

Nos. 10-1410-11-1003

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SOUTHERN POWER COMPANY

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**

ROBERT J. ENGLEHART
Supervisor Attorney

MICHAEL D. BERKHEIMER
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-3771

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHERN POWER COMPANY	*
	*
Petitioner/Cross-Respondent	*
	* Nos. 10-1410, 11-1003
v.	*
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case Nos.
	* 10-CA-37348 and
Respondent/Cross-Petitioner	* 10-CA-37414
	*

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici: Southern Power Company (“the Company”) is the petitioner/cross-respondent before the Court; the Company was the respondent before the Board. The Board is the respondent/cross-petitioner before the Court; its General Counsel was a party before the Board. There are no amici in the case. International Brotherhood of Electrical Workers, Local 84 and International Brotherhood of Electrical Workers, System Counsel U-19 on behalf of Local 801-1 were the charging parties before the Board. Southern Company Services, Inc. was a party in interest before the Board.

B. Ruling Under Review: This case involves the Company's petition to review, and the Board's application to enforce, a Decision and Order of the Board issued on November 30, 2010, and that is reported at 356 NLRB No. 43.

C. Related Cases: The Board is unaware of any related cases pending in this Court or any other court.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Dated at Washington, DC
This 5th day of July 2011

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GLOSSARY

A	Joint Appendix
Act	National Labor Relations Act
Alabama Power	Alabama Power Company
Board	National Labor Relations Board
Br	Southern Power Company's Opening Brief
Company	Southern Power Company
FERC	Federal Energy Regulatory Commission
Georgia Power	Georgia Power Company
GPO	General Plant Operator
IBEW	International Brotherhood of Electrical Workers
Local 84	International Brotherhood of Electrical Workers Local 84
Local 801-1	International Brotherhood of Electrical Workers Local 801-1
MOU	Memorandum of Understanding
OT	Operator Technician
Union(s)	International Brotherhood of Electrical Workers Local 84 and/or International Brotherhood of Electrical Workers Local 801-1

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court upon the petition of Southern Power Company (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order against the Company. The Board found that the Company committed unfair labor practices by refusing to recognize and bargain with the International

Brotherhood of Electrical Workers (“IBEW”) System Council U-19, on behalf of Local 801-1 (“Local 801-1”), and IBEW Local 84 (“Local 84”).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices. The Court has appellate jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that any person aggrieved by a Board order may seek review of the order in this Court, and Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides that the Board may cross-apply for enforcement.

The Board’s Decision and Order issued on November 30, 2010, and is reported at 356 NLRB No. 43. (A 241.)¹ It is a final order with respect to all parties under Section 10(e) and 10(f) of the Act (29 U.S.C. § 160(e) and 160(f)). The Decision and Order incorporates by reference the findings and

¹ Record references in this final brief are to the Joint Appendix (A __.). When a reference contains a semicolon, references preceding it are to the findings of the Board. References following the semicolon are to the supporting evidence.

reasoning of the Board's previous decision in this case, which issued on March 20, 2009, and is reported at 353 NLRB 1085.² (A 228-40.)

The prior decision was issued at a time when the Board only had two sitting members. In 2009, the Company petitioned the Court for review of that Order, and the Board cross-applied for enforcement. Before the case was briefed, the Court placed it in abeyance pending final resolution of the validity of decisions issued by the two-member Board. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members. 130 S. Ct. 2635 (2010). After the Supreme Court's decision, the Court granted the Board's request that the case be remanded for disposition by a properly-constituted Board. The Board then issued its November 30, 2010 Decision and Order that incorporated by reference the March 20, 2009 decision.

The Company filed its petition for review of the November 30, 2010 decision on December 14, 2010, and the Board filed its cross-application for

² Because the November 30, 2010 Decision and Order incorporates the March 20, 2009 Decision and Order, all cites to the findings of the Board will be made to the March 20, 2009 Decision and Order.

enforcement on January 4, 2011. All filings were timely; the Act places no time limit on petitioning for review or applying for enforcement of Board orders.

STATEMENT OF THE ISSUES

I. Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 801-1 and Local 84. Resolution of that question turns on the subsidiary issue of whether substantial evidence supports the Board's finding that the Company became a successor employer to Alabama Power Company ("Alabama Power") and Georgia Power Company ("Georgia Power"), which operated four of the Company's power plants, when the Company terminated its labor-service agreements with Alabama Power and Georgia Power and hired their existing union-represented work force to continue operating the plants.

II. Whether Section 10(e) of the Act forecloses the Court from considering the Company's arguments that Board processed this case in an arbitrary manner and that the same union cannot represent both the employees of the Company and the employees of Alabama Power and Georgia Power.

III. Whether substantial evidence supports the Board's determination that a multifacility bargaining unit consisting of the three facilities formerly operated by Georgia Power continues to constitute an appropriate unit.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

This unfair labor practice case arose out of the Company's refusal to recognize and bargain with Local 801-1 and Local 84, after the Company took over the operation of one generating plant owned by the Company, but run by Alabama Power, and three generating plants owned by the Company, but run by Georgia Power, and hired the existing union-represented work force at each of these plants. Acting upon charges filed by Local 801-1 and Local 84, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by not bargaining with the Unions over the terms and conditions of employment for employees, titled General Plant Operators ("GPOs"), who operated these power plants. (A140-47.) After a hearing, an administrative law judge found merit to the General Counsel's allegations and issued a decision and recommended order. (A 230-40.) The Company, the General

Counsel, and Local 84 filed exceptions to the administrative law judge's decision.

