ORIGINAL

IN THE SUPREME COURT OF OHIO

Greater Dayton Regional Transit Authority,

Appellant-Appellant,

v.

State Employment Relations Board,

and

Amalgamated Transit Union, AFL-CIO, Local 1385,

Appellees-Appellees.

Supreme Court Case No.: 15-1205

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals
Case No. 14AP-876

BRIEF OF AMICUS CURIAE OHIO PUBLIC TRANSIT ASSOCIATION IN SUPPORT OF APPELLANT GREATER DAYTON REGIONAL TRANSIT AUTHORITY'S MEMORANDUM IN SUPPORT OF JURISDICTION

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INTEREST OF AMICUS CURIAE

The Ohio Public Transit Association ("OPTA") is a non-profit professional association providing resources and support to public and private transit agencies throughout Ohio. Among OPTA's 61 members are the largest public transit agencies in the State, including the Greater Cleveland Regional Transit Authority, the Central Ohio Transit Authority, the Toledo Area Regional Transit Authority, the METRO Regional Transit Authority (Akron), and the Southwest Ohio Regional Transit Authority (Cincinnati). The appellant here, the Greater Dayton Regional Transit Authority ("GDRTA"), is also an OPTA member.

OPTA submits this amicus brief in support of GDRTA's jurisdictional memorandum because the Tenth District's decision has substantial ramifications for its members, their employees, and the various unions representing these employees.

EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Ohio Revised Code 4117.13(D) defines the appeal rights of every Ohio public employer, public employee, and the labor unions representing those public employees when faced with an adverse SERB decision in an unfair labor practice case. *S. Community, Inc. v. SERB*, 38 Ohio St.3d 224, 226, 527 N.E.2d 864 (1988); R.C. 4117.13(D). According to R.C. 4117.13(D), an adverse SERB order may be appealed to any court of common pleas where: (1) the alleged unfair labor practice took place; (2) the person adversely impacted by SERB's order resides; or (3) the person adversely impacted by SERB's order transacts business. R.C. 4117.13(D).

The Tenth District's decision, which requires a physical presence in a county to transact business there for purposes of R.C. 4117.13(D), ignores the plain meaning of the statutory phrase "transacts business." As a result, the Tenth District's decision improperly and unnecessarily limits the legislatively-given appeal rights of all public employers, public employees, and the

labor unions representing public employees in Ohio—including many of OPTA's members and their employees—by adding a requirement to the statute that is simply not there. *See Hanson v. Shaker Hts.*, 152 Ohio App.3d 1, 2003-Ohio-749, 786 N.E. 2d 487, ¶ 14 (8th Dist.) ("If one cannot perfect an appeal without strictly adhering to statutory provisions, nor should we add provisions that are not strictly required by the statute.").

Because this decision harms the appeal rights of an entire class of Ohio employers, employees, and their unions, the Court should accept this jurisdictional appeal on all propositions of law and reverse the judgment of the Tenth District.

STATEMENT OF THE CASE AND FACTS

OPTA adopts the Statement of the Case and Facts as set forth in GDRTA's Memorandum in Support of Jurisdiction.

PROPOSITIONS OF LAW

OPTA agrees with GDRTA that the Court should accept review of both propositions of law set forth in GDRTA's memorandum in support of jurisdiction:

Proposition of Law I: **The Existence Of Multiple Definitions For An Undefined Statutory Term Does Not Render The Statute Ambiguous.**

Proposition of Law II: **R.C. 4117.13(D)'s Phrase "Transacts Business" Is Not Ambiguous And Must Be Given Its Common, Everyday Meaning.**

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

As set forth in GDRTA's memorandum in support of jurisdiction, the Tenth District's decision holding that public employers do not transact business in a county for purposes of R.C. 4117.13(D) unless they maintain a physical presence there is legally flawed. OPTA supports GDRTA's legal analysis and requests that this Court accept jurisdiction to review the Tenth

District's faulty legal conclusions. This Court should also accept jurisdiction over GDRTA's appeal because the Tenth District's decision is practically unworkable in two important respects.

First, all of OPTA's 61 members rely on operations-imperative contracts with Ohio businesses not located in their home counties. These contracts are for goods and services vital to the existence and functioning of each transit system. For example, many of OPTA's members purchase their buses, bus parts, other transit vehicles, and fuel from Ohio businesses not located in their home counties. Without these goods and services, the transit systems relied on by millions of Ohioans each year could not function.

A recent survey of OPTA's members validates that Ohio's transit systems heavily rely on in-state, but out-of-county, business transactions to enable them to offer transit services to the public. For example, since January 1, 2014, all of the major public transit systems in Ohio[1] have entered into contracts worth more than $500,000 for goods and services vital to their operations with vendors located in Ohio, but not in their home counties. It can hardly be said that operations-essential dealings do not constitute part of the "business" of the transit systems or that the transit systems have not "transact[ed] business" in negotiating and entering into such agreements. It is, of course, part of a transit system's business to repair its buses' engines when necessary, purchase the parts necessary to repair its buses, and refuel its buses. There is nothing in R.C. 4117.13(D) that justifies eliminating these essential elements of running a transit system from the definition of "transacts business." The Tenth District's holding to the contrary is therefore ill-considered, and this Court should review and reverse it.

[1] For purposes of this assertion, the major public transit systems in Ohio are: Central Ohio Transit Authority, Greater Cleveland Regional Transit Authority, METRO Regional Transit Authority (Akron), Toledo Area Regional Transit Authority, and the Southwest Ohio Regional Transit Authority (Cincinnati). Collectively, these public transit systems employ more than 4,000 union-represented employees and have collective bargaining agreements with at least eight local unions.

The Tenth District's limitation on the meaning of "business" as the term is used in R.C. 4117.13(D) is practically unworkable for a second reason. Under the Tenth District's holding, a public employer does not transact business in an Ohio county unless it maintains a physical presence there. (App. A, ¶ 27). As the trial court's decision makes clear, this required physical presence must take the form of a "permanent physical facility, or office" or employees situated in the county. (App. B at pp. 5-6).

