

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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:
TRANSCENDENCE TRANSIT II, INC., :
TRANSCENDENCE TRANSIT, INC., :
PATRIARCH PARTNERS, LLC, and :
PATRIARCH PARTNERS AGENCY : Case 29-CA-182049
SERVICES; Single or Joint Employers, :
:
and :
:
LOCAL 1181-1061, AMALGAMATED :
TRANSIT UNION, AFL-CIO. :
:
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**REPLY BRIEF OF CHARGING PARTY
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

PRELIMINARY STATEMENT

Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO (“Local 1181” or “the Union”), respectfully submits this reply brief in further support of its Exceptions to the Decision dated September 4, 2019 (“ALJD”) of Administrative Law Judge Kenneth W. Chu (“the ALJ”). We reply herein to selected points in Respondents’ brief and otherwise respectfully refer the Board to Local 1181’s main brief in support of its Exceptions.

ARGUMENT¹

Respondents’ brief contains more mischaracterizations of the General Counsel’s and Local 1181’s positions and the record evidence than can be addressed in this reply brief. Some mischaracterizations can be addressed as a group, such as the tactic of Respondents’ brief of asserting that the General Counsel’s and Local 1181’s positions are not supported by *any* evidence, the record notwithstanding. For example, the General Counsel’s and Local 1181’s main briefs set forth extensive direct evidence, including many admissions by Respondents, that Respondents employed the employees in issue and provided the paratransit services from February 24 until Respondents decided to cease operating on February 26.² Even the ALJ did not say that no evidence supports the Complaint on these issues. Yet Respondents state “there was no evidence that Transcendence II ever hired any TransCare bargaining unit employees. There was simply no record evidence of any continuity of business enterprise or workforce.” Respondents Br. at 3. Respondents even at times acknowledge admissions only then to argue as if admissions are not evidence. See, e.g., id. at 11, 20-21 (acknowledging that Patriarch attorney

¹Capitalized terms used herein have the same meaning as in Local 1181’s main brief in support of its Exceptions.

²All dates refer to 2016 unless noted otherwise.

Stephen told the MTA that TransCare employees were transferred to Transcendence II but contending that the General Counsel presented no evidence that Stephen's testimony contradicting his earlier statement was untruthful); id. at 21 (referencing PPAS attorney Creswell's February 25 statement to the Trustee that Transcendence II was operating, citing the ALJ's erroneous finding that Creswell's February 25 and 26 statements were "overstatement[s]," and contending that the General Counsel did not present evidence supporting an "alternative conclusion"). Other examples include Respondents' assertions that the record contains no evidence that Patriarch or PPAS set terms and conditions of employment even though Patriarch had Fuchs send the February 24 NewCo Announcement (after Tilton reviewed it) stating that there would be no change in such terms and conditions (see id. at 36; GC Ex. 29; Tr. 457-58 (Jones)), and that no testimony supports that the Trustee did not know the state of ownership of the server although the Trustee so testified (see Respondents Br. at 23 n.17; Tr. 469, 481 (LaMonica)). Fortunately, Respondents can not make record evidence disappear.

Respondents also misrepresent that the Exceptions solely challenge the ALJ's factual findings. See, e.g., Respondents Br. at 2, 16. Many Exceptions challenge the ALJ's legal conclusions, including, but not limited to, the ALJ's conclusion that the transfer of the MTA Contract was void and the ALJ's failure to give adequate consideration to the need to prevent the use of corporate form in a manner that frustrates the purposes of the Act in deciding whether Respondents are a single employer. See 1181 Main Br. at 33-35, 45.

I. THE ALJ ERRED BY CONCLUDING THAT TRANSCENDENCE II WAS NOT A SUCCESSOR EMPLOYER BECAUSE IT DID NOT EMPLOY THE EMPLOYEES.

As described in Local 1181's main brief, Respondents repeatedly stated between February 24 and February 26, and in the early stages of the bankruptcy case, that Transcendence II was the employer of the employees in question and was providing or provided the paratransit

services covered by the MTA Contract, and that Respondents acquired the assets necessary to provide those services. Moreover, Respondents do not dispute that the Trustee did not claim at any time to be the employer and did not direct any of the employees in any way.

With respect to whether Transcendence II hired TransCare NY's paratransit employees, Respondents state that Fuchs³ sent the Second NewCo Announcement on February 26 to TransCare employees. See Respondents Br. at 13. But in a 2018 deposition, Tilton rejected that the Second NewCo Announcement was sent to TransCare employees and stated that it was sent to NewCo employees only. See GC Ex. 35 at 124. The Announcement was addressed to "NewCo Employees ONLY" and Patriarch had Fuchs send it after Tilton approved it and without consulting the Trustee (who Respondents say was the employer). See GC Exs. 4, 6, 28.

