Nos. 07-1451 and 07-1482

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Nos. 07-1451 and 07-1482 Board Case Nos. 12-CA-21464, 12-CA-21659

THE BOARD'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Goya Foods of Florida ("the Company") was the respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. The Union of Needletrades, Industrial, and Textile Employees ("UNITE!") was the charging party before the Board.

B. Rulings Under Review

The Company is seeking review of a Decision and Order of the Board (Members Liebman, Schaumber, and Kirsanow) in Board Case Nos. 12-CA-21464 and 12-CA-21659, finding that the Company unlawfully made changes to terms and conditions of employment without bargaining with the union chosen by its

employees. The Board issued its decision on September 28, 2007, and reported it at 351 NLRB No. 13. That decision is located at Tab 7 in the Appendix.

C. Related Cases

This case has not previously been before this Court.

The Eleventh Circuit, in a case involving the same parties, enforced a prior Board decision finding that the Company illegally withdrew recognition from the Union. The Board's decision in that case was issued on August 30, 2006 and reported at 347 NLRB No. 103, and the Eleventh Circuit decision enforcing the Board's Order can be found at 525 F.3d 1117 (11th Cir. 2008) ("*Goya I*").

In addition, another case involving these parties is also pending before this Court, *Goya Foods of Florida v. NLRB*, Nos. 07-1398, 07-1471; briefing in these cases is scheduled to be complete on June 6, 2008. The Board's decision in that case was issued on September 28, 2007 and reported at 350 NLRB No. 13.

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June 6, 2008

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Goya Foods, Inc., doing business as Goya Foods of Florida ("the Company"), to review an Order of the National Labor Relations Board ("the Board") issued against the Company on

September 28, 2007 and reported at 351 NLRB No. 13.[1] The Board has cross-applied for enforcement of that Order. The Board's Order is a final order with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended.[2]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. The Company's petition, filed on November 5, 2007, and the Board's cross-application, filed on November 29, 2007, were timely; the Act places no time limitation on such filings. This Court has jurisdiction over both the petition for review and the cross-application for enforcement pursuant to Section 10(e) and (f) of the Act,[4] which provide that petitions for review of Board orders may be filed in this Court and that the Board may cross-apply for enforcement of its order.

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[1] A. Tab 7. "A." references are to the appendix. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. §§ 151, 160(e) and (f).

[3] 29 U.S.C. § 160(a).

[4] 29 U.S.C. §§ 160(e) and (f).

STATEMENT OF THE ISSUES PRESENTED

1. **Unilateral Changes.** It is illegal for an employer to make changes to wages and hours, work assignments, or other terms and conditions of employment without bargaining with the representatives of its employees. Without notifying or bargaining with the Union, the Company implemented a new inspection procedure, reassigned the work of a terminated employee, and implemented a new computer system that affected employees' wages and hours. Does substantial evidence support the Board's finding that these unilateral changes violated the Act?

2. **Repeat Offender.** While the General Counsel is prohibited from needlessly litigating violations of the Act in separate proceedings, the mere fact that an employer has been held accountable for previous violations of the Act does not preclude further prosecution of subsequently-committed, but similar, violations. The Company committed dozens of unfair labor practices over 5 years. Is the General Counsel's prosecution of these violations in consecutive, separate proceedings permissible?

3. **Changed Circumstances.** Section 10(e) of the Act bars judicial review of objections not made before the Board. The Company admits that it never filed a motion for reconsideration or submitted any evidence to the Board from which the Board could have concluded that changed circumstances make enforcement of the

Board's Order unfair or unworkable. Does the Court lack jurisdiction to consider the Company's changed circumstances argument?

4. **Backpay.** The finding of an unfair labor practice is presumptive proof that some backpay is owed, but the Board's policy is to leave the details of any backpay remedy to compliance proceedings. The Company objects to the Board's ordered remedy of backpay for one of the violations found, alleging that no evidence shows any employees lost wages from that particular unfair labor practice. Is the Company's objection premature?

PERTINENT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

This case is about changes the Company made to its employees' wages, hours, and conditions of employment without bargaining with its employees' union. It is well-settled that such changes violate Section 8(a)(5) and (1) of the Act.

Between April 9 and August 31, 2001, UNITE! ("the Union") filed a number of unfair labor practice charges against the Company.[5] Based on these charges, the Board's General Counsel issued a consolidated complaint on

[5] A. Tab 2.

September 25, 2001 alleging that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new inspection procedure, reassigning the route of a terminated driver, and refusing to discuss the effects of a new software program called Roadnet. The Company made all of these changes without bargaining with the Union. The complaint also alleged a violation regarding the termination of driver Rodolfo Chavez, but the parties settled that dispute and the allegation was withdrawn.[6]

The Regional Director ordered a hearing on the remaining allegations, and an administrative law judge heard argument and took evidence on November 8, 9, and 13, 2001. The judge issued a decision on July 2, 2004, finding that the Company violated Section 8(a)(5) and (1) by implementing Roadnet without bargaining with the Union over its effects. As a remedy, he ordered the Company to bargain in good faith over the effects, but he did not order backpay because the evidence did not show that the drivers suffered a pay loss due to Roadnet. The judge recommended dismissal of the other allegations.[7]

On September 28, 2007, the Board affirmed the judge's findings regarding Roadnet, but it disagreed with his remedy. The Board ordered backpay, noting that the General Counsel was not obligated to demonstrate monetary loss during the

[6] A. Tab 3.

[7] A. Tab 6.

liability proceedings, finding instead that it can be shown during compliance proceedings. The Board also rejected the judge's recommendation that the other allegations be dismissed and concluded that the Company violated Section 8(a)(5) and (1) by implementing the new inspection procedure and reassigning stores to delivery drivers.[8]

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Committed Dozens of Unfair Labor Practices and Illegally Withdrew Recognition from the Union; the Board Found that the Company Violated the Act, and the Eleventh Circuit Enforced the Board's Order

The Company operates a facility in Miami, Florida where warehouse employees sort and package food products that the Company's drivers then deliver to stores. The Company also employs sales representatives who sell products to stores and stock shelves after the drivers make their deliveries.[9]

On September 2, 1998, the Union filed a petition with the Board seeking to represent the Company's employees.[10] As the Eleventh Circuit recently noted while enforcing a prior Board Order involving the Company's behavior before and

[8] A. Tab 7.