Even if entering into contracts vital to the operation of the transit system does not constitute "transact[ing] business" under R.C. 4117.13(D), the physical presence test applied by the trial court and adopted by the Tenth District compels absurd results. The majority of OPTA's members have permanent physical facilities, offices, and employees situated in only one county. Yet, most, if not all, of OPTA's members operate buses or provide transit services in numerous counties—in fact, the Revised Code expressly contemplates that a "regional transit authority" will cross county or other political subdivision lines. The legislature grants the authority to create a regional transit authority to "any county, **or any two or more counties, municipal corporations, or townships**, or any combination of these . . . ." (Emphasis added.) R.C. 306.32. In addition, many of Ohio's rural transit systems provide transit services across county lines to transport passengers to Ohio's major metropolitan centers for specialized medical treatment. And many transit systems' normal routes traverse more than one county, though those systems may have facilities, offices, and employees situated in only one county.[2] Under the Tenth District's new rule, the many transit systems offering cross-county medical transit services or maintaining regular routes, but not facilities or employees, outside their home counties "transact business" for purposes of R.C. 4117.13(D) **only** in the county in which they maintain an office, permanent

[2] To be clear, many transit systems own property—whether park-and-ride locations or bus stops—in more than one county yet do not have a permanent physical facility, office, or employees situated outside their home county.

facility, or where their employees are situated—that is, where the transit systems currently reside. Consequently, the Tenth district's physical presence test renders the "transacts business" prong of R.C. 4117.13(D)'s jurisdictional grant obsolete because the statute already provides for jurisdiction in the county in which the transit system resides. (R.C. 4117.13(D)).

The Tenth District's decision also does not make clear what constitutes a "permanent" physical facility or office or employees. For example, it is unclear whether a parking lot owned and operated by a transit system so passengers can conveniently park near a bus stop (i.e. a "park-and-ride") is a "permanent physical facility." It is unclear whether leased office space in a county would create jurisdiction in that county's court of common pleas, and it is unclear how long an employee must perform work in a county to create jurisdiction in that county's court of common pleas. By determining that the phrase "transacts business" is ambiguous and defining it so narrowly, the Tenth District has created a host of practical questions that must be answered through future litigation, in both the Tenth District and throughout the state.

It is for this very reason that this Court has previously acknowledged that statutory language is subject only to limits placed on it by the legislature and courts do not have the liberty to add to or subtract from the legislature's chosen language. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14. Indeed, even if a court disagrees with the policy embodied in a statute, the statute may not be "recast" to "accommodate some unstated meaning or purpose." *Id.* In addition, this Court has held that statutes must be construed to avoid absurd results. *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶ 114 ("It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result."). Yet, in this case, the Tenth District limited the meaning of the term "business" in a way not required by the

express words of R.C. 4117.13(D) or its context and that produces an absurd result. The Tenth District's attempt to limit the meaning of the term "business" is therefore neither legally nor practically sound.

CONCLUSION

This Court's intervention is needed to review the Tenth District's legally unsound and practically unworkable decision. This Court should grant jurisdiction and review and reverse the decision below.

Dated: July 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief of Amicus Curiae Ohio Public Transit Association In Support of Appellant Greater Dayton Regional Transit Authority's Memorandum in Support of Jurisdiction was served upon the following by first class U.S. mail, postage prepaid, this 23rd day of July, 2015:

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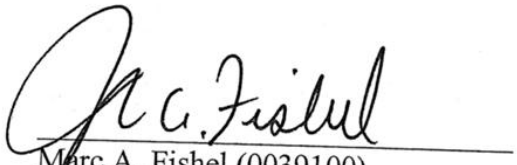

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APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Greater Dayton Regional Transit Authority,	:	
	:	
Appellant-Appellant,	:	No. 14AP-876 (C.P.C. No. 14CV0006408)
v.	:	(REGULAR CALENDAR)
State Employment Relations Board et al.,	:	
Appellees-Appellees.	:	

DECISION

Rendered on May 28, 2015

Baker & Hostetler LLP, Ronald G. Linville, Jennifer E. Edwards and *Jeremiah L. Hart*, for appellant.

Mike DeWine, Attorney General, *Lisa M. Critser* and *Jonathan R. Khouri*, for appellee State Employment Relations Board.

Kalniz, Iorio & Feldstein, Co., L.P.A., Christine A. Reardon; Jubelirer, Pass & Intrieri, PC, and *Joseph S. Pass*, for appellee Amalgamated Transit Union, Local 1385.

APPEAL from the Franklin County Court of Common Pleas

PER CURIAM.

{¶ 1} Greater Dayton Regional Transit Authority ("GDRTA"), appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the trial court dismissed GDRTA's appeal of a decision issued by the State Employment Relations Board ("SERB"), appellee.

{¶ 2} GDRTA is a mass-transit provider headquartered in Montgomery County, Ohio. GDRTA operators and maintenance employees are members of the Amalgamated Transit Union Local 1385 ("union"), appellee. On April 24 and May 3, 2014, the union

filed with SERB unfair labor practices charges against GDRTA based upon acts occurring in Montgomery County.

{¶ 3} SERB issued a complaint and notice of hearing after determining that probable cause existed to believe that GDRTA committed or was committing unfair labor practices. On December 5, 2013, SERB held a hearing. On April 3, 2014, a SERB administrative law judge issued a recommendation that SERB find GDRTA violated R.C. 4117.11(A)(1), (5), and (6). On June 5, 2014, SERB adopted the recommendation.

{¶ 4} On June 19, 2014, GDRTA appealed SERB's order to the Franklin County Court of Common Pleas. SERB and the union filed motions to dismiss arguing that the common pleas court lacked subject-matter jurisdiction because GDRTA failed to file its appeal in a county in which it "transacts business," as required by R.C. 4117.13(D). GDRTA countered that it "transacts business" in Franklin County because it has contracts with entities in Franklin County, it has employees who travel to Franklin County to conduct business, and its employees frequently telephone, fax, and email entities located in Franklin County.

{¶ 5} On September 28, 2014, the common pleas court filed a decision dismissing GDRTA's appeal for lack of subject-matter jurisdiction. The court found that the term "transacts business" was ambiguous because it did not indicate whether "transacts business" meant any business, the majority of its business, business related to its main purpose, or business related only to the alleged unfair labor practice. The court found federal cases interpreting 29 U.S.C. 160(f) ("§160(f)"), the National Labor Relations Act ("NLRA"), after which R.C. 4117.13(D) is modeled, to be persuasive. Relying upon several federal court cases, the trial court concluded that it did not have jurisdiction over the matter because GDRTA had no physical facilities or employees located in Franklin County. The court suggested that GDRTA file a motion to transfer venue to Montgomery County, which GDRTA subsequently did on September 19, 2014.

