

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

**ERRANDS PLUS INC. D/B/A
RMA WORLDWIDE CHAUFFEURED TRANSPORT**

and

Case 5-CA-230586

**TEAMSTERS LOCAL UNION 570 A/W
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA**

GENERAL COUNSEL'S POSTHEARING BRIEF

To the Honorable Arthur Amchan, Deputy Chief Administrative Law Judge

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I. INTRODUCTION

Errands Plus, Inc. d/b/a RMA Worldwide Chauffeured Transport (“Respondent”) violated Section 8(a)(5) of the National Labor Relations Act (“the Act”) when it failed to bargain with Teamsters Local Union 570 a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (“the Union”). Respondent is a *Burns* successor to Transdev Services Inc. (“Transdev”), because a majority of its drivers were previously Transdev drivers, and Respondent continued the operation of the Charm City Circulator in substantially unchanged form. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The Union represented the drivers when they were employed by Transdev, and Respondent was obligated to bargain with the Union upon demand. Therefore, Respondent’s continued failure to bargain with the Union violates Section 8(a)(5) of the Act.

II. ISSUES PRESENTED

1. Whether Respondent’s operation of the Charm City Circulator was a substantial continuation of Transdev’s operation, given that the City of Baltimore dictated the terms of the service to both contractors, and the employees observed no change in their job duties?
2. Whether a wall-to-wall unit of Union-represented Transdev drivers remain an appropriate unit when employed by Respondent?
3. Whether Respondent hired a majority of former Transdev employees, and employed a substantial and representative complement of drivers when the Union demanded to bargain?

III. FACTS

A. Respondent's Operation of the Circulator

Respondent is a contractor that is engaged by the City of Baltimore (“the City”) to operate the Charm City Circulator¹ (“Circulator” or “CCC”), a fixed-route bus service in the downtown area. (Tr. 51: 1-5).² The City designs the four Circulator routes, determines the stops, as well as the hours of operation. (Tr. 54: 11-12, 54: 25, 55: 1-5). All Circulator drivers are required to maintain a commercial driver’s license (“CDL”). (Tr. 93: 6-7, 104: 6-9, 117: 17-19, 127: 13-15). Respondent currently operates the Circulator from 1700 Cherry Hill Road, Baltimore, Maryland. Before moving to the Cherry Hill location, Respondent stationed its buses at the Baltimore-Washington International Airport. (Tr. 62: 11-14).

Respondent assumed operation of the Circulator on October 11, 2018, after the City severed its contract with Transdev-the former operator. (Tr. 55: 17-19). Pursuant to an emergency agreement with the City, Respondent was required to provide “uninterrupted Circulator service” to the public the day after Transdev ceased operations. (Tr. 55: 17-18, 22-25, 56: 1-4; GC Exh. 6).³ The Emergency Agreement reads,

The CCC serves residents, downtown employees, students, and tourists etc....The circulator service helps reduce congestion and greenhouse gas pollution while offering a convenient, reliable and eco-friendly form of public transportation...

(GC Exh. 6: 40)

¹ The Charm City Circulator was at some point referred to as Charm City Connector. (Transcript page 66: line number 17-25 and page 67: line number 1-9).

² References to the February 3, 2020 Hearing Transcript are noted in the following format - Tr. page number: line number(s).

³ General Counsel Exhibits are noted in the following format: GC Exh. Number.

It is the intent of the City to continue the CCC fixed route circulator services which are designed individually and collectively to serve a variety of ridership markets, including residents, workers, tourists, etc. in the agreed service area.

(GC Exh. 6: 46)

In the weeks leading up to October 11, 2018, Respondent recruited experienced Circulator employees to be the foundation of its workforce, and conducted interviews with driver-operators (“drivers”) who were working for Transdev at the time. (Tr. 58: 1-18). During the interviews, drivers were asked about their Circulator operating experience, and knowledge of the routes. (Tr. 85: 25, 86: 1-2, 98: 18-20, 122: 20-22). Respondent eagerly extended job offers to Transdev drivers during the interviews. (Tr. 86: 3-4, 96: 21-22, 122: 4-5). On October 6, 2018, Gigi Bridgers, Respondent’s Vice President of Operations and Finance, sent an e-mail to Transdev drivers confirming that they were hired, and already in Respondent’s “system.” Bridgers also informed the drivers that Respondent would issue a work schedule for the Circulator drivers by October 8, 2018. (GC Exh. 8).

On October 11, 2018, Respondent assumed operation of the Circulator with 27 employees, at least 60 percent of whom had been employed by Transdev up to the previous day, and represented by the Union. (GC Exh. 18). In addition to extending job offers to then-Transdev drivers, Respondent even hired former Transdev Circulator drivers who stopped working for Transdev before loss of contract.⁴ (Tr. 175-176). Respondent also hired three former Transdev Circulator drivers, and assigned them “supervisory” titles.⁵ (Tr. 179: 3-8).

