

United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: June 4, 2018

TO: Kathy Drew King, Regional Director  
Region 29

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Transcendence Transit II, Inc.  
Case 29-CA-182049

177-1642-0100-0000  
530-6067-4011-0000  
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This case was submitted for advice as to whether the successor Employer's failure to acquire a services contract constituted exigent circumstances that allowed the Employer to fail to pay employees' wages for work performed without first providing notice and an opportunity to bargain with the Union. Because the Employer ceased operations over the loss of the contract, we conclude that the Employer did not have an obligation to bargain over its decision to cease operations, but it had an obligation to bargain over the decision's effects, which included the Employer's failure to pay its employees.

We further conclude that a *Transmarine*<sup>1</sup> remedy is appropriate here because the Employer is a single employer with another Charged Party, which has remained viable and active in the two years since the events herein took place,<sup>2</sup> and is therefore

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<sup>1</sup> *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (Board may create a limited backpay remedy in failure-to-effects-bargain cases that creates economic consequences to assure meaningful bargaining and effectuate purposes of Act).

<sup>2</sup> The delay in proceedings stemmed from the Charged Parties' attempts to challenge the Region's subpoenas, which it issued, inter alia, to better understand the corporate relationships between the Charged Parties. After extensive subpoena enforcement proceedings, on July 28, 2017, the district court ordered the Charged Parties to comply fully with the Region's subpoenas, and the Region began receiving the subpoenaed documents in mid-January 2018. For the reasons discussed herein, we

derivatively liable for the Employer's unfair labor practices. Accordingly, absent settlement, the Region should issue complaint and specifically seek a *Transmarine* remedy.

### FACTS

(b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) private equity company, Patriarch Partners, LLC ("Patriarch"), acquired Transcare out of bankruptcy in 2003 and used Zohar funds, among other funds that (b) (6), (b) (7)(C) manages, to help finance Transcare's operation via various debt obligations.<sup>3</sup> Transcare owned numerous subsidiaries that, until the events herein, operated ambulances and vans in New York, Pennsylvania, and Maryland, providing emergency and non-emergency transportation services. Transcare New York, Inc. ("Transcare NY"), the predecessor employer, is a subsidiary of Transcare that provided services in the New York City area. Under a contract with New York's Metropolitan Transit Authority ("MTA"), approximately 275 of Transcare NY's driver-employees operated vans that provided "paratransit" services to disabled residents, which allowed them to reserve a trip in advance to destinations within a service area covered by public transportation.<sup>4</sup> (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) of both Transcare and Transcare NY. (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) of Performance Excellence for Transcare at the time of the events at issue here.

Transcare NY had a collective-bargaining agreement in place with Local 1181, Amalgamated Transit Union ("the Union") that was in effect from April 1, 2012 – March 31, 2015. A memorandum of agreement executed on April 21, 2015 extended the terms of the collective-bargaining agreement to March 31, 2018 and modified several provisions, including wage scales and employee benefits.

Transcare and its subsidiaries' operations had been financially strapped in the months leading up to February 2016,<sup>5</sup> and bankruptcy appeared imminent. Transcare

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have concluded that the evidence is sufficient to establish a single employer relationship.

<sup>3</sup> Patriarch has a practice of acquiring distressed companies and then attempting to turn them around through restructuring and funding via "Zohar funds." Zohar funds are financing vehicles created by (b) (6), (b) (7)(C) to fund (b) (6), (b) (7)(C) private equity endeavors.

<sup>4</sup> These paratransit vans operating under the MTA's contract are owned by the MTA and housed in a MTA-managed lot.

<sup>5</sup> All dates hereinafter are in 2016 unless otherwise stated.

NY's paratransit contract with the MTA, however, remained lucrative. In an effort to salvage this revenue stream, Patriarch devised a plan to spin off the MTA contract and create a new company that provided only paratransit services. On February 10, Patriarch incorporated Transcendence Transit, Inc. ("Transcendence") and Transcendence Transit II, Inc. ("Transcendence II" or "the Employer") in Delaware. Transcendence was created by Patriarch as a holding company, with its wholly-owned subsidiary, Transcendence II, functioning as an operating company whose only purpose was to service the MTA paratransit contract. (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) of the Transcendence Board of Directors.