{¶ 6} On October 1, 2014, the trial court issued a decision and final appealable order and entry. The trial court granted SERB's motion to dismiss. The court also denied GDRTA's motion to transfer venue to Montgomery County, finding that the requirements in R.C. 4117.13(D) are jurisdictional and not subject to a transfer of venue. GDRTA appeals the judgment of the trial court, asserting the following assignments of error:

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> 1. The lower court erred by holding that R.C. 4117.13(D) did not give it subject matter jurisdiction over Greater Dayton Regional Transit's ("GDRTA") administrative appeal.
>
> 2. The lower court erred by holding that GDRTA does not transact business in Franklin County, Ohio for purposes of R.C. 4117.13(D).
>
> 3. The lower court erred by failing to interpret R.C. 4117.13(D)'s phrase "transacts business" according to its common and everyday meaning.
>
> 4. The lower court erred by holding that the phrase "transacts business" as used in R.C. 4117.13(D) is ambiguous.
>
> 5. The lower court erred by deferring to federal court decisions interpreting the National Labor Relations Act to give meaning to R.C. 4117.13(D)'s phrase "transacts business."
>
> 6. The lower court erred by reading the modifier "main" into R.C. 4117.13(D)'s phrase "transacts business."
>
> 7. The lower court erred by denying GDRTA's Motion to Transfer Venue.
>
> 8. The lower court erred by refusing to rely on federal law to inform its venue ruling after deferring to federal law to inform its subject matter jurisdiction ruling.

{¶ 7} We will address GDRTA's first, second, third, fourth, fifth, and sixth assignments of error together, as they are related. All of these assignments of error generally assert that the common pleas court erred in construing "transacts business" as used in R.C. 4117.13(D), which provides:

> Any person aggrieved by any final order of the board granting or denying, in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or *transacts business*, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal.

(Emphasis added.)

{¶ 8} Statutory interpretation is a question of law that we review de novo. *State v. Banks*, 10th Dist. No. 11AP-69, 2011-Ohio-4252, ¶ 13. The paramount goal of statutory

construction is to ascertain and give effect to the legislature's intent in enacting the statute. *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 227 (1999). In so doing, the court must first look to the plain language of the statute and the purpose to be accomplished. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173 (1996). Words used in a statute must be accorded their usual, normal, and customary meaning. *Id.*, citing R.C. 1.42. If the words in a statute are " 'free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.' " *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶ 12, quoting *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of the syllabus. "An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

{¶ 9} " 'It is only where the words of a statute are ambiguous, uncertain in meaning, or conflicting that a court has the right to interpret a statute.' " *In re Adoption of Baby Boy Brooks*, 136 Ohio App.3d 824, 829 (10th Dist.2000), quoting *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81 (1997). "Ambiguity in a statute exists only if its language is susceptible of more than one reasonable interpretation." *Id.*, citing *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996). When construing an ambiguous statute, the court may consider a number of factors, including legislative history, the circumstances under which the statute was enacted, and the administrative construction of the statute. R.C. 1.49; *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 2002-Ohio-4034, ¶ 9.

{¶ 10} Words in a statute that have acquired a technical or particular meaning, whether by legislative definition or otherwise, must be construed accordingly. R.C. 1.42. *See Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 175 (1986) (noting that definitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms). Courts have no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for. *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944), paragraphs seven and eight of the syllabus. We must assume that any statutory language the legislature could have included but did not was intentional. *State ex rel. Gen. Elec. Supply Co. v. Jordano Elec. Co., Inc.*, 53 Ohio St.3d 66, 71 (1990)

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(declining to read into the statute an intent that the General Assembly could easily have made explicit had it chosen to do so).

{¶ 11} In the present case, GDRTA first argues that the trial court failed to afford the phrase "transacts business" in R.C. 4117.13(D), its common and everyday meaning. GDRTA asserts that to ascertain the common and everyday meaning of an undefined statutory term, courts have used dictionaries, and this court and the Supreme Court of Ohio have before accorded the words "transact" and "business" their common, everyday meanings using dictionary definitions. GDRTA cites *Kentucky Oaks Mall v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75 (1990), for the proposition that the plain and common dictionary definition of "transact," as used in R.C. 2307.382(A)(1), includes the carrying on or prosecution of complete, incomplete, or in-process business negotiations and contracting. Thus, GDRTA contends, the Supreme Court has authoritatively defined "transact" as a matter of law.

{¶ 12} GDRTA also asserts that in *Czechowski v. Univ. of Toledo*, 10th Dist. No. 98AP-366 (Mar. 18, 1999), this court held that the common, ordinary, and generally accepted meaning of the word "business," as used in R.C. 124.11(A)(7), was commercial, industrial, or professional dealings, or the buying and selling of commodities and services.

{¶ 13} Therefore, using the definitions from *Kentucky Oaks Mall* and *Czechowski*, GDRTA asserts that an employer "transacts business" when it prosecutes negotiations or has commercial, industrial, or professional dealings including the buying and selling of commodities or services. GDRTA claims its activities in Franklin County fall within this definition because it entered into $600,000 worth of contracts for the purchase of goods and services with at least 32 businesses in Franklin County from 2012 through 2014; these contracts were negotiated and administered via GDRTA's employees' trips, phone calls, emails, and faxes to and from Franklin County; and GDRTA has a collective bargaining agreement with a union whose parent organization is based in Franklin County.

{¶ 14} The trial court found that the term "transacts business" was ambiguous because it did not indicate whether "transacts business" meant any business, the majority of its business, business related to its main purpose or business related only to the alleged unfair labor practice. However, GDRTA maintains that "transacts business" in R.C. 4117.13(D) is not ambiguous because it is not susceptible to more than one "reasonable"

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interpretation. *See Clark v. Scarpelli*, 91 Ohio St.3d 271, 274 (2001) (statute is ambiguous only if it is susceptible of more than one reasonable interpretation). That a statute contains terms that are legislatively undefined, GDRTA asserts, does not render it automatically ambiguous. GDRTA argues that the legislature chose not to qualify the term "business," and the trial court created ambiguity by adding potential qualifications into the term. As it is not ambiguous, according to GDRTA, the trial court erred when it searched for statutory meaning beyond the common, everyday meaning.

{¶ 15} After reviewing GDRTA's arguments, relevant case law, and R.C. 4117.13(D), we find that the trial court did not err when it found the term "transacts business" ambiguous. We fail to find that "transacts business" has a single common and everyday meaning, as GDRTA suggests. Resorting to dictionary definitions, and case law that uses such dictionary definitions, as GDRTA urges the court to do, reveals materially differing definitions that, if applied to the present case, would result in different outcomes.