On review, the Board affirmed the judge's rulings, findings, and conclusions, as modified. (A 228-30.) In particular, the Board affirmed the administrative law judge's finding that the Company was a successor employer and that it violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions, but reversed the judge's finding that a multiplant bargaining unit was inappropriate for the three facilities formerly operated by Georgia Power. (A 229-30.) The Board found the three-plant bargaining unit appropriate based upon the three facilities' common history as part of a Georgia-Power-wide, multiplant bargaining unit. (A 229-30.) The Board's findings of fact are set forth below; its conclusions and order are summarized thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Contracts with Alabama Power and Georgia Power to Operate Four Power Plants

The Company engages in the generation and sale of electricity in competitive wholesale markets.³ (A 231; 95.) It owns eight natural-gas-fueled generating facilities, including the four facilities involved in this case: Plant Dahlberg (in Nicholson, GA); Plant Wansley (in Franklin, GA); Plant Franklin (in Smiths, AL); and Plant Harris (in Autaugaville, AL). (A 231; 95.) Employees at the other four generating facilities owned and operated by the Company are not represented by unions and are not involved in this case. Because the Company engages in wholesale energy generation, it is subject to regulation by the Federal Energy Regulatory Commission (“FERC”) instead of traditional state regulations. (A 231; 96.)

The Company initially staffed these four generating facilities by entering into labor-service agreements with two retail public-utility

³ The Company, Alabama Power, and Georgia Power are all corporate subsidiaries of the Southern Company. (A 231; 95.) Other Southern Company subsidiaries include Gulf Power Company, Mississippi Power Company, and Southern Company Services. (A 231; 73.)

providers, Alabama Power and Georgia Power.⁴ (A 231-32; 95, 97, 100.) Under these agreements, the Company retained ownership of the facilities, but Alabama Power assumed operational and staffing responsibility for Plant Harris, and Georgia Power assumed operational and staffing responsibility for Plant Dahlberg, Plant Wansley, and Plant Franklin. (A 232; 14-20, 40-46, 97, 100.) To operate the natural-gas-fueled plants, Alabama Power and Georgia Power determined that a new position, combining electrical, mechanical, and operational skills, needed to be created. (A 232; 98, 100.)

Alabama Power and Georgia Power believed that the then-current collective-bargaining agreements with System Council U-19 and Local 84 did not cover this new position, titled General Plant Operator (“GPO”). (A 232; 98, 100.) After negotiating about the position, Georgia Power and Local 84 agreed to a Memorandum of Understanding (“MOU”) in January 2000 that incorporated the GPOs into the existing company-wide bargaining unit. (A 232; 47, 100.) The Plant Dahlberg GPO positions were initially

⁴ IBEW System Council U-19, on behalf of various IBEW locals, has represented Alabama Power employees for over 60 years. (A 231; 96.) The most recent Memorandum of Understanding between Alabama Power and System Council U-19 was effective from September 14, 2004 to August 15, 2009. (A 231; 96.) IBEW Local 84 has for many years represented Georgia Power employees in a multiplant, company-wide bargaining unit. (A 231; 96.) Georgia Power and Local 84 have been parties to successive collective-bargaining agreements, the most recent being effective July 1, 2005 to June 30, 2008. (A 231; 96.)

filled in March 2000, the Plant Franklin GPO positions in August 2000, and the Plant Wansley GPO positions in April 2001. (A 232; 38-39.) In March 2002, Alabama Power and System Council U-19 agreed to a separate MOU (“the Harris MOU”), effective from April 1, 2002 through May 31, 2010, that voluntarily recognized a new sub-local, Local 801-1, as the bargaining representative for a new unit consisting solely of GPOs at Plant Harris. (A 232; 21-34, 98.) The Plant Harris GPO positions were initially filled in July and August 2002. (A 232; 38, 98.)

B. The Company Takes Over Staffing and Operation of the Four Power Plants from Alabama Power and Georgia Power

Alabama Power and Georgia Power operated the four generating facilities until January 2008, when the Company decided to terminate the labor-service agreements and to operate the four plants with its own employees. (A 232-33; 101-02.) The Company believed that the termination of the labor-service agreements was necessary to comply with a 2007 settlement agreement between its parent company and the Federal Energy Regulatory Commission (“FERC”), which required the Company to functionally separate its personnel and information from other Southern Company subsidiaries. (A 232; 72-75, 102, 199.) The Company’s reasons for terminating the labor-service agreements were communicated to the Unions, and the termination was never alleged as an unfair labor practice.

(A 55-82, 101-02.) On January 25, 2008, the Company took over the operation, maintenance, and repair of the four generating facilities. (A 232-33; 102.)

Upon the Company's takeover of operations, it provided the GPOs at all four plants written offers of employment to continue their jobs at their respective plants as Operator Technicians ("OT"). (A 233; 84-85, 103.) At Plant Harris, all but 1 of the 17 GPOs accepted the Company's offer of employment as an OT. (A 233; 103.) At Plant Dahlberg, four of the five GPOs accepted the Company's offer. (A 233; 104.) At Plant Wansley, 12 of 15 GPOs accepted the offer. (A 233; 104.) And at Plant Franklin, all 21 GPOs accepted the Company's offer of employment as an OT. (A 233; 104.) The Company did not hire any outside persons as OTs before it began regular operations at the four plants. (A 88-88.2, 104.) Thus, every OT position at the four plants was initially filled by a former Alabama Power or Georgia Power GPO. (A 233; 88-88.2, 104.)

Then, without any hiatus in operations, the Company began running the four generating plants in substantially the same manner as Alabama Power and Georgia Power had. (A 233; 102-05.) It generated the same product — energy — at the same four locations, and with the same plant management as before the takeover. (A 233; 102-05.) The OTs performed

the same electrical, mechanical, and operational duties, under the same immediate supervision, and in the same manner as they had when they were GPOs with Alabama Power and Georgia Power. (A 233; 104.) Only minor changes to the OTs' terms and conditions of employment were made by the Company: a wage increase was given, a new performance bonus was adopted, and the personal time-off policy and health-care options and premiums were changed. (A 233; 86-87, 104.)

