

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

**TRANSCENDENCE TRANSIT II, INC.;**

**TRANSCENDENCE TRANSIT, INC.;**

**Case No. 29-CA-182049**

**PATRIARCH PARTNERS, LLC AND**

**PATRIARCH PARTNERS AGENCY SERVICES;  
Single Employers or Joint Employers**

**And**

**LOCAL 1181-1061, AMALGAMATED TRANSIT  
UNION, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by  
Lynda Tooker  
Counsel for the General Counsel  
National Labor Relations Board  
Region 29  
Two MetroTech Center, Suite 5100  
Brooklyn, New York 11201  
(718) 765-6161

Dated at Brooklyn, New York  
this 11<sup>th</sup> day of December 2019

## I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, Counsel for the General Counsel (“CGC”) respectfully submits this Reply Brief in support of CGC exceptions to the decision of Administrative Law Judge Kenneth W. Chu (“the ALJ”) in this case, and in opposition to the Answering Brief filed by Respondents Transcendence Transit II, Inc. (“Transcendence II); Transcendence Transit, Inc. (“Transcendence”); Patriarch Partners, LLC (“Patriarch); Patriarch Partners Agency Services, LLC (“PPAS) (collectively “Respondents”). For the reasons set forth herein and in the General Counsel's Brief in Support of Exceptions, the Board should independently examine and reverse the ALJ’s erroneous findings of fact and conclusions of law in this case.

A review of the probative record evidence, set forth in the CGC’s Brief in Support of Exceptions, clearly demonstrates that the ALJ’s factual findings and legal analysis are not supported by the evidence or Board law. In their Answering Brief, Respondents try to counter the CGC’s exceptions and arguments in support of exceptions by mischaracterizing the evidentiary record, the ALJ’s decision, and CGC’s exceptions and argument. Respondents’ primary mischaracterization is that CGC’s exceptions are limited to the ALJ’s factual findings that rest upon appropriately rendered credibility resolutions. Respondents are wrong. CGC’s credibility exceptions are exceedingly limited in scope, accounting for only 5 of the 82 exceptions (Exceptions 15, 19, 23, 24, 30, 43). Respondents improperly attempt to mislead the Board by recasting virtually all the ALJ’s factual findings and legal conclusions as attributable to “credited testimony” when, in fact, there is no credibility analysis or determinations or even so much as a hint that the ALJ relied upon such testimony, credited or otherwise, in rendering his conclusions. Respondents’ arguments entirely ignore CGC’s exceptions challenging the ALJ’s application of the law (Exceptions. 9, 11, 12, 35, 37, 41, 55-57, 73-76).

## II. ARGUMENT<sup>1</sup>

The most important inquiry in this case, the one that is determinative of both the question of successorship and of single employer status, is who controlled the paratransit operations and the terms and conditions of the employees during the relevant time period from February 24, 2016 through February 26, 2016.<sup>2</sup> The record evidence overwhelmingly shows that Lynn Tilton as the sole manager of Respondent Transcendence II, was in control of the paratransit operations, and that she used the executives employed by Respondent Patriarch to exercise this control.

### A. Contrary to Respondents' Arguments, the ALJ Erred in Finding that Transcendence II did not Operate and was not a Successor to TransCare NY

As fully discussed in CGC's Brief in Support of Exceptions and Post Hearing Brief to the ALJ, the Board held in *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1206 (1994) and its progeny, that an acquiring "employer may be subject to successorship obligations despite the fact that there has been no transfer of title to the assets." *East Belden Corp.*, 239 NLRB 776, 791 (1978), enfd. mem. 634 F.2d 635 (9th Cir. 1980), and cases cited there. "The Board's traditional test for successorship status ... is whether there is continuity in the employing enterprise." *Petoskey Geriatric Village*, 295 NLRB 800, 802 (1989). If such continuity is being maintained by an acquiring employer during an interim or transition period before ownership actually changes hands, then that acquiring employer is obliged during that interim or transition period to observe statutory bargaining obligations imposed under the successorship doctrine. *Golden Cross*, 314 NLRB at 1205. In order to determine when the acquiring employer was required to bargain with the union, the *Golden Cross* Board looked to when the successor effectively managed and controlled operations, *id.* at 1209—not when the successor obtained the license it needed to legally operate the business or when it formally offered employment to the bargaining

---

<sup>1</sup> Herein, CGC will only reply to Respondents' arguments to the extent they require clarification beyond the GCG's argument in its Brief in Support of Exceptions.