[9] A. Tab 7, at 1.

[10] *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, __, 2008 WL 1821734, at *1 (11th Cir. Apr. 24, 2008) ("*Goya I*").

after the petition, the Company immediately began "a widespread and lengthy anti-union campaign."[11] Among other violations, then-president Mary Ann Unanue and other managers "told numerous different groups of employees on multiple occasions that Goya would never recognize a union, and would not bargain with the Union even if the employees voted to unionize."[12]

The Board conducted elections on October 14 and November 12, 1998, and the Company's employees voted for union representation. In late 1998, the Board certified the Union as the representative of two units: (1) the Warehouse Employees and Drivers Unit and (2) the Sales Representatives and Merchandising Employees Unit.

The Company's opposition to the Union continued, however, as it "ultimately followed through on its pre-certification threats not to recognize or bargain with the Union" by committing additional unfair labor practices, including numerous refusals to bargain.[13] Due to the Company's repeated violations, the Union's support among unit employees diminished drastically during the first year of certification.[14] In December 1999, a majority of employees in each of the two

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[11] *Id.* at *1.

[12] *Id.* at *2.

[13] *Id.* at *3.

[14] *Id.* at *4.

units signed disaffection petitions, and the Company withdrew recognition from the Union.

The Board subsequently determined that the Company's unfair labor practices caused the Union's loss of majority support.[15] Because "[a]n employer may not avoid its duty to bargain if its own unfair labor practices caused the union's loss of majority support," the Board held that the withdrawal of recognition violated Section 8(a)(5) and (1) of the Act and ordered the Company to bargain with the Union as a remedy.[16] On April 24, 2008, the Eleventh Circuit enforced the Board's Order: "Goya perpetrated numerous and extensive labor violations over the months leading up to certification and through the distribution of the disaffection petition."[17] The court ordered the Company to comply with the Board's Order and bargain with the Union.

B. The Company's Refusal to Recognize the Union Continued, and the Company Made a Variety of Unilateral Changes to Mandatory Subjects of Bargaining Without Notice to the Union

This case, *Goya III*, deals with a number of changes the Company made to its employees' wages, hours, and working conditions after it illegally withdrew recognition from the Union, but before the Eleventh Circuit issued its decision.

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[15] *Goya Foods of Florida*, 347 NLRB No. 103, slip op. at 4, 2006 WL 2540668, at *4 (2006).

[16] *Id*.

[17] *Goya I*, 525 F.3d at __, 2008 WL 1821734, at *6.

The Company admits it failed to bargain with the Union over these changes or notify the Union about the changes in advance.[18]

1. Drivers Often Return to the Company with Undelivered Merchandise; Prior to April 2001, Drivers Were Not Required to Document Such Items

Sometimes the Company delivers merchandise that its customers later discover is damaged. The customers notify the Company of the problem, and the Company approves the return of the damaged merchandise for credit. The next time a driver visits that store, he picks up the damaged merchandise and returns it to the Company's warehouse. The Company refers to this type of returned merchandise as "credited goods." Drivers bring back credited goods frequently.[19]

In addition, the Company's customers sometimes refuse to accept merchandise when the driver attempts to make a delivery. This may happen if the customer did not order the item the Company is trying to deliver or if the Company attempts to make a delivery at a time when the customer does not accept deliveries. The driver must return this merchandise to the Company's warehouse. The Company refers to this type of returned merchandise as "refused goods." Drivers bring back refused goods less frequently than credited goods.[20]

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[18] A. Tab 7, at 7-8; Tab 9, at 75, 104, 440; Br. 14.

[19] A. Tab 7, at 2; Tab 9, at 49-50.

[20] A. Tab 7, at 2; Tab 9, at 51-52, 285-87.

Prior to April 2001, drivers returning to the Company's warehouse with credited goods stopped at an area called the credit tent. The driver and a clerk working at the credit tent would remove the credited items from the truck. The driver was not required to sign anything. The driver then parked the truck and was done for the day. Refused goods were left on the truck to be unloaded later by warehouse employees.[21]

2. The Company Discovered a Theft and Unilaterally Instituted a New Inspection Procedure; the Company Terminated an Employee Who Refused to Comply

In March 2001, the Company received a tip that Yuniet Fuentes, a delivery driver hired through an employment agency, was stealing refused goods. The Company called the police, who followed Fuentes' truck while he was making deliveries. Fuentes was caught stealing, and he was terminated on March 30, 2001.[22]

The Company suspected other drivers were also stealing refused goods.[23] Without notifying or bargaining with the Union, the Company enacted additional security procedures to prevent similar thefts in the future.[24] The new rules require

[21] A. Tab 7, at 2; Tab 9, at 53-54, 285-87, 388.

[22] A. Tab 7, at 2; Tab 9, at 155-58, Tab 13-14.

[23] A. Tab 9, at 158.

[24] A. Tab 7, at 2; Tab 9, at 75, 158, 439-40.

drivers to wait at the credit tent while their refused goods are inspected and documented. The drivers are then required to sign a form verifying that the documentation accurately reflects the refused items on the truck.[25] The inspection process exposes drivers' to discipline if a discrepancy occurs.[26]

As the drivers returned to the warehouse on the afternoon of April 2, 2001, the Company informed them of the new procedure and required them to comply with it immediately.[27] No additional thefts were discovered.[28] Driver Rodolfo Chavez questioned Sergio Bazain, operations manager, about the new procedure and pointed out that the new procedure constituted a change in the drivers' working conditions. Bazain informed Chavez that the Company was concerned about theft.[29] The following day, April 3, Chavez again objected to the change in working conditions. When he was asked to sign the form verifying the contents of the truck, Chavez refused.[30] Chavez was terminated on April 4 for

[25] A. Tab 7, at 2; Tab 9, at 58, 69, 72-74, 289-91, 388, 411.

[26] A. Tab 7, at 2; Tab 9, at 89.

[27] A. Tab 9, at 76, 289, 413.

[28] A. Tab 9, at 79.