⁴ Meyana Edmonds and Monique Humphries. (GC Exh. 13:1).

⁵ Donovan Bea, Maurice Brown, and Albert Johnson. (GC Exh. 2, GC Exh. 4). The General Counsel does not concede the Section 2(11) supervisory status of these employees. However, it is not necessary to resolve this question because a clear majority of Respondent’s employees were former Transdev employees, represented by the Union.

Respondent did not provide Circulator training to former Transdev drivers because they had been sufficiently trained by Transdev. (Tr. 86: 5-8, 96: 23-24).

Though many laid-off Transdev Circulator drivers started working for Respondent on its first day of Circulator service, other drivers were hired in the weeks that followed.⁶ (GC Exh 2, GC Exh. 4, and GC Exh. 18). By December 10, 2018, Respondent had hired 38 employees, 32 of which were drivers, and a majority of which were former Transdev employees. (GC Exh. 2).⁷

From October 11, 2018, until about April 2019, Respondent did not employ Circulator-specific mechanics. (Tr. 62: 18-21). When necessary, it used mechanics from its other sites to address mechanical problems regarding the Circulator. (Tr. 62-63). Respondent asserts that it has not hired a fueler. (Tr. 185: 1-12).

Though the City initially engaged Respondent on an emergency basis, Respondent was the only bidder, and was “fairly certain” that it was going to be awarded the Circulator contract on a long-term basis. (GC Exh. 6; Tr. 158). On March 29, 2019, after the Emergency Agreement was extended two times, Respondent and the City entered into a three-year contract in which Respondent would continue operation of the Circulator. (Respondent Exh. 9). As of March 2019, Respondent had 47 employees, 37 of which are drivers. (Respondent Exh. 4, Tr. 166-168).

⁶Teneka (Teneica) Allen, Dwayne Campbell, James Thomas-El, Selina Perdue, and Nancy Pulley. Pulley testified that she was unemployed for two months after she was laid off because she was caring for her sick husband. (Tr. 87-88).

⁷ December 10, 2018, is the date in which Respondent provided GC Exh. 2 to the General Counsel as a representation of the employees it hired to operate the Circulator. (Tr. 10: 16-11:20). According to Pulley’s testimony, she was hired on December 8, 2018. (Tr. 83: 8-14). Respondent did not list her in GC Exh. 2).

When Respondent took over service of the Circulator, it inherited City-owned buses that Transdev used in operating the Circulator. (Tr. 110: 13-16, 111: 11-19, 154: 14-16). Pursuant to its contract with the City, Respondent purchased additional buses to supplement the fleet. (Tr. 159: 15-25, 160: 1-6).

B. Transdev's Operation of the Circulator

Under its contract with the City, Transdev operated the Circulator from the inception of the service in 2009 until October 10, 2018. (GC Exh. 3, Tr. 15: 20-22). Transdev and Respondent's operations share many characteristics, or are identical in most material aspects. According to Transdev's agreement with the City,

WHEREAS, the City has determined that the continued growth and development of Baltimore's downtown and waterfront areas will cause a significant number of intersections to reach a failing level of service in the next three to five years, thus requiring more mobility options...

(GC Exh. 3:1)

It is the intent of the City to provide fixed route circulator services which are designed individually and collectively to serve a variety of ridership markets, including residents, workers, tourists, etc. in the service area.

(GC Exh. 3: 4).

As with Respondent, the City designed four Circulator routes, determined the stops, and the hours of operation.⁸ (Tr. 18: 15-22, GC Exh. 16, GC Exh. 17). Transdev required Circulator drivers to maintain a CDL. (Tr. 95: 11-13, 106: 1-3, 119: 21-25). Before losing the City

⁸ At its inception, the Circulator had three routes, but the City later added a fourth one. (GC Exh. 3: 4, Tr. 18: 2-6). The City also changed the hours of operation at some point after its agreement with Transdev. However, according to the 2017 and 2019 schedules, the hours of operation during the relevant period were the same. (GC Exh. 16 and 17).

contract, Transdev operated the Circulator from 1400 Cherry Hill Road, Baltimore, Maryland, down the road from Respondent's current location at 1700 Cherry Hill Road.