C. The Company Refuses to Recognize and Bargain With Local 801-1 and Local 84

On January 15, 2008, Local 84 requested that the Company recognize and bargain with Local 84 as the exclusive bargaining representative of the OTs employed at the plants formerly run by Georgia Power: Plant Dahlberg, Plant Wansley, and Plant Franklin. (A 233; 105.) On January 24, 2008, Local 801-1 requested that the Company recognize and bargain with Local 801-1 as the exclusive bargaining representative for OTs employed at the one plant formerly run by Alabama Power: Plant Harris. (A 233; 105.) The Company refused to recognize and bargain with Local 801-1 and Local 84. (A 233; 105.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found, in agreement with the administrative law judge,

that the Company was a successor employer and violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 801-1 as the exclusive bargaining representative of the Plant Harris OTs and by refusing to recognize and bargain with Local 84 as the exclusive bargaining representative of the Plant Dahlberg, Plant Wansley, and Plant Franklin OTs. (A 228-30, 241.) The Board, however, disagreed with the administrative law judge and found that a single multifacility bargaining unit consisting of OTs at the three former Georgia Power plants (Plant Dahlberg, Plant Wansley, and Plant Franklin) is appropriate. (A 229-30.) In so finding, the Board determined that the administrative law judge erred by failing to give proper consideration to the importance of their multiplant bargaining history in making his unit determination. (A 229-30.)

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 230, 238-39.) The Order affirmatively requires the Company to recognize and bargain with Local 801-1 and Local 84 and to post copies of remedial notices. (A 230, 238-39.)

SUMMARY OF ARGUMENT

This case involves the straightforward application of well-settled law to the facts. An employer that takes over a business will be deemed a successor, and therefore have a duty to recognize and bargain with the employees' pre-existing bargaining representative, so long as a majority of the employer's work force is composed of employees of the predecessor and there is "substantial continuity" between the new and old enterprises. In determining whether the requisite continuity exists, the Court has repeatedly held that successorship will not be defeated if the essential nature of the employees' work remains the same.

In the instant case, substantial evidence supports the Board's finding that the Company was a successor to Alabama Power and Georgia Power because a majority of the Company's employees at each of the four power plants were the union-represented employees who worked at those plants when operated by Alabama Power and Georgia Power, and the employees continued without interruption to perform the same job duties, and under same immediate supervision, as under Alabama Power and Georgia Power. Further, the Company engaged in substantially the same operations, producing the same product, at the same locations, and under the same plant management as Alabama Power and Georgia Power had.

The Company's arguments to the contrary lack merit. The evidence relied upon by the Company in contesting substantial continuity — that the Company did not acquire Alabama Power or Georgia Power assets; that there were professed differences in size and operational nature between the Company and its predecessors; and that some changes were made by the Company to the former Alabama Power and Georgia Power employees' terms and conditions of employment — have all been found insufficient by the Board and the courts to defeat a finding of successorship.

The Company's other challenges to the Board's findings must also fail. The Company's argument that the initial recognition of the Unions was unlawful fails because Section 10(b) of the Act prohibits the Company from raising it nearly a decade after the six-month statute of limitations has passed. Further, because the Company failed to raise the issues before the Board, the Court lacks jurisdiction under Section 10(e) of the Act to hear the Company's arguments that the Board processed the case in an arbitrary manner and that the same union cannot represent both employees of the Company and the employees of Alabama Power and Georgia Power. In any event, each of these arguments also lacks merit.

Finally, substantial evidence supports the Board's finding that the multifacility bargaining unit is appropriate for the three former Georgia-

Power-operated facilities. Here, the three former Georgia Power facilities have a substantial history of being part of the same bargaining unit, and the Company has failed to present the compelling circumstances necessary to rebut the presumption of continued appropriateness.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH LOCAL 801-1 AND LOCAL 84

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”⁵ Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as “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” Under those provisions, it is well settled that an employer becomes a “successor,” who

⁵ An employer’s failure to meet its Section 8(a)(5) bargaining obligation produces a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights.” *See Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 207 (D.C. Cir. 2004.)

must recognize and bargain in good faith with the bargaining representative of its predecessor's employees, if: (1) a majority of its work force in a "substantially representative complement" was employed by the predecessor; and (2) there is substantial continuity between the two enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-42 (1987); *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 280-81 (1972); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009).

With respect to the second factor, whether substantial continuity between the two enterprises exists, the Board looks at the totality of circumstances, "with an emphasis on the employees' perspective." *Fall River*, 482 U.S. at 43. In *Fall River*, the Supreme Court identified the factors relevant to a determination of substantial continuity: whether the business of both employers is essentially the same, whether the employees of the new employer are performing the same work under the same conditions and supervisors, and whether the new employer has the same production process, the same products, and generally the same customers. *Id.*; *Dean Transp.*, 551 F.3d at 1060. *See also Pa. Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001) ("The essential inquiry is whether operations, as they impinge on union members, remain essentially the same.").

As required by Section 10(e) of the Act (29 U.S.C. § 160(e)), the Court upholds the Board’s factual findings “unless the Board’s findings are not supported by substantial evidence or . . . the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Cnty. Hosp. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1082-83 (D.C. Cir. 2003) (applying substantial evidence review test to finding of successorship and failure-to-bargain). *See U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (“The court applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.”).

B. The Company Became a Successor Employer to Alabama Power and Georgia Power When a Majority of Its Employees at Each of the Four Plants Was Hired from the Previous Unionized Work Force that Ran Those Same Plants Under the Employ of Alabama Power and Georgia Power

Applying the above principles, the Board reasonably found that the Company was required to recognize Local 801-1 and Local 84 as the exclusive collective-bargaining representatives of its employees because the Company's entire employee complement at each of the four plants was made up of former Alabama Power and Georgia Power employees employed at those same plants, and because there was substantial continuity between the Company's operations and that of its predecessors. As shown below, substantial evidence supports the Board's findings and the Company's arguments to the contrary lack merit.

