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In the

Supreme Court of Ohio

GREATER DAYTON REGIONAL TRANSIT AUTHORITY, Appellant, v. STATE EMPLOYMENT RELATIONS BOARD, and AMALGAMATED TRANSIT UNION, AFL-CIO, LOCAL 1385, Appellees.	:	Case No. 2015-1205 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 14-AP-876

MERIT BRIEF OF APPELLEE
STATE EMPLOYMENT RELATIONS BOARD

RONALD G. LINVILLE* (0025803)
**Counsel of Record*
JENNIFER E. EDWARDS (0079220)
JEREMIAH L. HART (0087744)
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, Ohio 43215-4260
614-228-1541; 614-462-2616 fax
rlinville@bakerlaw.com

Counsel for Appellant Greater Dayton Regional Transit Authority

JOSEPH S. PASS* (0093158)
**Counsel of Record*
Jubelirer, Pass and Intrieri, PC
219 Fort Pitt Boulevard
Pittsburgh, PA 15222
412-281-3850
jsp@jpilaw.com

CHRISTINE A. REARDON (0034686)
Kalniz, Iorio & Feldstein Co., L.P.A.
5550 W. Central Ave.
P.O. Box 352170
Toledo, Ohio 43635

Counsel for Appellee Amalgamated Transit Union, AFL-CIO, Local 1385

MICHAEL DEWINE (0009181)
Ohio Attorney General

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
MICHAEL D. ALLEN (0020693)
LORI FRIEDMAN (0018480)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for Appellee State Employment Relations Board

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 4

A. Modeled after federal law, Ohio's labor statutes for public employers set both substantive standards and mechanisms to appeal administrative orders 4

B. The Greater Dayton Regional Transit Authority appealed an adverse decision to a court in Columbus, not Dayton 4

ARGUMENT 6

Appellee State Employment Relations Board's Proposition of Law:

Jurisdiction for administrative appeals from SERB orders lies only in counties where the appealing party transacts its ordinary business 6

A. Transacting business means transacting the entity's ordinary business, not engaging in any commercial activity 6

1. The phrase "transacts business" has a limited reach, encompassing only substantial activity related to an entity's ordinary business 7

2. The examples in the dictionary entry show that "transacts business" is a term of art with an established, narrow meaning 9

a. By 1983, the National Labor Relations Act had been interpreted to equate "transacts business" with, at minimum, physical presence 11

b. By 1983, Ohio's business-licensing statute used the term "transacts business" in the narrow sense of less than all business activity 13

c. By 1983, state statutes limiting court jurisdiction over corporations transacting or doing business in a county or the State had an established narrow meaning 14

d. By 1983, the federal venue statute used the phrase "doing business" narrowly 17

3. The structure of the SERB statute confirms the narrow reach of the phrase "transacts business." 18

a. The full jurisdictional provision addresses specific and general jurisdiction, and "transacts business" relates to general jurisdiction, which generally requires substantial contacts with the forum 18

b. The provisions for enforcing Board orders and for emergency relief also show that the "transacts business" phrase is narrow 20

4. If there is any ambiguity, the tools for resolving it point in the same direction as the text and structure.....21

B. Dayton does not transact its business in Franklin County 23

C. Dayton musters no convincing counterargument 25

1. Dayton's plain-meaning arguments are mistaken.....25

a. Dayton overemphasizes dictionaries, but cites the wrong definitions in any event 25

b. Dayton's structural points all collapse on themselves 27

c. Dayton's foray into the case law loses its way 29

2. Dayton's application of the law to the facts never gives a concrete test 30

3. Dayton attacks a strawman when it assails the physical-presence requirement with policy arguments.....31

4. A clear rule prevents the alleged unfairness that Dayton bemoans 34

CONCLUSION.....35

CERTIFICATE OF SERVICE

APPENDIX:

Order, State Employment Relations Board, June 5, 2014 .....App. 1

Proposed Order, State Employment Relations Board, April 3, 2014 .....App. 6

TABLE OF AUTHORITIES

Cases **Page(s)**

Ali v. Fed. Bur. of Prisons,
552 U.S. 214 (2008).....8

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006).....10

Ashland Chem. Co. v. Jones,
92 Ohio St. 3d 234 (2001) 26

Auto Driveaway Co. v. Auto Logistics of Columbus,
188 F.R.D. 262 (S.D. Ohio 1999).....14

Auto. Material Co. v. Am. Std. Metal Products Corp.,
158 N.E. 698 (Ill. 1927).....16

Baker Botts L.L.P. v. ASARCO LLC,
135 S.Ct. 2158 (2015).....7

Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,
223 F.3d 1082 (9th Cir. 2000) 24

Bosl v. First Fin. Invest. Fund I,
2011-Ohio-1938 (8th Dist.) 14, 21, 32

Bowles v. Ranger Land Systems, Inc.,
527 Fed. App'x 319 (5th Cir. 2013) 23

Brentwood at Hobart v. N.L.R.B.,
675 F.3d 999 (6th Cir. 2012) 12

Brown v. Lockheed Martin Corp.,
814 F.3d 619 (2d Cir. 2016).....23

Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.,
406 U.S. 706 (1972).....28

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,
532 U.S. 598 (2001).....26

Cantrell v. Forest City Publ'g Co.,
419 U.S. 245 (1974).....9

Case v. Los Angeles Lumber Products Co.,
308 U.S. 106 (1939).....9

Caterpillar Inc. v. Lewis,
519 U.S. 61 (1996).....28

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....32

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).....10, 30

Daimler AG v. Bauman,
134 S.Ct. 746 (2014).....19

Dakota Indus., Inc. v. Dakota Sportswear, Inc.,
946 F.2d 1384 (8th Cir. 1991).....18

Davis v. Davis,
115 Ohio St. 3d 180, 2007-Ohio-5049.....8

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989).....9

Davis v. State Personnel Bd. of Review,
64 Ohio St. 2d 102 (1980).....30

Davlan Eng'g, Inc. v. N.L.R.B.,
718 F.2d 102 (4th Cir. 1983).....12, 24, 31

Dodd v. Croskey,
143 Ohio St. 3d 293, 2015-Ohio-2362.....7

E. Holmes Teachers Ass'n v. E. Holmes Local Sch. Dist. Bd. of Educ.,
No. 85CV-05-2466, 1985 WL 263517 (Franklin Cnty. C.P. Aug. 6, 1985).....34

F.A.A. v. Cooper,
132 S.Ct. 1441 (2012).....26

F.W. Woolworth Co. v. N.L.R.B.,
655 F.2d 151 (8th Cir. 1981).....11

Farah Mfg. Co. v. N.L.R.B.,
481 F.2d 1143 (8th Cir. 1973).....11

Filler Products, Inc. v. N.L.R.B.,
376 F.2d 369 (4th Cir. 1967).....11

First Nat'l Bank of Wilmington v. Kosydar,
45 Ohio St. 2d 101 (1976).....30

Fraley v. Estate of Oeding,
138 Ohio St. 3d 250, 2014-Ohio-452.....7

Frye v. Batavia (N. Y.) Veterans Admin. Emp. Fed. Credit Union No. 189,
8 F.R.D. 334 (D.D.C 1943).....15

Golden Dawn Foods, Inc. v. Cekuta,
1 Ohio App. 2d 464 (7th Dist. 1964).....13

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S.Ct. 2846 (2011).....19

Griffin v. Implement Dealers' Mut. Fire Ins. Co.,
241 N.W. 75 (N.D. 1932).....15

H.P. Hood, Inc. v. N.L.R.B.,
30 Fed. App'x 148 (4th Cir. 2002).....12

Harrison v. PPG Indust., Inc.,
446 U.S. 578 (1980).....8

Hartsock v. Chrysler Corp.,
44 Ohio St. 3d 171 (1989).....30

Hauser v. Dayton Police Dep't,
140 Ohio St. 3d 268, 2014-Ohio-3636.....7, 10, 11

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984).....19, 24, 31

Hertz Corp. v. Friend,
559 U.S. 77 (2010).....21

Hertz Corp. v. N.L.R.B.,
105 F.3d 868 (3d Cir. 1997).....12

Hoffman v. State Med. Bd. of Ohio,
113 Ohio St. 3d 376, 2007-Ohio-2201.....26

In re Contempt of Court of White,
60 Ohio App. 2d 62 (5th Dist. 1978).....21

Johnson Creative Arts, Inc. v. Wool Masters, Inc.,
743 F.2d 947 (1st Cir. 1984).....17, 18

Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.,
53 Ohio St. 3d 73 (1990).....8, 30

L.J. Smith, Inc. v. Harrison Cnty. Bd. of Revision,
140 Ohio St. 3d 114, 2014-Ohio-2872.....23

Lake Shore Elec. R. Co. v. Public Utilities Comm'n,
115 Ohio St. 311 (1926).....8

Lambert v. Schell,
69 S.E.2d 11 (N.C. 1952).....16

Leocal v. Ashcroft,
543 U.S. 1 (2004).....13

Lorain City Sch. Dist. Bd. of Educ. v. State Emp't Relations Bd.,
40 Ohio St. 3d 257 (1988) 4

Lorain Educ. Ass'n v. Lorain City Sch. Dist. Bd. of Educ.,
46 Ohio St. 3d 12 (1989) 4, 35

Manchester Educ. Ass'n v. Manchester Local Sch. Dist. Bd. of Educ.,
No. 85CV-03-1333, 1985 WL 263515 (Franklin Cnty. C.P. June 19, 1985).....34

Mergenthaler Linotype Co. v. Spokesman Pub. Co.,
270 P. 519 (Or. 1928) 15

Mut. Fed. Sav. & Loan Ass'n of Milwaukee v. Sav. & Loan Advisory Comm.,
157 N.W.2d 609 (Wis. 1968).....28

New Alaska Dev. Corp. v. N.L.R.B.,
441 F.2d 491 (7th Cir. 1971) 12

Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant,
760 F.2d 312 (D.C. Cir. 1985).....18

Ohio Ass'n of Public Sch. Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City Sch. Dist. Bd. Of Educ.,
59 Ohio St. 3d 159 (1991) 11

Olentangy Local Sch. Bd. of Educ. v. Delaware Cnty. Bd. of Revision,
141 Ohio St. 3d 243, 2014-Ohio-4723.....7

Olin Indus., Winchester Repeating Arms Co. Division v. N.L.R.B.,
191 F.2d 613 (5th Cir. 1951) 11

Premier Capital, L.L.C. v. Baker,
2012-Ohio-2834 (11th Dist.) 14

Pure Oil Co. v. Suarez,
384 U.S. 202 (1966).....17, 28

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992).....10

Riffle v. Physicians & Surgeons Ambulance Serv., Inc.,
135 Ohio St. 3d 357, 2013-Ohio-989.....9

Rikal, Inc. v. N.L.R.B.,
721 F.2d 402 (1st Cir. 1983).....12

Risner v. Ohio Dep't of Natural Res.,
144 Ohio St. 3d 278, 2015-Ohio-3731.....18

S. Cmty., Inc. v. State Emp't Relations Bd.,
38 Ohio St. 3d 224 (1988) 4, 20

S.L. Indus., Inc. v. N.L.R.B.,
673 F.2d 1 (1st Cir. 1982).....12, 33

Salinas v. United States,
522 U.S. 52 (1997).....8

Shambe v. Delaware & H. R. Co.,
135 A. 755 (Pa. 1927).....16

Spencer v. Freight Handlers, Inc.,
131 Ohio St. 3d 316, 2012-Ohio-880.....7

Stammco, L.L.C. v. United Tel. Co. of Ohio,
136 Ohio St. 3d 231, 2013-Ohio-3019.....32

State ex rel. Arcadia Acres v. Ohio Dep't of Job & Family Servs.,
123 Ohio St. 3d 54, 2009-Ohio-4176.....30

State ex rel. Extendicare Health Servs., Inc. v. Ryan,
126 Ohio St. 3d 12, 2010-Ohio-2452.....8

State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trs.,
108 Ohio St. 3d 288, 2006-Ohio-903.....14

State ex rel. Stahl v. Webster,
1933 WL 1672 (Williams Cnty. C.P. June 19, 1933).....21

State v. Superior Court of King Cnty.,
193 P. 229 (Wash. 1920).....15

Thompson v. Cmty. Mental Health Ctrs. of Warren Cnty., Inc.,
71 Ohio St. 3d 194 (1994) 9

UBS Fin. Servs., Inc. v. Levin,
119 Ohio St. 3d 286, 2008-Ohio-3821 33

United States v. Am. Bldg. Maint. Indus.,
422 U.S. 271 (1975) 10

United States v. Gonzales,
520 U.S. 1 (1997) 8

Yaohan U.S.A. Corp. v. N.L.R.B.,
Nos. 95-70818, 95-70913, 1997 WL 453688 (9th Cir. June 30, 1997) 12