{¶ 16} GDRTA relies upon *Kentucky Oaks Mall* and *Czechowski* for their respective definitions of "transact" and "business." With regard to the term "transact," GDRTA claims that the Supreme Court in *Kentucky Oaks Mall* authoritatively defined "transact" as the carrying on or prosecution of complete, incomplete, or in-process business negotiations and contracting. However, GDRTA fails to indicate the whole dictionary definition of "transact" that the court in *Kentucky Oaks Mall* provided:

> It is clear that R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) are very broadly worded and permit jurisdiction over nonresident defendants who are transacting any business in Ohio. "Transact," as defined by Black's Law Dictionary (5 Ed.1979) 1341, "* * * means to prosecute negotiations; to carry on business; to have dealings * * *. The word embraces in its meaning the carrying on or prosecution of business negotiations but it is a broader term than the word "contract" and may involve business negotiations which have been either wholly or partly brought to a conclusion * * *." (Emphasis added.)

(Emphasis omitted.) *Id.* at 75. Thus, in addition to the definition GDRTA picks from *Kentucky Oaks Mall*, the court in *Kentucky Oaks Mall* also indicated that "transact" may mean "to carry on business[,]" the application of which we will discuss infra after analyzing the term "business." *Id.*

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{¶ 17} With regard to the term "business," GDRTA claims that we found in *Czechowski* that the generally accepted meaning of "business" is "commercial, industrial or professional dealings; the buying and selling of commodities or services." *Id.* However, GDRTA admits in a footnote in its appellate brief that this court defined "business" differently in *Westerville v. Kuehnert*, 50 Ohio App.3d 77 (10th Dist.1998). In *Kuehnert*, we defined "business" as " '[t]he occupation, work, or trade in which a person is engaged. * * * Any commercial establishment, such as a store or factory.' " *Id.* at 82, quoting *The American Heritage Dictionary of the English Language* 180 (1969). We note that, although GDRTA attempts to preclude *Kuehnert* from consideration by distinguishing it factually from the present case, in that the focus in *Kuehnert* was whether an entity was a "business," whereas here the issue is what activity constitutes a "business," we fail to see why this distinction would make any difference in what the common, everyday definition of the word should be.

{¶ 18} Considering the definition of "transact" in *Kentucky Oaks Mall* and "business" in *Kuehnert*, we could find "transacts business" also means to carry on the trade in which a person is engaged. " 'Trade' is commonly defined as 'the business one practices or the work in which one engages regularly.' " *Fugate v. Ahmad*, 12th Dist. No. CA2007-01-004, 2008-Ohio-1364, ¶ 26, quoting *Webster's Third New International Dictionary* 2421 (1993). Applying these definitions to the present case, GDRTA could be found to transact business where it carries on the business it practices or the work in which it engages in regularly, which would be Montgomery County. There is no reason to find this definition is any less reasonable than the "common" and "everyday" meaning urged by GDRTA. Furthermore, although we agree with GDRTA that merely because a word might have more than one definition does not render it necessarily ambiguous, because other potential definitions of "transacts business" are just as reasonable as the other and cannot be eliminated by statutory context, we must find an ambiguity exists.

{¶ 19} Because we have found "transacts business," as used in R.C. 4117.13(D) is ambiguous, we must interpret the statute. R.C. 1.49 provides that if a statute is ambiguous, in determining the intention of the legislature, we "may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory

provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute."

{¶ 20} In the present case, after finding the statute ambiguous, the trial court looked to §160(f) of NLRA, and cases interpreting that provision, to define "transacts business." The language in §160(f) is essentially identical to that in R.C. 4117.13(D). *See Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME/AFL–CIO v. Dayton City School Dist. Bd. of Edn.*, 59 Ohio St.3d 159, 161 (1991), citing 29 U.S.C. 160 (finding that the procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are substantively identical to those established in NLRA to govern unfair labor practice cases before NLRB). The trial court relied on four federal court cases interpreting §160(f)—*U.S. Elec. Motors v. N.L.R.B.*, 722 F.2d 315, 319 (6th Cir.1983); *S.L. Industries v. N.L.R.B.*, 673 F.2d 1 (1st Cir.1982); *Davlan Engineering, Inc. v. N.L.R.B.*, 718 F.2d 102, 103 (4th Cir.1983); and *Bally's Park Place, Inc. v. N.L.R.B.*, 546 F.3d 318 (5th Cir.2008)—to conclude that an entity is required to have a physical presence in the jurisdiction to satisfy the "transacts business" requirement in R.C. 4117.13(D), and purchasing goods in, making telephone calls to, having sales representatives in, and having employees who traveled frequently to the jurisdiction were insufficient. The court noted that the legislature had to be aware of the federal law interpretation of the identical federal provision when it enacted the Ohio version.

{¶ 21} GDRTA presents three arguments as to why the trial court should not have relied upon federal law for guidance on the meaning of R.C. 4117.13(D): (1) the General Assembly clearly expressed that R.C. Chapter 4117 need not be interpreted consistent with NLRA; (2) the Supreme Court has made clear that although R.C. Chapter 4117 is interpreted within the general context of NLRA, the statutes need not be interpreted identically; and (3) §160(f) and R.C. 4117.13(D) are fundamentally different in nature and purpose.

{¶ 22} With regard to its first argument, GDRTA argues that, during the legislative proceedings that led to the enactment of R.C. Chapter 4117, the General Assembly rejected an amendment to R.C. Chapter 4117 that provided SERB and courts must conform, to the maximum extent possible, to the provisions of NLRA and to case law established by NLRB and the courts in interpreting and applying NLRA. *See* 1983 Ohio Legis. Bull. 744-745. GDRTA asserts that if the General Assembly had wanted R.C. Chapter 4117 to be

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interpreted consistent with NLRA, it would have passed the proposed amendment. Thus, GDRTA contends, the General Assembly expressed its desire that R.C. Chapter 4117 be interpreted as an independent Ohio statute subject to Ohio rules of construction and not in lockstep with NLRA by rejecting the proposed amendment.