<sup>2</sup> All dates are in 2016, unless otherwise noted.

unit employees. *Id.* at 1203-04. The ALJ's failure to consider, apply or even address *Golden Cross* is fatal to his finding that Respondent Transcendence II never commenced operations and therefore could not have been a successor to TransCare NY an error entirely ignored by Respondents in their Answering Brief.

Despite the ALJ's failure to consider and apply *Golden Cross*, Respondents argument that his successor finding is correct is entirely based upon ALJ's conjecture and speculation that Respondents could not and would not operate the paratransit business without a contract with the New York Transit Authority ("MTA") and that it could not operate without a contested server.<sup>3</sup> However, for the three days in question, Respondents did precisely that, as demonstrated in CGC's Brief in Support of Exceptions. The probative record evidence shows that without interruption, Respondents took over and continued Transcare NY's paratransit operations. (CGC Brf. 11-20, 22-24).

Respondents' Answering Brief and the ALJ's decision fail to mention or address the uncontroverted evidence establishing Respondents' continuation of its predecessor's operations. Instead, Respondents claim that the ALJ's conclusions were based on credited witness testimony (Resp. Brf. 18-19). However, the ALJ does not refer to any testimony or other record evidence that he relied on in making these conclusions, nor does the ALJ credit Tilton's testimony that she did not want to create a new entity or hire employees without a guarantee of long-term employment or Stephen's testimony that Transcendence would fail without the MTA contract, as argued by Respondents. (Resp. Brf. 19; ALJD 15:39-42). Absent a specific credibility determination by the ALJ, the ALJ's factual findings are subject to *de novo* review. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950). Here were the ALJ did not perform any credibility

---

<sup>3</sup> Respondents repeatedly refer to vehicles as one of the assets necessary for the paratransit operations. (Resp. Br. 11, 13, 17, 22, 44). It is undisputed that the vehicles used for paratransit operations were owned by the MTA. (ALJD 4:34-35; Tr. 403). The ALJ did not rely on the ownership or possession of the paratransit vehicles in his decision. Respondents did not except to the ALJ's failure to the ALJ's decision and therefore, Respondents' arguments related to those vehicles should not be considered by the Board. NLRB Rules & Regs. § 102.46(f).

analysis and did not consider the demeanor of the witnesses. Contrary to the ALJ's finding, the preponderance of the record evidence, including contemporaneous documentary evidence, shows that Transcendence II took over TransCare NY's paratransit operations as of February 24, therefore, the ALJ's finding should be reversed. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633 (2011).

It is undisputed that on February 24, Respondent PPAS executed a strict foreclosure of TransCare NY's assets, including the MTA contract and servers, and at that time decision makers, including Tilton and Brian Stephen, believed that the foreclosure had been properly effectuated and would survive scrutiny. (Joint Exh. 6; GC Exh. 26; Tr. 437). The foreclosed assets were then transferred to Respondent Transcendence.<sup>4</sup> (GC Exh. 12). It is also undisputed that the paratransit operations continued in unchanged form until the evening of February 26. Despite the plethora of evidence establishing that Transcendence II began operating on February 24, following the transfer of the assets, the ALJ nevertheless concluded that TransCare NY maintained control of the paratransit operations through February 26. (ALJD 16:13-14). The record evidence detailing the transfer of operations to Transcendence II includes the contemporaneous statements of Respondent PPAS's attorney Randy Creswell<sup>5</sup> that Transcendence II provided paratransit services from February 24 through February 26 (GC Exh. 9) and the testimony of Trustee Salvatore LaMonica (who became responsible for TransCare NY's operations when the Chapter 7 bankruptcy petition was filed on February 24) that as

---

<sup>4</sup> The foreclosure and sale of the assets, including the MTA contract, was effectuated with all parties knowing that the MTA needed to approve the assignment of the paratransit contract. However, the MTA had committed to approving the assignment prior to the foreclosure, and therefore Respondents did not anticipate any problems with the approval. (GC Exh. 34, p. 306).