York Products, Inc. v. N.L.R.B.,
881 F.2d 542 (8th Cir. 1989) 12

Statutes, Rules, and Constitutional Provisions

28 U.S.C. 1332(c)(1) 28

29 U.S.C. 160(f) 34

Fla. Stat. 48.193(1) 19

Fla. Stat. 48.193(2) 19

N.Y. C.P.L.R. 301 19

National Labor Relations Act 10, 32

114 Ohio Laws 563 (1931) 13

136 Ohio Laws II 3803 (1976) 8, 27

Pub. L. No. 100-702, 102 Stat. 4669 18

R.C. 1.42 9

R.C. 1.49(A) 33

R.C. 1.49(E) 33, 34

R.C. 1703.03 13

R.C. 1705.54 13

R.C. 2307.382(A)(1) 17

R.C. 2727.12 21

R.C. 4117.01(A) 27

R.C. 4117.02(O) 29

R.C. 4117.12 ..... 11, 22

R.C. 4117.12(C) 20

R.C. 4117.13 11

R.C. 4117.13(A) 20, 34

R.C. 4117.13(C) 22

R.C. 4117.13(D) ..... *passim*

R.C. 4117.13(F) 4, 22

R.C. 4123.512(A) 30

R.C. 4141.283(E)(2) 29

Other Authorities

12 Ruling Case Law § 49 (1916) 13

1927 Ohio Atty. Gen. Ops. No. 754 14

1932 Ohio Atty. Gen. Ops. No. 4423 13

2A Sutherland Statutory Construction § 47:26 (7th ed. 2015) 28

Black's Law Dictionary (5th ed. 1979) 7

Charles A. Wright, et al., 4A *Federal Practice and Procedure* § 1069.3 (4th ed. 2016) 17

Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807 (2004) 19

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 9

Greater Dayton Regional Transit Authority, http://www.i-riderta.org/about-rta/about (last visited April 29, 2016) 24

James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of Gen. Personal Jurisdiction*, 16 Lewis & Clark L. Rev. 969 (2012).....22, 24

Note, *Gen. Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 Rev. Litig. 741 (1995).....19

Zoe Niesel, *Daimler & the Jurisdictional Triskelion*, 82 Tenn. L. Rev. 833 (2015).....20, 22, 23

INTRODUCTION

Jurisdiction over appeals from the State Employment Relations Board ("Board") exists in a few limited counties; it does not exist wherever an appellant buys or sells a good or service. The General Assembly conferred jurisdiction over appeals from unfair-labor-practice orders—whether the appellant is a union, an employee, or an employer—on those common pleas courts of the county "where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business." R.C. 4117.13(D) ("Jurisdictional Statute"). The place where persons or entities "transact[] business" is not the same as the place (or places) where they engage in *any* business; it is instead the place where they conduct *their* business. A union does not transact business wherever it buys office supplies or contracts for IT services. An employer does not transact business in every place where it buys uniforms, signs retainer agreements with law firms, or attends hearings. The General Assembly did not write a jurisdictional statute that lets a disappointed litigant appeal *wherever* in the State it performed a commercial act. Otherwise, a union could seek an injunction in Cleveland about a labor dispute in Cincinnati, or a Toledo employer could drag an employee across the State into an appeal in Athens. The statute is written to foreclose, not encourage, these outcomes.

That meaning is apparent in the text and structure of the statute, and no resort to the tools for untangling ambiguity is needed to reach that conclusion and affirm both courts below. As a matter of text, the phrase "transacts business" is not the equivalent of "transacts any business" or simply "transacts" (which implies business). The words together mean an entity's regular business. The absence of the word "any" seals that conclusion.

But the Court need not rely on the absence of the qualifier "any" or the common import of the phrase because "transacts business" is a legal term of art that had acquired meaning long before the General Assembly transplanted it to the Jurisdictional Statute. The General Assembly

that passed this statute in 1983 would have been well aware of the federal National Labor Relations Act, which uses the same language in a venue statute. Before 1983, moreover, federal circuit courts had consistently interpreted "transacts business" to mean something more than engages in any business. Even if the General Assembly looked elsewhere when borrowing this phrase—say to Ohio's business-registration statute or to other States' service-of-process statutes—the meaning would be the same. In those setting as well, the meaning of "transacts business" as an entity's regular business was firmly rooted.

Statutory structure further confirms this meaning of the Jurisdictional Statute. In other parts of the chapter, the phrase "transacts business" authorizes appeals to enforce orders of the Board or to seek emergency relief before the Board acts. In those settings, authorizing jurisdiction every place an employer, employee, or union does any business would frustrate the need for immediate court action, say for a temporary restraining order. It would be odd if the General Assembly authorized the Cuyahoga County Common Pleas Court to issue a TRO simply because the Cambridge School District bought supplies from a Cleveland retailer.

Another structural clue is in the full phrase, "where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business." The division between specific jurisdiction—where the practice underlying the lawsuit occurred—and general jurisdiction—where a party resides or transacts business—shows that the "transacts" clause must be about a party's *general* amenability to suit, not its amenability related to the *specifics* of that appeal. This divide between specific and general jurisdiction was well-settled in 1983 when the General Assembly passed the Jurisdictional Statute.

Looking more broadly to the tools the General Assembly itself sanctions for resolving ambiguity cements the case that "transacts business" means transacts an entity's business. For one thing, the requirement to tally emails, receipts, and contracts merely to decide whether an

employer conducts some (undefined) threshold of business in a county invites pointless, fact-intensive collateral litigation in appeals that instead should focus on whether a party has committed an unfair labor practice. For another, letting one party shift an appeal to the far corner of the State sanctions forum shopping that, in the aggregate, disserves everyone. Any reading of the Jurisdictional Statute along the lines that Dayton suggests would authorize appeals for most cases in many Ohio counties when the employer (but not the employee) is the appellant. Everyone loses when a jurisdictional rule invites litigation about where to litigate.

Nothing the Greater Dayton Regional Transit Authority ("Dayton") says in response undercuts these indicia of meaning. Dayton touts dictionaries, but does not cite the most relevant definition (the one of the *entire* phrase "transacts business"). Dayton claims the mantle of the statute's context and structure, but ignores the contextual and structural clues that matter. Dayton rails against purpose-based aids to interpretation, but turns to exactly those arguments at the end of its brief. Amici supporting Dayton are no more helpful to it. They forcefully embrace purpose and policy arguments, claiming that the natural meaning of the words "transacts business" produces "harsh" results. There are only "harsh" results if a party appealing a Board order chooses to file other than where the labor practice occurred or where it obviously resides or transacts business. In the end, this case is about Dayton's choice (or error) to file in a place where no person would say it conducts its business—public transportation in the counties around Dayton. If the Court does not dismiss this case as improvidently granted, it should affirm the sensible judgments of the courts below.

STATEMENT

A. Modeled after federal law, Ohio's labor statutes for public employers set both substantive standards and mechanisms to appeal administrative orders.

Passed in 1983, state labor statutes for public employers are modeled after the federal National Labor Relations Act and "provide a process whereby employees will be consulted about decisions which have a profound impact on them and, thus, industrial peace will be preserved and promoted." *Lorain City Sch. Dist. Bd. of Educ. v. State Emp't Relations Bd.*, 40 Ohio St. 3d 257, 263 (1988). The statutes grant a losing party the right to appeal decisions of the State Employment Relations Board to common pleas court. *See* R.C. 4117.13(D). One important facet of that right is quick appellate resolution. *See* R.C. 4117.13(F) (these appeals should be resolved "expeditiously" and courts may "give precedence" to them over other appeals); *see also Lorain Educ. Ass'n v. Lorain City Sch. Dist. Bd. of Educ.*, 46 Ohio St. 3d 12, 19 (1989) (Wright, J., concurring in judgment) (lamenting length of appellate process in that case); *S. Cmty., Inc. v. State Emp't Relations Bd.*, 38 Ohio St. 3d 224, 231 (1988) (Douglas, J., dissenting) (criticizing lengthy appeal).

The question here is whether the jurisdictional part of these statutes allows a public employer that serves Montgomery and surrounding counties to take its appeal in any county where it conducts some business, and whether ancillary litigation about where an employer "transacts business," R.C. 4117.13(D), is faithful to the statutory text and the goal of quickly resolving labor appeals.

B. The Greater Dayton Regional Transit Authority appealed an adverse decision to a court in Columbus, not Dayton.

This appeal about jurisdiction started when several employees of the Greater Dayton Regional Transit Authority grew concerned that Dayton was not processing their labor grievances. ALJ Order, App'ee App'x 7. The employee's union filed a charge with the Board,

and an administrative law judge held a hearing and agreed with the employees that Dayton was violating the law by refusing to process grievances. *Id*. at 14.

The administrative law judge determined that the "testimony[] and evidence," *id*. at 11, revealed that Dayton had "unilaterally," *id*. at 13, refused to process grievances despite contract language prohibiting its non-action, *id*. at 12. The judge characterized Dayton's view of its contractual obligations as "fallac[ious]," *id.* at 11, "not . . . true," *id.* at 12, and without "merit," *id*. at 14. Even during the administrative hearings, Dayton promised it would process several of the grievances, but did not do so. *Id*. at 10. All told, the judge concluded, the evidence showed a "pattern or practice of repeated failures to timely process grievances." *Id*. at 13 (internal quotation marks omitted).

The judge recommended that the Board issue a cease-and-desist order, require Dayton to post a notice about that order in its workplaces, and require it to notify the Board about its compliance. *Id.* at 15. The Board adopted the judge's recommendations as penalties for "violat[ing]" the labor law by "unilaterally determin[ing] that nine grievances were not legitimate." SERB Order, App'ee App'x 2.

Choosing not to appeal either in the location of the unfair labor practice or the place where it does business, Dayton filed an administrative appeal in Franklin County. The Union and the Board filed motions to dismiss. The trial court granted the motions.

The trial court recognized that Dayton had no employees or business locations in Franklin County and operated no buses there. Trial Op., App. App'x 28. Highlighting the key statutory phrase "transacts business," the court observed that it lacks the expansive word "any." *Id*. at 29. The court also invoked the "almost identical," *id.* at 30, wording of the federal National Labor Relations Act, which the General Assembly "had to be aware of" when it passed Ohio's analogue, *id*. at 32. The court then turned to the federal circuit cases treating this

identical term under federal law and concluded that Dayton did not transact business in Franklin County within the meaning of that phrase. *Id*. at 30-32. Finally, the court invited briefing on whether it could transfer venue to another county, an issue "not briefed" initially. *Id*. at 33. In a later order, the court concluded that the place-of-filing language in the statute is jurisdictional, and overruled a motion to transfer venue. Trial Op. of Sept. 29, 2014, *id.* at 21.

Dayton appealed to the Tenth District, raising eight assignments of error, six about the meaning of "transacts business" and two about venue. App. Op. ¶ 6 (App. App'x 5, etc.). The Tenth District started by observing that both "dictionary definitions" and case law could be read to point in opposite directions. *Id*. ¶ 15. Starting with the dictionaries, the court concluded that it would be "just as reasonable" to read the phrase to encompass only the work a party "engages in regularly" as to cover anything broader. *Id*. ¶ 18. Turning to the cases, the court looked to federal interpretations of the identical language and rejected Dayton's arguments that the court should disregard these decisions. *Id*. ¶¶ 21-27. Finally, the court noted that a wealth of Ohio cases disagreed with the suggestion that the statute is about venue rather than jurisdiction. *Id*. ¶ 40. Dayton now agrees that there is "no question" that the statute is "jurisdictional." Apt. Br. 29. Dayton appealed again, this time trimming its alleged errors to two. This Court accepted a proposition about the meaning of "transacts business." 144 Ohio St. 3d 1439, 2015-Ohio-5468.

ARGUMENT

<u>Appellee State Employment Relations Board's Proposition of Law:</u>

Jurisdiction for administrative appeals from SERB orders lies only in counties where the appealing party transacts its ordinary business

A. Transacting business means transacting the entity's ordinary business, not engaging in any commercial activity.

Like many statutes conferring jurisdiction over administrative appeals, R.C. 4117.13(D) (the "Jurisdictional Statute") designates the specific common pleas courts that have jurisdiction

over appeals of Board orders. The Jurisdictional Statute does not grant jurisdiction across Ohio's 88 counties. Instead, it grants jurisdiction only where an appellant "transacts business." Saying that a company "transacts business" means that the company is conducting its business—i.e., what it is in business to do—not that it is engaged in incidental commercial acts. That is the plain meaning of the phrase, in both the most relevant dictionaries or the settled meaning in cases when the General Assembly put the phrase in the Revised Code. Without resort to any of the techniques for resolving ambiguity, the phrase refers to an entity's reason for being, not merely any commercial activity. Apple transacts business when it sells phones, but not when it attends trade shows. A law firm transacts business when it interviews clients in its office, but not when it orders legal pads. And a transportation company transacts business when it ferries passengers, but not when it repairs buses or attends government hearings. That meaning is plain from the text and all the usual aids to understanding the meaning of text.