1. The Company is a successor to Alabama Power and Georgia Power and unlawfully refused to recognize and bargain with Local 801-1 and Local 84

The facts in this case are not in dispute. The Company stipulated that former Alabama Power and Georgia Power employees at each of the four plants constituted a majority of the Company's work force at those plants when it assumed their operation. (A 233; 103-04.) In fact, every OT employed by the Company when it assumed operation of the four generating facilities was a former Alabama Power or Georgia Power GPO. See page

10, above. (A 233; 103-04.) Thus, when the Company had hired a substantially representative complement of its work force, a majority of that work force had been employed by the Company's predecessors.

The Company also stipulated that at each of the four plants it has engaged in substantially the same business operations, producing the same product, at the same location, and under the same plant management as Alabama Power and Georgia Power. (A 233; 102-03, 105.) The Company further stipulated that the OTs perform the same job duties, at the same work locations, and under the same immediate supervision as the GPOs. (A 233; 104.) Moreover, there was no hiatus in operations, or the OTs' employment, during the operational transition from Alabama Power and Georgia Power to the Company. (A 104.) Indeed, the Company has stipulated to substantially every factor that the Supreme Court identified as relevant in making a substantial continuity determination. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41, 43 (1987); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009). Thus, substantial continuity exists between the Company and the prior operators of the plants, Alabama Power and Georgia Power.⁶

⁶ The Company asserts (Br. 42) that *CitiSteel USA, Inc., v. NLRB*, 53 F.3d 350 (D.C. Cir. 1995), precludes a finding of substantial continuity. The Company's reliance upon *Citisteel*, however, is misplaced. In *CitiSteel*, the

Accordingly, because former Alabama Power and Georgia Power employees composed a majority – indeed all – of the Company’s work force and because substantial continuity existed between the Company’s operations and those of its predecessors, the Company is a successor employer with a duty to recognize and bargain with Local 801-1 and Local 84. Therefore, the Company violated Section 8(a)(5) and (1) of the Act by failing to do so.

2. The Company’s challenges to the Board’s successorship finding are without merit

Contrary to the Company’s contention (Br 38-29), the fact that the Company did not purchase its predecessors’ assets is insufficient to overcome a finding of successorship. Here, the Company already owned the four plants in question and, therefore, there were no predecessor assets to acquire when it assumed direct operation of the four plants. (A 231; 95.)

Successorship has been found where, like here, the employer recaptured

Court failed to find substantial continuity between two enterprises because the alleged successor substantially changed the employees’ job responsibilities and working conditions, the production process, the supervisory structure, and the customer base upon its operational takeover. *Id.* at 354-55. The Court also relied upon the two-year hiatus between the predecessor’s cessation of operations and the alleged successor’s assumption of operations. *Id.* at 356. Here, in contrast, the Company took over operations at the four plants without any hiatus in operations. In addition, the employees performed the same job duties under the same immediate supervision and plant management, with only minor changes to the terms and conditions of their employment. (A 233; 102-05.)

previously subcontracted operations. *See Saks Fifth Ave.*, 247 NLRB 1047 (1980), *enforced in relevant part*, 634 F.2d 681 (2d Cir. 1980); *Cablevision Sys. Dev. Co.*, 251 NLRB 1319 (1980), *enforced*, 671 F.3d 737 (2d Cir. 1982). Moreover, as the Court recognized in *Harter Tomato Products Co. v. NLRB*, “if other factors demonstrate substantial continuity and if employees perceive their new jobs as highly similar,” the fact that the successorship came about in a nontraditional manner is irrelevant. 133 F.3d 934, 938 (D.C. Cir. 1998). As shown above, substantially every factor in the successorship analysis has been met and the employees are doing the same jobs they had previously performed for Alabama Power and Georgia Power. Thus, the fact that the Company did not acquire assets from Alabama Power or Georgia Power is insufficient to overturn the Board’s finding of successorship.

Relying on *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), the Company next argues (Br 40-42) that substantial continuity does not exist because it differs in both size and operational nature from its predecessors. *Atlantic Technical*, however, is factually distinguishable and has largely been limited to its unique facts.

In *Atlantic Technical*, the Board found that the new employer was not a successor because it differed materially in both operational nature and size

from the former employer. *Id.* at 170. In finding the employers materially different, the Board noted that the former employer, Trans World Airlines (“TWA”), was a major airline with 14,000 employees companywide and 1,100 employed at the location involved, was regulated under the Railway Labor Act, and largely employed mechanics and related classifications. *Id.* at 169-70. In contrast, the new employer had only 41 employees, was regulated under the Act, and its only contract at the time of trial was to operate the internal-mail-distribution services previously performed by TWA. *Id.* at 170.

Here, the Company, in a corporate reorganization, took over the entire operations of two corporate affiliates at the locations involved. (A 95,102; 231-32.) From the perspective of the OTs, there was no change in the nature or scale of their employer’s operation; each facility continued to operate in the same manner and with approximately the same number of operation positions as it had under the predecessor. (A 104; 233.) And the labor relations of the Company, Alabama Power, and Georgia Power are all regulated under the Act.

Moreover, the Board has consistently limited *Atlantic Technical* to its “factually unique” circumstances and declined to follow it in factually different cases. *See e.g., Univ. Med. Ctr.*, 335 NLRB 1318, 1333 (2001),

enforced in relevant part, 335 F.3d 1079 (D.C. Cir. 2003); *M.S. Mgmt. Assoc., Inc.* 325 NLRB 1154, 1156 (1998), *enforced*, 241 F.3d 207 (2d. Cir. 2001). *See also Int'l Ass'n of Machinists and Aerospace Workers (Atlantic Technical Serv. Corp.) v. NLRB*, 498 F.2d 680, 683 (D.C. Cir. 1974). Accordingly, *Atlantic Technical* provides no justification for the Company's refusal to recognize and bargain with Local 801-1 and Local 84.