Respondents do not dispute that Fuchs emailed Cordiello, the responsible Union representative, a copy of the February 24 NewCo Announcement and told Cordiello that the NewCo Announcement was sent to all employees (although Respondents do not acknowledge this email when they contend that the General Counsel failed to confirm distribution of the NewCo Announcement to employees. See Respondents Br. at 26⁴. See GC Ex. 23. Patriarch had Fuchs also send this Announcement to the employees after Tilton reviewed it. Respondents also do not defend the ALJ's erroneous finding that Fuchs told Cordiello on February 24 that the job offers had not yet transferred to Transcendence II. See ALJD at 17:2-3.

Respondents acknowledge that PPAS and Creswell did not act on behalf of Wells Fargo, and that Creswell represented PPAS, a Respondent. See Respondents Br. at 5 n.4, 10; compare

³Fuchs knew he would run the paratransit business for Transcendence II. See Tr. 284-85 (Tilton). Respondents do not acknowledge this in their brief.

⁴Similarly, in asserting that General Counsel Exhibit 2 is only a draft, Respondents neglect that it is identical to the copy Fuchs emailed Cordiello. See id.; GC Ex. 23.

ALJD at 5:6-7, 5:36-37, 11:14, 15:22-24. Therefore, Respondents do not dispute that PPAS, by Creswell, told the Bankruptcy Court in a February 29 written submission that Transcendence II was the employer. See CP Ex. 2 ¶8. The ALJ erred by ignoring this admission.

Respondents assert that the General Counsel introduced communications from TransCare management to TransCare bargaining unit employees to show that Transcendence II hired the employees, but Respondents then list only some of the pertinent documents that the General Counsel introduced. See Respondents Br. at 25. Respondents omit General Counsel Exhibits 4, 6, 23, 28, and 29, which reflect communications to the employees showing that Transcendence II hired them. These exhibits, the exhibits Respondents list, and other exhibits reflect documents sent from or on behalf of Respondents to former TransCare bargaining unit employees that Transcendence II hired and admissions that Transcendence II hired the employees. See 1181 Main Br. at Point II(A), (B).

With respect to which company provided the paratransit services covered by the MTA Contract on February 24, 25, and 26, Respondents do not dispute that they told the MTA and the Bankruptcy Court that Transcendence II was providing or provided those services. See id. at Point II(C)-(D); GC Ex. 27 at 2; CP Ex. 2. Respondents caused the services to continue, see 1181 Main Br. at 45, and on February 26 caused them to stop.

Respondents do not dispute that, contrary to the ALJ's erroneous finding, Tom Charles from the MTA (not Fuchs) told Cordiello on February 26 that Transcendence (not TransCare NY) was closing its operations. See ALJD at 17:3-4; id. at 10:44-45; Tr. 223 (Cordiello).

Respondents defend the ALJ's determination that Stephen did not make any statement that would amount to an admission that Transcendence II was operational by changing the subject. See Respondents Br. at 20. The ALJ's determination relates to Stephen's February 26

email to the MTA. See ALJD at 15:8-16; GC Ex. 27. The ALJ erred because he ignored Stephen's statement in this email that, unless the MTA provides certain assurances, "we will, unfortunately, be forced to discontinue service at 5:00PM today." GC Ex. 27 at 2 (emphasis supplied); see 1181 Main Br. at 21-22. Respondents do not address what Stephen wrote about operating but, instead, whether employees were transferred to Transcendence II, which Stephen addressed in his February 25 (not 26) email. See Respondents Br. at 20. As to this, contrary to Respondents' argument, the ALJ did not discuss the February 25 email or credit Stephen's testimony attempting to explain away his representation therein that Transcendence II hired the employees. The ALJ should have accepted the admissions in both of Stephen's contemporaneous emails to the MTA, which are consistent with other admissions from that period, rather than Stephen's post hoc fabrications to protect Respondents.

In sum, the record evidence establishes that Transcendence II employed the employees in question and provided the paratransit services between February 24 and February 26.

II. THE ALJ ERRED BY CONCLUDING THAT TRANSCENDENCE II WAS NOT A SUCCESSOR EMPLOYER BECAUSE IT COULD NOT HAVE OPERATED BECAUSE IT DID NOT RECEIVE NECESSARY ASSETS.