C. Transdev's Long Bargaining Relationship with Teamsters Local Union 570.

The relationship between Transdev and the Union dates back to 2004, before the inception of the Circulator. (Tr. 68: 5-18). Most recently, they were parties to a collective-bargaining agreement ("CBA") with effective dates from May 8, 2016, through May 8, 2019. (GC Exh. 9). Before the Circulator started operation, the Union represented a group of drivers who worked on Transdev's various bus contracts with the City. When Transdev was awarded the Circulator contract, the parties agreed to include the Circulator drivers in the extant bargaining unit. (Tr. 68-69). The Union has represented Circulator drivers since the beginning of the Circulator service. (Tr. 69). In addition to the Circulator drivers, the unit consisted of "Baltimore Bus Drivers," mechanics, fuelers and utility workers employed by Transdev at its 1400 Cherry Hill Road location. (GC Exh. 9). The Baltimore Bus drivers operated various routes pursuant to the City's contract with Transdev. The Baltimore Bus routes (also referred to as the "Yellow Bus" routes) included Collegetown, Points East, and Under Armour. (Tr. 20: 19-25, 21: 1-6).⁹

D. Transdev's Assignment of Employees

When Transdev hired new employees, it assigned them to either the Baltimore Bus routes, or the Circulator routes based on organizational need. (Tr. 30: 18-23). Under the terms of the CBA, new employees were subject to a 90-day probationary period before they were assigned a route within the Baltimore Bus or the Circulator routes. (Tr. 67: 19-25, 68: 1-4).

⁹ At this time, Transdev no longer operates the Baltimore Bus contract, but it continued operation of the routes for a period after it lost the Circulator contract.

During the probationary period, the employees were covered under the terms of the collective-bargaining agreement, but they were not allowed to file grievances. (Tr. 68: 2-4).

Though members of the unit were typically assigned to either the Baltimore Bus routes or the Circulator routes, it was not uncommon for a Baltimore Bus driver to receive Circulator training. (Tr. 105: 15-16). Under the terms of the CBA, every six months, employees could bid to switch from the Baltimore Bus to the Circulator, and vice versa. (Tr. 69: 23-25).

E. Transdev's Loss of the Circulator Contract

Transdev learned that it lost the Circulator contract on or about September 22, 2018, and notified the Union by letter on September 26, 2018. (GC Exh. 4). In that letter, Transdev identified 49 Circulator employees who would be affected by the loss of contract. (GC Exh 4). The list consisted of 47 Circulator drivers, a mechanic, and a utility worker. (GC Exh. 4). Pursuant to the CBA, laid-off Circulator employees exercised "bumping rights" by seniority to remain in Transdev's employ. (GC Exh. 5, Tr. 22: 2-6, 106: 16-23, 140: 25, 141: 1-4). This caused Baltimore Bus employees such as Nikisha Staton, Carla Andrews, and James Thomas-El, to lose their positions. (Tr. 106: 16-23, 140: 25, 141: 1-4). Staton and Andrews testified that they lacked sufficient seniority to bump other employees, and were laid off. (Tr. 106: 16-23, 140: 23-25, 141: 1-3). However, Thomas-El had a part-time route assignment before he was bumped, and he would have been required to bid on a full-time position to remain a Transdev employee. (Tr. 121: 8-25, 122: 1-4). Instead, he chose to apply for a job with Respondent. (Tr. 117: 1-10). Respondent subsequently hired all three of these employees to work on the Circulator. (GC Exh. 2).¹⁰

¹⁰ In GC Exh. 2, Respondent erroneously refers to Thomas-El only as "James Thomas."

Transdev also laid off Yvonne Whitaker and Katrina Thompson, two probationary employees that were undergoing Circulator training in September 2018. (Tr. 31).

F. Circulator Employees Performed the Same Duties for Respondent and Transdev.

During the hearing, various employees testified that there was no change between their job duties as Circulator drivers working for Respondent and Transdev. (Tr. 99: 4-9, 128: 18-20). Both Respondent and Transdev tasked drivers with picking up passengers at designated stops on the Circulator routes, as required by the City. (Tr. 124: 15-17, 128: 18-22.) Employees unanimously testified that there was little to no difference in the clientele that rode the Circulator buses while employed by Respondent and Transdev. (Tr. 87: 3-7, 99: 13-20). The only difference raised during the hearing was the loss of benefits enjoyed under Transdev, such as paid time off, and sick leave. (Tr. 86: 13-23, 148: 6-10).

G. The Union Represented a Wall-to-Wall Unit of Transdev Employees.

When Transdev operated the Circulator, Baltimore Bus employees and the Circulator employees were housed at the same station, under the oversight of Transdev General Manager Michael Romeo. (Tr. 15: 11-19). There were two shop stewards and two alternate shop stewards assigned to the entire unit. (Tr. 146: 2-3).¹¹ When necessary, the Union filed global grievances that affected the working conditions of those in the unit. (GC Exh. 14, Tr. 71: 1-19).