To effectuate a spinoff of the MTA contract, (b) (6), (b) (7)(C) and Patriarch engineered a "foreclosure" of the contract. Early on February 24, (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) capacity as (b) (6), (b) (7)(C) for the Zohar funds and other funds that comprised the "Lenders" to Transcare via their contractual debt obligations, executed a document stating that Transcare was in default and "foreclosed" on, among other items, Transcare's MTA contract in "partial satisfaction" of the defaulted debt. (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C) then executed a Bill of Sale thereby selling the MTA contract to Transcendence. (b) (6), (b) (7)(C) signed the Bill of Sale as (b) (6), (b) (7)(C) of Transcendence.<sup>6</sup> Later that same day, (b) (6), (b) (7)(C) as Transcare's (b) (6), (b) (7)(C) authorized Transcare to file for Chapter 7 bankruptcy.

By early afternoon on February 24, Patriarch's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) directed that a communication be sent to Transcare employees working under the MTA paratransit contract. The message stated, in pertinent part, that Patriarch had completed "setting up and capitalizing the separate paratransit entity which will now be called Transcendence Transit II, Inc. This changes nothing for our transit employees except that their employment is being transferred to this new entity— same jobs, same compensation, same benefits." Soon after, (b) (6), (b) (7)(C) Patriarch's (b) (6), (b) (7)(C) of its Human Resources Platform, directed (b) (6), (b) (7)(C) to send a "transfer letter" to each paratransit employee. The letter advised employees that, as of February 24, their "employment relationship has been transferred from [Transcare] to [Transcendence II] as part of a corporate reorganization to strengthen the operations of [Transcendence II]." The letter stated that employees "will continue to have the same duties and responsibilities as an employee of [Transcendence II] with the same compensation and benefits you received from [Transcare]." The letter also stated that employees' continued work for Transcendence II "will serve as

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<sup>6</sup> (b) (6), (b) (7)(C) appears to have simultaneously acted as a manager for both Transcare and Transcendence because the record contains an email from (b) (6), (b) (7)(C) sent from (b) (6), (b) (7)(C) Transcare email account, but contains a signature block listing (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C) of Transcendence.

acknowledgement of the transfer of your employment.” Each employee letter was signed by (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C) of Transcendence. Notwithstanding the “employment transfer,” paratransit employees continued providing their services to New York-area residents without interruption.

Also on February 24, attorneys and managers for Patriarch, on behalf of Transcare and Transcendence II, contacted attorneys and procurement officers for the MTA on the mechanics of formally reassigning the MTA contract to Transcendence II. The MTA asked Patriarch to help it better understand Patriarch’s corporate reorganization of the entities, the status of Transcare’s bankruptcy proceedings, and, in the interim, asked Patriarch to complete the MTA’s “Responsibility Questionnaire” and “Agreement of Assignment” form to have ready should the MTA consent to the reassignment of the contract.

On February 25, while Transcendence II employees continued to provide paratransit services under the MTA contract before that contract had been reassigned to Transcendence II, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) of Patriarch’s legal department, sent an email to the MTA. The email sought to address the MTA’s concerns that the paratransit contract would be affected by Transcare’s bankruptcy proceedings. (b) (6), (b) (7)(C) assured the MTA that, because Transcare filed for bankruptcy after the “foreclosure” and “sale” of the MTA contract by Transcare’s lenders to Transcendence II, the contract would not be swept up in the bankruptcy proceedings.

Mid-afternoon on February 26, with Transcendence II employees still providing paratransit services under the yet-to-be-reassigned MTA contract, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) separately emailed representatives at the MTA asking if there was any way to expedite approval of the paratransit contract’s reassignment and for operational assurances during the interim. Soon after, a representative from the MTA emailed (b) (6), (b) (7)(C) and informed (b) (6), (b) (7)(C) that, despite Patriarch’s assurances, MTA’s attorneys had concluded that the paratransit contract would not be excluded from Transcare’s bankruptcy proceedings and that the assignment of the contract to Transcendence II could not move forward.

Around 4:00 p.m. on February 26, the MTA phoned the Union’s representative and informed (b) (6), (b) (7)(C) that the paratransit contract would not be transferred to Transcendence II and, according to the Union, the MTA claimed that Transcendence II was out of business as of that day. The Union representative then phoned a Transcare manager to confirm what the MTA had just told (b) (6), (b) (7)(C). The Transcare manager was not immediately aware of the situation but soon confirmed that Transcendence II was indeed out of business. The MTA then had drivers return the paratransit vans to its lot and locked them.

Bargaining unit employees who worked for Transcendence II from February 24 to February 26 were terminated and have not been paid for their work under the MTA contract for those days.