Respondents assert that no evidence exists that they had access to the assets necessary to operate and, further, that Local 1181's position is that "Transcendence II could have still been a successor of TransCare even if it did not have access to the assets required to operate." Respondents Br. at 23, 24. Local 1181's actual positions are, among other things, that the MTA Contract became Respondents' asset on February 24 and that, even if Respondents were not authorized to perform the paratransit services, Respondents had the access to the assets they needed to operate. This is supported by, among other things, the fact that Respondents performed the paratransit services on February 24, 25, and 26 until Respondents decided to stop

operating, Respondents' admissions they that were performing or performed the services, and the absence of any action by the Trustee to continue the services.

Respondents assert that the ALJ found that Transcendence II could not have operated because it did not have access to the necessary vehicles and server. See Respondents Br. at 22-24. However, with respect to vehicles, the ALJ made no such finding and Respondents did not file a cross-exception. Accordingly, the Board should disregard all of Respondents' assertions about their inability to operate because they did not have access to the vehicles. We do not address those assertions except to state that, as with the server, since Respondents performed the paratransit services, Respondents had the access to the vehicles they needed.

Local 1181 addressed the server in Point III(C) of its main brief. As additional points, Respondents assert that the Trustee refused to release the server on February 24. See id. at 22, 23 n.17, 23-24, 24. But the Trustee was not appointed until late that evening. See ALJD at 11:6. Youngblood did not inquire of the Trustee's counsel, Herbst, about the server until after hours on February 25. Respondents do not make clear that Herbst suggested the issue could be addressed the next morning and omit that, in any event, Youngblood wrote that Respondents did not "execute for logistical reasons." See Respondents Ex. 1; Respondents Br. at 22, 23, 24.⁵

Respondents misrepresent Local 1181's and the General Counsel's positions as: (1) the MTA and Transcendence II were never party to a contract; (2) if Transcendence II performed paratransit services without a contract it was *ultra vires* activity; and (3) Transcendence II would have performed paratransit services for free for as long as it took to reach an agreement with the

⁵Respondents also mischaracterize Local 1181's position when they list purported reasons Transcendence II may have had access to the server. See Respondents Br. at 23. To the extent mentioned by Local 1181, these are responses to the ALJ's suggestion that the Trustee improperly interfered with Respondents' access to the server. See 1181 Main Br. at Point III(C).

MTA. See Respondents Br. at 18-19. As to the first, Local 1181 stated that the MTA Contract was transferred to Respondents. See 1181 Main Br. at 35; see also Tr. 437 (Stephen) (MTA Contract was not part of the Debtors' bankruptcy estates). In response to the ALJ's conclusion that Respondents could not perform the paratransit services without being a party to the MTA Contract, Local 1181 explained that Respondents could, and did, perform the services between February 24 and 26 even if Respondents were not a party or authorized to perform. See 1181 Main Br. at Point III(B). Finally, Local 1181 said "Respondents risked that the MTA would not pay for services Respondents provided for a few days[,]" not indefinitely. See id. at 27.

Respondents assert that this is unsupported speculation, see Respondents Br. at 18-19, but that is what occurred and the ALJ found that Stephen believed "it would [be] easier to have the contract assigned to Transcendence II if it was seen by the MTA that the company was a going concern (Tr. 401, 434).". ALJD at 12:45-47. Respondents also assert that the ALJ credited Tilton's testimony that it would make "little business sense for Transcendence II to operate when it cannot pay employees and expenses." Respondents Br. at 19. The ALJ did not claim to credit any such testimony. He was explaining his own (incorrect) conclusion. See ALJD at 15:40-42.

With respect to the communications among Creswell, the Trustee, and the MTA on February 26, the most important fact to be derived therefrom is that Creswell said that "Transcendence Transit II has been providing services under the MTA contract above since the filing date. The MTA would like TT II to continue to provide those services in the near term, with the ultimate goal of, ideally, entering into a new agreement." See GC Ex. 9 at 2 (emphasis supplied). Although we address herein some of Respondents' mischaracterizations of the evidence relating to those communications, the mischaracterized evidence is generally not material because the Trustee's bad acts on February 26 according to Respondents relate to why

Tilton's plan failed rather than to the ALJ's incorrect conclusion that Transcendence II could not have operated because it was not a party to the MTA Contract.

Contrary to Respondents' assertion, see Respondents Br. at 12, Creswell did not tell the Trustee until 3:15 p.m. that he needed the Trustee's position by a 5:00 deadline Tilton unilaterally set. See GC Ex. 9. 18 minutes later, at 3:33, the MTA advised Patriarch that the MTA would not move forward, mooting the issue of the Trustee's consent. See GC Ex. 27. The MTA's decision does not show that the foreclosure or transfer of the MTA Contract was void, but rather that the MTA, after assessing the situation, on February 26 invoked its contractual remedies for a transfer of the MTA Contract without its consent.