Even after Transdev lost the contract, employees believed they were still represented by the Union. During the hearing, Joe Fowler, Union business agent, testified that employees

¹¹ Maurice Brown, former shop steward for Local 570, was also hired by Respondent, and designated a “supervisor.” (GC Exh. 2, GC Exh. 18).

continued to contact Union representatives to raise issues about the working conditions under Respondent, particularly about pay, personal time off, and health insurance. (Tr. 148: 6-10).

Early in 2018, Respondent's Owner, Robert Alexander, phoned Union Secretary/Treasurer Sean Cedenio to discuss the Union's representation of Transdev's employees. (Tr. 72: 8-16). Cedenio testified at the hearing, without rebuttal, that he received a voicemail from Alexander, requesting a copy of the CBA between the Union and Transdev. (Tr. 72: 8-14). In his voicemail, Alexander stated that Respondent was planning to bid on the Circulator contract to replace Transdev, and wanted details about the bargaining relationship with the Union. (Tr. 72: 8-14). However, Cedenio did not respond to Alexander's request for the CBA because the Union's practice is to refrain from interfering with the contract-bidding process. (Tr. 72: 17-24). Once Respondent was awarded the contract to operate the Circulator, Cedenio initiated contact with Alexander by calling and sending a letter. (Tr. 74).

H. The Union Demanded Bargaining.

On October 3, 2018, Union representatives Sean Cedenio and Joseph Fowler met with four Respondent representatives to discuss the Circulator drivers, and the bargaining relationship. (Tr. 75: 3-11). Owner Robert Alexander, Vice President of Administration Lynn Alexander, Senior Vice President of Business Development Art Meisenmer, and Bridgers were present on behalf of Respondent. (Tr. 74: 23-35). During the meeting, Cedenio and Fowler discussed the Union's representation of the Transdev employees. (Tr. 75: 1-11). The Union also asked Respondent to honor the Transdev contract until the parties could negotiate new terms. (Tr. 147: 8-12). In response, Respondent agreed to reach out to the Union to discuss next steps. (Tr. 147: 12-16). Receiving no further response from Respondent, the Union sent a letter on October 15, 2018, in which it demanded recognition. (GC Exh. 10). The Union asserted in its

letter, that Respondent was a successor to Transdev, and sought to bargain with Respondent regarding the bargaining unit. (GC Exh. 10)

I. Respondent Refused to Bargain.

On November 19, 2018, Respondent's counsel sent a letter to the Union in which it stated its refusal to bargain. Respondent asserted that it was "not a successor employer as the majority of [its] workforce was not previously employed by the predecessor, Transdev." (GC Exh. 12). Respondent provided no other reason in the letter for refusing the Union's request to bargain, or at any other time in the months before the February 3, 2020 hearing. However, at the hearing, Respondent's counsel asserted for the first time that Respondent refused to bargain with the Union because employees indicated that they were dissatisfied with the Union. (Tr. 150-152).

IV. ARGUMENT

Respondent is a *Burns* successor to Transdev, and it is required to bargain with the Union. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). A *Burns* successor is obligated to recognize and bargain with a union representing the predecessor's employees when: (1) there is a substantial continuity of operations, (2) the union makes a timely demand to bargain for an appropriate unit, and (3) the employer has hired a "substantial and representative complement" of employees, the majority of whom were represented by the union under the predecessor. *Ride Right, LLC*, 366 NLRB No. 16, slip op at 3 (2018) citing *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 43-47 (1987); *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

In this case, all elements of a *Burns* successorship are present: (1) there is a substantial continuity of operations as mandated by Respondent's contract with the City; (2) the Union made

a timely demand to bargain regarding an appropriate unit of drivers, and (3) when the Union made its demand on October 15, 2018, Respondent had hired a substantial and representative complement of employees, a majority of whom previously worked at Transdev. As such, Respondent is obligated to bargain with the Union. *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 43-47 (1987).

A. Respondent Has a Contractual Obligation to Substantially Continue Transdev’s Operation of the Circulator.

The Supreme Court has identified the following factors as relevant to the substantial continuity analysis: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, same products, and a similar body of customers. *Fall River Dyeing Corp.*, 482 NLRB 27, 43 (1987). These factors are analyzed from the perspective of the retained employees to determine whether they “understandably view their job situations as essentially unaltered.” *Fall River Dyeing Corp.*, 482 U.S. 27, 43 (1987) citing *Golden State Bottling Co.*, 414 U.S. 168, 184 (1973). The Board’s key consideration is “whether it may be reasonably assumed that as a result of transitional changes, the employees’ desires concerning unionization have likely changed.” *Jeffries Lithograph Co.*, 265 NLRB 1499, 1503 (1982) citing *Ranch-Way, Inc.*, 183 NLRB 1168, 1169 (1970).