[29] A. Tab 9, at 290

[30] A. Tab 7, at 2; Tab 9, at 292-93

insubordination.[31] Company president Robert Unanue testified that Chavez would not have been terminated but for his refusal to sign the form.[32]

3. The Company Unilaterally Redistributed Chavez's Delivery Route to Other Employees

Chavez delivered to the Hialeah area of Florida.[33] Without notifying or bargaining with the Union, the Company broke up Chavez's route and reassigned those stores to delivery drivers Isain Navarro, Antonio Castro, Miguel Then, and Vladimir Romero.[34] The assignment of stores directly impacts the income of drivers, who are paid commission.[35]

4. The Company Began Using a Computer System Called Roadnet to Design Delivery Routes; the Company Unilaterally Assigned These Routes to Drivers

Prior to May 2001, the Company's trip planners designed the drivers' delivery routes the old-fashioned way: using maps.[36] In May 2001, the trip planners began using a software program called Roadnet to design the routes. The Company bought the right to use the software years earlier, in August 1998, before

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[31] A. Tab 7, at 2; Tab 9, at 89, 302.

[32] A. Tab 9, at 89.

[33] A. Tab 9, at 207, 279.

[34] A. Tab 7, at 4; Tab 9, at 208, 383-84, 408, 410.

[35] A. Tab 7, at 4; Tab 9, at 45-46.

[36] A. Tab 7, at 3; Tab 9, at 114-15.

the union election.[37] The Company assigned the routes designed by Roadnet without bargaining with the Union.

The use of Roadnet affected the drivers' routes and pay. Prior to unionization, the drivers had fixed routes: they delivered to the same stores on a regular basis. Roadnet not only changed the routes themselves, but it also resulted in a change to the commission earned by most of the drivers. The routes designed with Roadnet are so much more efficient that most of the drivers deliver more merchandise each day and thus make more money.[38] All the drivers but one, Pedro Varela, saw a pay increase after the Company began using Roadnet, and they also spend more time on the road each day.[39] For example, driver Miguel Then used to work between 40 and 45 hours per week. He now works 50 hours or more per week.[40] Driver Isain Navarro used to work 32 hours per week. He now works about 40 hours per week.[41] In fact, the Company now uses 5 or 6 fewer temporary agency drivers to supplement its workforce because of the increase in

[37] A. Tab 7, at 3; Tab 9, at 167.

[38] A. Tab 9, at 119, 381.

[39] A. Tab 7, at 3; Tab 9, at 119, 214-15, 381, 405-06.

[40] A. Tab 9, at 381.

[41] A. Tab 9, at 405.

efficiency related to Roadnet (the agency drivers are not in the bargaining unit).[42] The Company did not bargain with the Union about Roadnet's effects on drivers' work assignments and wages before implementing the new software.[43]

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 28, 2007, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a new inspection procedure and assigning the stores on driver Chavez's route to other drivers, and by failing to bargain over the effects of the implementation of Roadnet. The Board concluded that the Company was obligated to bargain with the Union over these changes and held that the Company failed to establish any affirmative defense that would justify making such changes without bargaining.[44]

As a remedy, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's Order requires the Company to rescind the inspection procedure, notify and bargain with the Union before making any

[42] A. Tab 7, at 3; Tab 9, at 125.

[43] A. Tab 7, at 3; Tab 9, at 104.

[44] A. Tab 7, at 1-4.

changes in the terms or conditions of unit employees, make whole the employees who were affected by the failures to bargain, and post a remedial notice.[45]

SUMMARY OF ARGUMENT

This is the third case addressing the Company's ongoing efforts to avoid its employees' choice to select the Union as their bargaining representative. In the first case, the Eleventh Circuit enforced the Board's finding that the Company illegally withdrew recognition from the Union and committed dozens of unfair labor practices, including several unilateral changes that the Company failed to contest.[46] A second case involving the Company is also pending before this Court.[47] The present case deals with continued unilateral changes that the Company made to its employees' wages, hours, and working conditions after it unilaterally withdrew recognition from the Union. A fourth case is pending before the Board.[48]

In its opening brief, the Company admits it has not bargained with the Union since August 2000 but nevertheless made numerous changes to its employees'

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[45] A. Tab 7, at 4-5.

[46] *Goya I*, 525 F.3d 1117, 2008 WL 1821734 (11th Cir. Apr. 24, 2008).

[47] *Goya Foods of Florida*, 350 NLRB No. 74 (2007) ("*Goya II*") (pending before this Court, Case Nos. 07-1398, 07-1471).

[48] *Goya Foods of Florida*, JD-05-08, 2008 WL 220198 (ALJ Jan. 23, 2008) ("*Goya IV*") (pending before the Board).

terms of employment. Those changes include requiring drivers to attest to the merchandise on their truck at the end of their shifts, reassigning stores from the route of a terminated driver, and making changes to the drivers' routes, hours, and pay due to implementation of Roadnet. It is indisputable that these matters are mandatory subjects of bargaining, and that an employer's refusal to bargain prior to making the changes violates the Act. Furthermore, the Company's affirmative defenses, that the changes at issue are not significant, that the Company acted consistently with past practice, and that the General Counsel engaged in piecemeal litigation, were rejected by the Board and are without merit. Finally, the Company waived its claim regarding changed circumstances by failing to submit that argument to the Board and argues prematurely that it owes no backpay from one of the violations. Because substantial evidence supports the Board's Order, the Court should enforce it in full.

STANDARD OF REVIEW

This Court's review of the Board's factual conclusions is "highly deferential."[49] Under Section 10(e) of the Act, the Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole.[50] A

[49] *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

[50] 29 U.S.C. § 160(e).

reviewing court may not "displace the Board's choice between two fairly conflicting views" of the evidence, regardless of whether the Court might rule differently were it to consider the matter *de novo*.[51] In other words, this Court does not ask whether the Company's "view of the facts supports its version of what happened, but rather whether the Board's interpretation of the facts is reasonably defensible."[52] Accordingly, this Court has limited its review of Board decisions to whether they are supported by substantial evidence, or whether the Board "acted arbitrarily or otherwise erred in applying established law to the facts at issue."[53] The case for judicial deference is particularly appropriate here because of the Board's expertise in determining whether an employer has satisfied its bargaining obligations.[54]

ARGUMENT

The Eleventh Circuit recently enforced the Board's Order in *Goya I*, which ruled that the Company illegally withdrew recognition from the Union: "We find that the ALJ's opinion, adopted by the Board's Order, is supported by substantial

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[51] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Elastic Stop Nut Div. of Harvard Indus. v. NLRB*, 921 F.2d 1275, 1279 (D.C. Cir. 1990).