The Company also argues (Br 43-44) that the Board's successorship finding is unreasonable because the OTs had no legitimate expectation of continued union representation. Specifically, the Company claims the employees would view their new situation as OTs as so altered from their prior GPO positions as to preclude a successorship finding. The Company's argument must fail for several reasons.

First, the Company is wrong as a matter of law. The employees' expectation of continuing representation is not a question of fact determined through litigation. Rather, a legitimate expectation of continued representation arises as a matter of law when successorship is found. The factors used to determine substantial continuity, announced by the Supreme Court in *Fall River*, are designed to determine whether the employees would perceive themselves in essentially the same jobs after the change in employer, and therefore continue to legitimately expect union

representation. And here, as shown above, these factors all support the Board's successorship finding.

Second, the minor changes made to the terms and conditions of the OTs' employment, such as the wage increase and modifications to the healthcare premiums, are insufficient to overcome a finding of successorship. The Court has found successorship in cases where far greater changes than those present here were made by the successor employer. For example, in *Harter Tomato*, the Court affirmed the Board's finding of substantial continuity despite differences in "wages, benefits, training, customer base, managerial philosophy, and supplier contracts." 133 F.3d 934, 937 (D.C. Cir. 1998). Likewise, in *Pennsylvania Transformer Technologies, Inc. v. NLRB*, the Court discounted "differences in size, facilities, work force, managerial philosophy, [and] customer base," because "the business of both employers is essentially same" and employees continued to "use the same skills and expertise." 254 F.3d 217, 223-24 (D.C. Cir. 2001). Perhaps the most instructive case is *United Food & Commercial Workers (Spencer Foods) v. NLRB*, 768 F.2d 1463 (D.C. Cir. 1985), where the Court held that the Board was compelled to find substantial continuity even though the new employer "purged most of the former upper management, made changes to the production process, attracted new

customers and lost others, contracted with new suppliers, and down-sized its operation, using only a portion of the former facility.” *Pa. Transformer*, 254 F.3d at 224 n.2 (describing *Spencer Foods*). If the changes present in *Spencer Foods* were not sufficient to defeat successorship, the Company’s more limited changes here cannot be grounds to overturn the Board’s successorship finding.

Third, the employees’ acceptance of “non-union” OT positions with the Company does not signify that the employees no longer desired union representation. The Company attempts (Br 43-44) to depict the employees as voluntarily quitting their Alabama Power and Georgia Power jobs because they wanted nonunion jobs. Rather, the employees chose to keep their existing jobs at the four facilities and perform exactly the same work that they performed as GPOs. The Board, in *Siemens Building Technologies*, rejected a similar argument that employees accepting positions with a “non-union” successor employer demonstrated that they no longer desired union representation. 345 NLRB 1108, 1109 (2005). The taking of “non-union” jobs with the successor is an incidental part of the transition between employers until a substantial and representative complement has been hired and a successorship analysis can be performed. Therefore, the Court should reject the Company’s argument.

3. The Company's argument, that nearly a decade before the Company's takeover Local 801-1 and Local 84 were unlawfully recognized, is barred by Section 10(b) of the Act

The Company contends (Br 32-37) that, because the initial collective-bargaining agreements between Local 801-1 and Alabama Power and Local 84 and Georgia Power recognized Local 801-1 and Local 84 as the exclusive bargaining representative of the GPOs before any employees were hired to fill the GPO positions,⁷ the initial recognitions violated Sections 8(a)(2) and 8(b)(1)(A) of the Act (29 U.S.C §§ 158(a)(2) and 158(b)(1)(A)).⁸ Therefore, they are void and unenforceable. The Company's argument is without merit.

An employer outside the construction industry that grants recognition to a union without asking the union for evidence of majority support only remains free

⁷ Local 801-1 and Alabama Power reached agreement on the Harris MOU in March of 2002. (A 232; 98.) The first Plant Harris GPOs were hired in July and August of 2002. (A 232; 88.) Local 84 and Georgia Power reached agreement on their initial MOU on January 4, 2000. (A 232; 100.) The first GPOs in Plant Dahlberg were hired in March 2000, in Plant Franklin in September 2000, and in Plant Wansley in April 2001. (A 232; 88.1-88.2.).

⁸ The Board did not pass on the issue of whether the original recognition of Local 801-1 and Local 84 was lawful, finding it unnecessary to do so because it found that the defense was barred by Section 10(b). (A 241.) The administrative law judge found that initial bargaining agreements were *not* unlawful prehire agreements, but rather lawful attempts to include new job classifications which were related to those historically performed by Alabama Power and Georgia Power employees. (A 234.) *See Premcor, Inc.*, 333 NLRB 1365 (2001). Thus, contrary to the Company's assertion (Br 32-36), the Board did not find that the original recognition of Local 801-1 and Local 84 was unlawful.

to withdraw that recognition if, within six months after granting it, it accurately asserts that the union did not enjoy majority status at the time of recognition. *See Raymond F. Kravis Center for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189-90 (D.C. Cir. 2008) (“Section 10(b) requires that any challenge to the initial majority status of a union be made within six months of recognition”). This limitation flows from an application of Section 10(b) of the Act (29 U.S.C. § 160(b)).

Section 10(b) states that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board” *Id.* The Supreme Court, in *Machinists Local 1424 (Bryan Manufacturing) v. NLRB*, held that an alleged unlawful prehire agreement “constitutes a suable unfair labor practice only for six months following the making of the agreement.” 362 U.S. 411, 423 (1960). The Supreme Court noted that to hold otherwise “would vitiate the policies” of Section 10(b) that “bar litigation over past events ‘after records have been destroyed, witnesses have gone elsewhere, and recollections of the events have become dim and confused,’” and that seek “to stabilize existing bargaining relationships.” *Id.* at 419. *Bryan Manufacturing* stands for the rule that an unfair labor practice that occurred outside the Section 10(b) period cannot be used to render conduct unlawful that is currently legal on its face. *Id.* at 416-17.