In applying the above-listed factors to the present case, the totality of circumstances supports a finding of substantial continuity. (1) Respondent and Transdev are both in the business of working as government contractors that provide bus transportation in the City. *Montauk Bus Co.*, 324 NLRB 1128, 1135 (1997)(finding substantial continuity despite “some differences in the way [successor] operates...[because] it is self-evident that both are involved in

the same employing industry and that the employees essentially do the same work. They drive school buses.”); *Louis Pappas’ Homosassa Springs Restaurant, Inc.*, 275 NLRB 1519, 1519 (1985)(substantial continuity found even when the predecessor operated hotels, restaurants, an attraction park and a bait shop, and successor’s principal enterprise was operating a restaurant).

(2) Respondent’s employees testified that they were doing the same job they performed under Transdev, and were doing so, without any training from Respondent. During the interviews for driver positions, Respondent ensured that the employees had Circulator driving experience, and hired them on the spot. The employees are also still subject to the same CDL requirement as under Transdev. While Respondent’s supervisors differ from Transdev’s, this detail is insufficient to defeat a finding of substantial continuity. *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001)(“Nevertheless, viewed from the drivers’ perspective, the drivers are performing the same work that they performed as [predecessor] employees...we would not find that the employees’ job situation has so changed.”) (3) Respondent is producing the same output and serving the same body of customers with the same type of equipment as Transdev. There was also no hiatus between Transdev’s relinquishment of the service, and Respondent’s acquisition-further supporting a substantial continuity finding. *A.J. Myers & Sons, Inc.*, 362 NLRB 365, 371 (2015) (The essence of successorship is not “premised on an identical recreation 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 to take advantage of the trained work force of its predecessor.”) Respondent clearly took advantage of Transdev’s trained workforce to maintain continuity of the Circulator service. This undermines its argument that there was no substantial continuity. *Stewart Granite Ent.*, 255 NLRB 569, 573 (1981)(“if respondent was truly attempting to enter an essentially new business

area with a substantially different product, using different methods of production, there would have been little reason to rely so heavily on [the predecessor's] work force”).

To dispute substantial continuity, Respondent ineffectively points to minor operational differences between it and Transdev, such as where it stationed its buses and the models of buses used. However, given the parameters of the agreement with the City, Respondent had little autonomy because as with Transdev, the City determined how the Circulator operated. The City's stated goal in its implementation of the Circulator service was to reduce congestion in the downtown area by providing convenient public transportation, and that goal remained even after Respondent took over the service. Relevant portions of the agreement between Transdev and the City are mirrored in Respondent's agreement with the City. For example, in their respective agreements with the City, both contractors agreed,

It is the intent of the City to continue the CCC fixed route circulator services which are designed individually and collectively to serve a variety of ridership markets, including residents, workers, tourists, etc. in the agreed service area.

(GC Exh. 3:4 and GC Exh. 6:46).

A comparison of the 2017 and 2019 Circulator schedules further emphasizes that there is little difference between Transdev's operation and Respondent's operation of the service. The number of routes, the hours of operation, the stops on each route, the Circulator website address, and its social media access information are identical under both contractors. Respondent's denial of substantial continuity of operations is emphatically unsupported.

Respondent challenges substantial continuity by arguing that it was performing a better service than Transdev because it added more buses to the routes. However, even if Respondent improved upon Transdev's operation the Circulator, the alleged improvement is not sufficient to undermine the substantial continuity element. *Bronx Health Plan*, 326 NLRB 810, 812

(1998)(“A change in scale of operation must be extreme before it will alter a finding of successorship.”) Adding a few more buses to the “production process” is hardly extreme, particularly because the drivers view their job situations as essentially unaltered, and the routes and schedules remain unchanged. Respondent continued Transdev’s operations in significantly unchanged form, and therefore, the substantial continuity prong of the *Burns* successor analysis is established.

B. The Union Demanded Bargaining for an Appropriate Unit of Drivers.

Under Transdev, Circulator drivers and Baltimore Bus drivers were an appropriate bargaining unit, therefore, they remain such when employed by Respondent. Consequently, Respondent’s bargaining obligation survives even though it did not take over the entirety of Transdev’s operation. *Stewart Granite Ent.*, 255 NLRB 569, 573 (1981).

