

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

MV TRANSIT AND/OR MV TRANSPORTATION, INC.

and

Case 16-CA-110465

**AMALGAMATED TRANSIT UNION, LOCAL 1091
(ATU LOCAL 1091)**

Bryan Dooley and Roberto Perez, Esqs.,
for the General Counsel.

Kerry Martin, Esq.,
for the Respondent.

Glenda Pittman, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that MV Transit and/or MV Transportation, Inc. (Respondent) violated the National Labor Relations Act (the Act) by unilaterally deciding not to make retirement contributions for the benefit of bargaining unit employees, without first notifying the Amalgamated Transit Union, Local 1091 (the Union) and providing an opportunity to bargain about that decision and its effects. In support of that complaint allegation, the General Counsel maintains that Respondent was obligated to make the retirement contributions because Respondent is a “perfectly clear” successor, and/or because Respondent is an ordinary successor and implicitly led bargaining unit employees to believe that their retirement benefits would not be changed. Respondent contends the complaint allegation here is time-barred under Section 10(b) of the Act, and asserts that in any event, it was not obligated to make retirement contributions while it negotiated with the Union about the terms of a new retirement plan.

As explained below, I have found that Respondent indeed was obligated to make the disputed retirement contributions as a “perfectly clear” successor and/or ordinary successor. I also have found that by unilaterally deciding not to make the retirement contributions from August 19, 2012, to April 28, 2014, without first notifying the Union and providing an opportunity to bargain about that decision and its effects, Respondent violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE CASE

5 This case was tried in Austin, Texas, from August 27–29, 2018. The Union filed the
 unfair labor practices charge in this case on August 1, 2013.¹ On November 27, 2013, the
 Region deferred further proceedings on the charge to provide an opportunity for Respondent and
 the Union to resolve the dispute through the grievance-arbitration process. On or about October
 6, 2017, however, the Region learned that Respondent withdrew its consent to arbitrate the
 grievance underlying this case. In light of that development, the Region revoked its decision to
 10 defer this case, and resumed processing the unfair labor practices charge. (GC Exh. 1(c), (f).)
 The General Counsel subsequently issued the complaint in this case on February 27, 2018.

15 In the complaint, the General Counsel alleges that Respondent violated Section 8(a)(5)
 and (1) of the Act by, from about August 19, 2012, to April 11, 2014, ceasing providing
 employees with retirement benefits/and or retirement contributions (and not providing any
 substitute retirement benefits and/or retirement contributions) without first notifying the Union
 and affording an opportunity to bargain about these decisions and their effects. Respondent filed
 timely answers denying the alleged violations in the complaint.

20 On the entire record,² including my observation of the demeanor of the witnesses, and
 after considering the briefs filed by the General Counsel, Union and Respondent, I make the
 following

¹ All dates are in 2013, unless otherwise indicated.

² The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts, which incorporate several corrections proposed by the Union in a motion to correct transcript: p. 12, l. 21: “burned” should be “Burns”; p. 14, l. 6: “proposal” should be “proposed”; p. 14, l. 25: “burn” should be “Burns” and “waited” should be “waived”; p. 37, l. 1: “repeat” should be “replace”; p. 37, l. 2: “during” should be “during the”; p. 37, l. 4: “are” should be “of the” and “applied” should be “apply”; p. 38, l. 11: “Contracts” should be “contractor”; p. 57, l. 3: “days” should be “dues”; p. 61, l. 11: “HUW” should be “H & W”; p. 64, l. 17: “HU” should be “ATU”; p. 65, l. 9: “thought” should be “font”; p. 69, l. 8: “HU” should be “ATU”; p. 79, l. 24: “threat” should be “thread”; p. 89, l. 3: “CB” should be “DB”; p. 97, l. 4: “they set” should be “says that”; p. 117, ll. 19 and 24: “burn” should be “Burns”; p. 120, l. 25: “DV paying” should be “defined benefit”; p. 121, l. 4: Attorney Dooley was the speaker; p. 141, l. 6: “She answered. She knows.” should be “She can answer if she knows.”; p. 144, l. 11–12: “a contract to provide by way for time and” should be “a contractor to provide by way of retirement”; p. 149, l. 2: “tenant” should be “tentative”; p. 152, l. 20: “times” should be “terms”; p. 153, ll. 22–23: “we’ll hear about it or any violation” should be “we’re here about an NLRA violation”; pp. 156–177, throughout: Attorney Perez posed the questions during direct examination; p. 164, l. 1: “actual” should be “Financial”; p. 175, l. 4: “President” should be “present”; p. 233, l. 12: “then I’ll” should be “that will”; p. 247, l. 17: “compliant” should be “complaint”; p. 251, ll. 9–10: “leaves” should be “leaps” and “theater” should be “theory”; p. 254, l. 2: Counsel for the General Counsel or the Union was the speaker; p. 255, l. 4: Attorney Perez was the speaker; p. 259, l. 1: “mutual” should be “neutral”; p. 265, l. 3: “retry” should be “require”; p. 265, l. 21: “Yes, the characterization” should be “Object to the mischaracterization”; p. 268, l. 6: “reader” should be “redirect”; p. 285, l. 4: “chamber” should be “chain”; p. 285, l. 12: “allegations” should be “obligations”; p. 285, l. 14: “entire” should be “retirement”; p. 290, l. 1: “10(b)” should be “MV”; p. 290, l. 3: “unit” should be “Union”; p. 292, l. 21: “MF” should be “MV”; p. 302, l. 25: “MB” should be “MV”; p. 307, l. 6: “widgets” should be “wages”;

FINDINGS OF FACT³

I. JURISDICTION

5

Respondent, a corporation with an office and place of business in Austin, Texas, engages in the business of operating transportation services, including bus services. In the 12-month period ending August 1, 2013, Respondent derived gross revenues in excess of \$250,000, and purchased and received goods at its Austin, Texas facility that are valued in excess of \$5,000. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10

II. ALLEGED UNFAIR LABOR PRACTICES

15

A. Background

1. Capital Metro, StarTran and the Union

20

Since 1985, Capital Metro has been the public agency that contracts out the fixed route and paratransit public transportation in and around Austin, Texas.⁴ Beginning in or about 1990, Capital Metro relied on an in-house contractor, StarTran, to provide paratransit services. StarTran generally depended on Capital Metro for its funding, and essentially was an agency/instrumentality of Capital Metro. (R. Exh. 4 (pp. 8, 14, 20 fn. 24); Tr. 46, 158–159; see also Jt. Exh. 6 (pp. 55, 67, 139)⁵ (explaining that StarTran is a nonprofit corporation established by Capital Metro).)

25

Starting in about 1991, the Union served as the exclusive collective-bargaining representative for StarTran employees in the following appropriate bargaining unit:

30

All transportation and maintenance employees employed by [StarTran], excluding any office clerical employees, guards, supervisors, and confidential and managerial employees as defined in the Act.

p. 308, l. 8: “medication” should be “mediation”; p. 312, ll. 19, 21: Attorney Martin was the speaker; p. 426, l. 22: “raided” should be “raised”; p. 316, l. 6: “Return” should be “retirement”; p. 316, l. 16: “MV’s price,” should be “MV has priced”; p. 316, l. 17: “107” should be “187”; p. 427, l. 15: “Hernandez” should be “Fernandez”; and p. 437, l. 4: Attorney Martin was the speaker. To the extent that the Union proposed transcript corrections that are not reflected here, I hereby deny the Union’s requests for those corrections because they are not supported by the evidentiary record.

³ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

⁴ Fixed route bus services involve large buses that run back and forth on a predetermined route. Paratransit service buses operate from door to door, and transport individuals with disabilities. (Tr. 167.)

⁵ The joint exhibits in the record have consecutive page numbers. For ease of reference, when I refer to a specific page number of a joint exhibit in the record, I use the consecutive page number stamped in the bottom right corner of the document.

(GC Exh 1(g), (r) (par. 7).) StarTran recognized the Union during that time period, and executed successive collective-bargaining agreements with the Union, including an agreement that was effective from July 1, 2007, to June 30, 2011, and was extended through August 18, 2012. (Id.; see also Jt. Exhs. 2, 5, 7, 8 (p. 159), 9; Tr. 45, 163, 296.)

2. Retirement plan for the bargaining unit under StarTran

In the late 1990s, StarTran offered both a defined benefit (pension) plan and a 401(k) plan to employees in the bargaining unit. For the pension plan, employees with one or more years of service were required to contribute a percentage of their weekly wages to the pension fund. StarTran also contributed to the pension fund each year by paying an amount that equaled the total of employees' contributions. By contrast, the 401(k) plan that StarTran offered was voluntary (i.e., employees were not required to participate), and was funded only by employee contributions. (Jt. Exh. 2 (p. 12); Tr. 88-92, 208-210; see also Jt. Exh. 5 (p. 53-54) (collective-bargaining agreement effective from July 1, 2000 to June 30, 2005, indicating that employees' weekly contributions to the pension plan would be 4.3 percent of the top operator's hourly wage multiplied by forty hours); Jt. Exh. 6 (p. 97) (same).)