### ACTION

We conclude that the Employer, due to exigent circumstances, was not required to bargain over its decision to cease operations, but it was required to bargain over that decision's effects. Further, the Employer is a single employer with another, viable, Charged Party, making a *Transmarine* remedy appropriate.

- A. The Employer was not obligated to bargain over its decision to cease operations but was obligated to bargain over the shutdown's effects on unit employees.

An employer may lawfully make unilateral changes to employees' terms and conditions of employment "when economic exigencies compel prompt action."<sup>7</sup> Specifically, these "compelling economic considerations" must be due to "extraordinary events which are an unforeseen occurrence, having a major economic effect."<sup>8</sup> An employer's loss of its primary reason for operating is an economic exigency that excuses bargaining over the employer's decision to cease business and close operations.<sup>9</sup> It is also well established that an employer's decision to go entirely out of business for any reason is not subject to decisional bargaining.<sup>10</sup> But even when

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<sup>7</sup> *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enforced mem. sub nom. Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

<sup>8</sup> *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (citations omitted).

<sup>9</sup> *See Brooks-Scanlon, Inc.*, 246 NLRB 476, 477 (1979) (employer lawfully terminated operations without bargaining because decision was based solely on economic factors that no amount of bargaining could have changed—the scarcity of available timber in the area), *enforced per curiam sub nom., Local 1017, Lumber and Sawmill Workers v. NLRB*, 654 F.2d 730 (9th Cir. 1981). *Cf. Triple A Fire Protection*, 315 NLRB 409, 414–15 (1994) (employer's failure to win contracts and resulting competitive disadvantage was not sufficient economic exigency that would allow unilateral implementation), *enforced*, 136 F.3d 727 (11th Cir. 1998).

<sup>10</sup> *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681–82 (1981) (closing "decision" is not a mandatory subject of bargaining even though meaningful bargaining over the "effects" is required); *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 273–74 (1965) (not an unfair labor practice for employer to decide to close entire business).

an employer is excused from decisional bargaining, the employer must still bargain over the shutdown's effects.<sup>11</sup>

As an initial matter, we conclude that the Employer did not have an obligation to bargain over its decision to cease operations when it learned that the MTA would not reassign the contract to Transcendence II. The Employer's entire reason for being was to perform the MTA contract, which the MTA had intimated would be reassigned when it asked Patriarch to prepare MTA's "Responsibility Questionnaire" and "Agreement of Assignment" form in anticipation of reassignment. Thus, MTA's failure to reassign the contract robbed the Employer of its sole source of business and was not foreseeable.<sup>12</sup> In any event, the Employer's decision to close its *entire* business is not subject to bargaining.<sup>13</sup> However, regardless of the reasons for closing or the fact that the Employer closed its entire business, it still had an obligation to bargain over the closure's effects, which it unlawfully failed to do.

B. A *Transmarine* remedy is appropriate because the Employer is a single employer with another, viable, Charged Party.

The Board's traditional remedy for an employer's refusal to bargain over the effects of a nonbargainable decision is a *Transmarine* limited backpay remedy.<sup>14</sup> In *Transmarine*, the employer unlawfully refused to bargain about the effects of its decision to shut down one of its terminals and terminate the employees who worked there. The Board ordered the employer to engage in effects bargaining with the union and to pay the affected employees their normal wages beginning five days after the date of issuance of the Board's decision until one of four conditions occurred: 1) the

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<sup>11</sup> See, e.g., *Natl Terminal Baking Corp.*, 190 NLRB 465, 466, 467 (1971) (employer that closed plant in an "almost emergency situation" after theft of trucks was required to bargain over effects of closure); *Benchmark Industries*, 269 NLRB 1096, 1097 (1984) (employer whose plant was destroyed by fire was required to bargain over effects of closure).

<sup>12</sup> See *Brooks-Scanlon, Inc.*, 246 NLRB at 477 (employer lawfully terminated operations without bargaining because decision based solely on "economic factors so compelling that bargaining could not alter them").

<sup>13</sup> See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. at 681–82. We note, however, as discussed *infra*, that the Employer and Patriarch are a single employer, so the Employer did not in fact close its entire business, because Patriarch oversees a number of other businesses.