In *Stewart Granite Ent.*, the Board affirmed an ALJ’s determination that “successor obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation.” *Id.* citing *Zim’s Foodliner, Inc.*, 495 F.2d 1131, 1141 (7th Cir. 1974); *Van Lear Equipment Inc.*, 336 NLRB 1059 (2001)(successor’s bargaining obligation survived where successor only hired predecessor’s drivers, rather than the entire unit, and where 19 of successor’s 26 drivers had been employed by the predecessor). A preexisting bargaining unit remains presumptively appropriate after a change in the employing enterprise, and the successor employer has the burden of rebutting this presumption.” *AM Property Holding Corp.*, 365 NLRB No. 162, slip op. at 7 (2017), citing *Van Lear Equipment Inc.*, 336 NLRB 1059 (2001)(“The presumption is particularly strong where...the employees have historically been represented in a

single-location unit.”) Respondent is unable to rebut this presumption because the drivers at issue were part of a wall-to-wall bargaining unit at Transdev, and they continue to share a community of interest under Respondent. Under Transdev, the employees were represented by the same shop stewards, stationed at the same location, and subject to the same supervision, and one CBA. As such, Baltimore Bus drivers that were hired by Respondent after being displaced by Transdev’s loss of the Circulator contract, should rightfully be considered part of an appropriate bargaining unit along with Respondent’s Circulator drivers.

Respondent erroneously seeks to classify Carla Andrews, Nikisha Staton, and James Thomas-El as new hires because they were not assigned to the Circulator when Transdev lost the contract. However, its position is not supported by Board law. In *Derby Refining Co.*, 292 NLRB 1015 (1989), the Board found that employees who retired from the predecessor employer because of an impending business closure, and were then hired by the successor employer could be counted as predecessor hires in determining the majority. The *Derby* Board was persuaded by the fact that the retirements at issue were not “self-initiated withdrawals” because each retiree was encouraged to do so by the predecessor. *Id.* at 1016.

As in *Derby*, the departures of Andrews, Staton, and Thomas-El from Transdev were certainly not “self-initiated” withdrawals, and the drivers should be counted as predecessor drivers. The three drivers were directly affected by Transdev’s loss of the Circulator, just like the laid-off Transdev Circulator drivers. Andrews, Staton, and Thomas-El each testified that a more-senior Circulator driver caused them to lose their Baltimore Bus position with Transdev, which led them to Respondent’s employ. Respondent may argue that Thomas-El’s departure from Transdev was self-initiated because he could have bumped a junior employee to remain in Transdev’s employ. However, in order to remain a Transdev employee after the loss of the

contract, Thomas-El, a part-time employee, would have had to accept a full-time position. Board law does not require Thomas-El to accept a position that is not comparable to his original position. In *Derby*, the Board found that laid-off employees who refused temporary recall to the predecessor employer should be counted as former employees because turning down an offer of temporary work could not be viewed as “abandonment of interest in the unit.” *Id.* Similarly, Thomas-El’s refusal to bump into a job that was not substantially equivalent to his previous role should not render him a new Respondent employee. As such, Thomas-El should be counted as a predecessor employee, along with Staton and Andrews.¹²

C. Respondent Hired a Substantial and Representative Complement of Drivers by October 15, 2018, When the Union Demanded Bargaining.

Respondent asserts that it is not a successor to Transdev because by the time it approached normal operations, former Transdev employees were no longer the majority of its workforce. However, Respondent employed a substantial and representative complement the very day it started operating the Circulator.

There is no fixed minimum percentage of total employees that must be reached to establish a substantial and representative complement. *Ride Right, LLC*, 366 NLRB No. 16, slip op. at 3 (2018); *Jeffries Lithograph Co.*, 265 NLRB 1499, 1504-1505 (1982)(substantial and

¹² Though they were probationary employees when Transdev lost the Circulator contract, Yvonne Whitaker and Katrena Thompson should likewise be counted as predecessor employees. Respondent argues that they are new hires because there was no guarantee that they would have successfully completed the probation period. The Board has rejected this argument, and determined that probationary employees are considered members of the bargaining unit. *See Hollaender Mfg. Co.*, 299 NLRB 466, 469 (1990)(“eligibility of probationary employees does not turn on proportion of such employees who, willingly or not, fail to continue in the employer’s employ throughout the trial period.”) As such, Transdev rightfully included Whitaker and Thompson in its letter to the Union regarding Circulator employees that were affected by the loss of contract. (GC Exh. 4). Thompson and Whitaker should be counted as predecessor employees because they were members of the bargaining unit.

representative complement found when 48 percent of the eventual workforce was hired.) The Board considers the state of the successor's operations, such as whether it has substantially filled its job classifications, and is providing service in the same manner as the predecessor. *Id.* In *Ride Right, LLC*, the Board determined that the successor, a transit provider, achieved a substantial and representative complement the very day it assumed the predecessor's transit operations, despite sporadically increasing its workforce by 28 percent over a period of five months after it began operations. 366 NLRB No. 16, slip op. at 3 (2018). The Board has also found substantial and representative complement when "approximately 30 percent of the eventual employee complement was employed in 50 percent of the job classifications." *Shares, Inc.*, 343 NLRB 455, 455 fn. 2 (2004).