{¶ 23} We do not agree that the tabling of the amendment by the legislature necessarily signaled its desire to prohibit interpreting R.C. Chapter 4117 consistent with NLRA, as GDRTA suggests. What we can reasonably glean from the legislature's failure to adopt the proposed amendment is that the legislature desired to grant SERB and Ohio courts the discretion to interpret and apply R.C. Chapter 4117 consistent with NLRA and the decisions of NLRB and federal courts. The legislature's failure to vote on the proposed amendment more evidently permits flexibility and freedom rather than rigidity and prohibition in interpreting R.C. Chapter 4117. Importantly, the Supreme Court, as well as this court, have found it proper to look to NLRB's interpretations of NLRA in interpreting R.C. Chapter 4117. *See, e.g., State ex rel. Glass, Molders, Pottery, Plastics & Allied Workers Internatl. Union, Local 333, AFL-CIO, CLC v. State Emp. Relations Bd.*, 70 Ohio St.3d 252, 254 (1994) (with respect to bargaining-unit determination, R.C. Chapter 4117 is analogous to NLRA); *State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 353 (1994), citing *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.*, 66 Ohio St.3d 485, 496 (1993) (because R.C. Chapter 4117's treatment of unfair labor practices cases is modeled to a large extent on NLRA, NLRB's experience can be instructive, although not conclusive); *Liberty Twp. v. Ohio State Emp. Relations Bd.*, 10th Dist. No. 06AP-246, 2007-Ohio-295, ¶ 8, citing *Miami Univ.* at 353 (noting that while NLRB cases are not binding on SERB, SERB has used federal case law for guidance in the past); *In re Wheeland*, 10th Dist. No. 94APE10-1424 (June 6, 1995), citing *Miami Univ.* (because R.C. Chapter 4117 was modeled after NLRA, the NLRA's cases interpreting NLRA can be instructive in interpreting R.C. Chapter 4117). Thus, although we agree that the legislature has never expressed that R.C. Chapter 4117 need be interpreted in "lockstep" with NLRA, there is nothing that prohibits a court from looking to NLRA for guidance when interpreting R.C. Chapter 4117, and other Ohio cases have done so. Therefore, we reject GDRTA's assertion that the trial court was prohibited from following federal case law in interpreting R.C. Chapter 4117.

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{¶ 24} GDRTA next argues that the Supreme Court found in *S. Community, Inc. v. State Emp. Relations Bd.*, 38 Ohio St.3d 224, 228 (1988), that NLRA does not control the meaning of R.C. Chapter 4117, when it stated:

> We feel that it is not necessary to go into any great detail in the analysis of each of these laws and their similarities and differences. It need only be noted that the National Labor Relations Board deals with private sector employers and employees, and SERB deals with public sector employers and employees. The General Assembly has considered the public policy differences, and so enacted R.C. Chapter 4117.

{¶ 25} We first note that in the sentence immediately following the above quote, the Supreme Court acknowledged that "even though we would review the present issues within the general context of the National Labor Relations Act, Ohio's Act specifically provides for the appeal sought herein by way of R.C. 4117.02(M), which quite clearly carries out the legislative purpose to make SERB subject to R.C. Chapter 119." *Id.* at 228. Thus, the court specifically indicated that issues pertaining to R.C. Chapter 4117 are reviewed within the general context of NLRA, but such was not necessary in that case because the Public Employees' Collective Bargaining Act found within R.C. Chapter 4117 had a specific provision addressing the issue.

{¶ 26} Furthermore, notwithstanding the differences between the underlying issues in *S. Community* and the present case, given the Supreme Court's decisions in *Adena* and *Miami Univ.*, which were decided five and six years, respectively, after *S. Community*, it is apparent that the Supreme Court did not intend its decision in *S. Community* to prohibit Ohio courts from looking to NLRA and the determinations of NLRB to interpret R.C. Chapter 4117. The Supreme Court in both *Adena* and *Miami Univ.* clearly signaled that Ohio courts can utilize NLRA and federal cases that interpret NLRA when interpreting R.C. Chapter 4117. Therefore, GDRTA's argument, in this respect, is without merit.

{¶ 27} GDRTA next argues that §160(f) of NLRA and R.C. 4117.13(D) are not comparable because the Supreme Court has found that R.C. 4117.13(D) is jurisdictional in nature but federal case law has found that §160(f) of NLRA controls venue. However, we fail to see how this distinction would render the definition of "transacts business," as used in §160(f), any less comparable to "transacts business," as used in R.C. 4117.13(D). Therefore, we find the trial court did not err when it relied upon federal case law to define

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"transacts business," as used in R.C. 4117.13(D), and found that such case law requires a physical presence in the county. For these reasons, GDRTA's first, second, third, fourth, fifth, and sixth assignments of error are overruled.

{¶ 28} We will address GDRTA's seventh and eighth assignments of error together. GDRTA argues in its seventh assignment of error that the lower court erred when it denied GDRTA's motion to transfer venue. GDRTA argues in its eighth assignment of error that the lower court erred when it refused to rely on federal law to determine the venue issue after deferring to federal law to determine the subject-matter jurisdiction issue. GDRTA argues that, under the most recent federal jurisprudence, §160(f) is venue limiting in nature and not jurisdictional, citing *Brentwood at Hobart v. N.L.R.B.*, 675 F.3d 999 (6th Cir.2012).

{¶ 29} GDRTA's reading of *Brentwood* is correct. *Brentwood* involved a dispute over a union election, and the Sixth Circuit Court of Appeals addressed in which federal court the company and NLRB should have filed their petitions in relation to an NLRB order. Because neither the company nor NLRB contested whether the court could review the petitions, the court analyzed whether §160(f) concerned venue or subject-matter jurisdiction. If §160(f) concerned limitations on venue, the parties could waive the issue, but if it concerned limitations on subject-matter jurisdiction, the parties could not waive the issue.

{¶ 30} The court in *Brentwood* summarized the meaning of venue and subject-matter jurisdiction. Subject-matter jurisdiction defines a court's power to adjudicate, while venue specifies where judicial authority may be exercised based on convenience to the litigants. *Id.* at 1002, citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939). The former asks "whether"—whether the legislature has empowered the court to hear cases of a certain genre. The latter asks "where"—where should certain kinds of cases proceed? *Id.*, citing *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

{¶ 31} The court in *Brentwood* concluded that the requirements of §160(f) go to venue and not subject-matter jurisdiction. As geographic limitations, the section asks the "where"—the venue—"question," and the answer it gives turns on classic venue concerns, such as choosing a convenient forum. *Id.* By generally permitting the action to proceed in the circuit where the unfair labor practice in question occurred, where the company resides or transacts business, or in the D.C. Circuit, §160(f) ensures that the company will

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not be forced to defend an action in a faraway circuit and confirms the statute's focus on convenience. The court found that, in considering similar litigation-channeling provisions, the United States Supreme Court has uniformly treated them as venue, not jurisdictional, limitations. *Id.*, citing *Panhandle Eastern Pipe Line Co. v. Fed. Power Comm.*, 324 U.S. 635, 638-39 (1945) (finding that a provision allowing a company contesting a Federal Power Commission order to obtain a review in the circuit court of appeals wherein the company is located or has its principal place of business, or in the D.C. Circuit, was a geographic limitation relating to the convenience of the litigants and, thus, going to venue and not to jurisdiction). The court in *Brentwood* also noted that the United States Supreme Court had made a recent effort to bring discipline to the use of the term "jurisdictional." *Id.* at 1003, citing *Gonzalez v. Thaler*, 132 S.Ct. 641 (2012).