[52] *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

[53] *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 650 (D.C. Cir. 2003) (internal quotation marks omitted).

[54] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) ("[T]he Board [is] the expert in this field.").

evidence and that Goya perpetrated numerous and extensive labor violations over the months leading up to certification and through the distribution of the disaffection petition."[55] That court recognized "the particularly egregious nature of Goya's unfair labor practices."[56]

The Company's flagrant unfair labor practices in *Goya I* laid the groundwork for the refusals to bargain at issue here. In this case, *Goya III*, the Company violated the Act by implementing a new inspection procedure, adopting a trip planning system that affected drivers' wages and hours, and assigning work to delivery drivers, all without bargaining with the Union. As shown below, the Company's defenses, including its claims regarding past practice and piecemeal litigation, have no merit. The Court should enforce the Board's Order.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT BARGAINING WITH THE UNION

A. An Employer Must Bargain With Its Employees' Representative

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[57] It is well

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[55] *Goya I*, 525 F.3d at __, 2008 WL 1821734, at *6.

[56] *Id.* at *2.

[57] 29 U.S.C. § 158(a)(5).

settled that an employer violates Section 8(a)(5) of the Act if it unilaterally changes terms and conditions of employment absent a lawful bargaining impasse.[58]

While Section 8(a)(5) requires an employer to bargain collectively, Section 8(d) explains what it means to do so: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[59] These categories, "wages, hours, and other terms and conditions of employment," are referred to as mandatory subjects of bargaining. It is beyond debate that increases or decreases to employees' pay and work hours, changes in work assignments, and changes in work rules are mandatory subjects of bargaining.[60] An employer takes a risk in

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[58] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084-85 (D.C. Cir. 1991).

[59] 29 U.S.C. § 158(d).

[60] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410 (D.C. Cir. 1996) ("Because the program involved employee wages, we have no difficulty concluding that it was [a mandatory bargaining subject]."); *International Woodworkers of America, AFL-CIO, Local 3-10 v. NLRB*, 458 F.2d 852, 859 (D.C. Cir. 1972) ("The right to fix working hours . . . [is], of course, [a] mandatory bargaining subject[]."); *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988) ("[W]ork assignments . . . are mandatory subjects of bargaining."); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1056-57 (D.C. Cir. 2002) (new rule requiring employees to sign declaration violated Section 8(a)(5)).

making such changes after a withdrawal of recognition; if the withdrawal is deemed illegal, the unilateral changes violate Section 8(a)(5).[61]

The Supreme Court has stated that unilateral changes are a *per se* violation of the Act and "must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5)."[62] This Court has noted the serious damage inflicted by an employer's implementation of unilateral changes:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."[63]

For this reason, a violation of Section 8(a)(5) also derivatively violates Section 8(a)(1): unilateral changes tend "to interfere with, restrain, or coerce employees in the exercise of" their right to engage in concerted activity.[64] As the Supreme Court

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[61] *Virginia Concrete Co., Inc. v. NLRB*, 75 F.3d 974, 977 (4th Cir. 1996) ("Such unilateral changes are in violation of the Act if the Company's withdrawal of recognition was improper."); *see also Scepter, Inc.*, 280 F.3d at 1056-57 (finding unlawful unilateral changes after an illegal withdrawal of recognition).

[62] *NLRB v. Katz*, 369 U.S. 736, 746 (1962).

[63] *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

[64] *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) ("[A]n employer who violates section 8(a)(5) also, derivatively, violates section 8(a)(1).").

observed in *NLRB v. Katz*, unilateral changes "plainly frustrate[] the statutory objective of establishing working conditions through bargaining."[65]

B. The Board Reasonably Found that the Company's Unilateral Implementation of a New Inspection Procedure Violated the Act

Work rules are mandatory subjects of bargaining. The Company enacted a new rule requiring delivery drivers to attest through signature to the quantity of refused merchandise left on their trucks at the end of a shift, and it terminated a driver who refused to sign. As the Board found, the signature requirement became a new condition of continued employment, which the Company admittedly instituted without bargaining.[66]

In defense, the Company claims the new signature requirement did not constitute a change because drivers had always been responsible for the items on their trucks. However, the Company instituted the signature requirement for a reason, and it expected the rule to have an impact on employee behavior. The rule was intended to prevent theft and help the Company catch thieving employees red-handed. The Board found that the Company "formalized driver responsibility and created the potential for discipline if a driver failed to follow the new procedure. . . . [T]hey were required to sign *and* were subject to discharge if they

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[65] *NLRB v. Katz*, 369 U.S. 736, 744 (1962).

[66] A. Tab 9, at 75.

did not do so."[67] As the Court stated in *Scepter, Inc. v. NLRB*[68] while rejecting an almost identical challenge to an almost identical unilateral change, "[t]he new rule . . . converted a previously informal general policy into a hard and fast rule whose violation would subject an employee to summary discharge [and] made signing the declaration a new condition of continued employment."[69]

The new signature requirement is a change, and its impact on employees could not be clearer: driver Chavez was terminated for refusing to comply with it. Indeed, the Company's president testified that Chavez would not have been terminated if he had signed the form rather than insisting that the Company bargain with the Union before changing its work rules.[70] The Board was therefore reasonable in concluding that the Company violated the Act by refusing to bargain prior to instituting this material change.

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[67] A. Tab 7, at 2.

[68] 280 F.3d 1053 (D.C. Cir. 2002).

[69] *Id.* at 1056-57.

[70] A. Tab 9, at 89 ("Q. [I]f the things that happened on the 2nd and 3rd [Chavez's refusal to comply with the new rule] would not have happened, he would still be working? A. I'd say so.").

