco*, above. The burden is on the party opposing the appropriateness of the single-facility unit to present sufficient evidence to overcome the presumption. *J&L Plate, Inc.*, 310 NLRB 429 (1993).

A purchaser may be a successor even where it takes over only a portion of the bargaining unit, where the new unit can exist on its own as an appropriate unit. *Stewart Granite Enterprises*, 255 NLRB 569 (1981).

Further, there is nothing in the statute that requires that the proposed unit be the only appropriate unit, or the most appropriate unit, only that it be appropriate. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* on other grounds 190 F.2d 576 (7th Cir. 1951); *Overnite Transportation Co.*, 322 NLRB 723 (1996).

In determining whether the presumption of appropriateness is rebutted, the Board considers such factors as community of interest; central control over daily operations and labor relations including the extent of local autonomy; the degree of employee interchange; similarity of skills, functions, and working conditions; distance between the locations; and bargaining history, if any. See *J&L Plate*, above; *D&L Transportation, Inc.*, 324 NLRB 160 (1997); *Esco Corp.*, 298 NLRB 837 (1990).

At the relevant time period, the Respondent had two facilities: Yonkers and Wappingers Falls. The company is headquartered in Yonkers, which had previously been its only facility; Wappingers Falls is merely a satellite site. All managers and supervisors are located in Yonkers. They consist of President Judith Koller, Vice President Marlaina Koller, Office Manager ToniAnn Francisco, Fleet Manager Frank Ortiz, and Operations Manager Elida Wilson. They travel to Wappingers Falls as necessary to oversee operations there. That is generally a 45-minute drive. When the Wappingers Falls facility first opened, some managers traveled there frequently. The two driver/dispatchers at Wappingers Falls, Aldo Leon and Carlos Rivera, had been drivers at Yonkers before accepting the Wappingers Falls positions. They are not supervisors and do not make managerial decisions or exercise substantial judgment. They do not hire, fire, discipline, grant raises, or make any other decisions, including granting or denying time off. Those decisions are made only by Marlaina or Judith Koller, the owners, in Yonkers. They merely handle dispatching duties, and drive when needed. While Leon and Rivera communicate requests to Yonkers, all decisions regarding leave and time off are made at Yonkers. Initial assignments to bus routes are made by Yonkers. If an individual calls out sick, for example, either Leon or Rivera will determine what other drivers or monitors are available to cover for them, and ask that person to do so or will do it themselves. Scheduling an available driver or monitor to cover for an unexpected absence on a given day is not a managerial decision. One of the Yonkers' supervisors comes to Wappingers Falls on a weekly basis with paychecks. That individual may distribute the checks, or may leave them with Leon or Rivera to distribute. Distributing paychecks to employees is likewise not a managerial function.

All labor relations and personnel functions are performed at Yonkers. All payroll is done at Yonkers. All hiring, firing, and disciplinary decisions are made at Yonkers by Marlaina and/or Judith. Physical exams for new hires are performed by the doctor hired by Yonkers. All employee training is conducted at Yonkers. All bus maintenance is performed at Yonkers, if the bus can be driven there. Otherwise, it will be performed by a local service station. The only exceptions are minor matters, washing windows and filling fluids such as oil, as there is no maintenance department at Wappingers Falls.

Wappingers Falls is not a functioning stand-alone facility operating independently of Yonkers. All operations are run by Yonkers, and all decisions are made by Yonkers. The two driver/dispatchers at Wappingers Falls are not managers or supervisors, and are not responsible for making significant decisions. Wappingers Falls could not function without the daily oversight of Yonkers, and it does not have a separate

identity.

There are several cases somewhat similar to the instant situation where the Board has found a new employer not to be a successor. In fact, the instant situation presents a stronger case for integration than these cases.