A comparison of the list of employees working for Transdev on October 10, 2018, and those working for Respondent as of October 15, 2018, confirms that Respondent hired a majority of Transdev's former employees when it began operation of the Circulator. (GC Exh. 2, GC Exh. 4, GC Exh. 18). According to Respondent, as of October 15, 2018, when the Union demanded recognition, Respondent had hired 22 drivers-operators. (GC Exh. 18). Of the 22 drivers, 14 were former Transdev drivers that were laid off as a result of the loss of the Circulator contract.¹³ During the pendency of the unfair labor practice investigation, Respondent

¹³ Carla Andrews, Nicole Armstrong, Linda Carter Player, Arnold Dixon, Stephanie Edwards, Rayshon Morrison, Irene Simpson, Anthony Smith, Sharonne Spencer, Nikisha Staton, Rudy Suero, Katrena Thompson, Yvonne Whitaker, and Brandon Wynn.

During the hearing, Respondent offered conclusory statements asserting that Bea and Johnson were Section 2(11) supervisors, but did not provide supporting evidence to establish supervisory authority. Thus, Respondent did not meet its burden. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004). Even excluding Johnson and Bea, a majority of 14 Respondent employees were former Transdev employees that were laid off as a result of Transdev's loss of the Circulator contract.

represented that as of December 10, 2018, it had hired 32 drivers. Of those 32 drivers, at least 19 were former Transdev drivers that were laid off as a result of the Circulator contract. (GC. Exh 2; GC Exh. 4).¹⁴

Accordingly, Respondent hired a substantial and representative complement by October 15, 2018, when the Union demanded bargaining. Respondent asserts that it was operating normally as of March 2019, when it employed 37 drivers. Based on the *Shares Inc.*, formula, 30 percent of 37 drivers is 11 drivers. As of October 15, 2018, Respondent admittedly employed 22 drivers, double the number of drivers the *Shares Inc.* Board found to be a substantial and representative complement. Of those 22 drivers, at least 14 were former Transdev employees. Therefore, at the time the Union requested to bargain with Respondent, Respondent had hired nearly 60 percent of the drivers that Respondent considers to be a full complement.¹⁵

Respondent was obligated to bargain with the Union, and its failure to do so violates the Act.

¹⁴ Teneka (Teneica) Allen, Nicole Armstrong, Dwayne Campbell, Linda Carter Player, Arnold Dixon, Carl Eaddy, Stephanie Edwards, Rayshon Morrison, Selina Perdue, Irene Simpson, Anthony Smith, Sharonne Spencer, Rudy Suero, Brandon Wynn, Katrena Thompson, Yvonne Whitaker, Carla Andrews, Nikisha Staton, and James Thomas El. (The inclusion of Nancy Pulley increases the number of former Transdev drivers to 20 out of 33 total Respondent drivers in December 2018.)

¹⁵ During the hearing, Bridgers testified that Respondent did not hire mechanics until sometime in April 2019, after Respondent asserts that the Circulator started operating normally. Before April 2019, Respondent utilized mechanics from other sites as needed. Bridgers also testified that Respondent did not employ any fuelers. Respondent appears to concede that drivers are the only classification in the bargaining unit that it deems vital to the operation of the Circulator. As such, there is no doubt that Respondent hired a substantial and representative complement of drivers, the unit sought, when it began operation on October 15, 2018.

Even if there was no substantial and representative complement on October 15, 2018, there surely was on December 10, 2018,¹⁶ when Respondent admits to employing 32 drivers. At that point, 19 of 32 drivers were former Transdev drivers even if Donovan Bea and Albert Johnson are excluded as “supervisors.” As such, as of December 2018, Transdev employees made up at least sixty percent of Respondent’s drivers – a clear majority.