C. The Board Reasonably Found that the Company's Unilateral Work Assignments Violated the Act

Work assignments are mandatory subjects of bargaining.[71] After terminating driver Chavez, the Company broke up Chavez's route and reassigned those stores to delivery drivers Isain Navarro, Antonio Castro, Miguel Then, and Vladimir Romero.[72] The Company admits that it made these assignments without bargaining with the Union.[73] Each of these assignments affected the wages, hours, and working conditions of the drivers involved, who are paid commission. By making work assignments without bargaining with the Union, the Company violated the Act.[74]

The Company asserts two defenses to this charge. First, the Company claims that its due process rights were violated because the complaint in this case

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[71] *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988) ("[W]ork assignments . . . are mandatory subjects of bargaining."). *See also AMF Bowling Co., Inc. v. NLRB*, 977 F.2d 141, 148 (4th Cir. 1992) ("Because a work assignment affects wages, hours, and conditions of employment, it is a mandatory subject of bargaining.").

[72] A. Tab 7, at 4; Tab 9, at 208, 383-84, 408, 410.

[73] Br. 41-43.

[74] *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), *enforced*, 987 F.2d 1376, 1381 (8th Cir. 1993) (the employer violated Section 8(a)(5) by refusing to bargain over, among other things, the assignment of hotel employees to the banquet department or the kitchen); *Don Lee Distributor, Inc.*, 322 NLRB 470, 494 (1996), *enforced*, 145 F.3d 834, 840 (6th Cir. 1998) (unilaterally changes to route assignments without bargaining with the union violated Section 8(a)(5)).

did not contain an allegation related to the reassignment of the stores from driver Chavez's route.[75] The Company is wrong. The complaint alleged that, "[c]ommencing in or about May 2001, on a date not more specifically known to the [General Counsel], [the Company] instituted a change in the assignment of routes to its Unit employees and thereby also changed their wages and hours."[76] Presumably (it is not clear from the brief), the Company's beef is with the date. The complaint, however, alleged that the violation occurred "in or about May 2001"; Chavez was terminated on April 4, 2001 and the stores reassigned shortly thereafter. As this Court has noted, such "minor variances in 'on or about' dates [are] insufficient to prejudice the company's hearing preparation."[77]

Even assuming that the complaint lacked the requisite specificity, this Court has held that no due process violation exists where the employer "had a full opportunity to cross-examine the General Counsel's witnesses about the circumstances surrounding the [allegations], and to put [its own witnesses] on the stand to rebut those witnesses."[78] The Company cross-examined all of the General

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[75] Br. 41.

[76] A. Tab 3, at ¶ 6(b).

[77] *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122 (D.C. Cir. 2001).

[78] *Id. See also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938) (rejecting due process claim because "review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint"); *Owens-Corning v. NLRB*, 407 F.2d 1357, 1361 (4th Cir.

Counsel's witnesses and asked them specific questions regarding the routes assigned to them during their employment, including questions about the redistribution of Chavez's route.[79] The Company failed to object to the introduction of such evidence and fully presented its own witnesses. Because the unfair labor practice was fully litigated, its disposition by the Board was appropriate.

The Company next accuses the Board's Order of requiring the Company to suspend all deliveries to the stores on Chavez's route while bargaining with the Union over which driver would be assigned those stores.[80] The Board requires no such thing. In fact, the Board noted with approval the Company's past practice of "us[ing] temporary assignments to unit or agency drivers to cover short-term absences."[81] What the Board found illegal is the "permanent or long-term reassignment of Chavez' stores."[82]

The Company is free to comply with its bargaining obligation in any number of ways. The most common way to deal with this problem is through a clause in a

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1969) (material issue that has been fairly tried by parties should be decided by Board regardless of whether it has been specifically pleaded).

[79] A. Tab 9, at 312-14, 396-99, 416-18.

[80] Br. 42.

[81] A. Tab 7, at 4.

[82] A. Tab 7, at 4.

collective-bargaining contract. The employer may negotiate for the right to unilaterally assign work at any time for any reason, or it may agree to assign work based on any criteria important to the parties (such as seniority).[83] Ideally, had the Company not illegally withdrawn recognition from the Union, it would have engaged in such collective bargaining. "The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole."[84] Because the Company has any number of options available to it, the specter of daily bargaining over each assignment is nothing but a straw man. The Board expresses no preference in the outcome so long as the Company fulfills its bargaining obligation.

D. The Board Reasonably Found that the Company Violated the Act by Failing to Bargain Over the Effects of Roadnet

The Supreme Court has recognized that an employer may be required to bargain about the effects of a decision that is not itself subject to the bargaining

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[83] *Industrial, Professional and Technical Workers*, 339 NLRB 825, 825-26 (2003) (collective-bargaining agreement gave employer "unfettered discretion in the assignment of work"); *Southern California Gas Co.*, 316 NLRB 979, 983-84 (1995) (management rights clause giving employer "exclusive right to . . . direct the working forces" permitted employer to assign work); *Hilton's Environmental, Inc.*, 320 NLRB 437, 444 (1995) ("The Union contract with Son[']s Quality Foods] provided that job assignments should be made on the basis of seniority.").

[84] *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981).

obligation.[85] Applying this principle, the Board found that the Company did not have to bargain over its pre-unionization decision to use Roadnet to design its delivery routes. However, after unionization it did have to bargain over the discretionary effects Roadnet had on routes, wages, and hours, such as *which driver* was assigned the routes Roadnet designed.[86] As noted above, work assignments are mandatory subjects of bargaining,[87] and the work assignments here affected the drivers' hours and pay since they receive commission on deliveries.[88]

As an initial matter, the Company puzzlingly claims that its implementation of Roadnet is an operational modification within management's prerogative over which it was not required to bargain.[89] This issue, however, is not before the

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[85] *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n.15 (1981) ("There is no doubt that [the employer] was under a duty to bargain about the results or effects of its decision to stop the work at Greenpark."); *see also McClatchy Newspapers, Inc. (Fresno Bee)*, 339 NLRB 1214, 1214 (2003) (employer was required to bargain over effects of decision to implement new printing system, which included changes to lunch and shift schedules, even though it was not obligated to bargain over decision itself).