<sup>14</sup> *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

parties reached agreement; 2) the parties reached a bona fide impasse in bargaining; 3) the union failed to request bargaining; or 4) the union failed to bargain in good faith.<sup>15</sup> At a minimum, employees were to be paid what they would have earned for a two-week period at the rate of their normal wages when last employed by the employer.<sup>16</sup> The *Transmarine* remedy serves two functions: first, to make employees whole for their losses suffered as a result of the employer's violation; and, second, to create an incentive for the employer to bargain with the union, despite the absence of a restoration remedy, by recreating in some practicable manner a situation where the parties' bargaining position would not be devoid of economic consequences for the employer.<sup>17</sup> Importantly, the Board stated that an appropriate remedy "must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of [its] unlawful conduct[.]"<sup>18</sup>

A *Transmarine* remedy is appropriate and not considered punitive even in cases where employees have not suffered an overt economic loss, because the remedy is primarily designed to restore "some economic inducement for an employer to bargain as the law requires."<sup>19</sup> In *Live Oak Skilled Care & Manor*, the Board ordered a *Transmarine* limited backpay remedy for the employer's failure to bargain over the effects of its decision to sell its facility, even though the affected employees ultimately did not lose their jobs or lose wages.<sup>20</sup> However, there was a question of whether the employees' accrued time off and overtime benefits were at risk, and the Board determined that the union might have secured these benefits had the employer engaged in timely effects bargaining.<sup>21</sup> Accordingly, a limited backpay remedy was

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<sup>15</sup> *Id.* at 390.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing *Royal Plating and Polishing Co.*, 160 NLRB 990, 997–98 (1966)). *See also Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994) (*Transmarine* remedy imposed where the union might have secured additional benefits for employees had the employers bargained in a timely manner over effects).

<sup>18</sup> *Transmarine*, 170 NLRB at 389.

<sup>19</sup> *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). *See Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983) (purpose of *Transmarine* limited backpay remedy "is not to punish, but to create an incentive for the [employer] to bargain in good faith").

<sup>20</sup> 300 NLRB 1040, 1040 (1990).

<sup>21</sup> *Id.* at 1042.

needed to provide some level of compensation to employees for that lost opportunity and as an incentive for the employer to fulfill its bargaining obligation.<sup>22</sup>

However, a *Transmarine* remedy is not necessarily required in every case where there is an effects-bargaining violation. In *Natl Terminal Baking Corp.*, the Board determined that the employer unlawfully failed to bargain over the effects of its decision to close, but found a *Transmarine* backpay remedy inappropriate.<sup>23</sup> Specifically, the ALJ, affirmed by the Board, determined that the union was never in a position of strength when any effects bargaining could have taken place because the employer closed the plant “in an almost emergency situation[.]”<sup>24</sup> In other words, a *Transmarine* remedy would have been an attempt to “reestablish” bargaining leverage that the union could not have had. Thus, the ALJ simply ordered the employer to cease and desist from failing to effects-bargain and to place employees on a preferential hiring list in case the employer ever resumed operations.<sup>25</sup>

Where a defunct employer is actually a single employer, alter ego, or joint employer with a surviving entity, a *Transmarine* remedy is viable because the surviving entity’s derivative liability makes a bargaining obligation and backpay remedy practicable.<sup>26</sup> Indeed, the Board has broad authority to fashion an appropriate remedy, particularly where corporate machinations or other “unusual circumstances” makes a *Transmarine* remedy appropriate.<sup>27</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> 190 NLRB at 467.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See *Raskin Packing Co.*, 246 NLRB 78, 80 (1979) (employer was required to bargain over effects of closure but no *Transmarine* remedy ordered where it would be “unrealistic and inappropriate” because bank had rescinded line of credit that was employer’s primary means of funding).

<sup>26</sup> See *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006) (single-employer status conferred derivative liability such that “new” employer liable to same extent as “old” employer); *Hobbs & Oberg Mining Co.*, 316 NLRB 542, 542, 546 (1995) (joint employers required to satisfy each other’s make-whole remedy); *Metropolitan Teletronics Corp.*, 303 NLRB 793, 793, 797 (1991) (alter ego corporation liable for underlying *Transmarine* remedy), *enforced per curiam*, 961 F.2d 1568 (3d Cir. 1992).

<sup>27</sup> See *AG Communication Systems Corp.*, 350 NLRB 168, 173 (2007) (“in fashioning a remedy for an effects bargaining violation, the Board may consider any particular or unusual circumstances of the case”), *petition for review denied sub nom. Int’l Bhd. of*

Here, the evidence demonstrates that Transcendence II, Transcare NY, and Patriarch are all a single employer. Because these entities are derivatively liable for the effects-bargaining violation, a *Transmarine* remedy is viable.