1. The phrase "transacts business" has a limited reach, encompassing only substantial activity related to an entity's ordinary business.

Like all cases of statutory meaning, the "starting point is the statute's text." *Spencer v. Freight Handlers, Inc.*, 131 Ohio St. 3d 316, 2012-Ohio-880 ¶ 16. The text is considered by looking at "words and phrases in context," *Fraley v. Estate of Oeding*, 138 Ohio St. 3d 250, 2014-Ohio-452 ¶ 16, and viewing the statute "as a whole." *Dodd v. Croskey*, 143 Ohio St. 3d 293, 2015-Ohio-2362 ¶ 30. The relevant meaning of words or phrases in a statute is the meaning "'at the time'" they were enacted. *Hauser v. Dayton Police Dep't*, 140 Ohio St. 3d 268, 2014-Ohio-3636 ¶ 9 (pl. op.) (citation omitted); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, 2165 n.2 (2015).

The statute here dates from 1983. At that time, Black's Law Dictionary defined "transacting business" more narrowly than all business. *See Olentangy Local Sch. Bd. of Educ.*

v. Delaware Cnty. Bd. of Revision, 141 Ohio St. 3d 243, 2014-Ohio-4723 ¶ 30 (citing Black's); *Baker Botts*, 135 S.Ct. at 2165 (same). Black's defined the term by reference to statutes then using that term, including statues requiring an entity to be "doing business of any substantial character." Black's Law Dictionary 1341 (5th ed. 1979). The dictionary alone proves that the phrase cannot encompass "all commercial activity" undertaken by an entity because the business has to be of a "substantial character."

In addition, the narrowing quality of "transacts business" is apparent from the absence of the modifier "any." A statute aimed at all business activity might read "transacts *any* business." Read "naturally, the word 'any' has an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). It is an "expansive phrase" that rebuts specificity. *Davis v. Davis*, 115 Ohio St. 3d 180, 2007-Ohio-5049 ¶ 22.

Accordingly, many statutes would have vastly different meaning without the word "any." A ban on bribes affecting the business of a government agency is narrower than a ban on those affecting "any business." *See Salinas v. United States*, 522 U.S. 52, 56-57 (1997). A statute authorizing appeals of any final agency action is more expansive than one permitting appeals of final agency action. *See Harrison*, 446 U.S. at 589. And a statute prohibiting "the conduct of business" on the capitol square does not have the same reach as one that bans the "conduct of any business."

Absence of the word "any" here is significant. *See State ex rel. Extendicare Health Servs., Inc. v. Ryan*, 126 Ohio St. 3d 12, 2010-Ohio-2452 ¶¶ 26-29 (accepting argument that statute would mean otherwise if it included "any"); *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 75 (1990) ("It is clear that [the long-arm provisions] are very broadly worded" because they use the language "transacting *any* business in Ohio.") (some emphasis deleted). If the General Assembly intended that "transact business" mean transacting

any business, "it would not have been difficult to find language which would express that purpose." *Lake Shore Elec. R. Co. v. Public Utilities Comm'n*, 115 Ohio St. 311, 319 (1926). In fact, the phrase "transacting any business" was already in the Revised Code in 1983. *See* 136 Ohio Laws II 3803, 3808 (1976).

The omission of the modifier "any" and the legal dictionary entry pointing to "substantial" activity show that the phrase "transacts business" means a certain subset of all business activity. In other words, the business the entity is formed to conduct, not all of its commercial acts.

2. The examples in the dictionary entry show that "transacts business" is a term of art with an established, narrow meaning.

By pointing to examples of statutes using the same phrase before 1983, Black's shows that the phrase was a term of art at that time. The General Assembly has told courts that they "shall" construe words with an "acquired" meaning according to that meaning. R.C. 1.42. Courts generally "adhere to the familiar rule that where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense unless the context requires the contrary." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939). Or as one Justice colorfully put it, "if a word is obviously transplanted from another legal source[,] . . . it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

Many times, moreover, statutory words acquire meaning from preexisting judicial constructions of those words elsewhere. The Court has "reasoned that the General Assembly" is generally "aware of" the prior definitions of terms it uses in statutes. *Thompson v. Cmty. Mental Health Ctrs. of Warren Cnty., Inc.*, 71 Ohio St. 3d 194, 195 (1994); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is

presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts."); *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶ 19. Judicial decisions are a deep well of meaning.

Several examples illustrate the point. The word "cost" has many and expansive meanings when considered without context. But in a statute about expenses for litigating, the word has a specific, narrower meaning. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006). ("The use of this term of art, rather than a term such as 'expenses,' strongly suggests that [the statute] was not meant to be an open-ended provision."). Often, these acquired meanings turn on slight variations in language. The phrase "affecting commerce," for example, "indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause," but the "general words 'in commerce' and the specific phrase 'engaged in commerce' are understood to have a more limited reach." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-16 (2001) (term did not reach all those in the workforce); *see United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 279–280 (1975) (phrase "engaged in commerce" is "a term of art, indicating a limited assertion of federal jurisdiction"). Finally, the federal Foreign Sovereign Immunity Act "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). But that Act "was not written on a clean slate." *Id*. The Act, the Supreme Court has held, "largely codifies" the meaning of commercial "generally attached to that term" in the field of foreign relations at the time of the Act. *Id*. at 613.

This Court recently used similar reasoning when construing the definition of "employer," which had previously been judicially interpreted "in the context of the National Labor Relations Act" 12 years before the Ohio General Assembly put it in the Revised Code. *Hauser*, 2014-Ohio-3636 ¶ 10 (pl. op.). At that time, the definition "had already acquired a particular meaning

in the context of employment-practices legislation." *Id*. The Court could not "ignore" that acquired meaning, whether it "agree[d] or disagree[d]" with it. *Id*. ¶ 11 (pl. op.).

Here, four different sources color the phrase "transacts business"; each reveals its narrow scope when the General Assembly replanted it in the Jurisdictional Statute.

a. By 1983, the National Labor Relations Act had been interpreted to equate "transacts business" with, at minimum, physical presence.

Most obviously, the phrase "transacts business" was transplanted from the federal National Labor Relations Act. Indeed, procedures related to unfair-labor-practice disputes under R.C. 4117.12 and 4117.13 are "substantively identical" to procedures that govern such disputes in the federal context under the federal act. *Ohio Ass'n of Public Sch. Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City Sch. Dist. Bd. Of Educ.*, 59 Ohio St. 3d 159, 161 (1991); *see also* Amicus Br. of Ohio Public Emp'r Labor Relations Ass'n 9 ("Ass'n Br.") (Ohio language "taken directly from the federal statute").

In 1983, five federal circuits had concluded that whether a party "transacted business" in a certain place turned on whether the company had a significant (often permanent) presence in the forum. One opinion observed that a case about a Connecticut facility could be heard in a Texas court because the Connecticut company maintained a warehouse in Houston. *Olin Indus., Winchester Repeating Arms Co. Division v. N.L.R.B.*, 191 F.2d 613, 614, n.1 (5th Cir. 1951). Many others involved labor practices in one forum, but a "place of commerce," *Filler Products, Inc. v. N.L.R.B.*, 376 F.2d 369, 372 (4th Cir. 1967), "numerous business facilities," *F.W. Woolworth Co. v. N.L.R.B.*, 655 F.2d 151, 153 (8th Cir. 1981), an "office" that headquartered a "sales agent," *Farah Mfg. Co. v. N.L.R.B.*, 481 F.2d 1143, 1144 (8th Cir. 1973), or a corporate headquarters, *New Alaska Dev. Corp. v. N.L.R.B.*, 441 F.2d 491, 491-92 & n.3 (7th Cir. 1971), in another forum. Under this logic, one court held that a company did not transact business in the

forum even though it had "bought from and sold to various individuals and businesses" in the forum and had an exclusive-dealing arrangement covering that territory. *S.L. Indus., Inc. v. N.L.R.B.*, 673 F.2d 1, 2-3 (1st Cir. 1982). According to that court, the absence of the company's physical presence in the territory was "determinative." *Id.* at 3. To find otherwise, the court reasoned, would invite forum shopping. *Id*. All of this law was on the books when the General Assembly copied the phrase into the Revised Code.

Later litigation about the federal act confirms the meaning of the "transacts business" phrase in the Ohio statute. The same year that Ohio enacted its statute, the Fourth Circuit held that a company did not transact business in the forum because it "had no permanent physical facility nor any employees situated" there. *Davlan Eng'g, Inc. v. N.L.R.B.*, 718 F.2d 102, 103 (4th Cir. 1983). The Court reasoned that giving the term a broader meaning would "effectively eviscerate[]" it as imposing any limit on choice of forum, and that "the mere purchase and sale of goods, with its attendant telephone and personal contact" was not enough. *Id.* Later cases confirm the federal court's focus on significant, permanent activity in the forum. *See Rikal, Inc. v. N.L.R.B.*, 721 F.2d 402, 404 (1st Cir. 1983) (corporate offices); *York Products, Inc. v. N.L.R.B.*, 881 F.2d 542, 543 (8th Cir. 1989) (corporate headquarters); *Hertz Corp. v. N.L.R.B.*, 105 F.3d 868, 869 (3d Cir. 1997) (national car-rental company transacted business in the forum); *Yaohan U.S.A. Corp. v. N.L.R.B.*, Nos. 95-70818, 95-70913, 1997 WL 453688, at *1 n. 1 (9th Cir. June 30, 1997) ("specialty retail food stores," *see* Br. for the N.L.R.B., 1996 WL 33490617, at *3 (April 22, 1996)); *H.P. Hood, Inc. v. N.L.R.B.*, 30 Fed. App'x 148, 154 n. 6 (4th Cir. 2002) ("production and distribution facility"); *Brentwood at Hobart v. N.L.R.B.*, 675 F.3d 999, 1005 (6th Cir. 2012) ("assisted-living facilities").

It is not significant that the federal statute deals with venue and the Ohio statute with jurisdiction. A phrase does not take on different meaning when put to slightly varying tasks.

Cf., e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context," the same rule of construction applies in each context.). In sum, when the General Assembly enacted the labor statute in 1983, it used the exact term from a nearly identical statute that the federal courts had uniformly interpreted. It should bear the same meaning.

b. By 1983, Ohio's business-licensing statute used the term "transacts business" in the narrow sense of less than all business activity.

Ohio's business-licensing statute also narrowly used the phrase "transacts business" in 1983 to cover *only* places where an entity conducts *substantial* business activity. Ohio has long required that an out-of-state company have a license if it "transact[s] business" in the State. R.C. 1703.03; *see* 114 Ohio Laws 563, 564 (1931); *see also* 1705.54 (similar requirement for LLCs). That statute has never been read to reach all Ohio commercial activity; rather, it covered only a corporation's regular business, not its incidental business transactions.

Before 1983, the phrase had already been given this narrow reach. One case, for example, held that a grocer was not "doing business in the state of Ohio" when it sold products wholesale "to some fifty stores in Ohio" and owned "some stock" in an Ohio corporation. *Golden Dawn Foods, Inc. v. Cekuta*, 1 Ohio App. 2d 464, 466 (7th Dist. 1964). The Attorney General also had concluded by 1932 that "an incidental transaction does not determine whether or not a corporation is doing business" under that statute. 1932 Ohio Atty. Gen. Ops. No. 4423 at 777. Thus, soliciting orders in a State or maintaining an office there did not suffice. *Id.*; 12 Ruling Case Law § 49 (1916) ("It is frequently stated that the words 'doing business' and 'transacting business,' as used in statutes imposing conditions on foreign corporations, refer only to the transaction of the ordinary or customary business in which a corporation is engaged and do not include acts not constituting any part of its ordinary business.") (some internal punctuation

omitted)); *cf.* 1927 Ohio Atty. Gen. Ops. No. 754 at 1306 (corporation is not doing or "carrying on" business when it performs transactions "collateral" to or "incidental" to reason it was "created") (interpreting tax statute)).