[86] A. Tab 7, at 4 ("Respondent did have the obligation to bargain about the discretionary effects of its implementation of Roadnet on unit drivers, i.e., the changes in their routes, wages, and hours.").

[87] *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988) ("[W]ork assignments . . . are mandatory subjects of bargaining.").

[88] A. Tab 7, at 3; Tab 9, at 119, 381.

[89] Br. 36-39.

Court. The Board never said the Company was required to bargain over its use of Roadnet; in fact, as just noted, the Board specifically concluded that the Company was not required to bargain over the decision to use Roadnet because that decision was made before unionization. What the Board did say is that the Company was required to bargain over the *effects* of its decision to use Roadnet.

This Court regularly enforces Board orders requiring employers to bargain over the effects of operational decisions more fundamental than the decision to use a new computer program for designing driver routes. For example, in *UFCW v. NLRB*,[90] this Court enforced the Board's decision that Wal-Mart was obligated to bargain over the effects of its decision to stop selling deli-sliced meat, even though this decision actually eliminated the bargaining unit. In *Vico Products Co., Inc. v. NLRB*,[91] this Court enforced the Board's finding that the employer was required to bargain over the effects of its decision to relocate its facility from Plymouth, Michigan to Louisville, Kentucky. It is entirely unremarkable that the Act requires the Company to bargain over the effects of Roadnet.

Taking another stab, the Company contends that bargaining is not required because the use of "Roadnet has not adversely affected any driver monetarily."[92]

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[90] 519 F.3d 490, 495-96 (D.C. Cir. 2008).

[91] 333 F.3d 198, 208 (D.C. Cir. 2003).

[92] Br. 33.

But it is not just decreases in pay that violate the Act. As this Court has noted, it is *changes* in pay that violate the Act, whether those changes are increases or decreases.[93] Company president Robert Unanue testified that Roadnet has caused a change in pay for many of the drivers because they are delivering more merchandise:

> Q. After Roadnet was implemented, what, if any, effect did it have on the deliveries, the shipping the stuff to the customers?
> A. Actually, we've – as Mr. Crosland said, and I'll say here, the drivers are making more money without exception.
> Q. Why?
> A. Because they're delivering more.
> Q. Why?
> A. Why because the stops are more efficient. They're not running across town to deliver to this store when they have a store across the street that they can – So there's a – You know, they're not running all over.[94]

Several drivers also testified that their wages were impacted by Roadnet.

One driver, however, Pedro Varela, did not experience a pay increase after the Company began using Roadnet.[95] Varela's situation illustrates exactly why employers are required to bargain over work assignments. A union looks out for

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[93] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996) ("The Act is violated by a unilateral *change* in the existing wage structure whether that change be an increase or the denial of a scheduled increase.") (quoting *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 652-53 (6th Cir. 1977)); *see also NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267 (2d Cir. 1963) ("The wage increase is by far the most important 'unilateral act.'").

[94] A. Tab 9, at 119.

[95] A. Tab 7, at 3; Tab 9, at 214-15.

the interests of all employees in the unit. Only the Company knows why it decided that, of all the drivers, Varela was the only one who should not share in the increase in driver pay resulting from Roadnet. Had the Company engaged in bargaining as required, perhaps the Union could have obtained equal treatment for all employees.

In addition, the drivers' hours were increased due to Roadnet.[96] Driver Miguel Then testified that he used to work between 40 and 45 hours per week; he now works 50 hours or more per week.[97] Driver Isain Navarro testified that he used to work 32 hours per week; he now works about 40 hours per week.[98] Although the Company claims this finding is contrary to the evidence,[99] the administrative law judge and the Board credited this testimony.[100] As this Court has noted, the Board's credibility determinations deserve great deference.[101]

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[96] A. Tab 9, at 381.

[97] A. Tab 9, at 381.

[98] A. Tab 9, at 405.

[99] Br. 36.

[100] A. Tab 7, at 3, 8.

[101] *W&M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008).

E. The Company's Reliance on Past Practice is Unavailing

Finally, the Company claims that it had no duty to bargain over work assignments after Chavez's termination and any effects on employees' routes from using Roadnet because those changes were consistent with a past practice by which it varied the drivers' routes daily.[102] The Company has asserted this defense, which it sometimes refers to as a "dynamic status quo" rather than a past practice, in every case before the Board. Yet, as consistent as the Company has been in raising the defense, the Board has been as steadfast in rejecting it, both on the law and the facts.

First, the Company's legal argument essentially claims that because it could unilaterally change terms of employment – including drivers' routes – before the Union's certification, it could continue to do so afterwards. As the Board stated, however, the Company's "'right to exercise sole discretion changed once the Union became the certified representative.'"[103] Once employees select union representation, the employer may no longer unilaterally change terms and conditions of employment when the union requests bargaining, as the Union did here.

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[102] Br. 32-36, 41-43.

[103] A. Tab 7, at 4 (quoting *Goya Foods of Florida*, 347 NLRB No. 103, slip op. at 3 (2007), *enforced*, 525 F.3d 1117, __, 2008 WL 1821734, *1 (11th Cir. Apr. 24, 2008)).

Second, the Board properly found that, even if it had legal merit, the Company's claim that it frequently changed route assignments fails on the facts.[104] As the Board concluded here:

> The record in *Goya I* and *II* is consistent with drivers' testimony in this case that although their daily delivery schedules varied, they regularly and repeatedly serviced many of the same stores in a particular geographic area for long periods of time, years in some cases. . . . Consequently, we find no merit in the [Company's] defense that any changes in store and route assignments resulting from Roadnet's implementation were consistent with maintenance of an alleged dynamic status quo.[105]

Thus, the Company's argument boils down to a simple credibility challenge that the Board should have credited its president, Robert Unanue, who testified that employees never had fixed assignments, over the employees who testified to the contrary.

Substantial evidence, however, supports the Board's findings, and the Court should not disturb them. As noted above, the drivers testified that they drove the same routes for years. Miguel Then drove the same route for at least 3 years.[106] Isain Navarro worked the same route for 2 years.[107] By contrast, President Unanue, on whom the Company relies to establish its past practice, only began

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[104] A. Tab 7, at 3-4.

[105] A. Tab 7, at 3-4.

[106] A. Tab 9, at 377.