Now, nearly a decade after the six-month statute of limitations found in Section 10(b) has run, the Company is attempting to contest the original recognition of the Unions, which occurred in 2000 (Local 84) and 2002 (Local 801-1). As the Supreme Court made clear in *Bryan Manufacturing*, the recognition of the Unions could only be contested during the six months following the execution of the MOUs containing the initial recognition clauses. Accordingly, Section 10(b) bars the Company's argument that the initial agreements are void and unenforceable.⁹

The Company (Br 37) also relies on *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476 (3d Cir. 1980). In that case, the court found that an initial recognition that the court deemed unlawful could be used—even though it was outside the Section 10(b) period—to support an employer's good-faith

⁹ The fact that the Company seeks to use the prehire agreements as a defense to an unfair labor practice charge, and not to file a charge, does not save the argument from being time-barred under Section 10(b). *See Raymond F. Kravis Center for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189-90 (D.C. Cir. 2008); *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1158 (10th Cir. 2000) (“we see no reason why the Board's application of [the Section 10(b)] time bar to challenges to the formation of a bargaining relationship based on a lack of majority status is unreasonable”); *NLRB v. District 30, United Mine Workers of Am. (Blue Diamond)*, 422 F.2d 115, 122 (6th Cir. 1969) ([t]he Supreme Court in *Bryan Manufacturing* announced a rule which prevents the resurrection of legally defunct unfair labor practices . . . [t]o permit . . . the company's putative unfair labor practices in this case as a defense . . . would be directly contrary to this rule”).

doubt of the union's majority status when the employer had other evidence of its good-faith doubt—within the Section 10(b) period—such as unlawful union assistance and expressions of employee dissatisfaction. *Id.* at 478, 484-85. Here, by contrast, there is no finding that the initial recognition was unlawful; and here the Company has no additional evidence within the six-month period supporting its assertion that the Unions lack majority status.¹⁰ Indeed, the court in *Pick-Mt. Laurel*, contrary to the Company's position here, made it clear that Section 10(b) precludes a successor employer from withdrawing recognition based solely on the alleged infirmity of the initial recognition extended by the predecessor. *Id.* at 483. And that is precisely what the Company is trying to do here.

¹⁰ To withdraw recognition under current law, an employer would need objective evidence within the Section 10(b) period of actual loss of majority support, *see Levitz Furniture Co.*, 333 NLRB 717, 725 (2001), not just the good-faith doubt evidence that was permitted at the time of *Pick-Mt. Laurel*.

II. SECTION 10(e) OF THE ACT DEPRIVES THE COURT OF JURISDICTION TO CONSIDER THE COMPANY’S BELATED CLAIMS THAT THE BOARD PROCESSED THIS CASE IN AN ARBITRARY MANNER AND THAT THE SAME UNION CANNOT REPRESENT BOTH EMPLOYEES OF THE COMPANY AND THE EMPLOYEES OF ALABAMA POWER AND GEORGIA POWER; IN ANY EVENT, THE CLAIMS LACK MERIT

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”¹¹ The Supreme Court has interpreted Section 10(e) as depriving the Court of jurisdiction over issues not presented to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). As this Court has observed, the jurisdictional bar of Section 10(e) “affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the Court] may have the benefit of its opinion when [it] review[s] its determinations.” *Teamsters*

¹¹ *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

Local 115 v. NLRB, 640 F.2d 392, 398 (D.C. Cir. 1981) (quoting *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977)).

Extraordinary circumstances exist under Section 10(e) only if there has been some occurrence that has prevented the party from presenting the matter to the Board at the proper time. *See Teamsters Local 115*, 640 F.2d at 398-99; *Allied Prods.*, 548 F.2d at 654. And the Supreme Court has made clear that the proper time to challenge aspects of a case that arise for the first time in a Board decision is to file a motion of reconsideration with the Board. *See Woelke & Romero*, 456 U.S. at 665; *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

As discussed below, the Company raises several arguments for the first time in its brief before the Court. As such, the Company failed to give the Board an opportunity to respond to its allegations, and therefore Section 10(e) of the Act bars the Court from hearing the Company's claims. In any event, even if the Court entertains these arguments, each lacks merit.

A. The Court Lacks Jurisdiction To Consider the Company's Belated Claims that the Board Processed this Case in an Arbitrary Manner; In Any Event, the Claim Is Meritless

As discussed above in the Statement of Jurisdiction (p. 3), a three-member panel of the Board issued the November 30, 2010 Decision and Order after the Court vacated the two-member, March 20, 2009 Decision

and Order. The Company argues (Br 25-28) that the Court should vacate the 2010 Decision and Order because the Board failed to carefully review the record and “arbitrarily rushed” to issue a decision. These assertions suffer from several fatal flaws. First, the Company failed to give the Board an opportunity to respond to its allegations; as a result, Section 10(e) of the Act bars the Court from considering them. In any event, it is well settled that courts grant administrative agencies like the Board a presumption of regularity in their decision-making processes, and will not delve into their deliberative methods based on speculation—all the Company offers here. Accordingly, the Court should reject the Company’s belated and meritless contentions.

After the three-member panel of the Board issued its Decision and Order, the Company had 28 days to file a motion for reconsideration with the Board pursuant to Section 102.48(d)(1) and (2) of the Board’s Rules and Regulations (29 C.F.R. § 102.48(d)(1) and (2)). Doing so would have given the Board an opportunity to respond to the challenges to its decision-making process. The Company, however, failed do so. Given the Company’s failure to file a motion for reconsideration, and based upon the Section 10(e) principles discussed above, the Court lacks jurisdiction to consider the Company’s challenges to the Board’s decision-making process. *See N.Y. &*

Presbyterian Hosp. v. NLRB, 2011 WL 2314955 *8 (D.C. Cir. 2011) (Court lacks jurisdiction to hear due process claim because party failed to raise argument before the Board). Accordingly, Section 10(e) deprives the Court of authority to consider those claims.