By 2002, the StarTran pension plan was severely underfunded. To address that problem, the Union, StarTran and Capital Metro agreed that, effective January 1, 2002, Capital Metro would assume sponsorship of the pension plan and convert it to a government pension plan that would be exempt from the funding requirements established by federal law (such as the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code). As part of that new arrangement, Capital Metro took on the obligation of making the employer contributions to the pension plan that StarTran provided, and agreed to guarantee the benefits accrued under the plan. (Jt. Exh. 6 (pp. 55-57, 67); R. Exh. 4 (pp. 20-21); Tr. 114-115, 226-227, 236.) The Union and StarTran incorporated this revised pension plan arrangement (as well as the voluntary 401(k) plan) into their collective-bargaining agreements effective July 2000 to June 2005, July 2005 to June 2007, and July 2007 to August 18, 2012. (Jt. Exhs. 6 (p. 56); 7 (pp. 146-147), 8 (pp. 192-194), 9; Tr. 111-112, 228-231.)

B. 2011 – Capital Metro Plans to Select a Private Contractor to Provide Paratransit Services

In 2011, prompted by an audit of Capital Metro's finances, the Texas legislature passed a law that required Capital Metro to outsource all transportation services that were not being performed by a Capital Metro employee. As a result, Capital Metro had two options concerning StarTran – either make StarTran employees public employees of Capital Metro, or select a private contractor to replace StarTran in providing paratransit services. Bargaining unit members, however, voted against becoming employees of Capital Metro. Accordingly, on September 15, 2011, Capital Metro issued a request for proposals (RFP) from qualified independent contractors to provide paratransit services in the greater Austin area. (Jt. Exh. 14 (p. 317); R. Exh. 4 (p. 8); Tr. 296-298; see also Tr. 385-386 (general description of the RFP process).)

Later in the fall of 2011, Capital Metro provided written answers to various questions that it received from contractors who were contemplating submitting a proposal in response to the RFP. In those answers, Capital Metro explained that StarTran drivers are represented by the Union, and that drivers' wages and benefits are determined in negotiations with the Union.

5 Regarding pension and retirement benefits, Capital Metro stated that it did not expect the contractor to fund any existing liability for the pension plan, but noted that contractors would need to explain how they proposed to provide retirement plans for bargaining and non-bargaining employees. (Jt. Exh. 10 (pp. 289–290).)

10 In the same timeframe, the Union contacted Respondent and asserted that if Respondent won the contract, Respondent would be obligated as a successor employer to continue providing retirement benefits to bargaining unit members. Specifically, the Union stated as follows:

15 Currently, the StarTran bargaining unit workers who are represented by [the Union] have two types of retirement benefits: a defined benefit plan and a defined contribution plan. The defined benefit plan must continue to be maintained by Capital Metro as a government plan, based on agreements Capital Metro and StarTran have made with [the Union]. In addition, StarTran bargaining unit employees have a defined contribution plan, in the form of a 401(k) plan. Every aspect of each of these retirement plans must
20 remain in effect upon transition from one contractor to the next, unless and until Capital Metro and StarTran, or its successor, bargain with [the Union] to make any changes.

...

25 As we have consistently stated in past letters, we are committed to dealing with you in a good faith collective-bargaining relationship should you be awarded a contract by Capital Metro. As you prepare your final proposals, you may have additional questions regarding the terms that you will be assuming, and their potential costs. Thus, we again
30 extend an invitation to you to continue discussion with us, or to meet with our lawyers to discuss any issue in this regard.

(R. Exh. 1; see also Tr. 141–143.)

35 *C. January 2012 – Partial Settlement between Capital Metro and the Union Regarding the Obligations of the New Paratransit Services Contractor*

On January 19, 2012, the Union and Capital Metro reached a partial settlement on what terms and conditions of employment would apply once the new contractor replaced StarTran in providing paratransit services. For most terms and conditions of employment, the Union and
40 Capital Metro agreed that the new contractor would be free to negotiate, using “the core terms [specified in the RFP] as the minimum.” During those negotiations, however, the contractor would apply the terms and conditions of employment of the current collective-bargaining agreement between StarTran and the Union until either August 19, 2013, or the parties reached an agreement or impasse (if that occurred before August 19, 2013). (GC Exh. 9 (last page); see
45 also Tr. 100, 145, 151, 256–258.)

By contrast, the partial settlement outlined the following agreement between the Union and Capital Metro concerning the health and welfare and retirement benefits that the new contractor would provide:

5 [Health and welfare benefits]

During the above-defined negotiation period, health and welfare benefits will be comparable for all existing employees. Comparable is defined as:

10 The current co-pays, deductible, co-insurance, out of pocket max, and coverage;
and

The employee contribution percentage will be no greater than it is in the current CBA and the dollar amount of an employee's contribution will not be greater than
15 10% higher than the current contribution.

Retirement plan

[Capital Metro and the Union] will negotiate regarding the new contractor's obligations to provide retirement benefits during the negotiation period which will begin no later than
20 2/1/12.

This [pending] arbitration is continued until March 1 and 2. Arbitration will occur on that date if negotiations are not successful. An arbitration award will be issued no later
25 than April 6, 2012.

The subject of the arbitration shall be: what retirement benefits will Capital Metro require the contractor to provide until a new CBA is reached or the earlier of the date certain of
30 8/19/13 or impasse?

(GC Exh. 9 (last page); see also Tr. 100-101, 151.)

D. February/March 2012 – Communications between Capital Metro and Respondent about Respondent's Proposal to Provide Paratransit Services

35 On February 7, 2012, Capital Metro issued its request for final proposal revisions for the RFP concerning paratransit services. (Jt. Exh. 14 (p. 317).) In connection with that request, Capital Metro issued a revised set of "Labor and Employment Provisions (Core Terms)" for the contract, which states as follows concerning bargaining unit members:

40 Employment and Labor Requirements for Employees Represented by [the Union]

(a) Hiring Rights

45 (1) Employment of Existing Workforce – The Contractor shall offer employment to all bargaining unit employees who are represented by [the Union] and employed by StarTran, Inc. . . . on August 18, 2012. Such employees shall be

employed in positions with the Contractor that are comparable to those which they held as StarTran employees.

- 5 (2) Conditions on Hiring – Notwithstanding paragraph (1), the Contractor shall not be required to offer employment to any person otherwise eligible under that paragraph who [fails to successfully complete required drug and alcohol testing or a physical examination required under the CBA with StarTran, or fails to meet the criminal background check standards of Capital Metro].
- 10 (b) Union Representation – The Contractor shall recognize [the Union] as the authorized representative, for purposes of collective bargaining, of its employees who perform work of the type performed by the StarTran bargaining unit represented by [the Union]. The Contractor shall bargain collectively with [the Union], in accordance with this Section concerning the terms and conditions of employment of such
- 15 employees.
- (c) Establishment of Initial Terms and Conditions of Employment – The Contractor shall establish its initial terms and conditions of employment in accordance with the
- 20 mandatory labor terms and conditions set forth in subsection (e) below. The mandatory terms and conditions in subsection (e) below must be established at the outset of employment and will apply until a collective bargaining agreement is developed with the union or until the earlier of impasse or the date certain of 8/19/2013.
- 25 (d) Negotiation of CBA – The contractor shall negotiate a collective bargaining agreement with [the Union] that includes, without limitation, the terms and conditions in subsection (e) below, unless the Contractor and the Union expressly agree to alternative terms. . . .
- 30 (e) Mandatory terms and conditions – The collective bargaining agreement between the Contractor and [the Union] must contain (at a minimum) all of the terms, conditions, and subjects specified in this subsection, unless the Contractor and the Union expressly agree in writing to alternative terms.
- 35 (1) Seniority Rights – The Contractor shall recognize the seniority rights of represented employees in accordance with the existing seniority roster at the prior employer. . . .
- 40 (2) Health and Welfare – The Contractor shall offer health, disability, dental, life, and accidental death insurance for its employees that is substantially equivalent, in terms of type and scope of coverage, to the insurance coverage offered by the prior employer. The Contractor shall bargain collectively with [the Union] regarding employee contributions to premiums, co-payments, deductibles, and other economic matters relating to such insurance.
- 45 (3) Retirement – The Contractor shall provide a retirement plan for its employees. The Contractor shall bargain collectively with [the Union] over the terms and

conditions of such retirement plan, including the levels or amounts of employee and employer contributions to the plan.

- 5 (4) Wages – The contractor shall pay each employee of the prior employer who is hired under subsection (a) hereof an hourly wage, at the outset of his or her employment with the Contractor, that is not less than the hourly wage in effect for such employee on the date of his or her separation from employment with the prior employer.
- 10 (5) Grievances – The Contractor shall establish a procedure for the consideration, appeal, and resolution of grievances.
- 15 (6) Discipline – The Contractor shall establish a procedure for handling employee discharge and other discipline that allows for discharge or discipline if work is not satisfactory or for other just cause and that provides advance written notice to the employee, an opportunity for response before a proposed disciplinary action becomes final, and a process for appeal to a neutral party.
- 20 (7) Accrued leave – The Contractor shall assume all accrued sick and vacation leave of employees hired under subsection (a) above, as such leave is in existence on the date of the employee’s termination of employment with the prior employer. . . .

25 (Jt. Exh. 14 (pp. 329–330).) Respondent acknowledged these revised labor terms on March 1, 2012. (GC Exh. 2 (Amendment 6).)