[107] A. Tab 9, at 403.

working at the Miami facility in 1999,[108] after the union election. Thus, Unanue's testimony could not possibly support a finding that the changes in the present case are consistent with past practice prior to unionization. Moreover, to the extent Unanue testified that the method for assigning work had not changed since he arrived at the Company, the Company fails to acknowledge that Unanue arrived in the midst of an aggressive campaign of unfair labor practices, notably featuring numerous refusals to bargain over work assignments.[109] The Company presented no other evidence of the past practice as it existed prior to the Union's certification, and it is the Company's burden to prove such a defense.[110] The Board thus properly credited the testimony of the drivers over Unanue's claim that the drivers' routes were changed regularly.

II. THE GENERAL COUNSEL DID NOT ENGAGE IN DUPLICATIVE OR PIECEMEAL LITIGATION; RATHER, THE GENERAL COUNSEL FILED ADDITIONAL COMPLAINTS DUE TO THE COMPANY'S REPEATED VIOLATIONS OF THE ACT

The Company asserts that the Board's unfair labor practice findings in this case cannot be enforced because the Board should have litigated the charges in

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[108] A. Tab 9, at 42.

[109] *Goya I*, 525 F.3d at __, 2008 WL 1821734, at *2-3.

[110] *Sociedad Espanola de Auxilio Mutuo y Beneficiencia v. NLRB*, 414 F.3d 158, 166 (1st Cir. 2005); *see also City Cab Co. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986) ("The burden is on the employer to show that [unilateral] changes satisfy this standard [continuation of the status quo].").

Goya I, *Goya II*, and *Goya III* all in one hearing.[111] The Board, however, acted within its discretion in rejecting this argument because "the General Counsel . . . reasonably treated each unilateral change as a discrete event."[112]

This case involves an employer's repeated violations of the Act. It should go without saying that the General Counsel cannot wait to prosecute violations of the Act until an employer has committed its last unfair labor practice, something the General Counsel can never be sure of. In *Goya I*, the General Counsel prosecuted violations that occurred in 1998 and 1999.[113] In this case, *Goya III* (the Board decided Goya *II* and *III* out of order), the General Counsel prosecuted violations that occurred in 2001.[114] In *Goya II*, the General Counsel prosecuted violations that occurred in 2002.[115] Moreover, the hearing in *Goya I* concluded before charges were filed in *Goya III*, and *Goya III*'s litigation closed before all the charges prosecuted in *Goya II* were filed. Each of these cases involved different changes in work assignments, and arose from charges filed in a timely manner regarding each unilateral change. Particularly because many of the charges were

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[111] Br. 18-24.

[112] A. Tab 7, at 1-2 n.4.

[113] *Goya I*, 525 F.3d at __, 2008 WL 1821734.

[114] A. Tab 7, at 3-4.

[115] *Goya Foods of Florida*, 350 NLRB No. 74, slip op. at 3-5 (2007) ("*Goya II*") (pending before this Court, Case Nos. 07-1398, 07-1471).

not pending simultaneously, the General Counsel reasonably decided to prosecute them in chronologically successive cases.

Arguing that the Board should have waited until the Union stopped filing charges to prosecute an unfair labor practice complaint, the Company latches onto broad rhetoric from two Board cases. First, the Company relies[116] on the Board's statement in *Peyton Packing Co.* that, "[g]enerally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint."[117] The Company also notes *Jefferson Chemical Co.*, where the Board opined that the multiple litigation of issues that occurred there was "a waste of resources and an abuse of our processes."[118]

However, in *Service Employees Local 87 (Cresleigh Management, Inc.)*, the Board construed that broad rhetoric as dictum, unnecessary to decide the more narrow issues presented in *Peyton Packing* and *Jefferson Chemical.* [119] Instead, the Board stressed that "the sound principle favoring consolidation of pending allegations in one proceeding is not absolute" and that "such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion

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[116] Br. 19.

[117] *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961).

[118] *Jefferson Chemical Co.*, 200 NLRB 992, 992 n.3 (1972).

[119] *Service Employees Local 87 (Cresleigh Management, Inc.)*, 324 NLRB 774, 776 (1997).

and, in some cases, could unduly delay the disposition of pending cases."[120] The Board made clear that an abuse will be found only "in the specific circumstances presented in *Peyton Packing* and *Jefferson Chemical*, where the General Counsel has attempted to 'twice litigate the same act or conduct *as a violation of different sections of the Act*' . . . or to relitigate the same charges in different cases,"[121] neither of which are presented here. This Court, as well as the Tenth Circuit, has cited *Cresleigh Management* approvingly.[122]

The Board's decision to limit *Peyton Packing* and *Jefferson Chemical* makes sense. The General Counsel might have any number of valid reasons for litigating charges separately, including avoiding the delay that a consolidated proceeding might cause in securing an order against a recidivist violator. It is for these reasons that the cited cases have never been interpreted as a bar to "'litigation spanning several years [where] the General Counsel pursues the litigation in reasonable, self-contained segments,'" as the Board explained here.[123]

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[120] *Id.* at 775.

[121] *Id*. (citations omitted).

[122] *See U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007); *NLRB v. Community Health Services, Inc.*, 483 F.3d 683, 686 (10th Cir. 2007).

[123] A. Tab 7, at 1-2 n.4 (quoting *Beverly Health & Rehabilitation Svcs.*, 332 NLRB 347, 347 n.1 (2000)).

The Board also recognized that rarely will the harm done to an employer by having to litigate charges in successive proceedings warrant the drastic remedy of dismissal – a remedy that would completely ignore the harm done by an employer to the interests that the Board's unfair labor practice proceedings are designed to protect.[124] Thus, the Board has stated that it will opt for dismissal only on a showing of overriding prejudice, to avoid "improperly interfer[ing] with the General Counsel's discretion" and punishing the victims of unfair labor practices who have no control over the General Counsel's prosecutorial judgment and whose interests the Board is duty bound to protect.[125]

In sum, contrary to what the Company argues here,[126] *Jefferson Chemical* and *Peyton Packing* cannot be read to deny the General Counsel's right to prosecute an employer's continued refusal to bargain simply because the General Counsel had previously succeeded in defeating an employer defense common to all the charges. Under this Court's precedent, the Company can only succeed on a

[124] *Cresleigh Management, Inc.*, 324 NLRB at 775-76.