The Respondent's facility is similar to *Dattco*, above. Like *Dattco*, all wages and benefits companywide are set by the main office. All accounting, payroll, personnel, and records functions are carried out at the main office. Timesheets and paychecks are processed and generated at the main office. All employees in both locations are subject to the same rules and policies, and only Yonkers' management may discipline, hire, or fire employees at either location. Decisions on time off are made at Yonkers. All drivers operate school buses, transporting special needs children, with monitors who assist and supervise the children. All drivers must possess the same license and receive (19a) certification. Mandatory annual training is conducted at Yonkers. There is no maintenance facility at Wappingers Falls; all periodic routine maintenance and all emergency repairs (if possible) are done in Yonkers. Bus routes are planned at the main office, assignments to routes are made by the main office (other than emergency call-outs). There are no managers or supervisors at Wappingers Falls; they travel from Yonkers as needed. There are two driver/dispatchers, who do not exercise substantial judgment. They decide what available driver or monitor will cover for another in case of an unscheduled absence, but otherwise they merely communicate information to drivers, or between drivers and parents or teachers. They relay requests or communicate emergency situations to Yonkers, from whom they receive instructions. There is no local autonomy in operations.

*P. S. Elliott Services*, 300 NLRB 1161 (1990), is a case where the operations were likewise integrated. The owner and all supervisors were located in the main office. There was a lead person at each jobsite, but that individual was not a supervisor. All personnel matters, hiring decisions, wage rates, and benefits were established and handled at the main office. All labor relations and employment policies were centralized; the same rules, policies, and procedures applied to all employees.

*Budget Rent A Car Systems*, 337 NLRB 884 (2002), is instructive as to the significance of the role of dispatchers Leon and Rivera. Although there were branch managers at the two stores at issue, their authority was limited to scheduling of employees for regular work hours. They had little or no authority, little or no input into hiring, termination, serious discipline, wages, benefits, transfers, or scheduling of overtime; control of labor relations was thus centralized. The Board found there was substantial functional integration, with some employee contact among all stores and identical job functions and terms and conditions at each store. The job functions, skills, starting wages, benefits, incentives, uniforms, and all other terms and conditions were identical in all stores. Training was centralized, and truck mechanics traveled to the stores to perform vehicle servicing.

*Novato Disposal Services*, 328 NLRB 820 (1999), has some commonalities with the instant case. All employees at the company's various facilities were under the supervision of the same individuals, and there was a high degree of centralized control

over labor relations. There was also a significant degree of contact and interchange between the facilities, including both permanent and temporary interchange. Further, all employees had common pay and benefits, seniority, training, and employees in similar job classifications performed similar work.

*Prince Telecom*, 347 NLRB 789 (2006), likewise had a high degree of administrative centralization of its labor relations policies. All human resources personnel were located at headquarters, and uniform personnel policies applied to all locations. Headquarters was responsible for establishing the budget, pay scales and benefits that applied to all employees. Training was centralized, and operations management was centralized. The area manager visited all locations, interviewed new hires, set their pay, and made all hiring, firing, and disciplinary decisions. All employees within the same classification performed the same duties and had the same skills. The company also temporarily transferred a significant number of employees (26 of 148). Unlike *Prince*, in the Respondent's situation, no one else has input into hiring, firing, or disciplinary decisions.

In *Marine Spill Response Corp.*, 348 NLRB 1282 (2006), the Board found centralized control over labor relations and personnel matters, no local autonomy, no day-to-day local supervision but evidence of common day-to-day supervision at two plants, and of regular interaction among employees and employee transfers among facilities.

There are also several cases where the Board found successorship, and where the situations were dissimilar to the instant case.

In *Esco Corp.*, 298 NLRB 837, the Board determined that there was local autonomy, as it had a lead man, overseeing operations, though he was not a statutory supervisor. That individual had authority that Leon and Rivera do not.

The instant situation is also unlike *Dean Transportation, Inc.*, 350 NLRB 48 (2007), where the employees had different job skills, different working conditions, virtually no interchange of employees, and some local autonomy such as mechanics, route planners, and supervisors. Wappingers Falls' and Yonkers' drivers and monitors have the same skills and the same working conditions. There are no mechanics, route planners, or supervisors at Wappingers Falls.