30 In March 2012, Respondent communicated with Capital Metro about the terms of Respondent’s proposal. Among other details, Respondent advised Capital Metro that its proposal “factors for a 100 percent retention of the existing bargained employees, at the seniority level and wage rates provided in the RFP.” (GC Exh. 7 (p. 2).) As for retirement benefits, Respondent explained that it proposed offering all employees a defined contribution (401(k)) plan, and proposed offering existing employees: a deferred life annuity that would mirror the incremental pension benefit that they would have received had they worked one more year with StarTran;⁶ and a pension buy down after one year. (Id. (pp. 4–5); GC Exh. 4 (p. 4) (explaining that Respondent concluded that “any proposed pension plan will have to be substantially equivalent to the current pension plan for all of the bargained employees”); Tr. 313–318; see also GC Exhs. 2 (p. 2), 4 (p. 4).)

40 *E. April 6, 2012 – Arbitrator Decision Concerning Whether Capital Metro Should Specify the Retirement Benefits that the Paratransit Services Contractor Must Provide*

On April 6, 2012, a neutral arbitrator issued a decision on the following question presented by Capital Metro and the Union: whether Capital Metro is required to insist that any

⁶ The exact proposal language for the annuity describes the benefit as a “[o]ne year benefit for a fixed group as a single payment group annuity - \$60/month deferred life annuity ten years guaranteed.” (GC Exh. 7 (last page).)

new contractor selected during its current procurement process be bound by the Capital Metro retirement plan for bargaining unit employees of StarTran. (R. Exh. 4 (pp. 3, 6–7).) After reviewing a range of arguments, the arbitrator concluded that Capital Metro was not required to impose such a restriction on the new contractor. (Id. (p. 25); see also Tr. 253).

5

F. April 23, 2012 – Capital Metro Awards Paratransit Services Contract to Respondent

On April 20, 2012, Capital Metro notified employees that its staff had recommended to the Capital Metro board of directors that Respondent be selected to provide paratransit services beginning on August 19, 2012. Capital Metro stated as follows regarding the effect that the decision would have on employees:

10

15

In our commitment to protect employees, Capital Metro is requiring [Respondent] to provide core employment terms for jobs, wages and benefits while negotiating a new collective bargaining agreement with [the Union]. Bargaining employees are guaranteed a job offer, current wages, sick and vacation time, health benefits and a retirement plan. . .

Regarding the pension for bargaining employees, earlier this week Capital Metro filed a motion in federal court to confirm the independent arbitration ruling received earlier this month. The arbitration ruling stated that Capital Metro is not obligated to require a new contractor to be bound by any terms of the Capital Metro Retirement Plan for Bargaining Unit Employees of StarTran, Inc. [Capital Metro] believes this is the best way to move forward to continue the labor structure transition.

20

25

(Jt. Exh. 12; see also Tr. 127–128, 165–170, 260–263, 271–272.)

As the Union explained during trial, Respondent could not pay into the Capital Metro/StarTran pension plan because that plan was a government plan, and Respondent is a private employer. The Union’s position was that Respondent should address that issue by making pension contributions into an interest-bearing account while the parties negotiated the terms of a new collective-bargaining agreement (and the terms of a new retirement plan). (Tr. 91–92, 95–96, 119–121.)

30

35

The board of directors for Capital Metro formally awarded the paratransit services contract to Respondent on April 23, 2012. In a letter sent to employees that same day, Capital Metro reiterated that Respondent was required to provide the employment terms and benefits described in Capital Metro’s April 20 letter. (Jt. Exhs. 13, 14 (p. 313); see also Tr. 27, 170–173, 272–273.)

40

G. April 24–25, 2012 – Respondent Communicates with Employees about Benefits

On April 24, 2012, Respondent provided bargaining unit employees with a flyer that provided an overview of hiring, pay and benefits that Respondent would provide after taking over for StarTran. Respondent promised the following:

45

Job Offers – Bargaining employees with StarTran, Inc. as of August 18, 2012 will be given a job offer by [Respondent] comparable to their job held as a StarTran, Inc. employee. Employees must successfully complete [Respondent’s] physical and drug screening requirements. [Respondent] will not offer a position to anyone who fails to successfully complete the drug screening or physical exam required under provisions of the collective bargaining agreement with StarTran, Inc., or who fails to meet criminal background checks as required by Capital Metro.

Pay – [Respondent] will pay each former employee of StarTran who were employed as of August 18, an hourly wage at the outset of his or her employment with [Respondent] that is not less than the hourly wage in effect for such employee at the date of his or her separation from StarTran, Inc.

[Health and Welfare Benefits] – [Respondent] will offer health, disability, dental, life, and accidental death insurance for its employees [that is] substantially equivalent, in terms of type and scope of coverage, to the insurance offered by the prior employer. [Respondent] will bargain collectively with [the Union] regarding employee contributions to premiums, copayments, deductibles, and other economic matters relating to such insurance. . . . [Respondent] will assume all accrued sick and vacation leave of the employees hired (who were StarTran employees as of August 18, 2012), as such leave is in existence on the date of the employee’s termination of employment with the prior employer. [Respondent] will also honor the vacation mark ups that StarTran, Inc. will conduct that covers the period of time from the employee’s hire date with [Respondent] through December 2012.

Retirement – [Respondent] will provide a retirement plan for its employees. [Respondent] will bargain collectively with [the Union] over the terms and conditions of such retirement plan, including the levels or amounts of employee and employer contributions to the plan.

...

Seniority – [Respondent] shall recognize the seniority rights of represented employees in accordance with the existing seniority roster [of] StarTran, Inc. Seniority shall apply to layoffs, re-hiring/return from furlough, bidding on routes, and selection of vacation.

(R. Exh. 12 (pp. 1, 3–4); see also Tr. 428–430.) Similarly, in an April 25, 2012 meeting with Union representatives, Respondent indicated that it would: bargain with the Union; continue to collect union dues on a biweekly basis; and hire all existing employees. (Tr. 174–177.)

H. April 30, 2012 – Capital Metro and Respondent Execute the Paratransit Services Contract

On April 30, 2012, Capital Metro and Respondent executed the paratransit services contract. The contract incorporated the Labor and Employment Provisions (Core Terms) that Capital Metro set forth on February 7, which set guidelines for: establishing initial terms and conditions of employment; negotiating a collective-bargaining agreement; and mandatory terms

and conditions of employment. (Jt. Exh. 14 (pp. 324, 329–332); see also Findings of Fact (FOF), Section II(D), *supra* (setting forth the text of the Labor and Employment Provisions); GC Exh. 8 (copy of contract with attachments); Tr. 27, 31–33, 46–47, 149–151, 411.)

5 *I. June 6, 2012 – Capital Metro’s Letter to Employees about Retirement Benefits*

On June 6, 2012, Capital Metro sent a letter to employees to explain how retirement benefits would be affected by the transition from StarTran to private contractors (including, Respondent, for paratransit services). Capital Metro stated as follows in the letter:

10 [A]n agreement was signed on January 19, 2012, by the [Union] and Capital Metro agreeing that *most of the terms and conditions of the current collective bargaining agreement will remain in place for up to a year while the [Union] and the contractors are negotiating new agreements.* **The terms and conditions related to the retirement plans were not included in that agreement.**

15 Capital Metro believes that the Defined Benefit Pension Plan does not carry over to the new contractors. This was confirmed by an arbitration ruling on April 6, 2012, saying that Capital Metro does not have to require any new contractor to be bound by any terms
20 of the Capital Metro Transportation Authority Retirement Plan for Bargaining Unit Employees of StarTran, Inc. Further, the Labor Agreement that requires the Pension Plan expires on August 18, 2012. Since the Labor Agreement does not carry over to the new contractors, there will be no requirement for employees to continue to earn a pension benefit or for employer contributions to continue. . . .

25 (R. Exh. 7 (emphasis in original); see also Tr. 345–346.)

J. Summer 2012 – Respondent and the Union Begin Bargaining

30 On May 10, 2012, the Union wrote to Respondent to request bargaining “over the terms and conditions of our current collective bargaining agreement relating to wages, all benefits including both retirement plans and working conditions,” and “over all previously negotiated policies, procedures and rules and regulations.” (Jt. Exh. 15; see also Tr. 47–48 (noting that the Union’s letter was correctly addressed to Respondent’s chief negotiator, but included a
35 typographical error in the first sentence, insofar as the sentence referred to McDonald Transit instead of Respondent).)

40 A few weeks after the Union’s bargaining request, on June 8, 2012, representatives of Respondent and the Union met to discuss various issues related to the transition from StarTran to Respondent as the provider of paratransit services. Initially, the parties worked out an agreement about the application process for StarTran bargaining unit members who wished to seek employment with Respondent.⁷ Respondent reiterated that it intended to hire existing StarTran

⁷ In May and early June 2012, a dispute arose between Respondent and the Union about the application process for StarTran bargaining unit members who wished to seek employment with Respondent. Part of the dispute centered around whether bargaining unit members should be required to answer all of the questions on Respondent’s application form. (See Jt. Exhs. 16–18.) The Union and

employees who met the basic requirements (i.e., passing a physical exam, drug screening, and criminal background check). Respondent added that if individual applicants did have issues in their background that might disqualify them from employment, Respondent would consider their circumstances on a case-by-case basis. (Jt. Exh. 20; GC Exh. 11 (pp. 1, 3, 5-6); Tr. 46-47, 50-51, 55-57; see also Jt. Exhs. 16 (May 15, 2012 letter from Respondent, stating Respondent's "strong desire to hire 100% of the current workforce, subject to review of individual qualifications") (emphasis in original), 17 (May 2012 memorandum from Respondent to StarTran operators/drivers, stating that all StarTran operators/drivers that meet Respondent's hiring criteria and are in good standing will be guaranteed employment); Tr. 48-50, 185-189.)