After 1983, that interpretation has not changed. The statute does not reach "all" business activity. *See, e.g.*, *Auto Driveaway Co. v. Auto Logistics of Columbus*, 188 F.R.D. 262, 265 (S.D. Ohio 1999) (statute asks whether "operations in Ohio are substantial, ordinary and customary enough to qualify as conducting business in the state, or whether they are casual, sporadic, or isolated acts"); *Premier Capital, L.L.C. v. Baker*, 2012-Ohio-2834 ¶ 29 (11th Dist.) (activity to collect a debt "not 'transacting business'"); *Bosl v. First Fin. Invest. Fund I*, 2011-Ohio-1938 ¶ 22 (8th Dist.) (same); *cf. State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trs.*, 108 Ohio St. 3d 288, 2006-Ohio-903 ¶¶ 20-22 (entity exempt from statutory registration requirement for foreign non-profits before they conduct "'continual course of transactions'" in Ohio because it had "no office or employees in Ohio, and any financial transactions in the state [were] rare and sporadic."). Ohio certainly does not require a license (or registration) for every company, LLC, or non-profit that conducts any business in Ohio. The phrase is similarly limited when deciding where a public employer transacts business.

c. By 1983, state statutes limiting court jurisdiction over corporations transacting or doing business in a county or the State had an established narrow meaning.

State statutes about a company's amenability to suit in a State or county provide another source of meaning for the phrase "transacts business." Like the Ohio licensing statute, these statutes date back well before the General Assembly used the phrase in 1983. These statutes used either the phrase "transacts business" or "doing business," but the meaning was the same: a company had to perform its regular business in the forum to be open to suit there. *See Griffin v. Implement Dealers' Mut. Fire Ins. Co.*, 241 N.W. 75, 76 (N.D. 1932) ("'Transaction of business'

and ‘doing business’ are to be considered as synonymous terms.”) (collecting cases)); *Frye v. Batavia (N. Y.) Veterans Admin. Emp. Fed. Credit Union No. 189*, 8 F.R.D. 334, 335 (D.D.C 1943) (“‘Doing business’ is equivalent to the words ‘transacting business’”) (collecting cases) (citation and some quotation marks omitted)).

Under these statutes, courts recognized a wide margin between doing any business and transacting a company’s ordinary business. A Washington Supreme Court decision reviewing a timber company’s activities in a particular county held that it did not transact business there because it “did not have an office for the transaction of business in the county.” *State v. Superior Court of King Cnty.*, 193 P. 229, 230-31 (Wash. 1920). Thus, “the mere shipment of lumber” (and inspection there) “would not be the transaction of business in that county.” *Id.* And “visits made [to the County] by the [company’s] officers . . . for the purpose of checking up deliveries” did not mean transacting business there because those visits “were not part of the defendant’s ordinary business.” *Id.*; *see also, e.g.*, *Griffin*, 241 N.W. at 77 (The terms transacting or doing business “impl[y] continuity of business dealings, and such arrangements whereby this continuous carrying on of business may be fostered.”); *Mergenthaler Linotype Co. v. Spokesman Pub. Co.*, 270 P. 519, 521 (Or. 1928) (“Where the local business transacted is incidental to the principal transaction, the corporation is not ‘doing business’” there.).

An Illinois Supreme Court case captured the overall sense of the phrases well: “It is well established by the authorities of this country that a foreign corporation is not doing, carrying on, transacting, or engaging in business in a state . . . by merely appointing an agent for the transaction of . . . future business[, . . . or] by the doing of acts therein which are merely preliminary to the transaction of the business in which the corporation is to engage.” *Auto. Material Co. v. Am. Std. Metal Products Corp.*, 158 N.E. 698, 703 (Ill. 1927). Even though these

activities are "undoubtedly 'transacting business' within the unlimited meaning of that term," that is "not the sense in which the term is used in the statutes . . . ." *Id*.

Cases addressing transit companies under these statutes are especially instructive. A Pennsylvania statute permitted service of process where a company "'shall have an agency or transact any business.'" *Shambe v. Delaware & H. R. Co.*, 135 A. 755, 757 (Pa. 1927) (quoting statute). Interpreting that statute, the Pennsylvania Supreme Court reasoned that a rail company, whose agent solicited orders and performed "office work connected therewith," and "occasionally acted as a messenger for shippers who request re-routing merchandise already shipped," did not transact business in the State. *Id*. at 758. As the Court explained, it had been "careful to distinguish between acts which are in aid of a main purpose, and those necessary to its existence. The former are collateral or incidental, while the latter are direct." *Id.*

Likewise, the North Carolina Supreme Court considered a "traveling freight and passenger agent [who maintained an office in North Carolina] of the corporate defendant[, and] whose duties were 'to cultivate good will among manufacturers' representatives . . . with a view of inducing the routing or shipment of freight from such manufacturers . . . , to solicit business for [the] railroad, to adjust grievances and generally to conduct the business of [the] railroad in this State." *Lambert v. Schell*, 69 S.E.2d 11, 12 (N.C. 1952) (internal quotations sic). These actions were "not the doing or transaction of business," at least where the railroad "ha[d] no line in the State and d[id] no business there other than soliciting business for interstate commerce, even though it maintain[ed] an office and employ[ed] an agent within the State," because those contacts were "merely incidental to the main business of the corporation." *Id.* at 14.

To be sure, the terms "doing business" and "transacts business" sometimes have different meanings in statutes—the first invoking general jurisdiction and the second invoking specific jurisdiction. *See* Charles A. Wright, et al., 4A *Federal Practice and Procedure* § 1069.3 (4th ed.

2016). But those meanings are generally found in statutes where "transacts business" confers only specific jurisdiction. *See, e.g.*, R.C. 2307.382(A)(1); Wright § 1069.3 (discussing phrase in state long-arm statutes conferring specific jurisdiction). But here, the phrase is plainly used in a *general-jurisdiction* sense both because it is paired with the word "resides" and because it is an alternative to the phrase that invokes specific jurisdiction: "where the unfair labor practice" occurred. R.C. 4117.13(D); *see infra* at § D.1. Dayton, too, obviously reads this phrase as discussing general jurisdiction, because the contacts they have with Franklin County are unrelated to the underlying dispute here (the failure to process labor grievances).

d. By 1983, the federal venue statute used the phrase "doing business" narrowly.

Another possible source of the phrase is the federal venue statute. *See, e.g.*, *Pure Oil Co. v. Suarez*, 384 U.S. 202, 203-04 (1966). The 1983 Jurisdictional Statute tracks the 1948 federal act in that it aims to define when a company is "resident" in a certain place. These statutes can be read as recognizing that, while natural persons reside somewhere, corporations do not fit that word so neatly. As used in the federal venue statute, the "doing business" phrase "defin[ed]" residence. *Pure Oil*, 384 U.S. at 204. And that, the Supreme Court said, meant conducting "a substantial amount of business." *Id*. A substantial amount means that the contacts are extensive enough to permit the forum to require licensure or registration there. *See, e.g.*, *Johnson Creative Arts, Inc. v. Wool Masters, Inc*., 743 F.2d 947, 954-55 (1st Cir. 1984) (venue provision equates doing business with "engaging in transactions there to such an extent and of such a nature that the state in which the district is located could require the foreign corporation" to be licensed there) (emphasis deleted)); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 760 F.2d 312, 316 n.7 (D.C. Cir. 1985) (Ginsburg, J.) (same). Applying that meaning, federal circuit courts have concluded that a company was not doing business in a forum even though it sold

1.5% of its products there, *Noxell*, 760 F. 2d at 314, or it "regularly shipped goods" to the forum and its "president had recently attended a trade show" there, *Johnson*, 743 F.2d at 955.

Congress amended the venue statute in 1988, making it even more apparent that the location of business activity is like the inquiry for personal jurisdiction. *See* Pub. L. No. 100-702, 102 Stat. 4669; *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1392 (8th Cir. 1991) (amendment made venue provision coextensive with personal jurisdiction). But even before that amendment, the model of linking residence to substantial business activity was there for the General Assembly.

3. The structure of the SERB statute confirms the narrow reach of the phrase "transacts business."

Two structural clues in the statute confirm that "transacts business" is the equivalent of "conducts its business there." *See, e.g., Risner v. Ohio Dep't of Natural Res.*, 144 Ohio St. 3d 278, 2015-Ohio-3731 ¶¶ 14-19.

a. The full jurisdictional provision addresses specific and general jurisdiction, and "transacts business" relates to general jurisdiction, which generally requires substantial contacts with the forum.

The Jurisdictional Statute invokes both specific and general jurisdiction by authorizing suit either in "any county where the unfair labor practice in question was alleged to have been engaged in" or in any county "where the [aggrieved] person resides or transacts business." R.C. 4117.13(D). The two clauses address different kinds of jurisdiction. The first confers jurisdiction in the place where the actions underlying the suit took place. That is specific jurisdiction. The second authorizes suit in places with no connection to the events, but a place where the aggrieved party resides or transacts business. That is general jurisdiction. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011) (distinguishing

two types of jurisdiction). Statutes routinely encompass both types of jurisdiction. *See, e.g.*, Fla. Stat. 48.193(1), (2); N.Y. C.P.L.R. 301, 302.

The meaning of general jurisdiction—a concept that stretches back long before 1983—is well understood. As the U.S. Supreme Court recently explained, it is appropriate "only when the corporation's affiliations with the [forum] in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum.'" *Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014) (citation omitted; bracket sic). Being "at home" means incorporation, principle place of business, or something similar. *See id*. at 760-62.

Sales, marketing, or training are not enough. *See Daimler*, 134 S.Ct. 746, 752, 760 (2.4% of worldwide sales in forum not enough); *Goodyear*, 131 S.Ct. at 2855 (sales and marketing in forum not enough); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 418 (1984) ("sending" chief executive to forum, making "regular" purchases of goods and services there, and sending "personnel [to forum] for training" not enough).

The touchstone is enough contact to be regarded as "at home" because the "theoretical foundation for general jurisdiction" is that contacts with the forum make the company "a quasi-domiciliary owing temporary allegiance to the [forum]." Note, *Gen. Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 Rev. Litig. 741, 814 (1995). Through that lens, contact with the forum is measuring whether the company is "enjoying the benefits of a [forum] to an extent comparable to corporations chartered there," "regarded by members of the community as local," and "capable of influencing local political processes." *Id*.; *see also* Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807, 888 (2004) ("the nature of the defendant's forum operations should indicate activities at least analogous to the types of in-state activities that define a commercial domiciliary"); Zoe Niesel, *Daimler & the Jurisdictional Triskelion*, 82 Tenn. L. Rev. 833, 874-75 (2015) (establishing an

office in a forum "subject[s]" the company to "additional taxes and state laws that it would not be if it just entered into transactions in the forum"). An entity transacts business where it substantially conducts its business, not where it engages in some collateral commercial transactions. When applied to entities like Ohio's regional transit authorities, that includes not just the headquarters, but also places where, for example, citizens can ride Dayton's buses, and where citizens are taxed to support it. *See* Br. of Ohio Public Transit Ass'n 9 ("Transp. Br.") (counties surrounding Franklin support COTA through "taxpayer funding").

When the General Assembly used the phrase "transacts business" in a statute whose other words already cover specific jurisdiction, it transplanted these general-jurisdiction concepts to the new statute.

b. The provisions for enforcing Board orders and for emergency relief also show that the "transacts business" phrase is narrow.

The "transacts business" phrase also appears a few subsections away from the provisions involved here, and that placement is yet more evidence that the phrase has a tightly fenced meaning. In R.C. 4117.13(A), the same "resides or transacts business language" authorizes a person subjected to an unfair labor practice to petition a common pleas court to enforce a Board order, including through preliminary injunction. *See id*; R.C. 4117.12(C) (same language for pre-hearing equitable relief); *S. Cmty., Inc. v. State Emp't Relations Bd.*, 38 Ohio St.3d 224, 226-27 (1988) (noting availability of equitable relief). A broad meaning of "transacts business," one that opens every Ohio county as a forum for emergency relief, makes no sense in these provisions dealing with speedy relief. That is true for two reasons.

For one thing, *enforcing* an injunction against an unfair labor practice is easier if it arises in a place where the person enjoined is a resident or conducts business. Available remedies for disobedience, such as attachment and "close custody" are more easily managed in a defendant's

home county. *See* R.C. 2727.12 (remedies to enforce injunctions); *cf. State ex rel. Stahl v. Webster*, 1933 WL 1672, at *1 (Williams Cnty. C.P. June 19, 1933) (rejecting effort to secure injunction outside "county of . . . residence") (dissolving injunction). In this part of the statute, "transacts business" refers to someone charged with committing an unfair labor practice. The remedies a court might impose to prevent further violations make the most sense if they are in the hands of a local court, not one on the other side of the State.