<sup>5</sup> As fully discussed in CGC's Brief in Support of Exceptions, the ALJ improperly disregarded Creswell's statements which should have been admitted and relied upon as non-hearsay statements. Fed. R. Evid. 801(d)(2). (CGC Brf. 9-11, 23-24, 31-32). Respondents argue that the ALJ recommended CGC call Creswell as a witness, however the ALJ's statement was in the context of a discussion regarding the admissibility of General Counsel Exhibit 10 (Tr. 157:16-157:20), the ALJ later reconsider his ruling that Creswell's out of court statements were inadmissible and were admitted (Tr. 297-99). Therefore, it was up to Respondents to call Creswell if they wanted to refute any of his previous statements made in his capacity as legal representative of Respondent PPAS.

Trustee, he had not directed any paratransit work to be performed by TransCare NY after the bankruptcy petition was filed on February 24. (Tr. 126). The overwhelming record evidence proves that Transcendence II took over the paratransit operations on February 24.

As fully discussed in CGC's exceptions brief, the record evidence shows that TransCare NY trustee was not in control of the paratransit operations when he took over TransCare NY on the morning of February 25, as those operations had already been acquired by Respondents the day before pursuant to the foreclosure. Tilton and Respondent Patriarch had no authority to direct employees of TransCare NY after the bankruptcy petition was filed on February 24. 11 USC § 704. However, Tilton and Respondent Patriarch did have control over the operations of Respondents Transcendence and Transcendence II. The ALJ's finding that Transcendence never operated and nor hired any employees is directly refuted by the fact that Tilton and Patriarch, rather than Trustee LaMonica, made the decision to cease operations of February 26. It is uncontested that Trustee LaMonica, the only person with authority to take any actions pertaining to TransCare NY after the petition was filed on February 24, played no part in the decision to cease operations. The fact that LaMonica was not involved in any decision making related to the paratransit operations is supported by LaMonica's testimony, the testimony of Respondents' witnesses and documentary evidence showing that Tilton and Respondent Patriarch's representatives were directing communication to the paratransit employees and communicating with the MTA on behalf of Transcendence II, not Transcare NY. (GC Exhs. 13-15, 17, 26-29). It is uncontested that it was Tilton who made the decision on February 26 to end the paratransit operations and the communication to the employees to this effect was directed by Patriarch Managing Director W. Randall Jones. (GC Exh. 28, Tr. 422-23). Tilton admitted that the February 26 communication was sent to Transcendence II employees, not TransCare NY employees. (GC Exh. 35 p.124) As such the overwhelming record evidence shows that TransCare NY was not providing paratransit services as of February 24.

The ALJ and Respondents give substantial weight to the fact that on the night of February 25, President of Respondents Transcendence and Transcendence II Glen Youngblood did not take possession of a computer server after a conversation with Trustee LaMonica's attorney,<sup>6</sup> concluding that Respondence Transcendence could not operate without taking physical possession of this server. However, as is the nature of computer servers that are connected to the internet, one does not have to have physical possession of a server to access it. As fully explained in CGC's brief in support of its exceptions, the conclusion that Respondents did not have access to the server necessary for Transcendence II to commence operations is not supported by the record evidence. (CGC Brf. 20-22, 32-34).

The primary purpose of the Board's *Golden Cross* decision is to protect the principles of the successorship doctrine articulated in *NLRB v. Burns International Security Services, Inc.*, to promote the statutory policy of avoiding, or at least minimizing, industrial strife to facilitate the flow of commerce. 406 U.S. 272, 279–81 (1972). The *Golden Cross* Board recognized that the statutory policy could be “frustrated, or even negated completely, if acquiring employers could avoid successorship obligations and create a new status quo in employment terms by simply taking control of enterprises before prospective ownership changes occur, making changes under the guise of predecessors’ action, and, then, once the ownership changes occur, confronting bargaining agents with purportedly preexisting employment terms and conditions.” *Golden Cross*, 314 NLRB at 1205. In this case, the evidence shows that Tilton and the representatives of Patriarch took control of the paratransit operations after the February 24 foreclosure on behalf of Transcendence II. This fact is demonstrated by Tilton’s decision to make the ultimate change to the status quo by ceasing operations. Respondents have tried to attribute that decision to the predecessor by blurring the lines between Tilton’s many roles as the sole director of TransCare