In the latter part of the June 8 meeting, the Union presented its initial contract proposal, and asked if Respondent would maintain the status quo under the StarTran collective-bargaining agreement during negotiations. Respondent indicated that it could not extend the entire StarTran agreement, but as an alternative would prepare a transition agreement that all parties could agree to. (GC Exh. 11 (p. 2-3, 6); Tr. 50, 55; see also Jt. Exh. 19 (Union's initial contract proposal).)

The Union and Respondent met again for bargaining on July 16 and 17, 2012. In those sessions, Respondent again proposed that the parties sign a transition agreement that would set initial terms and conditions of employment. The Union opposed that idea, as it preferred to keep the current (StarTran) agreement in place. Respondent, however, indicated that it did not like certain aspects of the StarTran agreement because certain terms were too complicated and/or could be deleted. (GC Exh. 12 (pp. 1-2, 6), 13; Jt. Exh. 21; Tr. 57-60.)

In the July 17 session, the Union and Respondent briefly touched on the issue of retirement benefits. The Union stated that it wanted Respondent to provide a pension plan⁸ and a 401(k) plan. Citing the April 6, 2012 arbitration decision, Respondent indicated that it was not obligated to provide a pension plan to employees, and added that it would be an uphill battle to get Respondent's administration to agree to such a plan. Respondent also stated that it would not be able to administer a 401(k) plan. The Union asserted that Respondent's position on those retirement issues did not supersede the requirements established by Section 13(c) of the Federal Transit Act. In addition, the Union requested that Respondent deposit the amount of its pension contributions in an interest-bearing bank account until the parties determined how retirement benefits would be administered (hereafter, I refer to these requested payments as "retirement contributions").⁹ Respondent did not say one way or the other whether it would make retirement

Respondent used the June 8, 2012 meeting to resolve their differences on this issue. (See Jt. Exh. 20.) Thereafter, StarTran employees wishing to work for Respondent could submit their job applications online. (Tr. 187-188, 299; see also Jt. Exh. 17 (describing the online application process).)

⁸ The bargaining notes in the record often refer to the pension plan as a "DB" (defined benefit) plan. Occasionally, note takers also used the abbreviation "DP" to refer to the pension plan. I find that all of those terms are synonymous. (See, e.g., GC Exh. 14 (pp. 1-3); Tr. 89, 91-92.)

⁹ Respondent correctly points out that the bargaining notes taken by the Union's representatives do not mention the Union's request that pension payments be deposited into an interest-bearing account. (See GC Exh. 14.) Nevertheless, I have credited the Union's testimony that it made the request. Two Union witnesses (Yvette Trujillo and Lawrence Prosser) corroborated each other on that point, and Respondent did not call any of its four representatives from the July 17 session to say otherwise. In addition, when the Union asked, at a July 23, 2013 bargaining session, whether Respondent was making retirement contributions, Respondent's representative stated that she believed Respondent was making the

contributions into an account as the Union requested, and there is no written agreement that addresses the issue.¹⁰ (GC Exh. 14 (pp. 1–3); Tr. 61–62, 92–97, 106–110, 122, 126, 128–129, 134–135, 138, 214, 263–264; see also Tr. 63–64.)

5 Respondent and the Union did not revisit (until July 2013) the topic of whether Respondent should make pension contributions while the parties negotiated the terms of an initial collective-bargaining agreement. (Tr. 122, 124, 215–216, 266–267, 269.) However, in negotiations in late July 2012, the Union and Respondent did work out the following transition agreement:

10 The parties agree that all tentative agreements reached between the parties with respect to seniority, **initial** health and welfare – including **rates**, ~~retirement~~, **initial** wages, grievances, discipline, accrued leave, **General Provisions and other agreed-to areas** will be **adhered to during the negotiation period and ultimately** incorporated into a final agreement once reached, unless the parties agree to alternative terms. **Such terms shall remain in effect until Impasse, a new comprehensive CBA is reached or August 19, 2013.**

20 (Jt. Exh. 24 (emphasis and strikethrough text in original); see also Jt. Exhs. 22–23 (earlier transition agreement proposals).) The Union’s understanding of the transition agreement was that Respondent would need to maintain the status quo for any topics, including retirement, not covered by the transition agreement. (Tr. 64.)

25 *K. August 2012 – Respondent Begins Providing Paratransit Services*

In early August, the CEO of Capital Metro met with groups of bargaining unit employees to discuss the transition from StarTran to Respondent as the provider of paratransit services. At those meetings, Capital Metro confirmed (as stated in previous communications) that employees’ jobs, wages, hours and benefits with Respondent would be comparable to what the employees had with StarTran. (Tr. 197–199.)

35 On August 14, 2012, Respondent delivered a memorandum to StarTran drivers’ workplace mailboxes. Although Respondent had not previously notified the drivers of any formal hiring decisions, Respondent stated as follows in the memorandum:

On Sunday, August 19, 2012, [Respondent] will officially begin [paratransit services]. All of you will be employees of [Respondent] and there will be some changes to your regular operating procedures that you will need to be aware of. . . . Below is a list of changes from the previous management and operating procedures. If you have any

contributions. (See GC Exh. 21 (p. 7); Tr. 95–96, 131–134; see also Findings of Fact (FOF), Section II(L), *infra* (noting that starting in September 2012, Respondent began recording accrued retirement contributions on its general ledger).) Respondent’s comments on July 23, 2013, further corroborate the witness testimony that, on July 17, 2012, the Union asked Respondent to make retirement contributions into an interest-bearing bank account.

¹⁰ The Union believed that, irrespective of whether there was a written agreement, the NLRA required Respondent to continue making retirement contributions. (Tr. 129, 131, 138.) That issue is now presented in this case for me to decide.

questions please do not hesitate to ask any manager for assistance and direction. Thank you in advance for your cooperation and understanding during this time. Our goal is to complete a seamless transition and all of you are an integral part to our success.

WELCOME ABOARD!

5

(Jt. Exh. 28 (p. 2, emphasis in original); see also Tr. 191–193, 269–270.) As indicated in the memorandum, one of Respondent’s nine managers and two of Respondent’s four road supervisors worked for StarTran in a similar capacity (five other StarTran employees were promoted to manager or supervisor positions with Respondent). Although Respondent indicated that employees were expected to enroll in “benefits” by August 14, 2012, Respondent did not specifically address retirement benefits or contributions in the memorandum. (Jt. Exh. 28 (pp. 2–3); Tr. 193–197, 269–270.) Respondent did not announce any major changes in the memo, though it did: explain that some employees/departments would be located in different offices; and describe new procedures for drivers to receive their manifests and vehicle assignments each day. Respondent also instructed employees to bring in their uniforms to swap out the StarTran patches for Respondent’s patches, and advised that the routes and schedules that drivers previously selected would take effect on August 19, 2012. (Jt. Exh. 28.)

20 On August 19, 2012, Respondent formally began providing paratransit services under its contract with Capital Metro.¹¹ Respondent hired all but one of the approximately 150–175 employees who had been working for StarTran and were members of the bargaining unit. Bargaining unit members continued with their general duties of picking up and dropping off paratransit bus passengers, albeit with minor changes such as: signing in and out (instead of swiping a card) for timekeeping purposes; replacing the StarTran patch on their uniforms with one of Respondent’s patches; using a different type of mobile data terminal that Respondent provided; attending two days of training; and getting familiar with changes in office/room assignments at the main office. Among other things that remained constant notwithstanding the transition, bargaining unit members kept their same wages, route assignments, work schedules, and paratransit vehicles. (Tr. 46, 66–67, 158, 167–168, 189–190, 199–208, 274; see also Tr. 300–301 (describing a similar transition for non-bargaining unit employees).)

35 In late August, Capital Metro contacted Respondent to verify that Respondent understood and accepted its responsibilities under the contract to, among other things, comply with: the labor and employment provisions outlined in the contract; and the January 19, 2012 partial settlement agreement between Capital Metro and the Union. (GC Exh. 9 (p. 1); see also GC Exh. 15 (indicating that Capital Metro notified the Union about its inquiry to Respondent, and noting that the Union previously asked Capital Metro to reconfirm these issues); Jt. Exh. 14 (pp. 329–332) (labor and employment provisions in the contract); GC Exh. 9 (last page, stating the terms of the partial settlement agreement); Tr. 33–34, 68.) In a letter dated August 22, 2012, Respondent stated that it understood and accepted its obligations to comply with the labor and employment terms of the contract and the partial settlement agreement. (GC Exh. 10; see also Tr. 35–36, 99.)

¹¹ In connection with this transition, on August 18, 2012, Capital Metro (with the Union’s consent) froze its defined pension benefit plan and established guidelines for when and how bargaining unit members could access benefits that they had accrued under that plan. (R. Exh. 11.)

L. August 2012 to July 2013 – Respondent and the Union Continue Negotiating for a New Collective-Bargaining Agreement

5 On August 21, 2012, Respondent and the Union reached a tentative agreement concerning payday, check-off and payroll deductions. Under the tentative agreement, Respondent agreed to deduct union initiation fees, dues and assessments from employee paychecks, and remit those funds to the Union each pay period. Respondent also agreed to make other deductions that employees might authorize in writing, such as deductions for uniforms, group insurance and pension contributions. (Jt. Exh. 29; see also Tr. 67.)