For another thing, *deciding* whether temporary relief is appropriate to remedy an unfair labor practice is easier for a local court than a distant one. A court located where the defendant resides or transacts business can gather the parties for an immediate hearing. It can also observe whether temporary relief is necessary. *See, e.g.*, *In re Contempt of Court of White*, 60 Ohio App. 2d 62, 63 (5th Dist. 1978) (common pleas judge had "personally seen the school hour picketing" and convened a hearing within minutes). When the General Assembly linked appeal rights over Board orders to the place of residence or transacting business it spoke of the vicinity of the relevant parties, not the far corners of the state where one of those players conducted some incidental business.

4. If there is any ambiguity, the tools for resolving it point in the same direction as the text and structure.

Even if there is any remaining ambiguity, two factors pull in the same direction as the text and structure. *First*, courts should strive to adopt "[s]imple jurisdictional rules" that promote the "predictability" that is "valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). A rule that avoids *quantifying* transactions "provides clarity for both courts and corporations." Niesel, 82 Tenn. L. Rev. at 881. For example, the "presence or absence of a physical office can be determined and presented to the court fairly easily and would not require significant fact-finding." *Id*. at 875. Looking to office

space or local employees ensures that "companies have some reasonable assurance about where they could be subject to [suit]." *Id*. Adopting Dayton's position, by contrast, would force public employers and employees to quibble over contract volume and email traffic in far-flung counties. Jurisdictional rules should provide clarity, not fertile ground for collateral litigation about where the parties should be litigating.

This administrative concern is heightened for labor statutes, whose plain purpose is speedy relief. The statute authorizes temporary restraining orders, R.C. 4117.12, limits appellate review, R.C. 4117.13(C), and directs courts to hear cases "expeditiously" and often ahead of "all other civil matters," R.C. 4117.13(F). Those purposes are ill-served by a broad meaning of "transacts business" that would often involve multiple affidavits or require courts to decide whether "1.7" average transactions per week is or is not transacting business. Apt. Br. 4. Collateral litigation about where there should be litigation serves no one's interests.

Second, jurisdictional rules should rein in opportunities for forum shopping. If several Ohio counties are *possible* places to appeal a Board order, some litigant will try to argue that they can appeal there. A broad meaning for "transacts business" invites these arguments and lets litigants move cases to the courts they prefer. *See* James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of Gen. Personal Jurisdiction*, 16 Lewis & Clark L. Rev. 969, 985 (2012) ("It should come as no surprise that" low barriers to jurisdiction "increases opportunities for forum shopping"). And removing the natural limits associated with the term of art "transacts business" turns the Jurisdictional Statute into an equal-opportunity invitation for forum shopping. The appeal statute, after all, is just as likely to *subject* employers to suit in some far-off county if a union or employee can argue that *it* transacts business in some other part of the state by buying supplies there, attending conferences there, or contracting with parties there. But that opportunity is equally inappropriate for employers and employees.

The goal of the Jurisdictional Statute, like the goal of jurisdictional statutes generally, is to let parties easily distinguish, for example, a place where a corporation is at "home" from a place where a corporation is "merely doing business—i.e., entering into transactions, maintaining bank accounts, or negotiating contracts." Niesel, 82 Tenn. L. Rev. at 880. The Tenth District's judgment serves that purpose; reversing that judgment does not.

B. Dayton does not transact its business in Franklin County.

Dayton "bears the burden" to prove jurisdiction in Franklin County. *L.J. Smith, Inc. v. Harrison Cnty. Bd. of Revision*, 140 Ohio St. 3d 114, 2014-Ohio-2872 ¶ 18. Yet, through 10 affidavits, it has shown without doubt that it does not "transact business" in Franklin County within the meaning of the Jurisdictional Statute.

The affidavit of Dayton's Executive Director makes this point well. It highlights a $13,000 dues payment to a Columbus entity while also touting more than 9,000,000 passenger rides each year. Supp. 1, 2. With each ride costing more than a dollar (and adding in the public subsidy), these $13,000 are a speck in Dayton's total budget. Even totaling the "nearly $600,000" Dayton claims in Franklin County spending over 30 months, Apt. Br. 3, does not cut it. Courts have rejected much higher dollar values as bases for claiming that a company is at home in a forum. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 628 (2d Cir. 2016) (not enough that the company "derived about $160 million in revenue" in the State and paid taxes on that revenue).

No better are the various other contacts reflected in the affidavits. Dayton points to trade-association meetings in Franklin County, *e.g.*, Supp. 34-35, 426, 428, but courts have likewise rejected these as bases for finding an entity present in a forum. *Bowles v. Ranger Land Systems, Inc.*, 527 Fed. App'x 319, 322 (5th Cir. 2013) ("participation of . . . employees in training" not enough); *Helicopteros*, 466 U.S. at 416 ("sending" chief executive to forum and "sending

personnel [to forum] for training" not enough). So too, courts routinely find daily email and weekly telephone calls to a forum as insufficient. *Compare* Supp. 2, *with Helicopteros*, 466 U.S. at 418 ("regular" purchases of goods and services insufficient); *Davlan*, 718 F.2d at 103 ("mere purchase and sale of goods, with its attendant telephone and personal contacts" not enough); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) ("engaging in commerce with residents of the forum" not enough). No more useful is the mention of four long-term contracts with Franklin County entities. The only surprise there is that the fourth-largest transit system in the State does not have *more* such contracts. And even those contracts are far from significant. One is for legal services, but only for certain kinds of cases. Supp. 27-28. Another is for a maximum of $100,000 of uniform rental and cleaning. Supp. 22.

These affidavits show the problem with a legal rule about jurisdiction that means counting individual telephone calls, Supp. 37-58, or single business-trip costs in the hundreds of dollars, *id.* 384. (And not even all those telephone calls seem to be to Franklin County anyway. Plain City is not in Franklin County. Supp. 38.) No good comes from a rule about jurisdiction that asks either party to comb its records (or its opponent's) for these minutiae. This is exactly the kind of penny counting that the Court should reject as the fulcrum for deciding jurisdiction.

Unless "transacts business" is to be rewritten as "transacts *any* business," Dayton does not transact business in Franklin County. It does, however, transact business in several other counties. The Greater Dayton Regional Transit Dayton is the public transit agency that citizens count on in Montgomery County and western Greene County. *See* http://www.i-riderta.org/about-rta/about (last visited April 29, 2016). And, as one helpful amicus points out, most, "if not all" regional transit companies "provide transit services in numerous counties," not just the county where they are headquartered. Transp. Br. 9. Those are the places that the statute means. Not any county where these entities buy goods or services.

C. Dayton musters no convincing counterargument.

Dayton's brief reveals the weakness of its position. At every turn it is mistaken about plain meaning, context, structure, and case law.

1. Dayton's plain-meaning arguments are mistaken.

Dayton's brief starts with common ground—statutory interpretation starts with dictionaries, context, and structure, and none of those tools mean the Court is faced with ambiguity. Apt. Br. 13-18. Dayton simply gets all of these clues to meaning wrong.

a. Dayton overemphasizes dictionaries, but cites the wrong definitions in any event.

Starting with dictionaries (Apt. Br. 13-15), Dayton cites *separate* definitions of "transacts" and "business," but omits the Black's Law definition of the *entire* phrase "transacting business." Dayton is right that dictionaries "at the time" are valuable clues to statutory meaning, Apt. Br. 13, but it is wrong to omit the definition of the very phrase at issue here in the version of Black's used when the General Assembly voted on the language. As shown above, the definition of the full phrase is at odds with Dayton's argument. Perhaps that is why, buried in a footnote, Dayton admits that the definitions it cites are not the "only" possibly "appropriate" ones. Apt. Br. 15 n.4. The appropriate definition is the definition of the *full phrase*, not separate definitions of its *component parts* plucked out of context to shape the rule that Dayton needs.

Even focusing on the disaggregated phrase, as Dayton does, is not helpful to its position. For example, Black's defines "business" not only as "commercial activity engaged in for livelihood," *id*. 179, but also that "which habitually busies or occupies or engages the . . . effort of persons as a principal serious concern," *id*. In other words, the main business, not the incidental one. This Court has reversed the Tenth District for plucking only the broadest meaning of a word from a dictionary definition. *Ashland Chem. Co. v. Jones*, 92 Ohio St. 3d 234

(2001). It hardly helps Dayton's argument to claim that the Tenth District erred by *following* this Court's teaching in *Ashland*.

Of course, dictionaries are only a starting point. When a phrase is a legal term of art, a dictionary may often *mislead* a court into the wrong conclusion. That is why, when confronting legal terms of art, the U.S. Supreme Court frequently rejects litigants' calls to **"**rely on the ordinary meaning . . . as it is defined in standard general-purpose dictionaries." *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1449 (2012) (citations and internal quotation marks omitted). In those situations, "it is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" *Id*. (citations and internal quotation marks omitted). For example, "the word 'prevailing' can have other meanings in other contexts: 'prevailing winds' are the winds that predominate, and the 'prevailing party' in an election is the party that wins the election. But when 'prevailing party' is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally— . . . *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability. . . . Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring). This Court has done the same thing by, for example, rejecting the "dictionary meaning" of the word "assist" because context indicated that "the General Assembly intended [a] technical meaning to apply." *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201 ¶ 26. Dictionaries are not the whole answer, but if they were, Dayton has steered around the most useful definition—the one in the *legal* dictionary.

Next, Dayton places confusing emphasis on the word "any," insisting (rightly) that it is a word of breadth, but then concluding (wrongly) that "transacts business" is a sweeping term.

Apt. Br. 16-17. If "any" signals breadth, its *absence* from the phrase "transacts business" signals restraint. The absence is doubly notable because the General Assembly had a model for that exact language in the long-arm statute. *See* 136 Ohio Laws II 3803, 3808 (1976). It does Dayton no good to stress that the jurisdictional statute is not limited "in any way," Apt. Br. 17, when the most obvious way to limit it was to omit the word any. Dayton's only discussion of the absence of the word "any" is hidden in a footnote discussion of another point. Apt. Br. 19 n.6. Even there, the thought is incomplete. The necessary conclusion is missing from Dayton's argument that "the term 'any' signals" an expansive construction: The term "any" is *absent* here. So is the breadth Dayton needs to win reversal.

b. Dayton's structural points all collapse on themselves.

Dayton next turns to more common ground—that context and structure inform meaning—(Apt. Br. 16-18) but again gets it wrong. First, Dayton emphasizes the "or" connector in the statute, claiming that it requires separate meaning for "residence" and "transacts business." But the "or" here is best read distributively because "person" in the phrase "where the person resides or transacts business," R.C. 4117.13(D), means "individual, corporation," "employee organization[], public employee[], [or] public employer[]," R.C. 4117.01(A); 1.59(C). The key phrase here thus reads something like "where the individual or corporation or public employer resides or transacts business." That phrase should be read to match individuals with resides and corporations, etc. with transacts business, not to match both antecedents with both consequents. "Where a sentence contains several antecedents and several consequents, courts read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A Sutherland Statutory Construction § 47:26 (7th ed. 2015); *Mut. Fed. Sav. & Loan Ass'n of Milwaukee v. Sav. & Loan Advisory Comm.*, 157 N.W.2d 609, 612 (Wis. 1968) (applying rule). The rule of distribution is especially appropriate here because doing or

transacting business is often the way a corporation's residence is defined. *See Pure Oil*, 384 U.S. at 203-04. When the "residence" and "transacts business" are used disjunctively, they are most naturally read to match up with natural and corporate persons *respectively*.

But even if both natural persons and corporate ones can both reside and transact business, Dayton's argument fails to recognize any difference between the place of transacting business and the place of transacting *any* business. It instead says that "transacts business" must mean something expansive because the only alternative is to treat residence and "transacts business" coextensively. That is wrong because a corporation may reside in one place, yet transact most of its business elsewhere. A corporate entity has long been treated as "residing" where it is incorporated or chartered. *See, e.g.*, *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972) ("the residence of a corporation . . . is its place of incorporation"). But that place need not be the place where it transacts business. The federal diversity-of-citizenship statute recognizes these as distinct places, *see* 28 U.S.C. 1332(c)(1), and many entities are incorporated in Delaware, yet headquartered elsewhere, *see, e.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 65 (1996). So too with the language in the Jurisdictional Statute: A union might be chartered in one place, but conduct its business in another. The difference between residence and "transacts business" also covers situations like this one where an entity is headquartered in one place, but does *its* business (transporting passengers) in multiple places.

Finally, Dayton seizes on another part of the statute that explicitly uses the term "principal office," but once again draws the wrong lesson. Apt. Br. 17 (citing R.C. 4117.02(O)). That part of the labor statutes permits the Board (not the litigants) to certify questions of "public or great general interest" about the statute to the court of appeals embracing an employer's principal office. R.C. 4117.02(O). That section may suggest that residence and the place of "transacting business" can be distinct places, but it certainly does not mean that the place of

transacting business must mean *any* place where *any* business is transacted. This narrow statute (to the Board's knowledge, it has never been invoked) shows nothing more than the General Assembly using different jurisdictional limits for different appeals. The one does not teach anything about the other.