---

<sup>6</sup> Contrary to Respondent’s assertion, the ALJ’s determination that Transcendence II needed the server to operate was not based on the ALJ crediting Stephen’s testimony. The ALJ does not state what if any record evidence his conclusion is based on. (Resp. Exh. 22; ALJD 14:38-14).

NY and the sole manager of Respondent Transcendence II. However, the Board should not be duped, as was the ALJ. Tilton had no authority as director of TransCare after the bankruptcy petition was filed. The only person who could act or advance the interest of TransCare NY after February 24 was Trustee LaMonica. As such, all of Tilton's actions related to paratransit operations and those taken on her behalf by representatives of Respondent Patriarch were taken in furtherance of Respondent Transcendence II's operations. These facts show that under *Golden Cross*, Respondent Transcendence II was the successor to TransCare NY as of February 24.

In addition to the arguments described above, Respondents argue that the ALJ correctly found that Transcendence never hired the paratransit drivers. However, as fully explained in CGC's Brief in Support of Exceptions, the ALJ's finding was flatly contrary to the record evidence, which conclusively establishes that Transcendence II hired all TransCare NY's paratransit employees, including the drivers. (CGC Brf. 11-17, 39-42).<sup>7</sup>

B. Contrary to Respondents' Arguments, the ALJ Erred in Finding that Respondents were Not a Single Employer

Respondents argue that they are not single employers, however, the record evidence overwhelmingly shows that Respondents are single employers with Respondent Transcendence II. All Respondent entities worked together as a single integrated enterprise, as was planned and choreographed by Tilton, to take over TransCare NY's paratransit operations.

In determining single employer status, the Board and courts consider four factors: (1) common ownership;<sup>8</sup> (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965). Centralized control of labor relations is the most important factor in the single employer analysis, *Soule Glass & Glazing Co.*

---

<sup>7</sup> Alternatively, if the Board finds that the bargaining unit employees were not hired because they did not receive transfer of employment letters, Transcendence II is still a successor under *Golden Cross* because it controlled the paratransit operations and the terms and conditions of the bargaining unit employees as of February 24.

<sup>8</sup> It is undisputed that Respondents are commonly owned by Tilton through her investment companies.

v. *NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981). As fully demonstrated in CGC’s Brief in Support of Exceptions,<sup>9</sup> Respondents’ witnesses admitted that Tilton had the ultimate authority to approve offers of employment and the terms and conditions of employment for the employees of Respondents Patriarch, Transcendence and Transcendence II (Respondent PPAS has no employees). (Tr. 265, 275-76, 452). Even in light of the ALJ crediting<sup>10</sup> of Respondents’ witnesses’ conclusory testimony that they had “limited responsibilities” as representatives of Respondent Patriarch in governing the essential terms and conditions of employment, Tilton’s admission that she exercised sole authority in the hiring and setting of terms and conditions of employment for employees of the Transcendence companies and Patriarch indisputably satisfies the centralized control of labor relations prong in the single employer analysis.

In *Navigator Communications Systems, LLC* the Board found that three entities were single employers relying upon the fact that common owners formed and financed all three companies, and that the direct employer of the employees did not have independent control over its labor relations because the common owners determined its initial labor relations policies and chose who would be hired to run the day to day operations of the direct employer. 331 NLRB 1056, 1062-63 (2000). In this case, Tilton decided to hire all paratransit drivers, determined that they would retain the same wage rate, benefits and job titles. (Tr. 275-76). Additionally, it was Tilton, not the newly hired managers for Respondents Transcendence or Transcendence II who determined that paratransit operations would cease on February 26. Tilton’s direction to end the paratransit operations shows that she participated in the conduct alleged to constitute unfair labor practices; this participation is additional evidence of her control of labor relations. *Royal*

---

<sup>9</sup> Contrary to Respondents assertion, CGC’s discussion of control over paratransit employees, including by setting terms and conditions of employment, hiring and firing employees contains numerous citations to the record including exhibits and transcript testimony. (Resp. Brf. 36; CGC Brf. 45-47).