D. Respondent’s After-the-Fact Justification for its Failure to Bargain with the Union is Pretextual and Ineffective.

In a last-ditch defense, Respondent now argues that it could not have bargained with the Union until it officially got the long-term contract with the City in March 2019. However, Bridgers testified that Respondent was fairly certain that it was going to receive the contract award at the beginning of the process, and that Respondent was the only bidder on the Circulator contract. In its November 19, 2018 letter to the Union, Respondent’s only stated rationale for refusing to bargain with the Union is its erroneous assertion that a majority of its workforce was not previously employed by Transdev. (GC Exh. 12). Respondent did not raise this alleged defense during the unfair labor practice investigation, or in its Answer to the Complaint and Notice of Hearing. The first mention was during the February 3 Hearing. Clearly, any argument that Respondent could not bargain with the Union because it was unsure of its tenure with the Circulator is a fabrication after-the-fact. Nevertheless, a similar argument was not persuasive in *Fall River Dyeing Corp.*, where the Supreme Court rejected the successor’s assertion that its bargaining obligation should arise only when it has hired a “full complement,” and accomplished its stated goal of two shifts. 482 U.S. 27, 49 (1987). The Court noted that the full complement

¹⁶ December 10, 2018, is the date in which Respondent provided GC Exh. 2 to General Counsel as a representation of the employees it hired to operate the Circulator. (Tr. 10: 16-11:20).

argument fails to consider the significant interest of employees in being represented as soon as possible. *Id.* Respondent’s unpersuasive attempts to continue avoiding its bargaining obligation should be disregarded.¹⁷

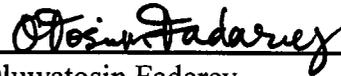
V. CONCLUSION

Respondent is a *Burns* successor because: (1) there was substantial continuity between Respondent and Transdev’s operations of the Circulator; (2) the Union made a timely continuing demand to bargain for an appropriate unit; and (3) Respondent had hired a “substantial and representative” complement of drivers, the majority of whom were represented by the Union under Transdev when the Union requested bargaining. As such, Respondent was obligated to bargain with the Union upon demand. It is undisputed that Respondent refused to recognize or bargain with the Union. Therefore, Respondent’s failure to do so violates Section 8(a)(5) of the Act. The General Counsel respectfully urges a finding that Respondent violated Section 8(a)(5), and a bargaining order in which Respondent is required to comply with its obligation to recognize and bargain with the Union.

¹⁷ During the hearing, Respondent sought to benefit from its unfair labor practice by arguing that employees no longer sought representation by the Union. However, after months of not seeing the benefits of unionization that they enjoyed at Transdev, it is understandable if some employees became disillusioned about the Union. That is the exact consequence that the *Fall River Dyeing Corp.*, Court cautioned against when discussing the need for a presumption of majority support among union-represented employees. 482 U.S. 27, 38 (1987) (“The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union’s support among the employees.) Respondent should not be able to capitalize on the impact of its unfair labor practice to continue avoiding its obligation under the Act.

Attached for your consideration, as Appendix I and II, is a proposed Order and proposed Notice to Employees respectively.

Respectfully submitted,



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APPENDIX I

PROPOSED ORDER

That Respondent, Errands Plus, Inc. d/b/a RMA Worldwide Chauffeured Transport, its officers, agents, successor, and assigns be ordered to:

1. Cease and desist from:
 - a. Refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of employees in the Unit.
 - b. Refusing to recognize the Union as the exclusive collective-bargaining representative of employees in the Unit.
 - c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - a. Recognize and upon request, bargain collectively with the Union as the exclusive collective-bargaining representative concerning the wages, hours, and other working conditions of employees in the Unit.
 - b. Give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and other working conditions of employees in the Unit before putting such changes into effect.
 - c. On the Union's request, identify and rescind any unilaterally implemented changes to the wages, hours, and other working conditions of employees in the Unit.
 - d. Compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilaterally implemented changes to the wages, hours, and other working conditions of employees in the Unit.
 - e. Within 14 days after service by the Region, post a notice with the language set forth in Appendix II, in all places where Respondent customarily posts notices to employees, including, but not limited to its facility currently located at 1700 Cherry Hill Road, Baltimore, Maryland, 21230. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent should be required to keep the Notice posted

for 60 consecutive days after the initial posting.

- f. Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX II

PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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.

Teamsters Local Union 570 a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (“the Union”) is the employees’ representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (“the Unit”):

All full time and regular part-time bus drivers assigned to the Charm City Circulator and employed by the Company at its Baltimore, Maryland facility, but excluding all other employee dispatchers, road supervisors, mechanics, customer service employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse to bargain collectively with the Union by refusing to recognize the Union as the exclusive collective-bargaining representative of our employees in the Unit.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative concerning the wages, hours, and other working conditions of our employees in the Unit. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and other working conditions of our employees in the Unit before putting such changes into effect.

WE WILL identify and, on the Union’s request, rescind any changes that we have made unilaterally since October 6, 2018 to the wages, hours, and other working conditions of our employees in the Unit.

WE WILL compensate our employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and other working conditions since October 6, 2018.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

CERTIFICATE OF SERVICE

This is to certify that on March 9, 2020, a copy of the General Counsel's Post-Hearing Brief was served by e-mail on:

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