10 Starting in September 2012, and continuing to at least April 2014, Respondent began accruing, on its general ledger, retirement contributions for its administrative employees, drivers and maintenance employees. (R. Exhs. 8–10; Tr. 357–366, 370–377, 382–384.) There is no evidence that Respondent paid or assigned these “paper” contributions to specific bargaining unit members or to a retirement fund or account, or that Respondent notified the Union of the accruals. Further, the evidentiary record does not establish whether the retirement contribution amounts indicated on Respondent’s general ledger are comparable to the amounts that StarTran paid in periodic retirement contributions before Respondent began providing paratransit services. (See, e.g., Tr. 380–381, 393–394, 396–398, 408–409, 414–415.)

20 Between August 2012, and early July 2013, Respondent and the Union continued bargaining for a collective-bargaining agreement. The terms of a new retirement plan persisted as one of the unresolved issues, with the parties generally negotiating about the amount that Respondent might contribute (based on a percentage of the employee’s wages) to a 401(k) plan, and when employees would become eligible for those contributions. In this timeframe, the parties did not discuss whether Respondent was making retirement contributions into an interest-bearing account while the parties negotiated. (Jt. Exhs. 30–40; GC Exhs. 16–19; Tr. 69–76, 301–303, 322–324.)

30 *M. July 23, 2013 – the Union asks if Respondent is Making Retirement Contributions*

35 In mid-July 2013, the Union received what it characterized as a “favorable” opinion from the NLRB concerning an unfair labor practice charge against Travis Transit (a.k.a. McDonald Transit), the contractor that Capital Metro selected to provide fixed route bus transportation services.¹² Since one of the issues concerning Travis Transit was that it allegedly was failing to

¹² During trial, Respondent sought to offer the following documents concerning Travis Transit into evidence: (a) an October 9, 2012 unfair labor practice charge (Case 06–CA–087951) (R. Exh. 2 – rejected); and (b) an NLRB complaint, issued on March 31, 2014, against Travis Transit (Cases 06–CA–087951 and 16–CA–091323) (R. Exh. 3 – rejected). I gave Respondent the opportunity to demonstrate the relevance of those documents through testimony, but ultimately found that Respondent failed to establish that the Travis Transit unfair labor practice charge or complaint were relevant. Specifically, I found that the documents concerning Travis Transit were too remote to support a theory that, based on what was happening with Travis Transit, the Union should have known that Respondent was not making retirement contributions. (Tr. 288–291; see also Tr. 241–252 (testimony and argument that I allowed Respondent to present on this issue)). I stand by that ruling, which is supported by the following observations: (a) the Travis Transit unfair labor practices charge does not mention any alleged failure to make retirement contributions (though the charge does make a general allegation of unlawful unilateral

make pension contributions, the Union wondered if Respondent also was failing to make retirement contributions. (Tr. 214–215, 239–241; see also Tr. 238 (noting that after this development, in July 2013, Union financial secretary Lawrence Prosser inspected his paycheck and noted that Respondent was not deducting any money for retirement).)¹³

5

On July 23, 2013, the Union and Respondent met for another bargaining session. On the issue of retirement, the Union asked Respondent if it made an (unlawful) unilateral change by not making retirement contributions (and by not deducting retirement funds from employee paychecks).¹⁴ When Respondent, through general manager Brenda Fernandez, stated that Respondent was making the contributions and deductions (to her knowledge), the Union disputed the accuracy of that assertion and asked for supporting documentation. (GC Exh. 21 (p. 7); see also Tr. 76–79, 95–96, 132, 134, 216, 218.)

10

In an email dated August 6, 2013, Fernandez responded to various questions that the Union posed in the July 23 bargaining session about the status of contract negotiations. Regarding the question of whether Respondent was making retirement contributions, Fernandez asserted: “[w]e have no obligation for the StarTran Pension Plan or any contribution. Article 21 is our proposal regarding retirement.” (Jt. Exh. 43 (p. 2); Tr. 82–83.)

15

20 *N. August 2013 to February 2014 – the Union and Respondent Complete Negotiations for a Collective-Bargaining Agreement*

In fall 2013, the Union and Respondent agreed that, irrespective of language in the paratransit services contract that indicated that collective-bargaining would conclude by August 19, 2013, they would continue contract negotiations. (Jt. Exhs. 44, 51; GC Exh. 22; Tr. 83–84.)

25

On September 26, 2013, Respondent and the Union signed a tentative agreement concerning the retirement plan that would be available to bargaining unit members under the new collective-bargaining agreement. The tentative agreement stated as follows:

30

Article 21 – Retirement Plan

Regular, full-time employees within the bargaining unit shall be eligible for participation in [the Union’s] 401(k) plan, subject to the plan’s rules, regulation and eligibility requirements. All regular full-time employees are eligible to participate upon reaching ninety (90) days of service, **Employer contributions shall begin the first pay period**

35

changes to terms and conditions of employment); (b) none of the parties established that the unfair labor practices charge against Travis Transit was the “favorable” decision that prompted the Union, in July 2013, to wonder if Respondent was making retirement contributions (see Tr. 240, 247); and (c) the Travis Transit complaint was issued in March 2014, well after the Union asked (in July 2013) whether Respondent had been making retirement contributions.

¹³ For StarTran’s pension plan, both the employer and the employee made pension contributions. (See, e.g., Jt. Exh. 8 (pp. 193–194); Tr. 109–110.) Respondent did not deduct any retirement funds from employee paychecks during negotiations for a new collective-bargaining agreement. (Tr. 138–140.)

¹⁴ The Union conceded that, between the July 17, 2012, and July 23, 2013 bargaining sessions, it did not take any action to verify that Respondent was making retirement contributions. (Tr. 123–125, 129–130, 132, 136–138, 265–269.)

following ninety (90) days of service. The Employer will not contribute to any other retirement plan or arrangement for the benefit of employees within the bargaining unit other than the 401(k) plan. Upon ratification of this Agreement, the Employer will contribute **(3.75%)** of the full time employee's regular straight time wages each pay period to the plan for all operations and maintenance employees. **The Company contribution shall increase to (4.1%) effective the first pay period after 8/1/14.** The Employer agrees to deduct each pay period, by payroll deduction, any additional voluntary contributions allowed by the plan.

10 (Jt. Exh. 50; see also Tr. 85, 99, 306, 324–325.) The parties did not work out an agreement concerning whether Respondent should have been making retirement contributions starting on August 19, 2012, the date that Respondent began providing paratransit services under its contract with Capital Metro. (Tr. 85–86, 306–307.)

15 On April 28, 2014, the Union and Respondent executed a new collective-bargaining agreement that was effective retroactively to February 20, 2014. The new collective-bargaining agreement included, as Article 19, a 401(k) retirement plan with the same terms stated in the September 26, 2013 tentative agreement. Respondent did not make any retirement contributions between August 19, 2012, and April 28, 2014 (i.e., between the day that Respondent began providing paratransit services under its contract with Capital Metro and the day that the parties executed the new collective-bargaining agreement). (Jt. Exhs. 52 (p. 514), 53; Tr. 154, 219–221.)

25 APPLICABLE LEGAL STANDARDS

A. WITNESS CREDIBILITY

30 A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). My credibility findings are set forth above in the findings of fact for this decision.

40 B. SECTION 8(A)(5) ALLEGATIONS

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.¹⁵ The Act prohibits employers from taking

¹⁵ Separate and apart from the unilateral change doctrine, an employer also has a "duty to engage in

unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue, and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. Notably, an employer lawfully may take unilateral action that does not alter the status quo (e.g., by unilaterally making changes to working conditions where the changes in question were part of a regular and consistent past pattern), and also may unilaterally take actions that do not materially vary in kind or degree from what has been customary in the past. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3-4 (2016).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. The party asserting impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139 (2014), *enfd.* 807 F.3d 318 (D.C. Cir. 2015).

DISCUSSION AND ANALYSIS

A. INTRODUCTION

The General Counsel alleges that, from about August 19, 2012, to April 11, 2014, Respondent violated Section 8(a)(5) and (1) of the Act by not providing bargaining unit members with retirement benefits and/or retirement contributions, without first notifying the Union and giving the Union an opportunity to bargain about the conduct and/or its effects, and without first bargaining with the Union to a good-faith impasse. (GC Exh 1(n) (pars. 8-10).) In support of that allegation, the General Counsel maintains that Respondent was either a "perfectly clear" or ordinary successor, and was obligated under the Act to make retirement contributions as part of maintaining the status quo while it bargained with the Union for a new collective-bargaining agreement. Respondent, on the other hand, maintains that the complaint allegations are time barred under Section 10(b) of the Act, and also asserts that it did not have an obligation to pay retirement contributions until it worked out an agreement with the Union (as part of the collective-bargaining process) to provide such benefits.¹⁶

bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain," unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11-12, 16-17 (2017) (emphasis in original).

¹⁶ Based on the language in the complaint and the evidence that the parties presented, I have concluded that the General Counsel only challenges Respondent's failure, as the employer, to make retirement contributions on behalf of bargaining unit employees. I do not interpret the complaint as also asserting that Respondent unlawfully failed to deduct money from bargaining unit employees' paychecks

B. ARE THE COMPLAINT ALLEGATIONS TIME-BARRED UNDER SECTION 10(B) OF THE ACT?

5 As its initial argument, Respondent maintains that the complaint allegations in this case are time-barred under Section 10(b) of the Act. In support of that argument, Respondent asserts that the Union had actual and/or constructive notice that Respondent was not making retirement contributions once Respondent began providing paratransit services on August 19, 2012. (R. Posttrial Br. at 12–14.)