{¶ 32} Furthermore, the court in *Brentwood* admitted that it had before, in *U.S. Elec. Motors* at 318, referred to the geographic limitation in §160(f) in jurisdictional terms, but that was in the days when the courts (including the Sixth Circuit) were less than meticulous about using the term "jurisdiction." *Id.* at 1004, citing *Gonzalez* at 648. The court in *Brentwood* then concluded that, even though §160(f) relates to venue and not jurisdiction, and, thus, the court could transfer the matter to another venue, it would not exercise that discretion as the dispute had ample connections to the Sixth Circuit, as the company "transacts business" in the Sixth Circuit.

{¶ 33} Although *Brentwood* might be persuasive if there existed no applicable Ohio case law on the issue, there exists case law from the Supreme Court of Ohio, this court, and other appellate courts that is applicable to this issue before us and conflicts with *Brentwood*. *See P.D.M. Corp. v. Hyland-Helstrom Ents., Inc.*, 63 Ohio App.3d 681, fn. 1 (10th Dist.1990) (decisions of the Sixth Circuit Court of Appeals serve as persuasive authority, at best); *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-606, 2012-Ohio-1017, ¶ 16 (this court is bound by the doctrine of stare decisis and must follow our own court's precedent); *Martinez v. Yoho's Fast Food Equip.*, 10th Dist. No. 00AP-441 (Dec. 19, 2000) (this court is obliged to following binding Supreme Court precedent). GDRTA fails to cite any authority, and we find none, to support its proposition that, because we relied upon federal authority to define "transacts business," we should rely upon federal authority to address every other issue relating to R.C. Chapter 4117, particularly when there exists applicable Ohio authority on the issue.

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{¶ 34} In *Nibert v. Dept. of Rehab. & Corr.*, 119 Ohio App.3d 431 (10th Dist.1997), the appellant appealed an order from the State Personnel Board of Review ("SPBR") to the common pleas court. The common pleas court dismissed the appeal for lack of subject-matter jurisdiction under R.C. 124.34, which allows for an appeal from an SPBR order to the court of common pleas of the county in which the employee resides in accordance with the procedure in R.C. 119.12. On appeal, the appellant argued that the court erred when it dismissed her complaint for lack of subject-matter jurisdiction and should have granted her motion to transfer venue to another county.

{¶ 35} This court affirmed the decision of the trial court, citing *Davis v. State Personnel Bd. of Review*, 64 Ohio St.2d 102 (1980). We found that, "as the court in *Davis* explained, the issue is not one of venue, but of jurisdiction. As a result, not only was the Franklin County Common Pleas Court without jurisdiction to consider appellant's appeal, but a motion to transfer venue is an inappropriate vehicle to correct the improper filing." *Nibert* at 433, citing *Davis* (finding that a common pleas court lacks subject-matter jurisdiction if an employee appeals a decision of SPBR under R.C. 124.34 but is not a resident of the county in which the common pleas court is located). We concluded that, "[i]ndeed, because the Franklin County Common Pleas Court lacked jurisdiction in the matter, it could not grant appellant's motion for transfer of venue." *Id.*, citing *Heskett v. Kenworth Truck Co.*, 26 Ohio App.3d 97 (10th Dist.1985).

{¶ 36} In *Heskett*, this court reviewed former R.C. 4123.519, which required that a claimant's appeal from an order of the Industrial Commission of Ohio ("IC") be filed in the common pleas court of the county in which the injury occurred. The claimant argued that R.C. 4123.519 was a venue statute and the court could have transferred the matter to a more appropriate venue, pursuant to Civ.R. 3(C), while the IC and employer argued that it was a jurisdictional statute. We relied upon *Indus. Comm. v. Weigand*, 128 Ohio St. 463 (1934), which interpreted the predecessor to R.C. 4123.519 and held that the statute is a special limited-jurisdiction statute applying to cases brought under workers' compensation law and relates not only to venue but to jurisdiction, as it selects the court which shall hear and determine such causes. *See Heskett* at 98, citing *Weigand* at paragraph one of the syllabus. Because R.C. 4123.519 was jurisdictional in nature, this court found in *Heskett* that the trial court had no authority to change the venue of an appeal that should have been filed in a different county.

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{¶ 37} We note that R.C. 4123.519 was amended in 1989 and renumbered R.C. 4123.512 in 1993, and those two later statutes specifically contained safe-harbor provisions that allowed the transfer of an appeal filed in the wrong jurisdiction. It has been held that the safe-harbor provision in amended R.C. 4123.519 and 4123.512 converted the jurisdictional into a venue provision. *See Mays v. Kroger Co.*, 129 Ohio App.3d 159, 163 (12th Dist.1998) (Ohio courts construed the county of injury filing requirement as a mandatory jurisdictional provision because the statute explicitly required, rather than merely authorized, the filing of an action in the court in a specified place, but amended R.C. 4123.519 and 4123.512 converted the jurisdictional requirement into a venue provision).

{¶ 38} This court has subsequently followed *Nibert* and *Heskett*, as have other courts. *See Saxour v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 96APE09-1271 (May 27, 1997) (interpreting R.C. 124.34 and finding that because the employee filed her appeal from the order of SPBR in the common pleas court in a county in which she did not reside, the common pleas court lacked subject-matter jurisdiction and, therefore, could not grant motion for transfer of venue); *Styers v. Falcon Foundry Co.*, 11th Dist. No. 99-T-0017 (Mar. 24, 2000) (the requirement that an employee must file a retaliatory-discharge claim under R.C. 4123.90 in the county where the employer is located relates to subject-matter jurisdiction and not venue; thus, the court could not transfer venue); *McKown v. Mayfield*, 11th Dist. No. 1829 (June 30, 1988) (the filing requirements in R.C. 4123.519 relate to subject-matter jurisdiction, not venue, and a court does not have authority to change the venue of an appeal filed in the wrong county); *Vilimonovic v. Modern Tool & Die Prods., Inc.*, 8th Dist. No. 54123 (June 23, 1988) (the filing requirements in R.C. 4123.519 relate to subject-matter jurisdiction, not venue; thus, a court cannot transfer venue when an appeal is filed in the wrong county).