The controlling criteria to determine single-employer status are: interrelation of operations; common management; common ownership; and centralized control of labor relations.<sup>28</sup> All four criteria do not need to be present; single employer status may be found where the evidence demonstrates the absence of an arm's-length relationship.<sup>29</sup> The most critical factor in the analysis is centralized control over labor relations.<sup>30</sup>

Patriarch, Transcendence, Transcendence II, Transcare, and Transcare NY satisfy all four criteria for finding single-employer status. First, all the entities' operations are interrelated and appear to be coordinated by Patriarch. (b) (6), (b) (7)(C) Patriarch's (b) (6), (b) (7)(C) and others at Patriarch coordinated the establishment of the entities' necessary business components, including payroll bank accounts, workers compensation coverage, and liability insurance for Transcendence and Transcendence II. And (b) (6), (b) (7)(C) of Patriarch's (b) (6), (b) (7)(C) acted on behalf of Transcare NY and Transcendence II in working with the MTA to reassign the paratransit contract. Second, the entities share common management where the same individuals hold management positions in multiple entities, who all take direction from Patriarch as the ultimate decision maker. For example, (b) (6), (b) (7)(C) was simultaneously (b) (6), (b) (7)(C) of Performance Excellence for Transcare and (b) (6), (b) (7)(C) of Transcendence, and received (b) (6), (b) (7)(C) dictates from (b) (6), (b) (7)(C) and Patriarch.<sup>31</sup> Third, all the entities share common ownership through (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C) of Patriarch. (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) for Transcare and Transcare NY and (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) of

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*Elec. Workers, Local 21 AFL-CIO v. NLRB*, 563 F.3d 418 (9th Cir. 2009). See generally *Transmarine*, 170 NLRB at 389 (“remed[ies] should be adapted to the situation that calls for redress” (internal quotations omitted)).

<sup>28</sup> *AG Communications Systems*, 350 NLRB at 169 (citing *Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *RBE Electronics*, 320 NLRB at 80 (common management found where parent company has ultimate control over day-to-day matters); *Masland Industries*, 311 NLRB 184, 186 (1993) (same individuals holding leadership positions in both corporations demonstrated common management).

the Zohar funds that were creditors to Transcare.<sup>32</sup> Patriarch also set up Transcendence and then Transcendence II as its wholly owned subsidiary and provided the financial backing to fully capitalize both entities. Finally, and most critically, all entities' labor relations are centrally controlled by Patriarch. Patriarch's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) instructed Transcare NY's leadership to send the initial notice to employees (b) (6), (b) (7)(C) their employment was being transferred to Transcendence II. (b) (6), (b) (7)(C) Patriarch's (b) (6), (b) (7)(C) of its Human Resources Platform, also provided the employee transfer letter to Transcendence II's management stating that employees would work under the same terms and conditions as they did with Transcare NY. Accordingly, the Charged Parties are a single employer.<sup>33</sup>

Because Patriarch and Transcendence II are a single employer, Patriarch is subject to derivative liability for Transcendence II's failure to engage in effects bargaining. Importantly, Patriarch will also be liable for any remedies imposed by the Board. Thus, a *Transmarine* remedy is appropriate in these unusual circumstances where the original employers—Transcare NY and Transcendence II—are defunct, but Patriarch survives as a viable and well-established entity that is available to bargain with the Union. Accordingly, a *Transmarine* backpay remedy is appropriate because economic consequences are needed to incentivize Patriarch to fulfill its effects-bargaining obligation; further, the remedy is appropriate because the Union may have been able to secure additional benefits for employees—e.g., employment opportunities at other Patriarch-run businesses—beyond merely the three-days' pay.

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<sup>32</sup> See *Masland Industries*, 311 NLRB at 186 (fact that companies' corporate structure was intertwined as between corporate parent and wholly owned corporate subsidiary was sufficient to show common ownership).

<sup>33</sup> Because a finding of single-employer status is sufficient for derivative liability, it is not necessary for us to also determine alter ego or joint employer status at this time.

Accordingly, for the foregoing reasons, the Employer unlawfully failed to bargain over the effects of its closure and the Region should issue complaint, absent settlement, and include a *Transmarine* limited-backpay remedy.<sup>34</sup>

/s/  
J.L.S.

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<sup>34</sup> The Region should also include a remedy requiring the Employer and Patriarch to place the terminated employees on a preferential hiring list in the event that Patriarch operates a similar paratransit business in the future.