10 Under Section 10(b) of the Act, “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy [of the charge] upon the person against whom such charge is made.” The fundamental policies underlying the 10(b) period are to: bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused; and to stabilize existing bargaining relationships. *A & L Underground*, 302 NLRB 467, 468 (1991) (citing *Bryan Manufacturing Co. v. NLRB*, 362 US 411, 419 (1960)).

20 It is well-settled that the 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act. Either actual or constructive notice of the alleged unfair labor practice may be sufficient to start the 10(b) period, although constructive notice must be predicated on a showing that the charging party failed to exercise reasonable diligence (i.e., that the charging party would have discovered the alleged unfair labor practice in the exercise of reasonable diligence). *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *R. G. Burns Electric*, 326 NLRB 440, 440–441 & fn. 4 (1998). An unfair labor practice charge will not be time-barred if the delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party. *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2 (2017); *Concourse Nursing Home*, 328 NLRB at 694. The burden of showing clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b). *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2; *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

35 When Respondent signed the paratransit services contract in April 2012, it agreed to provide a retirement plan to bargaining unit employees as an initial term and condition of employment. Because Respondent, as a private entity, could not make retirement contributions to the pension plan sponsored by Capital Metro, in a July 17, 2012 bargaining session the parties discussed what retirement plan Respondent might offer. When Respondent indicated that it was reluctant to administer either a 401(k) plan or a pension plan, the Union suggested that Respondent could make retirement contributions into an interest-bearing account while the parties bargained for a new collective-bargaining agreement. Thereafter, the parties said little

for the purposes of retirement, or provide a voluntary 401(k) plan (two additional aspects of StarTran’s retirement package, see FOF, Section II(A)(2)). I note that my more narrow interpretation of the complaint does not result in a materially different remedy than what might be available with a broader interpretation – indeed, to the extent that Respondent did not deduct retirement funds from employee paychecks or provide a 401(k) plan during negotiations with the Union, employees simply retained the money and used it as they saw fit.

about the matter, though: (a) in August 2012, Capital Metro reconfirmed that Respondent would comply with the labor and employment terms of the contract (which included the requirement that Respondent provide a retirement plan to bargaining unit employees as an initial term and condition of employment); and (b) in September 2012, Respondent began listing retirement contribution accruals in its general ledger (albeit without telling the Union about that practice). (Findings of Fact (FOF), Section II(D), (F)–(H), (J)–(L).) Notably, there is no evidence of any established mechanism (such as a monthly statement from a retirement fund) that the Union could have used to monitor whether Respondent was making retirement contributions. On the other hand, there is no evidence that the Union (until July 2013) asked Respondent whether it was making retirement contributions. Ultimately, Respondent did not, until August 6, 2013, unequivocally tell the Union that Respondent had no obligation to make retirement contributions. By that point, the Union had already, on August 1, 2013, filed the unfair labor practices charge in this case. (FOF, Section II(M); GC Exh. 1(a).)

Based on those facts, I do not find that the complaint allegations here are time barred under Section 10(b) of the Act. First, the Union did not receive actual notice that Respondent was not making retirement contributions until August 6, 2013, after the Union had already filed its unfair labor practices charge. The evidentiary record does not support Respondent’s argument that the Union had actual notice at an earlier point (such as in July 2012). To the contrary, in July 2012, the Union suggested that Respondent make retirement contributions to an interest-bearing account while the parties bargained about the terms for a collective-bargaining agreement, and then the parties put the issue aside until July 2013. When the Union, in a July 2013 bargaining session, asked if Respondent was making retirement contributions, Respondent’s general manager stated that she believed Respondent was doing so. Thus, the Union’s suspicions were not confirmed until August 6, 2013, when Respondent’s general manager provided actual notice that Respondent would not be making retirement contributions for the benefit of bargaining unit employees. Given that sequence of events, the Union’s August 1, 2013 unfair labor practices charge was timely, and in fact was filed before the Union had actual notice that Respondent was violating the Act.

Second, Respondent did not establish that the Union, based on constructive notice, should have filed its unfair labor practices charge at an earlier date. Respondent maintains that, in January 2012, the Union and Capital Metro agreed (via partial settlement) to negotiate/arbitrate the question of what retirement benefits the new paratransit services contractor would have to provide. In Respondent’s view, when the Union lost in arbitration (in April 2012), the Union was on notice that Respondent, as the new paratransit services contractor, did not have to provide retirement benefits during negotiations for a new collective-bargaining agreement. I do not find Respondent’s argument to be persuasive, because Respondent overstates the scope of the arbitration award. Simply put, the arbitrator only addressed the narrow question of whether Capital Metro’s new paratransit services contractor had to use the Capital Metro Retirement Plan as its retirement plan for bargaining unit employees. The arbitrator ruled that the answer to that limited question was “no,” but the fact remains that Respondent, by virtue of its contract with Capital Metro, was required to provide a retirement plan of some sort as an initial term and condition of employment. (See FOF, Section II(D)–(E) (noting that the paratransit services contract states that a retirement plan is a required initial term of employment, and discussing the arbitrator’s ruling).) Thus, while the Union could have been more proactive in trying to verify that Respondent was making retirement contributions (e.g., by submitting an information request

to Respondent), it was reasonable for the Union to expect Respondent to abide by the terms of its contract with Capital Metro, including the contractual obligation to provide retirement benefits when Respondent began providing paratransit services on August 19, 2012.

5 In sum, I find that the Union filed the unfair labor practices charge in a timely manner, and I find that complaint allegations in this case are not time-barred under Section 10(b) of the Act. Accordingly, I now turn to the merits of the complaint allegations.

10 **C. IS RESPONDENT EITHER AN ORDINARY SUCCESSOR OR A PERFECTLY CLEAR SUCCESSOR TO STARTRAN?**

15 The Board’s successorship doctrine is founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed. Consistent with this view, when a new employer continues its predecessor’s business in substantially unchanged form and hires employees of the predecessor as a majority of its work force, the new employer is a successor and is obligated to bargain with the union that represented those employees when they were employed by the predecessor. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5 (2016). The essence of successorship 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 worked force of its predecessor. *Always East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2 (2017).

25 In *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. *Id.* at 295. The Court recognized, however, that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms.” *Id.* at 294–295.

35

1. IS RESPONDENT AN ORDINARY SUCCESSOR?

40 An employer is a successor employer obligated to recognize and bargain with the union representing the predecessor’s employees when (1) the successor acquires, and continues in substantially unchanged form, the business of a unionized predecessor (the “substantial continuity” requirement; (2) the successor hires, as a majority of its workforce at the acquired facility, union-represented former employees of the predecessor (the “workforce majority” requirement); and (3) the unit remains appropriate for collective bargaining under the successor’s operations. *Ports America Outer Harbor, LLC*, 366 NLRB No. 76, slip op. at 2 (2018).

45

To determine whether, in the totality of the circumstances, there is substantial continuity between the predecessor and alleged successor, the Board considers the following factors:

whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); see also *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2. In conducting the analysis, the Board keeps in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43. The Board determines whether the workforce majority requirement has been met based on the time that the successor has hired a substantial and representative complement of its employees. *Ports America Outer Harbor, LLC*, 366 NLRB No. 76, slip op. at 2.

As a preliminary matter, I note that certain issues are not in dispute regarding whether Respondent is an ordinary successor to StarTran. First, Respondent concedes that the bargaining unit is appropriate. (See GC Exhs. 1(n), (r), par. 7(a).) Second, there is no dispute that the workforce majority requirement has been met here. When Respondent began providing paratransit services on August 19, 2012, under its contract with Capital Metro, a majority of Respondent's employees in the bargaining unit were former StarTran employees who were represented by the Union. Indeed, Respondent hired all but one of the union-represented employees who had worked for StarTran, and there is no evidence that Respondent made any other hires that undermined (from a numerical standpoint) the majority support for the Union in the bargaining unit. (FOF, Section II(L).)

I also find that, based on the evidentiary record, there is substantial continuity between StarTran and Respondent. Both entities provided paratransit services to Austin residents. To provide those services after it began operations on August 19, 2012, Respondent hired almost the entire StarTran bargaining unit as its employees, and generally directed them to continue performing the same jobs that they held while employed by StarTran. Further, Respondent allowed bargaining unit members to keep their seniority, allowed drivers to keep the same schedules and routes that they established with StarTran, and even had employees use the same uniforms (except for replacing the StarTran patch with Respondent's patch). That level of continuity was by design, partly because Respondent made it clear that it wished to hire 100% of the existing (StarTran) workforce, and partly because Respondent's contract with Capital Metro required Respondent to maintain a certain level of consistency with StarTran in the terms and conditions of employment for bargaining unit members. (FOF, Section II(D), (F)–(G), (J).)

To be sure, Respondent did implement some changes when it began operations. Most of the managers and supervisors that Respondent hired were new to the facility and/or to the positions that they held. Respondent also made some changes to the procedures for employees to sign in and out, and to the procedures for drivers to obtain their vehicles and manifests each day. Notwithstanding those changes (which were relatively minor in the grand scheme of things), I find that the General Counsel established substantial continuity between StarTran and Respondent, such that bargaining unit members would understandably view their job situations as essentially unaltered. See *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 3 (finding substantial continuity because the respondent provided the same general school bus

transportation service as the predecessor and bargaining unit members performed the same general jobs, and noting that even though the respondent had a new facility, different supervisors, and different employee handbook policies, bargaining unit members' jobs remained essentially unchanged); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063-1064 (2001) (finding substantial continuity, even though the employer provided a different supervisor, different pay rates and benefits, and newer buses to drive, where bus drivers performed the same work that they performed for the predecessor).