{¶ 39} In addition to *Nibert* and the other cases above, we also find applicable our decision in *Calo v. Ohio Real Estate Comm.*, 10th Dist. No. 10AP-595, 2011-Ohio-2413. In *Calo*, an individual filed a complaint with the Ohio Department of Commerce against a real estate broker. The Ohio Real Estate Commission ("REC") issued an order revoking the broker's real estate license, and the broker appealed to the Franklin County Court of Common Pleas, pursuant to R.C. 4735.19, which provides that a real estate licensee may appeal an order of the REC in accordance with R.C. Chapter 119. Because R.C. 119.12

requires a party to file an appeal in his or her place of residence or place of business, and the broker's residence and business were located in Cuyahoga County, the court dismissed the matter for lack of subject-matter jurisdiction. On appeal, we rejected the broker's contention that the issue was one of venue and not jurisdiction. We concluded that, because the broker failed to comply with R.C. 119.12 to perfect his appeal, the Franklin County Court of Common Pleas properly concluded it lacked subject-matter jurisdiction.

{¶ 40} We find *Nibert, Heskett, Calo, Davis,* and *Saxour,* as well as the cases from other appellate courts, answer the issue before us. These cases all conclude that a statutory requirement for appealing an administrative order to a specific court is a matter of subject-matter jurisdiction and not venue. Thus, in the present case, the requirement in R.C. 4117.13(D) that any person aggrieved by a final order of SERB may appeal to the court of common pleas of any county where the person transacts business relates to subject-matter jurisdiction and not venue. Furthermore, because the common pleas court lacked subject-matter jurisdiction, the court lacked the authority to transfer venue to the appropriate court. For these reasons, GDRTA's seventh and eighth assignments of error are overruled.

{¶ 41} Accordingly, GDRTA's eight assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, SADLER and LUPER SCHUSTER, JJ., concur.

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APPENDIX B

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Greater Dayton Regional Transit Authority.,	:	
Appellant,	:	CASE NO. 14CV-6408
-vs-	:	**JUDGE SERROTT**
State Employment Relations Board,	:	
and	:	
Amalgamated Transit Union Local 1385,	:	
Appellee.	:	

DECISION GRANTING APPELLEES' MOTION TO DISMISS ADMINISTRATIVE APPEAL

Rendered this 8th day of September, 2014.

SERROTT, J.

I. PROCEDURAL HISTORY

This matter is before the Court upon the Appellant's, Greater Dayton Regional Transit Authority's, hereafter "G.D.R.T.A," administrative appeal of a S.E.R.B. order finding G.D.R.T.A. had committed unfair labor practices in violation of R.C. 4117.11. G.D.R.T.A. and the other Appellee, Amalgamated Transit Union Local 1385, hereafter "the Union," are both physically located in Montgomery County. Neither of the parties have physical locations in Franklin County.

Appellees, the Union, and S.E.R.B., each filed a Motion to Dismiss this appeal arguing this Court does not have jurisdiction to hear this appeal pursuant to R.C. 4117.13(D). The matter has been fully briefed and the Court has reviewed all the memoranda including the "surreply." The parties all agree that the issue turns upon whether or not Appellant, G.D.R.T.A, "transacts business"

in Franklin County, Ohio as set forth in R.C. 4117.13(D). This issue is a matter of first impression for any Ohio Appellate Court. A review of R.C. 4117.13(D), the relevant statute authorizing appeals from S.E.R.B. and its "legislative history" will provide guidance to the Court in determining this issue.

II. LEGAL ANALYSIS

R.C. 4117.13(D) permits appeals from S.E.R.B. orders "to the Court of Common Pleas in any County where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or **transacts business**." The parties all agree the first two provisions establishing jurisdiction or venue do not apply to this case. Therefore, the determinative issue is whether Appellant "transacts business" in Franklin County, Ohio.

The Appellant has offered uncontradicted proof that it has contracts with vendors in Franklin County and has expended about $600,000.00 in relation to those contracts. Appellant also has offered proof its employees make numerous phone calls to this County and its employees travel to Franklin County for "business." Most of the travel involves meetings with Federal or State agencies. Appellant also has a contract with a Union whose headquarters is in Franklin County (not however, the Appellee Union herein). Appellant's main business is the operation of a mass transit system in the greater Dayton area. Appellant has no employees and has no physical business locations in Franklin County and operates no buses or equipment in Franklin County. Appellant cannot dispute that its main business purpose is to provide mass transit for passengers in the greater Dayton area.

In the Court's opinion there is little doubt that Appellant indeed transacts "business" in Franklin County, Ohio. However, the crucial issue is whether the business it transacts is "business

transactions" within contemplation of R.C. 4117.13(D). In subsection (D), the legislature used the term "transacts business" not the term "transacts any business" as used by the legislature in Ohio's long arm statute, R.C. 2307.382(A)(1). The addition of the term "any" in the long arm statute greatly expands the meaning of "transacts business" in the Court's opinion. Therefore, Appellant's arguments that this Court should look to the decisions interpreting the long arm statute are not persuasive to the Court.

R.C. 4117.13(D) and its express terms must be interpreted in light of the context and legislative history of the statute. While the express terms "transacts business" seems unambiguous the term is undefined. Does the term mean any business; the majority of its business; business related to its main purpose; or is it restricted to the "business" or transactions related to the alleged unfair practice? The above issues are unclear and in that sense the term is ambiguous.

First, the Court recognizes that it should give the term used in the statute its plain ordinary meaning under R.C. 1.42, which provides the following verbatim:

> **Words and phrases shall in be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meeting, whether by legislative definition or otherwise, shall be construed accordingly.**

Thus, the phrase "transacts business" must be read in the context of the statute in light of the origin of the statute and in light of whether the phrase has any special meaning. Additionally, statutes authorizing administrative appeal requirements have been strictly and narrowly construed regarding the appeal requirements. Hughes v. Ohio Department of Commerce, 114 Ohio St.3d 47 (2007).

R.C. 4117.13(D) is modeled and almost identical to the National Labor Relations Board Act governing appeals. See 29 U.S.C. 160(f). § 160(f) provides "any person aggrieved by a final order of the Board…may obtain a review by such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or **transacts business**." The Franklin County Court of Appeals has noted that R.C. 4117.13 is almost identical to 29 U.S.C. 160(f). Moore v. Youngstown State University , 63 Ohio App.3d 238, 242 (1989). As noted supra, no Ohio Appellate decision has interpreted the phrase "transacts business" as used in R.C. 4117.13(D). Therefore, because of the almost identical nature of the statutes, this Court finds it instructive to review the Federal decisions construing the phrase.