One amicus supporting Dayton makes an equally unsatisfying structural point. That amicus notes the "resident or principal place of business" language in the unemployment-compensation statute. Ass'n Br. 4. But that language, while different from the language in the Jurisdictional Statute here, reinforces the Board's point—"transacts business" is not the same as a principal place of business, but this language does distinguish *any* business from the entity's main business. The amicus then cites the statute for appeals of unemployment claims arising from labor disputes, which directs filing to the county where the "operations of an employer" are located. *Id*. Again, this language supports the Board's point that county-specific jurisdiction for administrative appeals are often restrictive. The language in this statute directs appeals to the county where the "largest number" of claimants worked. R.C. 4141.283(E)(2). That may be more precise than the phrase "transacts business," but it gets at the same idea—jurisdiction is not proper wherever an entity does business.

c. Dayton's foray into the case law loses its way.

Turning from text and structure to precedent, Dayton finds false comfort in *Kentucky Oaks Mall* and *First National Bank of Wilmington*. Apt. Br. 18-21. *Kentucky Oaks Mall* interpreted the very different phrase "transacting *any* business." 53 Ohio St. 3d at 75 (some emphasis deleted). The Court itself emphasized the word "any" when stressing the statute's breadth. *Id*. The case simply reiterates one of the Board's main points—the absence of "any" in the Jurisdictional Statute means that it has a narrower reach.

Dayton finds no more refuge in *First National Bank of Wilmington v. Kosydar*, 45 Ohio St. 2d 101 (1976). That case is irrelevant for a doctrinal reason and a linguistic one. *Doctrinally*, the case turned on the "established practice" of this Court to construe tax statutes strictly in "favor of" the citizen. *Id*. at 104. The phrase was read in that light, not as a matter of setting jurisdiction. Unlike tax statutes, this Court has long read jurisdictional limits on administrative appeals *against* conferring jurisdiction. *See, e.g.*, *State ex rel. Arcadia Acres v. Ohio Dep't of Job & Family Servs.*, 123 Ohio St. 3d 54, 2009-Ohio-4176 ¶ 12 ("administrative appeals are authorized by statutes that set forth the conditions for the exercise of judicial authority, and those conditions call for strict compliance") (noting rule)); *Hartsock v. Chrysler Corp.*, 44 Ohio St. 3d 171, 174 (1989) (applying rule to county-of-filing requirement), *superseded by* R.C. 4123.512(A); *Davis v. State Personnel Bd. of Review*, 64 Ohio St. 2d 102, 106 & n.1 (1980) (upholding dismissal for filing in wrong county). The background canon of construction thus supports, rather than undermines, the Tenth District here. *Linguistically*, the case interpreted the phrase "engages in business," not "transacts business." "Engages in business," unlike "transacts business," lacked the meaning established by decades of interpretation. *See Adams*, 532 U.S. at 114-16 ("engaged in commerce" has meaning different from "in commerce").

As a last point about cases, Dayton cites (Apt. Br. 20-21) a few Tenth District cases, but it is a mystery how those general discussions of the word "business" help it when the judgment below, also from the Tenth District, unanimously held against them.

2. Dayton's application of the law to the facts never gives a concrete test.

Dayton also spends a few pages applying the averments in its own affidavits to the supposed "common" meaning of "transacts business," but it does so without offering a concrete definition of what the phrase means. Apt. Br. 25-27. Is it a dollar threshold, a percentage threshold, a certain number of "calls, email[s], and faxes," Apt. Br. 25, or something else? To

take the facts Dayton itself offers, consider what is left unanswered. Are contracts "allowing" a business to perform its business enough? Apt. Br. 25. If so, what contract could possibly fail this test? Businesses, even public ones, are not in the habit of inking contracts that *undermine* their missions. Is $600,000 out of a budget of (Dayton does not say) enough? *Id*. How about phone calls and emails? How many are enough? Is it a percentage? All of this raises the very real question of why anyone, especially in an administrative appeal, should be litigating about email volume or contract value. Dayton apparently agrees because its bottom line is pure ipse dixit: "Whatever . . . 'transacts business' might mean," an employer "certainly" does it when it "engages in nearly $600,000" of commercial activity in a county. Apt. Br. 26. The law of general jurisdiction contradicts this statement, *see, e.g.*, *Helicopteros*, 466 U.S. at 416, as does the law from which the phrase was transplanted, *see, e.g.*, *Davlan*, 718 F.2d at 103. It is easy to claim that you meet a standard that you do not define.

3. Dayton attacks a strawman when it assails the physical-presence requirement with policy arguments.

The final portions of Dayton's brief mistakenly take aim at what it calls the Tenth District's physical-presence requirement, and identify various policy arguments in support of its view. Apt. Br. 27-36.

First, Dayton is wrong to say that the lower court judgment adopted such a physical-presence requirement. The Tenth District affirmed because it found no error when the trial court "relied upon" federal cases to define "transacts business." App. Op. ¶ 27. For its part, the trial court, while adopting the "reasoning and holding" of the federal courts, never said that physical presence is a threshold necessity under the Ohio statute. App't App'x 33. Indeed, the trial court seemed to leave that question open. *See id*. Dayton itself *agrees* that the federal courts do not "require a physical presence." Apt. Br. 35 (internal quotation marks omitted).

Regardless, the role of this Court is to review "judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 2013-Ohio-3019 ¶ 51 ("We have consistently held that a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons."). The lower courts here, and the federal courts interpreting the National Labor Relations Act before that, merely concluded that incidental business is not "transacting business." It is easy to see here that Dayton's business in Franklin County is all incidental, not the conduct of *its* business. Without some physical presence, it may be hard to prove more than incidental business. But it is neither necessary, nor sufficient. Any debate about the exact rule in the federal courts or in the two lower courts here sidesteps the easy path to affirming: whatever the lowest threshold for transacting business, Dayton does not meet it.

Second, Dayton concludes its brief with a tour of federal cases that undercuts the first three-fourths of its brief. The theme of this portion is that, because the federal cases dealt with venue, they serve a different legislative "aim" and should, therefore, not guide the meaning of Ohio's jurisdictional statute. Apt. Br. 29. The General Assembly's "aim" is the same as the "object sought to be obtained." R.C. 1.49(A). That is one of the explicit bases for interpreting an "ambiguous" statute. *Id.*; *see UBS Fin. Servs., Inc. v. Levin*, 119 Ohio St. 3d 286, 2008-Ohio-3821 ¶ 35 (looking to aim of taxing statute; citing R.C. 1.49(A)). To be sure, Dayton calls these "context," but context does not ask about a "legislature's concern," Apt. Br. 30, nor plumb the varying "consequences" of venue versus jurisdiction. R.C. 1.49(E). But that is exactly what this part of the brief does. It invokes the General Assembly's goals of party "convenience" and compares how jurisdictional and venue dismissals differ. Apt. Br. 30.

The amici supporting Dayton pile on this problem of pointing to policy and purpose-based arguments. Dayton says that statutes may not be interpreted to "'accommodate some

unstated meaning or purpose,'" Apt. Br. 12 (citation omitted), and must be viewed "without regard for the policy implications, *id*. 37. The amici apparently disagree, as the bulk of both briefs discuss policy implications.

The Association Brief touts the "immense practical consequences" of reading "transacts business" according to its settled pre-1983 meaning because "an employer may prefer to file an appeal in Franklin County." Ass'n Br. 4, 5. Employers may prefer that, but the relevant question, as Dayton is quick to remind us, is what the phrase "transacts business" meant in 1983 because courts must "'take the law as they find it,'" Apt. Br. 1 (citation omitted), not make the law as they want it. *See S.L. Indus.*, 673 F. 2d at 3 (rejecting interpretation of the same language that would leave litigants "free to roam" to forums they view as "more favorable"). The Association brief continues in this vein by explaining why employers may find Franklin County "more convenient," and why having all appeals there would let that court gain "greater familiarity" with the issues in labor appeals. Ass'n Br. 6. Again, the statute actually enacted directly rebuts these management desires for a Franklin County forum. Unlike the federal law after which the Jurisdictional Statute was modeled, the Ohio statute has no fallback jurisdiction in the agency's administrative home. *Compare* 29 U.S.C. 160(f) (D.C. Circuit is an available forum), *with* R.C. 4117.13(A), (D) (Franklin County is not). Ohio's public employers might find the statute "overly harsh," Ass'n Br. 11, (although no other employer since the 1980s has had a problem following its plain language), but that is not a policy choice for the courts.

The Ohio Public Transportation Association's brief ("Transp. Br.") follows suit. It also decries the lower court's ruling as "too harsh," and opines that federal courts can give the phrase "transacts business" a narrower meaning *because* venue-transfer rules soften the consequences. *See id*. 6. That is not an argument about the meaning of words.

4. A clear rule prevents the alleged unfairness that Dayton bemoans.

Dayton bemoans the "confusion and uncertainty" of the rulings below. Apt. Br. 24. But it is Dayton's own choice to file in a county where it does not transact its business that has spawned the uncertainty of counting bills and emails. Dayton could have appealed in Montgomery County, or one of the surrounding counties it serves with regional transportation, but it did not. A quick glance at the annotations to the Jurisdictional Statute told Dayton of the risk of its choice. Several cases listed there dismissed appeals lodged in Franklin County because the appellant did not reside or transact business there. *See, e.g.*, *E. Holmes Teachers Ass'n v. E. Holmes Local Sch. Dist. Bd. of Educ*., No. 85CV-05-2466, 1985 WL 263517 (Franklin Cnty. C.P. Aug. 6, 1985); *Manchester Educ. Ass'n v. Manchester Local Sch. Dist. Bd. of Educ.*, No. 85CV-03-1333, 1985 WL 263515 (Franklin Cnty. C.P. June 19, 1985); *see also Lorain Educ. Ass'n v. Lorain City Sch. Dist. Bd. of Educ.*, 46 Ohio St. 3d 12, 18-19 (1989) (Douglas, J., concurring in dismissal of appeal to Franklin County Common Pleas Court). To the Board's knowledge, no party *since the 1980s* has repeated the error of appealing to a county where there is a question about residence or transacting business. Whether or not Dayton would "prefer" to file in Franklin County, Ass'n Br. 4, the statute tells litigants where these appeals must be filed. This case proves why a bright-line jurisdictional test that looks to where an entity conducts *its* business, rather than where it makes a certain number of contracts or sends a requisite number of emails, makes sense. Courts should be resolving the merits of labor issues, not counting email traffic or business trips.

CONCLUSION

The Court should affirm the judgment of the Tenth District.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
MICHAEL D. ALLEN (0020693)
LORI FRIEDMAN (0018480)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for Appellee
State Employment Relations Board

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee State Employment Relations Board was served by regular U.S. mail this 4th day of May, 2016 upon the following:

Ronald G. Linville
Jennifer E. Edwards
Jeremiah L. Hart
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, Ohio 43215-4260

Counsel for Appellant
Greater Dayton Regional Transit Authority

Joseph S. Pass
Jubelirer, Pass and Intrieri, PC
219 Fort Pitt Boulevard
Pittsburgh, PA 15222

Christine A. Reardon
Kalniz, Iorio & Feldstein Co., L.P.A.
5550 W. Central Ave.
P.O. Box 352170
Toledo, Ohio 43635

Counsel for Appellee
Amalgamated Transit Union, AFL CIO,
Local 1385

/s Eric E. Murphy
Eric E. Murphy
State Solicitor

APPENDIX

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Greater Dayton Regional Transit Authority,

Respondent.

Case Number 2013-ULP-04-0104

ORDER

Before Chair Zimpher and Vice Chair Schmidt: June 5, 2014.

On April 24 and May 3, 2013, the Amalgamated Transit Union, Local 1385 ("Union" or "Intervenor") filed unfair labor practice charges against the Greater Dayton Regional Transit Authority ("Employer" or "Respondent"), alleging that the Employer violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1), (A)(5), and (A)(6). On September 12, 2013, the State Employment Relations Board ("Board" or "Complainant") determined that probable cause existed to believe that the Employer committed or was committing unfair labor practices, authorized the issuance of a complaint, and directed the matter to hearing. A complaint and notice of hearing were issued on September 25, 2013. On October 9, 2013, the Union filed a motion to intervene, which was granted.