In sum, I find that the General Counsel established that Respondent is an ordinary successor to StarTran. The workforce majority requirement and the appropriateness of the bargaining unit were not in dispute, and the General Counsel met its burden of proving substantial continuity between StarTran and Respondent.

2. IS RESPONDENT A PERFECTLY CLEAR SUCCESSOR?

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board addressed the "perfectly clear" successor exception, and found it was "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Acknowledging that "the precise meaning and application of the Court's caveat is not easy to discern," the Board reasoned that "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court," because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new work force. *Id.*

In subsequent cases, the Board has clarified that the perfectly clear successor exception is not limited to situations where the successor fails to announce initial employment terms before it formally invites the predecessor's employees to accept employment. Rather, a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor. Thus, in applying the "perfectly clear" exception of *Burns*, the Board scrutinizes not only the successor's plans regarding the retention of the predecessor's employees but also the timing and clarity of the successor's expressed intentions concerning existing terms and conditions of employment. *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 2-3 (2016), enfd. 882 F.3d 510 (5th Cir. 2018); see also *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5-7; *Canteen Co.*, 317 NLRB 1052, 1053-1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).¹⁷

¹⁷ The Board's decisions in *Creative Vision Resources*, *Nexeo Solutions* and *Canteen Co.* are binding authority that I am required to follow. As an aside, however, I note that individual Board members have raised questions about how the Board in those cases interpreted the decision in *Spruce Up*. See, e.g., *Walden Security*, 366 NLRB No. 44, slip op. at 1 fn. 4 (2018) (indicating that two of the Board members

If an employer indeed is a perfectly clear successor, then it has an obligation “to maintain the status quo of conditions of employment under the predecessor until it bargains to agreement or impasse with the representative union over terms of a new collective-bargaining contract for the successor workforce.” *First Student Inc., a Division of First Group America*, 366 NLRB No. 13, slip op. at 3 (2018); see also *Paragon Systems, Inc.*, 364 NLRB No. 75, slip op. at 1 (2016) (explaining that a perfectly clear successor has “an obligation to bargain with the Union prior to setting initial terms and conditions of employment that differ[] from those under the predecessor’s collective-bargaining agreement with the Union”).

The evidentiary record here shows that on April 24, 2012, the day after it was awarded the paratransit services contract, Respondent notified bargaining unit employees that it would offer them jobs, pay, health and welfare benefits and seniority that were comparable to what they had with StarTran, as well as a retirement plan that would be bargained with the Union. The only caveat that Respondent expressed concerning its hiring plans was that employees would need to satisfy physical, drug and criminal background screening requirements. (FOF, Section II(G).) Between that announcement and the day (August 19, 2012) that Respondent began providing paratransit services under the contract, Respondent reiterated its intent to hire all employees in the bargaining unit, and did not articulate that it intended to establish different terms and conditions of employment than what employees had with StarTran. (FOF, Section II(J)–(K).) As noted above, that consistency was by design, because it was virtually required by Respondent’s contract with Capital Metro.¹⁸

Under the circumstances present here, I find that the Respondent is a “perfectly clear” successor to StarTran. On April 24, 2012, Respondent demonstrated a clear intent to employ StarTran’s employees without simultaneously or previously making it clear that their employment would be on different terms than what the employees had with StarTran. Indeed, to the extent that Respondent described the terms and conditions of employment that it would offer, Respondent indicated that its initial employment terms would be comparable to StarTran’s employment terms. On the specific issue of the retirement plan, Respondent stated that it would bargain with the Union about the terms of such a plan, and did not state that employees would have different retirement benefits (or no retirement benefits) while bargaining was in progress. As a result, bargaining unit employees reasonably would have believed that Respondent planned to retain them without any material changes in their wages, hours, or conditions of employment (including retirement benefits), pending the outcome of bargaining with the Union. See *First Student Inc., a Division of First Group America*, 366 NLRB No. 13, slip op. at 3 (finding that the employer was a perfectly clear successor because it “clearly and consistently communicated its intent to retain the School District’s unit employees” and did not simultaneously or beforehand clearly announce its intent to set new terms and conditions of employment); *Nexeo Solutions*,

on the panel might be inclined to reexamine the Board’s precedent in this area).

¹⁸ I recognize that, in their July 16–17, 2012 bargaining sessions, Respondent and the Union did discuss what terms and conditions of employment should apply while the parties negotiated the terms of a new collective-bargaining agreement. In those sessions, Respondent expressed some reservations about simply following the terms of the StarTran collective-bargaining agreement because it viewed aspects of that agreement as too complicated. Notably, however, Respondent did not articulate any new terms and conditions of employment that it intended to follow, nor did it notify employees that their terms and conditions of employment with Respondent would be different from StarTran. (FOF, Section II(J).)

5 *LLC*, 364 NLRB No. 44, slip op. at 7 (same, where: the employer notified unit employees that they would transfer to the new company, and was silent regarding terms and conditions of employment or any intent to establish a new set of conditions; and the employer noted, in a question and answer session with employees, that the terms of the purchase agreement required the employer to provide transferred employees with wages and benefits that were comparable to what the predecessor provided); see also *Road & Rail Services*, 348 NLRB 1160, 1161-1162 (2006) (finding that an employer was a perfectly clear successor where the employer clearly expressed its intent to hire existing employees, did not unilaterally establish initial terms and conditions of employment, and indicated that it would negotiate with the Union about changes to existing employment terms).¹⁹

10 In an effort to work around its April 24, 2012 statement to bargaining unit members, Respondent asserts that Capital Metro notified employees, on April 20 and June 6, 2012, that their retirement benefits would change. (See R. Posttrial Br. at 15.) That argument falls short.

15 On April 20, 2012, Capital Metro informed employees that Respondent had been recommended as the new paratransit contractor. Capital Metro did not tell employees that their retirement benefits would change as part of that transition. Instead, Capital Metro told employees that they were guaranteed a retirement plan once Respondent commenced operations, but advised that based on the April 6, 2012 arbitration decision, Capital Metro was not obligated to require Respondent to be bound by the existing retirement plan. (See FOF, Section II(F).) As noted

20 above, four days later, Respondent notified employees that it would bargain with the Union about the terms of a retirement plan. As for Capital Metro's June 6, 2012 letter to employees, Capital Metro reiterated that it was not obligated to require Respondent to be bound by the existing retirement plan, but added its view that the labor agreement (and the retirement plans therein) did not carry over to the new contractors. Capital Metro, however, was not speaking for Respondent at the time, and in any event, the proverbial ship had already sailed on April 24 when Respondent expressed its intent to offer jobs to all bargaining unit employees, and its intent to bargain with the Union about the terms of a retirement plan. (See FOF, Section II(G), (I).) Accordingly, as noted above, I find that the General Counsel demonstrated that Respondent is a

25 perfectly clear successor to StarTran.

30

¹⁹ In a contradictory turn, the General Counsel (in addition to arguing that Respondent is a perfectly clear successor, see GC Posttrial Br. at 19-25) argued in its posttrial brief that Respondent should not be considered a perfectly clear successor because when Respondent expressed its intent to employ StarTran's employees, the Union and unit employees already were aware (based on the April 6 arbitrator decision) that employees would not be able to participate in the StarTran pension plan. (GC Posttrial Br. at 25-26.) To the extent that the General Counsel maintains that a change in Board law would be necessary for this argument to be valid, it suffices to observe that I am bound to follow existing Board precedent. As a point of fact, however, I note that the arbitrator's decision did not preclude Respondent from implementing a pension plan comparable to StarTran's plan; to the contrary, the arbitrator only determined that Capital Metro did not have to require Respondent to use StarTran's pension plan as its retirement plan. (See FOF, Section II(E).) Thus, the arbitrator's decision did not put the Union or employees on notice that retirement benefits would change (let alone establish what retirement benefits Respondent would provide to employees as initial employment terms).

D. DID RESPONDENT VIOLATE THE ACT BY NOT MAKING RETIREMENT CONTRIBUTIONS DURING COLLECTIVE-BARGAINING AGREEMENT NEGOTIATIONS?

5 The General Counsel contends that Respondent, as a perfectly clear successor, was obligated to make retirement contributions while Respondent and the Union negotiated a new collective-bargaining agreement. The General Counsel contends, in the alternative, that Respondent had that obligation even as an ordinary successor. Respondent denies having an obligation to make retirement plan contributions as part of any status quo during negotiations, regardless of whether it is a perfectly clear or ordinary successor. I address each of those issues below.

1. OBLIGATION TO MAKE RETIREMENT CONTRIBUTIONS AS A PERFECTLY CLEAR SUCCESSOR?

15 As a perfectly clear successor, Respondent was obligated to bargain with the Union before setting initial terms and conditions of employment that differ from those under the predecessor's collective-bargaining agreement with the Union. See *Paragon Systems, Inc.*, 364 NLRB No. 75, slip op. at 1. While Respondent was not required to adopt StarTran's collective-bargaining agreement, Respondent was required under the Act to maintain the status quo conditions of employment under StarTran (the predecessor) until Respondent and the Union bargained to agreement or impasse over terms of a new collective-bargaining contract for the successor workforce. See *First Student Inc., a Division of First Group America*, 366 NLRB No. 13, slip op. at 3.