Also contrary to Respondents' assertion, the Trustee did not "drag his feet". Respondents Br. at 17-18. Although the Trustee was under no obligation to assist Transcendence II or to respond to Creswell, the Trustee did so promptly. Indeed, Creswell acknowledged in his 2:00 email that the Trustee "ha[s] many matters to attend to right now[.]" GC Ex. 9. The Trustee stated in his 5:07 email response and testified that he tried to call Creswell several times. See id.; Tr. 154-55 (LaMonica). Creswell responded that he was in security at JFK. See GC Ex. 9.

Respondents now assert that the Trustee put onerous conditions on his consent. See Respondents Br. at 13. The Trustee's conditions are reasonable and foreseeable. See GC Ex. 9.⁶

Finally, Respondents cite evidence that does not support their assertion that the Trustee claimed to the MTA on February 26 that he controlled the MTA Contract. See Respondents Br. at 13. The Trustee agreeing to terminate the foreclosed MTA Contract (as Respondents requested) and seeking payment for services the pre-bankruptcy Debtors rendered thereunder are

⁶Respondents' assertion that the MTA would not consent to assignment of the MTA Contract unless the Trustee consented to terminate it makes no sense. See Respondents Br. at 17. A terminated contract can not be assigned and the MTA Contract was already transferred.

not claims to control the Contract. Indeed, Stephen’s understanding the night of February 25 was that the Trustee was not objecting to the foreclosure. See GC Ex. 26 at 3; Tr. 398 (Stephen).

III. THE ALJ ERRED BY CONCLUDING THAT NO RESPONDENTS ARE A SINGLE EMPLOYER.⁷

Respondents do not defend the ALJ’s incorrect reasons for concluding that the transfer of assets was at arms’ length, do not dispute that Tilton’s companies (and only Tilton’s companies) were on both sides and in the middle of the transaction, and do not identify any evidence that the transaction was at arms’ length. See Respondents Br. at 38-39. Still, Respondents contend that the ALJ correctly concluded that the transaction was at arms’ length. Respondents assert that the companies are not “the same” merely because Tilton had “a role” in them. See id. at 38. But Tilton had far more than “a role” – she owned and actively controlled the companies. Beyond common ownership and control, Patriarch and PPAS dictated for Tilton’s benefit the terms of the foreclosure and transfer, both of which happened essentially simultaneously on February 24 without any negotiations or other safeguards to ensure that fair value was paid for the assets. See GC Ex 12; Jt. Ex. 6.⁸ Recognizing that such a transaction was not at arms’ length poses no risk that most investment and management funds will be deemed single employers with the

⁷Local 1181 did not brief the joint employer issue but stated that it concurred with the General Counsel’s position. See 1181 Main Br. at 4 n.3. Having now read the General Counsel’s brief in support of its Exceptions, Local 1181 requests to withdraw its Exception #3 on the joint employer issue. Respondents state that Local 1181’s argument on the joint employer issue is half-hearted and that Local 1181 admits that the ALJ applied the correct legal standard. See Respondents Br. at 39, 40. Since Local 1181 did not brief the issue, there was nothing half-hearted and no such admission.

⁸Respondents misrepresent that Local 1181 seeks a single employer “finding” based only on the common ownership factor. See Respondents Br. at 29-30. Local 1181’s Exception #53 states “The ALJ erred in the weight he assigned to the common ownership and financial control factor in establishing single-employer status. ALJD at 23:19-29.” Emphasis supplied. See also 1181 Main Br. at 45 (“the ALJ gave insufficient consideration to the need to prevent the use of corporate form, as Respondents did here, in a manner that frustrates the purposes of the Act.”).

companies they own or control. If the ALJ had understood these facts, nothing in his Decision suggests that he would have concluded that the transaction was among companies with an arms'-length relationship rather than among companies constituting a single integrated enterprise.

Respondents' assertion that the General Counsel's and Local 1181's arguments demonstrate "their inability to understand the nature and relationship of the various entities at issue" is disrespectful and incorrect. See Respondents Br. at 38. Local 1181 and the General Counsel well understand the shell game Respondents play, as well as why Respondents seek to reject, among other statements, their 2016 statements to employees, Local 1181, the MTA, the Trustee, and the Bankruptcy Court. The paratransit services continued because Respondents caused them to continue, see 1181 Main Br. at 45, and stopped because Respondents caused them to stop, but Respondents have not paid the employees who did the work. For the reasons discussed in Local 1181's and the General Counsel's briefs, the Board should now hold Respondents liable as a single employer for violating the Act.

CONCLUSION

For the foregoing reasons and those set forth in Local 1181's main brief in support of its Exceptions, Local 1181's Exceptions should be granted.

Dated: December 11, 2019

Respectfully submitted,

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