A hearing was held on December 5, 2013. Subsequently, the parties filed post-hearing briefs. On April 3, 2014, the assigned Administrative Law Judge issued a Proposed Order, recommending that the Board find that the Employer violated O.R.C. §§ 4117.11(A)(1), (A)(5), and (A)(6) when it unilaterally determined that nine grievances were not legitimate grievances and returned those grievances to the Union as unprocessed. On April 23, 2014, the Employer filed exceptions to the Proposed Order. On May 5, 2014, Counsel for Complainant filed a response to the exceptions. On May 5, 2014, Intervenor filed a response to Respondent's exceptions, which adopted the exceptions filed by Complainant.

On May 15, 2014, Respondent filed a reply to Complainant's and Intervenor's response to Respondent's exceptions to the Proposed Order. Respondent cites O.R.C. § 4117.12(B) and Ohio Administrative Code (O.A.C.) Rules 4117-1-13 and 4117-1-15 as authority to file its reply. On May 16, 2014, Counsel for Complainant and Intervenor filed a joint motion to strike Respondent's May 15, 2014 reply. Complainant's Counsel

and Intervenor assert that their joint motion to strike should be granted for the following reasons: (1) their response to Respondent's exceptions raised no new issues outside those addressed in the exceptions; (2) no cross exceptions were filed under O.A.C. Rule 4117-1-13(B); (3) SERB did not authorize Respondent's May 15, 2014 reply; and (4) O.R.C. § 4117.12(B) and O.A.C. Rule 4117-1-15 provide no authority for Respondent's May 15, 2014 reply. A review of the information contained in the case file and the relevant code provisions supports the motion to strike.

After reviewing the unfair labor practice charges, complaint, answer, Proposed Order, exceptions, responses to exceptions, and all other filings in this case, the Board: (1) grants the motion to strike and strikes Respondent's Reply to the Response to Exceptions, filed on May 15, 2014, pursuant to O.A.C. Rule 4117-1-13; (2) adopts the Findings of Fact and Conclusions of Law in the Proposed Order, finding that the Employer violated O.R.C. §§ 4117.11(A)(1), (A)(5), and (A)(6) when it unilaterally determined that nine grievances were not legitimate grievances and returned those grievances to the Union as unprocessed; and (3) orders Respondent, Greater Dayton Regional Transit Authority, to take the following action:

Respondent, Greater Dayton Regional Transit Authority is hereby ordered to take the following action:

A. CEASE AND DESIST FROM:

(1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by refusing to process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(1) of the Ohio Revised Code;

(2) Refusing to bargain collectively with the Amalgamated Transit Union Local 1385 by not processing grievances filed by such Union and/or its members and from otherwise violating section 4117.11(A)(5) of the Ohio Revised Code; and

(3) Engaging in a pattern or practice of repeated failures to timely process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(6) of the Ohio Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days in all the usual and normal posting locations, where bargaining unit employees represented by the Amalgamated Transit Union Local 1385 work, the Notice to Employees furnished by the State Employment Relations Board stating the Greater Dayton Regional Transit

Authority shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

It is so ordered.

ZIMPHER, Chair, and SCHMIDT, Vice Chair, concur.

W. CRAIG ZIMPHER, CHAIR

TIME AND METHOD TO PERFECT AN APPEAL

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal setting forth the order appealed from and the grounds of appeal with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, on this 05th day of June, 2014.

ERIN E. CONN, ADMINISTRATIVE ASSISTANT

NOTICE TO EMPLOYEES FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE STATE EMPLOYMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

(1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by refusing to process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(1) of the Ohio Revised Code;

(2) Refusing to bargain collectively with the Amalgamated Transit Union Local 1385 by not processing grievances filed by such Union and/or its members and from otherwise violating section 4117.11(A)(5) of the Ohio Revised Code; and

(3) Engaging in a pattern or practice of repeated failures to timely process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(6) of the Ohio Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days in all the usual and normal posting locations, where bargaining unit employees represented by the Amalgamated Transit Union Local 1385 work, the Notice to Employees furnished by the State Employment Relations Board stating the Greater Dayton Regional Transit Authority shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

SERB v. Greater Dayton Regional Transit Authority
CASE NO: 2013-ULP-04-0104

_____
BY DATE

_____
TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

SERB
"Promoting Orderly and Constructive Labor Relations Since 1984"

State Employment Relations Board

65 East State Street, 12th Floor
Columbus, Ohio 43215-4213
Phone 614.644.8573
Fax 614.466.3074
www.serb.state.oh.us

W. Craig Zimpher, Chair
Aaron A. Schmidt, Vice Chair
N. Eugene Brundige, Board Member

Christine A. Dietsch, Executive Director

John R. Kasich, Governor

State Employment Relations Board v. Greater Dayton Regional Transit Authority
SERB Case No. 2013-ULP-04-0104

CERTIFICATION

I, the undersigned General Counsel for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order of the State Employment Relations Board entered on its journal, on the 5/19 day of June, 2014.

DONALD M. COLLINS
General Counsel

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N. Eugene Brundige, Board Member

Christine A. Dietsch, Executive Director

REC'D APR 04 2014

April 3, 2014

Lisa M. Critser
James M. Evans
Assistant Attorneys General – Labor Relations
30 E Broad St – 26th FL
Columbus, OH 43215

Re: Greater Dayton Regional Transit Authority
Case No. 13-ULP-04-0104

Enclosed please find a copy of the Proposed Order in this case. You have the right to appeal this decision to the Board pursuant to Ohio Administrative Code Rule 4117-1-13. This rule states as follows:

4117-1-13 EXCEPTIONS AND BRIEFS IN SUPPORT

(A) Exceptions to a proposed order pursuant to section 4117.12 of the Revised Code in unfair labor practice cases and briefs in support thereof shall be filed with the Board within twenty days after service of the proposed order. Exceptions and briefs in support in all other cases shall be filed with the Board within ten days after service of the recommended determination.

(B) Where exceptions have been filed, any other party may file a response and/or cross-exceptions within ten days after service of the exceptions. Within ten days after service of cross-exceptions, a party may file a response to the cross-exceptions, but such response must be limited to only new issues raised in the cross-exceptions. No other response may be filed, unless allowed by the Board.

(C) Exceptions to a proposed order or recommended determination shall contain, in addition to the requirements of Rule 4117-1-02 of the Administrative Code, a brief statement of each issue with which the party takes exception, the reason for the exception, and a statement of the precise relief sought.

MMS:dlm
Enclosure

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD,

Complainant, **CASE NO. 2013-ULP-04-0104**

AMALGAMATED TRANSIT UNION LOCAL 1385,

Intervenor,

v. **MARCIE M. SCHOLL**
Administrative Law Judge

GREATER DAYTON REGIONAL TRANSIT AUTHORITY,

Respondent. **PROPOSED ORDER**

I. INTRODUCTION

On April 24 and May 3, 2013, the Amalgamated Transit Union Local 1385 (Union) filed unfair labor practice charges against the Greater Dayton Regional Transit Authority (Employer) alleging that the Employer violated Ohio Revised Code sections 4117.11(A)(1), (A)(5) and (A)(6).[1] On September 12, 2013, the State Employment Relations Board (SERB) determined that probable cause existed to believe that the Employer, by refusing to bargain with the exclusive representative of its bargaining-unit employees and repeatedly refusing to process grievances, committed the unfair labor practices of interfering with, restraining, or coercing employees in the exercise of their rights in violation of section 4117.11(A)(1); failed to bargain in good faith in violation of section 4117.11(A)(5); and established a pattern and practice of repeated failure to process grievances in violation of section 4117.11(A)(6) of the Ohio Revised Code.

On September 25, 2013, a Complaint was issued. A hearing was held on December 5, 2013, wherein testimonial and documentary evidence was presented. Subsequently, the parties filed post-hearing briefs.

[1] All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

II. ISSUES

1. Whether the Employer violated section 4117.11(A)(1) by refusing to bargain with the exclusive representative of its bargaining-unit employees and repeatedly refusing to process grievances, thereby interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Chapter 4117. of the Ohio Revised Code.

2. Whether the Employer violated section 4117.11 (A)(5) by refusing to bargain with the exclusive representative of its bargaining-unit employees.

3. Whether the Employer violated section 4117.11(A)(6) by establishing a pattern or practice of repeated failures to timely process grievances.

III. JOINT STIPULATIONS

1. The Greater Dayton Regional Transit Authority ("Employer") is a "public employer" as defined by R.C. 4117.01(B).

2. The Amalgamated Transit Union, Local 1385 ("Union") is an "employee organization" as defined by R.C. 4117.01(D) and is certified by the State Employment Relations Board ("SERB") as the exclusive bargaining representative for the Employer's transit employees.

3. The Union and the Employer are parties to a collective bargaining agreement ("CBA") effective from April 2, 2012 through April 1, 2015.

4. On April 24, 2013, the Union filed with SERB unfair labor practice charges against the Employer, under R.C. 4117.12(B) and Ohio Adm. Code 4117-7-01.

5. On May 3, 2013, the Union filed with SERB amended unfair labor practice charges against the Employer, under R.C. 4117.12(B) and Ohio Adm. Code 4117-7-01.

6. Article XXXI of the parties' CBA contains a final and binding comprehensive grievance and arbitration provision.

7. On August 5, 2013, the parties participated in SERB's voluntary mediation process that was unsuccessful.

8. On September 12, 2013, SERB in Case No. 2013-ULP-04-0104 issued a "Finding Of Probable Cause And Direction To Hearing" and authorized the issuance of a Complaint.

9. On September 25, 2013, SERB issued a Complaint and Notice of Hearing to determine if the Employer violated R.C. 4117.11(A)(1), (5), and (6).

10. On October 7, 2013, the Employer filed an Answer and Affirmative Defenses to the Complaint and Notice of Hearing.

11. The parties stipulate to the authenticity and admissibility of Joint Exhibit 1.

IV. FINDINGS OF FACT

1. A Pre-Hearing was held in this matter on October 31, 2013. At that time, the Union moved to include three additional grievances that were not part of the unfair labor practice charge filed by the Union on April 24, 2013, nor were they part of the amended unfair labor practice charge filed by the Union on May 3, 2013. The Employer voiced an objection to the inclusion of the three additional grievances and was given an opportunity to file written objections, which it did on November 21, 2013. The Union and SERB filed responses on November 25, 2013. This Administrative Law Judge did not find the Employer's Objections to be well-taken and ruled at the November 26, 2013, Pre-Hearing that the three additional grievances would be allowed in and considered along with the grievances originally comprising the unfair labor practice charge.

2. During negotiations for the current CBA, the Union elected new leadership.

3. The parties have an extensive bargaining history, spanning multiple decades.

4. On January 3, 2013, the Union filed a grievance, referred to as the "Ashour" grievance. The Employer returned the grievance to the Union as unprocessed.

5. On January 24, 2013, the Union filed a grievance, referred to as the "Elliot" grievance. The Employer returned the grievance to the Union as unprocessed.

6. On January 30, 2013, the Union resubmitted the "Elliot" grievance. The Employer returned the grievance to the Union as unprocessed.

7. On January 25, 2013, the Union submitted a grievance, referred to as the "Duffy" grievance. The Employer returned the grievance to the Union as unprocessed.

8. On March 9, 2013, the Union filed another grievance on behalf of "Duffy". The Employer returned that grievance to the Union as unprocessed.

9. On March 15, 2013, the Union filed a grievance, referred to as the "Overtime" grievance. The Employer returned the grievance to the Union as unprocessed.

10. On June 3, 2013, the Union filed a grievance, referred to as the "Ferguson" grievance. The Employer returned the grievance to the Union as unprocessed.

11. On June 13, 2013, the Union filed a grievance, referred to as the "Brice" grievance. The Employer returned the grievance to the Union as unprocessed.

12. On July 3, 2013, the Union filed a grievance, referred to as the "COPE" grievance. The Union amended the grievance on July 8, 2013. The Employer returned the grievance to the Union as unprocessed.

13. On November 26, 2013, a pre-hearing conference was held in this matter and the Employer stated they were going to process four of the grievances – the "Elliot", "Duffy", "Ferguson" and "COPE" grievances. On the date of the Record Hearing in this matter, December 5, 2013, the Employer had not yet processed those grievances. In the Employer's Post-Hearing Brief, filed on January 27, 2014, the Employer states the "Duffy" grievance was processed and a hearing was held on December 11, 2013; the "Ferguson" grievance was processed and a hearing was held on December 12, 2013; and the "Elliott" and "COPE" grievances were processed and hearings held on December 12, 2013.

14. Article XXXI, section 4 of the current CBA, states as follows:

    a. All claims or disputes of employees or the Union regarding the application, interpretations or violations of any provision of this Agreement or the imposition of any discipline, including discharge, shall be settled under grievances.