<sup>10</sup> In making this and other credibility determinations, the ALJ fails to discuss any factors he used to make such determinations. Therefore, there is no indication that the determinations were based on witness demeanor, and the ALJ’s determinations are not entitled to deference, but rather should be evaluated in light of the record evidence as a whole and overturned to the extent the preponderance of the evidence is contrary to the ALJ’s findings. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633 (2011).

*Typewriter Co.*, 209 NLRB 1006, 1010-11 (1974). Respondents claim that there are “many examples” of Respondents acting independently, however they cite no such examples. To the contrary, the evidence shows that all actions taken by Youngblood and Fuchs related to the operations of Transcendence and Transcendence II were explicitly directed by Tilton or Patriarch representatives. (GC Exhs. 11, 13-15, 17, 28, 29).

CGC’s Brief in Support of Exceptions fully discusses the evidence showing that the common management prong of the single employer test is satisfied. (CGC Brf. 43). Respondents claim that CGC’s arguments related to common management improperly rely on Tilton’s role as common owner to also establish this additional prong. However, the Board has held that an owner’s exercise of significant control over multiple entities constitutes evidence of common management. *Pathology Institute, Inc.*, 320 NLRB 1050, 1061 (1996); *see also, Lebanite Corp.*, 346 NLRB 748, 759 (2006) (Common management may be found where the separate managerial hierarchies take close instruction from a common owner.) The record evidence shows that Tilton exercised significant control over the Respondent entities proving that she was a common manager.

Additionally, Respondents’ witnesses admitted that at the direction of Tilton in her role as the sole manager of the Transcendence companies, managers for Patriarch including Senior Director Brian Stephen and Managing Director W. Randall Jones performed managerial tasks for Transcendence II such as negotiating with potential customers (the MTA) and drafting employee communications. (Tr. 392, 435, 445-46). The performance of these tasks that were essential to Transcendence II’s operations by Patriarch managers is further evidence of common management.

Finally, as demonstrated in CGC’s Brief in Support of Exceptions, contrary to Respondents’ assertions that there was no interrelation of operations among Respondents, the record evidence established that the Respondents were interrelated. Respondents rely on the fact

that Respondents Patriarch and PPAS were not formed for the purpose of providing paratransit services as proof that the entities are not interrelated. However, in *Pathology Institute, Inc.*, the Board held that companies can be interrelated even when each entity has a distinct purpose. It found that a company that operated hospitals had interrelated operations with a company that provided strategic planning, and financial services including loans. 320 NLRB 1050, 1059-61 (1996); *see also Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), enf'd, 551 F.3d 722 (8th Cir. 2008). Additionally, the Board has held that the lack of arm's length financial transactions shows financial interdependency that is evidence of integration. *Emsing's Supermarket, Inc.* 284 NLRB 302, 303-04 (1987). As fully discussed in CGC's Brief in Support of Exceptions, the financial transactions between Respondents show that they were all interdependent and that the fledgling Respondents Transcendence and Transcendence II were wholly dependent on Respondent Patriarch and PPAS.

The overwhelming record evidence shows that Respondents meet all four criteria for single employer. However, even if the Board finds that one of the factors is not satisfied, the existence of the other three will still support the conclusion that Respondents are a single employer. *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir. 1979). As such, the ALJ's finding that Respondents are not a single employer should be reversed.

### **III. CONCLUSION**

Based upon the above and CGC's Brief in Support of Exceptions, the ALJ's decision must be overturned and his findings that Respondents were not a single employer and successor to TransCare NY and therefore did not violate the Act by failing to give the Union notice and opportunity to bargain over the effects of Respondents' cessation of operations must be reversed.

Respectfully submitted this 11<sup>th</sup> day of December 2019.

/s/ Lynda Tooker  
Counsel for the General Counsel  
National Labor Relations Board