In any event, its contentions that the Board arbitrarily rushed its November 30, 2010 decision must be rejected because they lack merit. It is well settled that courts afford administrative agencies like the Board a presumption of regularity in their decision-making and will not delve into their internal deliberative processes. Further, the Company offers nothing but speculation in asserting (Br 26) that it “strains credulity” that “the Board had time to carefully review the entire record . . . and consult with other Board members as to the appropriate outcome in this case.”

Under the “presumption of regularity,” courts presume that public officials have properly discharged their official duties, absent “clear evidence to the contrary.” *U.S. v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (“A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.”). Here, the Board incorporated by

reference its earlier decision only after it explicitly explained that it “considered the judge’s decision and the record in light of the exceptions and briefs” (A 241.) The Company offers no factual support, much less any “clear evidence to the contrary,” that would warrant disregarding this explanation or delving into the Board’s processes in issuing the November 30, 2010 decision. *See Chem. Found.*, 272 U.S. at 14-15.

For instance, in *U.S. v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court concluded that it was error to permit the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates. As the Court explained, the courts may not “probe [the Secretary’s] mental processes” because, “[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.” Following this logic, the Supreme Court has held that it will accept at face value the Board’s assurances that it adequately considered the record before issuing a decision. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where the Board assigned case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time).

Contrary to the Company's argument (Br 26-27), neither the fact that the Board issued its November 30, 2010 Decision and Order six business days after vacating the two-member Board's Decision and Order, nor the number of decisions issued during the same time period, can counter the presumption that Board members properly discharged their duties. Courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly they carried out their duties. *See, e.g., National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) ("bare allegation" that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process). Accordingly, the Board must be afforded its presumption that it properly discharged its official duties.

The Company also argues (Br 28-29) that, because of "the Board's rush to issue a decision," there is confusion as to whether the Board, in its November 30, 2010 Decision and Order, adopted its prior decision that the three-plant bargaining unit consisting of the former Georgia-Power-operated

facilities constitutes an appropriate unit or the administrative law judge's determination that the three-plant bargaining unit is inappropriate and that the Company was required to bargain with three single-plant units. This argument too must fail because the Company failed to raise its purported confusion to the Board in a motion for reconsideration. Therefore, Section 10(e) bars the Court from finding that the Board's order was confusing.

In any event, the plain text of the Board's November 30, 2010 Decision and Order clearly establishes that the Board adopted its prior decision finding the three-plant bargaining unit appropriate. In order to place the Company's argument in context, the relevant procedural history of the instant case will be briefly summarized. In its March 20, 2009 Decision and Order, the two-member Board reversed the administrative law judge's finding that a three-plant bargaining unit consisting of the former Georgia Power operated plants was inappropriate. Then in its November 30, 2010 Decision and Order, the three member panel of the Board stated that it "decided to affirm the judge's rulings, findings, conclusions, and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NLRB No. 116, which is incorporated by reference."

Contrary to the Company's contention, the plain reading of the above-quoted sentence clearly establishes that the Board adopted its prior decision and remedial order, and not the administrative law judge's finding that the three-plant bargaining unit is inappropriate. The sentence, by concluding with the phrase "*to the extent and for the reasons* stated in the [March 20, 2009] decision reported at 353 NLRB No. 116, which is incorporated by reference," qualifies and limits the scope of the Board's agreement with the judge's decision. (Emphasis added.) The meaning of the qualifying and limiting language is plain; the Board, in its November 30, 2010 Decision and Order, only affirmed the judge's rulings, finding, conclusions, and recommended order to "the extent" and "for the reasons stated" in the Board's prior decision, which it incorporated by reference.¹² By explicitly incorporating these documents into its November 30, 2010 Decision and Order, the Board made them part of that Decision and Order. As such, they contain the articulated basis for the Board's decision to reverse this aspect of the judge's decision. Thus, the Company's professed confusion whether Board adopted its prior decision, or that of the

¹² Incorporation by reference is "[a] method of making a secondary document part of the primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." Black's Law Dictionary (9th ed. 2009).

administrative law judge, in regard to the appropriateness of the three-plant bargaining unit is unfounded.

B. The Court Lacks Jurisdiction To Consider the Company's Belated Claim that the FERC Settlement Prevents the Same Union from Representing Both the Employees of the Company and the Employees of Alabama Power and Georgia Power; In Any Event, the Claim Is Meritless

The Company asserts (Br 30-32) that an October 5, 2006 settlement¹³ between its parent company and FERC precludes the same union from representing both the Company's employees and the Alabama Power and Georgia Power employees. The assertion must fail, however, because the Company did not raise the issue before the Board. In the Board proceedings, the Company's only references to the FERC settlement were to justify its termination of its labor-service agreements with Alabama Power and Georgia Power in January 2008 and to state that it was regulated by FERC, not state regulators; nowhere in the exceptions or briefs filed with the Board did the Company even remotely connect the FERC settlement with its refusal to recognize and bargain with the Unions. Accordingly, under the Section 10(e) principles discussed above (see pp. 30-31), the Court lacks jurisdiction to consider the Company's argument. *See, e.g., Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (holding that a party

¹³ *Southern Company Services, Inc., et al.*, 117 FERC ¶ 61,021 (2006).

“forfeit[s]” its challenge to the Board’s findings by failing to first present its arguments to the Board).

In any event, the Company’s argument is meritless. Congress was aware that policy reasons may dictate that the same union should be prohibited from representing two different groups of employees and made provision for such situations in the Act. *See* 29 U.S.C. § 159(b)(3) (“but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards”). Nothing in the Act, however, prohibits the same union from representing two different groups of employees in a situation like that in the instant case.