The Federal decisions construing the term have narrowly construed the phrase. The decisions require more than simply conducting business through contracts, or e-mails, or even when employees travel to the jurisdiction where the appeal was filed. The First Circuit ruled that it did not have jurisdiction over an NLRB appeal simply because the Appellant bought and sold items in the First Circuit's jurisdiction. The Court also rejected Appellant's claim that an exclusive sales representative's physical presence in the First Circuit's jurisdiction was sufficient to transact business within the meaning of the statute. S.L. Industries v. N.L.R.B. 673 F.2d 1 (1st Cir. 1982). In reaching a similar conclusion, the Sixth Circuit found it significant that Appellant never owned or leased property or maintained an office for its employees within its jurisdiction. U.S. Elec. Motors v. N.L.R.B., 722 F.2d 315, 319 (6th Cir. 1983).

Two other Federal Circuit decisions have also narrowly construed the phrase "**transacts business**" for purposes of NLRB appeals. The Fourth Circuit ruled that an Appellant who purchased goods, had sales representatives, and employees who traveled frequently to the

jurisdiction, did not "transact business" within the Fourth Circuit in spite of fairly extensive business relations within the Circuit. Davlan Engineering, Inc. v. N.L.R.B. 718 F.2d 102, 103, (4th Cir. 1983). As in the cases from the Sixth and First Circuit, the Fourth Circuit fount it significant that Appellant had no "permanent physical facility nor any employees" situated in the Fourth Circuit. Id. at 103. The Fourth Circuit in the opinion at p. 103 stated the following verbatim:

> Without attempting to define the minimum level of activity to satisfy the prong of the § 160(f) venue requirements, we hold that Davlan does not "transact business" in this circuit. It has neither any permanent physical facility nor any employees situated here. *See S.L. Industries, Inc. v. NLRB*, 673 F.2d 1, 3 (1st Cir. 1982). If the mere purchase and sale of goods, with its attendant telephone and personal contacts within this circuit-suffices without more as "transacting business," we think the force of § 160(f) as a **venue-limiting** provision would be effectively eviscerated. See *S.L. Industries*, 673 F.2d at 3.

The Fifth Circuit reached the same conclusion in Bally's Park Place Inc. v. N.L.R.B. 546 F.3d 318 (5th Cir. 2008). In the Bally case, the Court rejected Appellant, Bally's, contention that its parent company transacted business in the Fifth Circuit sufficient to satisfy the statute. The Fifth Circuit noted that the statute was designed to limit appeals and that if a broad interpretation of the phrase was adopted appeals could be filed in practically any Federal Circuit. (Id. At 321). The Fifth Circuit adopted the Davlan test seeming to require a "permanent facility or employees situated" test. (Id. at 321). The Court went on to quote from the Davlan case the following:

> **If the mere purchase and sale of goods, with its attendant telephone and personal contacts-which fairly characterizes all Davlan's contacts with this circuit-suffices without more as "transacting business," we think the force of § 160(f) as venue-**

> **limiting provision would be effectively eviscerated. (Citing Davlan)**
> **The principal precedent in our own Circuit is consistent with an analysis requiring some sort of physical presence.**

One Ohio Common Pleas decision interpreting R.C. 4117.13(D) decided by Judge Martin (whom this Court practiced law before and has the utmost respect for) reached the same conclusion as the Federal Court. However, a review of the decision indicates the appellant may not have transacted any business in Franklin County. See *Manchester Educ. Assoc. v. Manchester Local School Bd of Educ.* 85-CV-03-1333, 1985 W.L. 263515.

This Court concludes that the reasoning and policy considerations outlined in the Federal cases are equally applicable herein. This Court notes that Appellant does not have any permanent physical facility, or office, in Franklin County. The Federal cases seem to require a "physical presence" test. The legislature has restricted SERB appeals to locations where a person "transacts business." The legislature did not include the term "any business" and the legislature had to be aware of Federal law interpreting the phrase when it adopted the phrase "transacts business" in the Ohio statute. The term must be restricted to more than simply buying and selling goods; entering into contracts; or telephoning persons within Franklin County. If this Court were to adopt such a broad interpretation, an appeal could be filed in almost any County in Ohio. The expansive interpretation advocated by Appellant would in effect "eviscerate" the limiting effect of the phrase.

However, this Court notes that this decision was a "close call." Appellant does indeed transact significant business in Franklin County. Nothing in the Ohio statute requires a permanent physical facility, or physical presence, in order to satisfy the "transacts business" requirement. The Ohio statute already has a provision for an appeal if the aggrieved party <u>resides</u> in the County.

Therefore, should this Court restrict the "transacts business" phrase to require a physical presence in order to satisfy transacting business? These are difficult questions. The court did however find the Federal cases persuasive and adopts the reasoning and holdings of those cases. An appeal should be perfected to allow the Appellate Court to decide this thorny issue de novo.

Finally, this Court notes the Federal cases ruled that the "transacts business" requirement is a venue issue and ordered some of the cases transferred to the proper venue. This issue was not briefed before this Court.

This Court will GRANT the Motion to Dismiss for the reasons stated herein unless either party convinces the Court that it should simply transfer venue to Montgomery County. Accordingly, the Court will delay entering a final judgment on this Decision until September 19, 2014 to allow either party to brief the venue issue or to indicate to the Court that it is not an issue.

IT IS SO ORDERED.

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Franklin County Court of Common Pleas

Date: 09-08-2014

Case Title: GREATER DAYTON REGIONAL TRANSIT AUTHORIT -VS- OHIO STATE EMPLOYMENT RELATIONS BOARD ET AL

Case Number: 14CV006408

Type: DECISION

It Is So Ordered.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 14CV006408

Case Style: GREATER DAYTON REGIONAL TRANSIT AUTHORIT -
VS- OHIO STATE EMPLOYMENT RELATIONS BOARD ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 14CV0064082014-08-2899970000
   Document Title: 08-28-2014-MOTION FOR LEAVE TO FILE
   Disposition: MOTION GRANTED

2. Motion CMS Document Id: 14CV0064082014-07-2599980000
   Document Title: 07-25-2014-MOTION TO DISMISS
   Disposition: MOTION GRANTED

3. Motion CMS Document Id: 14CV0064082014-07-1099980000
   Document Title: 07-10-2014-MOTION TO DISMISS
   Disposition: MOTION GRANTED