V. ANALYSIS AND DISCUSSION

Complainant and Intervenor allege that the Employer violated sections 4117.11(A)(1), (A)(5) and (A)(6), which state as follows:

> (A) It is an unfair labor practice for a public employer, its agents or representatives to:
>
> (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;
>
> ***
>
> (5) Refuse to bargain collectively with the representative of his (sic) employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code;

***

> (6) Establish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances:

It is the burden of Complainant to demonstrate by a preponderance of the evidence that an unfair labor practice has been committed. Section 4117.12(B)(3). For the reasons that follow, and based upon the stipulations of the parties, testimony, and evidence provided at the hearing in this matter, the Complainant has met its burden of proof, and the Employer has violated sections 4117.11(A)(1), (A)(5) and (A)(6).

The Employer violated sections 4117.11(A)(1), (A)(5) and (A)(6) when it returned nine grievances to the Union as unprocessed. [2]

The Employer admitted, through the testimony of Ms. Dale Crutcher, Manager of Employee and Labor Relations for approximately fourteen years, that it is her responsibility to review every grievance filed by the Union to ensure "that it is a proper grievance". She testified that all grievances are faxed to her and she reviews each grievance to determine if the grievance meets the definition of such as found in the CBA, namely that the grievance is legitimate, timely, based on an interpretation or violation of the CBA or based on discipline. If the grievance meets all of the criteria, then Ms. Crutcher enters the grievance into the system and forwards it to the particular department to handle. Ms. Crutcher also testified that if she determines the grievance is not proper, then she sends it back to the Union with an explanation as to why the grievance is not proper. She stated this has been her practice for approximately thirteen years.

Employer argued that the CBA mandates someone in management to review every grievance, as Ms. Crutcher does, pursuant to Article I, Section 4(I), the Management Rights Clause, which states that Union members may only raise "a legitimate complaint or file a grievance based on this collective bargaining agreement." The fallacy in Employer's argument is that the CBA does not specify that management is the party responsible for determining the legitimacy of a grievance. In fact, if one reads the cited paragraph in full, it states the Employer "is not required to bargain on subjects reserved to the management and direction of the Authority [Employer], except as affect wages, hours, terms and conditions of employment, . . . ". In looking back at the grievance article (Article XXXI, section 4), that article provides that all disputes regarding the application, interpretation or violation of the CBA, as well as discipline,

2 The nine grievances are comprised of "Ashour", two "Elliots", two "Duffy's", "Overtime", "Ferguson", "Brice" and "COPE". It is recognized that the Employer stated after the hearing that the "Elliot", "Duffy", "Ferguson" and "COPE" grievances were processed; however no evidence was presented as to if the multiple of those grievances were processed. Since none of the nine grievances were processed as of the hearing date and the taking of evidence, for purposes of this analysis, all nine grievances are considered as non-processed by the Employer.

shall be settled under grievances. Thus, if determining the legitimacy of a grievance was left to the Employer, then it would follow that the Employer is not required to bargain a grievance procedure, as it would be a subject "reserved to the management and direction of the Employer". Clearly this is not the case as the parties did bargain a grievance procedure to settle disputes regarding the "application, interpretation or violation of the CBA". Once the grievance procedure was bargained, the Employer has a duty to follow the mandates of the procedure. Nowhere within the grievance procedure does it state that the Employer must unilaterally first determine the legitimacy of a grievance.

In the past, SERB has looked at NLRB decisions for guidance on particular issues. In the case of *In re Cuyahoga Cty Sheriff's Dept*, SERB 90-017 (8-30-90), SERB noted a section 8(a)(5) violation under the NLRA would be found by the NLRB in the circumstance of an employer improperly creating a unilateral condition to the processing of grievances. *Id.* at 3-109, citing *Independent Stave Co.*, 233 NLRB 1202 (1977), *enf'd* as modified 591 F.2d 443 (8th Cir.1979).

The Employer also argued that the CBA requires an informal discussion to take place between a Union member and that member's department director or supervisor prior to being able to file a grievance and that Ms. Crutcher screens the grievances to determine if such discussion took place. Once again, this is not a true statement. The provision of the CBA which the Employer references states in Article XXXI, section 5, that "Any employee ***may***, at any time informally discuss any matter with their department director or supervisor. (Emphasis added). There is no mandate that this informal discussion take place as the language in the CBA is discretionary, not mandatory. There is no provision within the CBA that states a grievance may not be filed unless an informal discussion took place and there is no language which states that the Employer does not have to accept a grievance that has not first been discussed informally.

Pursuant to section 4117.01(G) of the Ohio Revised Code, the definition of "To bargain collectively" means " . . . to resolve questions arising under the agreement." The parties in this matter negotiated a CBA which provides that claims or disputes involving the matters encompassed by the CBA are to be resolved by the grievance procedure. When the Employer refuses to process grievances which have been unilaterally determined not legitimate by the Employer, then the Employer is violating section 4117.11(A)(5) of the Ohio Revised Code by refusing to bargain collectively.

Section 4117.03(A) of the Ohio Revised Code enumerates the rights of public employees. Paragraph (5) of that statute specifically states public employees have the right to:

> Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

When the Employer refuses to process grievances which it unilaterally determines as not legitimate, the Employer violates section 4117.11(A)(1) of the Ohio Revised Code by interfering with or restraining the Union employees' exercise of the rights granted to those employees under Chapter 4117. of the Ohio Revised Code.

The case of *In re Dist 1199/HCSSU/SEIU,* SERB 96-004 (4-8-96), held that the totality of the circumstances determines good faith bargaining. That line of analysis is consistent with SERB's holding *In re Mayfield City School Dist Bd of Ed,* SERB 89-033 (12-20-89), which found that regardless of subjective good faith, a circumvention of the duty to bargain, is unlawful. Since the grievance process is an extension of the collective bargaining process, the refusal to process grievances is also a refusal to bargain. *In re Bryan City Bd of Ed,* SERB 97-003 (3-14-97).

Lastly, the evidence established and Ms. Crutcher testified that she has been screening grievances and returning them as unprocessed for approximately thirteen years. That testimony and evidence in and of itself is enough to establish a "pattern or practice of repeated failures to timely process grievances . . .", which is a violation of section 4117.11(A)(6) of the Ohio Revised Code. The CBA contains clear and unambiguous language as to the processing of grievances, therefore the defense of past practice cannot be used to modify the language of the CBA (In *re Defiance City School Dist Bd of Ed* SERB 97-016 (11-20-97), but that same past practice, when in contravention of the clear and unambiguous language of the CBA, can establish a "pattern or practice". Where such pattern or practice is based on a willful decision carried out over the course of repeated and continuous conduct by a public employer, it is sufficient to establish a "practice" for purposes of section 4117.11(A)(6) of the Ohio Revised Code. *In re Tuscarawas Twp Bd of Trustees*, SERB 2009-001 (8-31-2009).

The instant case is very similar in its facts to those found in *Franklin County Sheriff*, SERB 91-001 (1-8-91). In that case, the employer refused to process seven grievances to arbitration, stating that it was the employer's belief the cases were not arbitrable. This is very similar to the Employer's actions in the instant case of not processing the nine grievances because the Employer determined unilaterally that the grievances were not legitimate. SERB held in that case, which was affirmed in *Franklin County Sheriff's Dept v SERB*, 1992 SERB 4-16 (10th Dist Ct App, Franklin, 1-28-92), that such refusal was a violation of section 4117.11(A)(6) of the Ohio Revised Code. SERB specifically stated:

> . . . the legislature clearly defined the employer's obligation and responsibility in processing grievances. This is a consequential part of the legislature's overall design to provide a consistent mechanism for dispute resolution in promoting orderly and constructive relationships between all public employers and their employees. (*Id.* at SERB 91-001, at 3-3).

The Employer also argued throughout the hearing that in order for SERB to make a determination as to whether or not the alleged violations of sections 4117.11 (A)(1), (5) and (6) of the Ohio Revised Code took place, it was necessary to examine the merits of each grievance to determine if the grievance would have "a reasonable likelihood of success". The Employer's argument has no merit, as the grievance process which was negotiated in good faith and included in the parties' CBA, sets out a procedure to process a grievance and it is through that process that a grievance will be deemed "successful" or not. It is not within the purview of this Board to become an arbitrator of grievances and to give what amounts to be a declaratory judgment as to whether or not a grievance will ultimately make it to arbitration and be successful. The purview of this Board in the instant case was to look at the actions of the Employer to determine if those actions of not processing nine grievances were or were not unfair labor practices. The evidence established that such actions did constitute an unfair labor practice on the part of the Employer. 3

VI. CONCLUSIONS OF LAW

1. The Greater Dayton Regional Transit Authority is a public employer as defined in section 4117.01(B) of the Ohio Revised Code.

2. The Amalgamated Transit Union, Local 1385, is an "employee organization" as defined in section 4117.01(D) of the Ohio Revised Code.

3. The Greater Dayton Regional Transit Authority violated sections 4117.11(A)(1), (5) and (6) of the Ohio Revised Code by unilaterally determining that nine (9) grievances were not legitimate grievances and returning those grievance to the Union as unprocessed.

---

3 It must be noted that despite the above findings and analysis, it is interesting to observe that the parties have been participating in labor negotiations and have entered into numerous collective bargaining agreements spanning approximately twenty years (Employer's post hearing brief) and this is the first time the Union has brought the issue of grievance processing forth. The evidence clearly established that the Employer has been utilizing the practice of screening grievances for at least as long as Ms. Crutcher's tenure, approximately thirteen years, and it was not until the current President occupied that office as of June 2012, that this became an issue. Mr. Salyer, the current President, testified that since taking office, he has filed "a lot of grievances" although he could not give an exact number. Given the time and expense of pursuing and defending these unfair labor practices, perhaps it would behoove the parties to find a mutually agreeable way to ensure that grievances are not being filed frivolously and at the same time working together to maintain the presence of a fair and reasonable work place for all concerned.

VII. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.

2. The State Employment Relations Board issue an **ORDER**, pursuant to Ohio Revised Code section 4117.12(B)(3), requiring the Greater Dayton Regional Transit Authority, to do the following:

A. **CEASE AND DESIST FROM**:

(1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by refusing to process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(1) of the Ohio Revised Code;

(2) Refusing to bargain collectively with the Amalgamated Transit Union Local 1385 by not processing grievances filed by such Union and/or its members and from otherwise violating section 4117.11(A)(5) of the Ohio Revised Code; and

(3) Engaging in a pattern or practice of repeated failures to timely process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(6) of the Ohio Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days in all the usual and normal posting locations, where bargaining unit employees represented by the Amalgamated Transit Union Local 1385 work, the Notice to Employees furnished by the State Employment Relations Board stating the Greater Dayton Regional Transit Authority shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

ISSUED and **SUBMITTED** to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and **SERVED** on all parties listed below by Certified U.S. Mail, return receipt requested, this _3rd__ day of April, 2014.

Marcie M. Scholl
MARCIE M. SCHOLL
Administrative Law Judge

Lisa M. Critser
James M. Evans
Assistant Attorneys General - Labor Relations
Office of Ohio Attorney General Mike DeWine
30 East Broad Street -26th Floor
Columbus, Ohio 43215
Office number: 614-644-8462
Lisa.critser@ohioattorneygeneral.gov
James.evans@ohioattorneygeneral.gov
Representing Complainant

Joseph S. Pass, Esq.
Jubelirer, Pass and Intrieri, PC
219 Fort Pitt Boulevard
Pittsburgh, PA 15222
(412) 281-3850
jsp@jpilaw.com
Representing Intervenor

Ronald G. Linville, Esq.
Kathleen M. Portman, Esq.
Baker & Hostetler, LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
(614) 462-2647
rlinville@bakerlaw.com
kportman@bakerlaw.com
Representing Respondent

NOTICE TO EMPLOYEES FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE STATE EMPLOYMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

(1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by refusing to process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(1) of the Ohio Revised Code;

(2) Refusing to bargain collectively with the Amalgamated Transit Union Local 1385 by not processing grievances filed by such Union and/or its members and from otherwise violating section 4117.11(A)(5) of the Ohio Revised Code; and

(3) Engaging in a pattern or practice of repeated failures to timely process grievances filed by the Amalgamated Transit Union Local 1385 and/or its members and from otherwise violating section 4117.11(A)(6) of the Ohio Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Post for sixty (60) days in all the usual and normal posting locations, where bargaining unit employees represented by the Amalgamated Transit Union Local 1385 work, the Notice to Employees furnished by the State Employment Relations Board stating the Greater Dayton Regional Transit Authority shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and

(2) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

SERB v. Greater Dayton Regional Transit Authority
CASE NO: 2013-ULP-04-0104

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