Further, the Company fails to cite to any case law to support its argument. The FERC settlement placed affirmative demands upon the Southern Company and its corporate subsidiaries alone. (A 73-75.) The Union was not involved in the FERC settlement, and the Company presents no support for why it would be held accountable by FERC for discussions at Union meetings or for the actions of Union leaders during bargaining. Accordingly, the Court should reject the Company’s belated and meritless assertion.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE A MULTIPLANT BARGAINING UNIT FOR THE FORMER GEORGIA-POWER-OPERATED PLANTS IS APPROPRIATE

A. Applicable Principles and Standard of Review

The Board has broad discretion in the selection of bargaining units, and it is well established that the Board “need only select *an* appropriate unit, not *the most* appropriate unit.” *Dean Transportation, Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009) (emphasis in original) (internal citation omitted). In the successorship context, where “the Board has long given substantial weight to prior bargaining history,” an acquired unit remains appropriate even if it is not the unit the Board itself would have chosen in the first instance. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). Moreover, “employees with a significant history of representation by a particular union presumptively constitute an appropriate bargaining unit.” *Univ. Med. Ctr. v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003); *see also Elec. Workers v. NLRB*, 604 F.2d 689, 696 (D.C. Cir. 1979) (bargaining unit consisting of five plants of the predecessor’s larger multiplant unit remained an appropriate unit). This presumption is rebuttable only if the employer can demonstrate “‘compelling circumstances’ sufficient to ‘overcome the significance of bargaining history.’” *Univ. Med. Ctr.*, 335 F.3d at 1085 (quoting *Children’s Hosp. of*

San Francisco, 312 NLRB 920, 929 (1993), *enforced sub nom. Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304 (9th Cir. 1996)).

Where, as here, a challenge is lodged to the continued viability of an historical bargaining relationship, the weight afforded to the factors assessed falls exclusively within the Board's domain. Thus, the weight the Board affords to such factors must be upheld on review, unless arbitrary or irrational in light of the Act's policies. *See Am. Hosp. Assoc. v. NLRB*, 499 U.S. 606, 611-13 (1991) (it is within the Board's purview to determine reasons for selecting one unit over another so long as reasons comport with the Act's policies).

B. The Board Properly Found that the Multiplant Bargaining Unit Consisting of the Three Former Georgia-Power-Operated Facilities Continued to Constitute an Appropriate Unit

In the instant case, the Board properly applied the above presumption in finding that the three former Georgia-Power-operated facilities continued to constitute an appropriate multifacility bargaining unit.¹⁴ At the time the Company took over operations, the GPOs employed at Plant Dahlberg, Plant

¹⁴ GPOs at Plant Harris, the plant formerly run by Alabama Power, had from the plants construction constituted a separate sub-local with System Council U-19. Based upon the presumption of appropriateness for single plant units, the administrative law judge found that a bargaining unit consisting solely of Plant Harris GPOs was appropriate. Neither the Company nor the General Counsel has ever contested the appropriateness of such a unit.

Wansley, and Plant Franklin had been a part of the Local 84 multifacility bargaining unit since the plants began operating in the early 2000s.¹⁵ (A 47, 96, 100.) As such, the GPOs at all three plants had been covered by the same collective-bargaining agreements since the positions were created, and their wages, benefits, and working conditions had always been bargained for on a group basis. (A 10, 47, 50, 53.) Further, the GPOs at the three plants had all shared certain common rights, such as the grievance-arbitration procedure. (A 10-13, 47, 49-52, 53-54.) Thus, the Board appropriately attached significant weight to this bargaining history and determined that the multifacility bargaining unit was presumptively appropriate. *See Trident Seafoods*, 101 F.3d at 118.

To overcome the presumption of appropriateness arising from the bargaining history shared by Plant Dahlberg, Plant Wansely, and Plant Franklin, the Company was required to demonstrate “compelling circumstances.” *See Univ. Med. Ctr.*, 335 F.3d at 1085. The Company failed to do so. The circumstances relied upon by the Company (Br 46-47) – the geographical distance between the three plants, the lack of functional integration among the plants, and the operational grouping of the three

¹⁵ Plant Dahlberg and Plant Franklin began operation in 2000. (A 38.) Plant Wansley began operation in 2001. (A 39.) Local 84 began representing the GPOs in January 2000. (A 100.)

plants with other unrepresented plants –did not prevent this multifacility bargaining relationship from succeeding in the past, and have all been rejected by the Board as grounds for finding that a continuation of that relationship is no longer appropriate. *See Met Elec. Testing Co.*, 331 NLRB 872 (2000); *White-Westinghouse Corp.*, 229 NLRB 667, 674 (1977), *enforced sub nom. Elec. Workers v. NLRB*, 604 F.2d 689, 696 (D.C. Cir. 1979). Accordingly, the three-plant bargaining unit consisting of the former Georgia-Power-operated facilities constitutes an appropriate bargaining unit.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment denying the petition for review and enforcing the Board's Order in full.

s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

s/ Michael D. Berkheimer
MICHAEL D. BERKHEIMER
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2978
(202) 273-3771

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2011

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ADDENDUM

STATUTES

Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Sec. 8(d) of the Act (29 U.S.C. § 158(d)) provides in relevant part:

(d) 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: *Provided*, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

Section 9(b) of the Act (29 U.S.C. § 159(b)) provides in relevant part:

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(e) 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 proceeding, 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 cause notice thereof to be served upon

such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) 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.

BOARD RULES AND REGULATIONS

Procedure Before the Board

§ 102.48 *Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions* -

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHERN POWER COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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* Nos. 10-1410
* 11-1003
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* Board Case No.
* 10-CA-37348
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,337 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of July, 2011

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system. As a courtesy hard copies were also served on the following counsel at the addresses listed below:

Seth T. Ford, Esquire
Troutman Sanders LLP
600 Peachtree Street, NE
5200 Bank of America Plaza
Atlanta, GA 30308-2216

M. Jefferson Starling, III
Balch & Bingham, LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-464

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of July, 2011