[125] *Id. Accord Unbelievable Inc., d/b/a Frontier Hotel & Casino*, 324 NLRB 1225, 1226 (1997).

[126] Br. 21-22.

Jefferson Chemical/Peyton Packing claim by showing that the Board abused its discretion.[127] As demonstrated above, the Company has failed to do so.

III. THIS COURT LACKS JURISDICTION TO CONSIDER THE COMPANY'S CHANGED CIRCUMSTANCES AND DELAY ARGUMENTS DUE TO THE COMPANY'S FAILURE TO RAISE THAT ISSUE BEFORE THE BOARD

Before this Court, the Company argues for the first time that changed circumstances and delay make enforcement of the Board's Order unfair or unworkable. The Company admits that it never put this issue before the Board in this case.[128] Judicial consideration is therefore precluded by Section 10(e) of the Act, which provides that "no objection that has not been urged before the Board … shall be considered by the Court" absent extraordinary circumstances.[129] As this Court has recognized, the Supreme Court has made clear that "'orderly procedure and good administration'" require that "'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.'"[130]

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[127] *See U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007) ("[W]e conclude the General Counsel did not abuse his discretion in pursuing the complaints against U-Haul in separate proceedings.").

[128] Br. 25.

[129] 29 U.S.C. § 160(e).

[130] *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)).

This Court very recently explained the path the Company should have taken: "If aggrieved by the Board's remedy, [an employer] should have filed a motion for reconsideration pursuant to the Board's rules and regulations,"[131] explaining how circumstances have changed and why the Board's remedy is now inappropriate. No such motion was filed. Thus, the Board issued its Order in this case without any indication from the Company that circumstances had changed so much that the Board's remedy was inappropriate. Because the Board was never given the opportunity to address this issue, this Court lacks jurisdiction to consider the untimely challenges articulated for the first time in the Company's brief.[132] "To hold otherwise would be to set the Board up for one ambush after another."[133]

Acknowledging its failure, the Company claims that it would have been futile to file a post-order motion because the Board denied the Company's motion for reconsideration in *Goya I*.[134] The Court has repeatedly rejected this argument, however, holding that "'the requirement that a litigant present such a petition is ordinarily not excused simply because the [agency] was unlikely to have granted

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[131] *W&M Properties v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008).

[132] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[133] *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996).

[134] Br. 25.

it.'"[135] Under the Court's precedent, futility arguments have merit only where the agency "rested its decision on a ground neither party had argued, so long as a request for reconsideration appeared clearly doomed."[136] The Board decided this case on the basis of the arguments put forth by the parties, and the fact that the Board denied a motion for reconsideration in *Goya I* does not show that a motion for reconsideration in this case was "clearly doomed." *Goya I* and this case deal with different violations of the Act, for which the Board ordered different remedies. Although the supposed changed circumstances may not have justified modifying the remedy in *Goya I*, it is not impossible that the Board may have come to a different conclusion in this case, which deals with a different remedy. The Company, however, never gave the Board the chance.

IV. THE COMPANY'S OBJECTION TO THE BACKPAY REMEDY IS PREMATURE

The Company objects to the Board's ordered remedy of backpay because it was not shown during the trial that the drivers lost wages due to Roadnet.[137] The Company's objection, however, is premature and should instead be made during compliance proceedings.

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[135] *W&M Properties*, 514 F.3d at 1346 (quoting *Georgia State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889, 892 (D.C. Cir. 1999)).

[136] *Georgia State Chapter Ass'n of Civilian Technicians*, 184 F.3d at 892.

[137] Br. 43-44.

Section 10 of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator "to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act]."[138] The Supreme Court has noted that the Board's remedial power "is a broad discretionary one, subject to limited judicial review"[139] because the Board "draws on a fund of knowledge and expertise all its own."[140] This Court has repeatedly said that it owes Board remedial orders "special respect" and that review of such orders is limited.[141]

This Court and many others have acknowledged that "'[t]he finding of an unfair labor practice is presumptive proof that some back pay is owed.'"[142] As the Supreme Court has noted, the Board's practice is to litigate liability first "but

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[138] 29 U.S.C. § 160(c);

[139] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

[140] *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

[141] *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *see, e.g.*, *Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002) ("[T]he Board is accorded broad discretion in fashioning an appropriate remedy."); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998) ("[A] reviewing court must give special respect to the Board's choice of remedy."); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981) ("The Board's choice of remedies is entitled to a high degree of deference.").

[142] *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) (quoting *NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968)); *see also NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965);

l[eave] disputes over the details of reinstatement and back pay to the compliance stage of the proceedings,"[143] including whether anyone is entitled to backpay at all. Indeed, in *Sure-Tan v. NLRB*, the Supreme Court reiterated its support for the Board's procedures and made clear that "compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, *if any*, to which the discharged employees are individually entitled."[144]

At least one driver in this case, Pedro Varela, did not experience a pay increase after Roadnet was implemented.[145] Varela and other drivers may be entitled to backpay; that issue will be determined later. Under these circumstances, the Board properly ordered the presumptively appropriate backpay remedy, leaving the exact amount owed, if any, for future compliance proceedings.

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[143] *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260 (1969); *see also United Steel Workers v. NLRB*, 405 F.2d 1373, 1377 (D.C. Cir. 1968) (noting that an employee's "right to reinstatement and back pay, if any, can be determined in the compliance proceedings").

[144] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (emphasis added).

[145] A. Tab 7, at 3; Tab 9, at 214-15.

CONCLUSION

The Board respectfully requests the Court deny the petition for review and grant its cross-application for enforcement in full.

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June 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC.	*	
	*	
Petitioners/Cross-Respondent	*	Nos. 07-1451,
	*	07-1482
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-21464
	*	12-CA-21659
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,420 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
June 6, 2008

STATUTORY ADDENDUM

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Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or

district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS OF FLORIDA	*	
	*	
Petitioners/Cross-Respondent	*	Nos. 07-1451,
	*	07-1482
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-21464
	*	12-CA-21659
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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