In *Van Lear Equipment, Inc.*, 336 NLRB 1059 (2001), the Board found successorship even where the new employer assumed only a discrete portion of the predecessor's operations and did not take over the entire bargaining unit. The 19 bus drivers hired by the respondent had been employed by the predecessor, doing the same jobs under generally similar working conditions, although with a different supervisor. They utilized the same production processes and serviced the same customers, and parked buses in the same lot. That is not the situation here, where most of the terms and conditions of employment changed. Additionally, the Board found that there was no interchange of employees between locations, and that the local supervisor had discretion and independence on certain matters (interviewing applicants, recommendations for hire, giving oral and written warnings, suspending employees for drug and alcohol, or safety infractions). In the instant case, there was significant interchange of employees initially, and there is no local individual with any similar labor relations authority. All such

decisions are made at Yonkers.

*Stewart Granite Enterprises*, 255 NLRB 569 (1981), is of interest because the new employer retained all the predecessor's production employees when it acquired the plant. It continued to operate the plant, producing the same products with essentially the same customers. It desired to keep the predecessor's production employees in order to perform the same production tasks without the necessity of training a new work force. In addition, the new employer sought former employees of the predecessor when additional staff was needed, for the same reason. That situation is different from the instant case, in that the changes there were superficial, and all employees were retained. The employees continued to work at the same location doing the same tasks in the same manner as they previously had. The Respondent herein, did not take over the location or any of the equipment used by Durham. It did not retain any of Durham's employees; it hired individuals who worked for Durham and then quit when they accepted positions with the Respondent. The Respondent also had significantly different procedures than Durham.

In *Bronx Health Plan*, 326 NLRB 810 (1998), the Board found continuity of operations although the group hired by that employer was only a small fraction of all the bargaining unit employees covered by the collective-bargaining agreement. The new employer continued the same operation, in the same location, performing the same services in the same manner, and hired the same employees and supervisors to perform the same duties with no hiatus. Again, none of that applies to the instant situation.

For these reasons, I find that the following factors have been met.

I find that the Wappingers Falls facility has a community of interest with Yonkers, in that both operate under the same managers and supervisors, with the same company policies, benefits, and wage structure.

I find that Yonkers exercises central control over the daily operations and labor relations at the Wappingers Falls facility, and that there is no local autonomy at Wappingers Falls whatsoever.

I find that there is some employee interchange between Wappingers Falls and Yonkers, though it is limited. At the beginning of the Dutchess County contract in 2014, there was significant interchange as numerous Yonkers drivers and monitors temporarily worked the new Dutchess County routes, either shuttling daily between the two facilities or staying at a Poughkeepsie area hotel. There is no evidence that any Wappingers Falls drivers or monitors have ever temporarily worked out of Yonkers.

I find that the drivers and monitors at Wappingers Falls and Yonkers have identical skills and functions, and similar working conditions. All drivers have the same training and certifications, and all monitors receive the same training, since the Company provides bus services only for special education and special needs children. All drivers receive the same 19a training, in the same location, from the same trainer. All drive similar buses. The same work rules and company policies apply to all employees at both locations. The same wage scale and benefits apply to all employees. All employees work for the same

supervisors and managers. All celebrations such as holiday parties are held for both facilities in the Yonkers area. Working conditions are similar but not identical, since Wappingers Falls is a satellite facility and has no supervisors or managers permanently stationed there, and there is no maintenance department there. However, all employees at both locations report to the same supervisors and managers, who are in Yonkers. There are two dispatchers in Wappingers Falls, so the employees deal with different dispatchers than the Yonkers' employees.

I find that the Wappingers Falls facility is 54 miles from headquarters in Yonkers, usually a 45-minute drive.

There is no bargaining history at Allways East, as the Company has always been nonunion.

I find, therefore, that Wappingers Falls is not an appropriate stand-alone bargaining unit.

#### Conclusions

Since I find that there is no substantial continuity of operations between Durham School Services and the Respondent, and that the Wappingers Falls facility is not an appropriate stand-alone bargaining unit, I conclude that the Respondent is

not a successor to Durham School Services.

Since I find that the Respondent is not a successor to Durham School Services, it follows that it 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 change the wage rates of employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 12, 2015

---

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.