25 Notably, Respondent's obligation to maintain the status quo applied to terms of employment that would be the subject of negotiations (like the retirement plan at issue here). Thus, even if Respondent wished to offer a different retirement plan than StarTran, as a perfectly clear successor, Respondent was required to maintain the status quo of the StarTran retirement plan until it negotiated a new retirement plan with the Union (or until bargaining resulted in a good-faith impasse). See *First Student Inc., a Division of First Group America*, 366 NLRB No. 13, slip op. at 3.

35 With that stated, I pause to observe that one of the wrinkles here was that Respondent, as a private employer, was not eligible to contribute to the government employer pension plan that StarTran (and Capital Metro) offered. (FOF, Section II(A)(2), (F).) It does not follow from that fact, however, that Respondent could simply offer no retirement plan at all, particularly with no notice to bargaining unit members at the time (or before) Respondent expressed its intent to hire them. Instead, as a perfectly clear successor, Respondent needed to provide a comparable retirement plan of some sort to maintain the status quo during collective-bargaining agreement negotiations (such as by making equivalent retirement contributions into an interest paying account, as the Union suggested). To the extent that Respondent did not make any such retirement contributions for the benefit of bargaining unit employees between August 19, 2012, and April 28, 2014, Respondent violated Section 8(a)(5) and (1) of the Act.²⁰

²⁰ In connection with the proposition that Respondent needed to make retirement contributions as part of maintaining the status quo, the General Counsel, in another moment of contradiction, argues that the

2. OBLIGATION TO MAKE RETIREMENT CONTRIBUTIONS AS AN ORDINARY SUCCESSOR?

5 If Respondent was an ordinary successor (and not a perfectly clear successor), then
 Respondent was not bound by the substantive terms of the Union’s collective-bargaining
 agreement with StarTran, and had the opportunity to set initial terms and conditions of
 employment unilaterally. *NLRB v. Burns Security Services*, 406 U.S. at 281–295. The Board
 has explained, however, that if an ordinary successor foregoes that opportunity by remaining
 10 silent about certain terms and conditions of employment, then the successor implicitly tells
 bargaining unit employees that those unaddressed terms and conditions will remain the same,
 and the successor cannot later unilaterally depart from those terms and conditions. See *301*
Holdings, LLC, 340 NLRB 366, 367–368 (2003) (finding that a successor employer that told
 employees about a scheduling change when it set initial terms and conditions of employment, but
 remained silent as to all other working conditions, implicitly accepted the status quo for all other
 15 working conditions, and could not unilaterally change those other conditions); see also *Nexeo*
Solutions, LLC, 364 NLRB No. 44, slip op. at 13 fn. 38 (indicating that it was unlawful for an
 ordinary successor employer to unilaterally change practices that were not part of the initial
 employment terms that the employer announced and implemented).

20 Respondent, through its silence, essentially forfeited its opportunity to set initial terms
 and conditions of employment regarding its retirement plan. Specifically, when Respondent, on
 April 24, 2012, announced its plan to hire virtually all employees in the StarTran bargaining unit,
 Respondent promised to provide a retirement plan, but said nothing about the terms of that plan
 (other than promising to negotiate retirement plan terms with the Union). Respondent continued
 25 to take that position up to August 19, 2012, when it formally hired all but one of the employees
 in the StarTran bargaining unit and began providing paratransit services. (FOF, Section II(G),
 (J)–(K).) By taking that approach, Respondent implicitly told bargaining unit employees that
 their retirement benefits would remain the same (pending negotiations with the Union), and
 thereafter was precluded from unilaterally changing the retirement plan by not making retirement
 30 contributions. Accordingly, I find that even as an ordinary successor, Respondent violated
 Section 8(a)(5) and (1) of the Act to the extent that it did not make retirement contributions for
 bargaining unit employees between August 19, 2012, and April 28, 2014.

35 In sum, I find that the General Counsel established that Respondent, from August 19,
 2012, to April 28, 2014, violated Section 8(a)(5) and (1) of the Act by unilaterally deciding not
 to make retirement contributions for the benefit of bargaining unit employees, without first
 notifying the Union and giving the Union an opportunity to bargain about the conduct and/or its
 effects, and without first bargaining with the Union to a good-faith impasse. Respondent’s
 40 defenses to the allegation in the complaint fall short.

Board should overrule its decision in *StaffCo of Brooklyn, LLC*, 364 NLRB No. 102 (2016), *enfd.*, 888
 F.3d 1297 (D.C. Cir. 2018), a case in which the Board held that the employer violated the Act by
 unilaterally ending pension contributions when the collective-bargaining agreement expired. (See GC
 Posttrial Br. at 30–32.) As I have previously noted, I am bound to follow existing Board precedent,
 including the decision in *StaffCo* to the extent that it is applicable here.

CONCLUSIONS OF LAW

1. Respondent MV Transit and/or MV Transportation, Inc. is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

5

2. Charging Party Amalgamated Transit Union, Local 1091 is a labor organization within the meaning of Section 2(5) of the Act, and represents Respondent's transportation and maintenance employees in the following appropriate bargaining unit:

10

All transportation and maintenance employees employed by Respondent, excluding any office clerical employees, guards, supervisors, and confidential and managerial employees as defined in the Act

15

3. Respondent, as a "perfectly clear" successor to StarTran, violated Section 8(a)(5) and (1) of the Act by, from August 19, 2012, to April 28, 2014, unilaterally changing the initial terms and conditions of employment for bargaining unit employees, specifically by not making retirement contributions, without first notifying the Union and giving it an opportunity to bargain.

20

4. Alternatively, Respondent, as an ordinary successor to StarTran, violated Section 8(a)(5) and (1) of the Act by, from August 19, 2012, to April 28, 2014, implicitly (through its silence) telling bargaining unit employees that their retirement benefits would remain the same, and then unilaterally changing bargaining unit employee retirement benefits by not making retirement contributions without first notifying the Union and giving it an opportunity to bargain.

25

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

REMEDY

30

Having found that the Respondent is a perfectly clear successor and an ordinary successor to StarTran, and that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally deciding not to make retirement contributions for bargaining unit employees without first bargaining with the Union to agreement or impasse, I shall require Respondent, on request by the Union, to rescind the unlawful unilateral change and retroactively restore the retirement contribution terms and conditions of employment established by its predecessor (to the extent practicable, given that the retirement plan provided by StarTran was a government plan, and Respondent is a private entity). Respondent shall also be required to make employees whole for any loss of wages or other benefits they suffered as a result of Respondent's unlawful unilateral change in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

35

40

In addition, I shall order Respondent to remit all payments it owes to employee benefit funds, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). If there is no applicable benefit fund that will accept such contributions, Respondent shall deposit an amount equal to the

required contributions in an escrow account and negotiate with the Union over how the moneys will be distributed to make the unit employees whole.²¹ Further, Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, I shall require Respondent to compensate affected bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

Respondent, MV Transit and/or MV Transportation, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Amalgamated Transit Union, Local 1091 (the Union) in the following appropriate unit, by unilaterally changing the terms and conditions of employment of unit employees, including retirement contributions that Respondent makes on behalf of unit employees, without first providing notice to the Union and an opportunity to bargain to agreement or impasse. The bargaining unit is:

All transportation and maintenance employees employed by Respondent, excluding any office clerical employees, guards, supervisors, and confidential and managerial employees as defined in the Act.

²¹ This aspect of the remedy tracks the remedy that the Board ordered in *StaffCo of Brooklyn, LLC*, 364 NLRB No. 102, slip op. at 5. I decline the Union's request that I direct Respondent to deposit funds into bargaining unit employees' 401(k) accounts, because (among other reasons) the current 401(k) plan did not exist when the unfair labor practices occurred, and because it is not clear whether all affected unit employees remain eligible to participate in the 401(k) plan. The parties, of course, remain free to negotiate about whether Respondent should distribute the funds that it owes (as a result of this decision) to the current 401(k) plan.

²² 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.

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

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

5

(a) Before implementing any changes in the bargaining unit employees' retirement contributions or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

10

(b) To the extent it has not already done so, on request by the Union, rescind any changes in retirement contributions for unit employees that were unlawfully unilaterally implemented on August 19, 2012.

15

(c) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes to retirement contributions in the manner set forth in the remedy section of this decision.

20

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

25

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

30

(f) Within 14 days after service by the Region, post at its facility in Austin, Texas, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 19, 2012.

35

40

²³ 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."

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

5

Dated, Washington, D.C. January 9, 2019

10



Geoffrey Carter
Administrative Law Judge

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 bargain in good faith with the Amalgamated Transit Union, Local 1091 (the Union) in the following appropriate unit, by unilaterally changing the terms and conditions of employment of unit employees, including retirement contributions that we make on behalf of unit employees, without first providing the Union with notice and an opportunity to bargain. The bargaining unit is:

All transportation and maintenance employees that we employ, excluding any office clerical employees, guards, supervisors, and confidential and managerial employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, before implementing any changes in the bargaining unit employees' retirement contributions or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL, to the extent we have not already done so, on request by the Union, rescind any changes in retirement contributions for unit employees that were unlawfully unilaterally implemented on August 19, 2012.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed change to retirement contributions, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

MV TRANSIT AND/OR
MV TRANSPORTATION, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/16-CA-110465 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.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.