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Palm Beach Metro Transportation, LLC and Amalgamated Transit Union, AFLCIO, Local 1577.
Cases 12–CA–25842, 12–CA–25866 and 12–CA–25969

July 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On March 22, 2010, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and argument in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions, to modify his remedy,³ and to adopt the recommended Order as modified.⁴

¹ The General Counsel has moved in his answering brief to strike the Respondent's exceptions and supporting brief. Although the exceptions and brief are not in strict conformity with the Board's Rules and Regulations, we find that they are not so deficient as to warrant striking them. Accordingly, we deny the General Counsel's motion. See generally *Postal Service*, 339 NLRB 400 fn. 1 (2003).

² We observe that the Board's decision in *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), enfd. 371 Fed.Appx. 167 (2d Cir. 2010), vacated and remanded 131 S.Ct. 458 (2010), a case cited by the judge, was recently reaffirmed by the Board. See 356 NLRB No. 134 (2011). Member Hayes did not participate in the recent *Eugene Iovine* decision. He expresses no view concerning the rationale for finding a violation there and finds no need to rely on that decision in this case.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds ___ F.3d ___, 2011 WL 2277530 (D.C. Cir. June 10, 2011), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, the judge inadvertently failed to specify that backpay and other make-whole relief shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

⁴ We find merit in the General Counsel's exception to the judge's failure to require that the remedial notice be mailed to those employees working out of the Belle Glade area, inasmuch as they do not report to the West Palm Beach facility, where the notice will be posted, and there is no apparent physical location for posting in Belle Glade.

Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

The judge concluded that the Respondent violated Section 8(a)(5) of the Act on April 28, 2008, by unilaterally reducing the number of hours and days of work of unit employees. The judge rejected the Respondent's contention that it was acting pursuant to a past practice established prior to the Union's certification on February 29, 2008. We agree. The Respondent clearly failed to prove a past practice of reducing hours and days of work in response to fluctuations in available work. In fact, even in the few instances where there were such fluctuations prior to April 2008, the Respondent failed to establish that they ever resulted in a comparable reduction of hours and days of work. From the Respondent's inception, through April 2008, there was enough work available for all unit employees to work as much as they wanted, 5 to 7 days a week, with lots of overtime. Consequently, the substantial reduction in available work that led to the unilateral reduction of hours and days of work on April 28, 2008 was a first-time event, with no established past company practice for dealing with it.⁵ Accordingly, the Respondent had an obligation to give the Union notice and an opportunity to bargain prior to implementing a reduction in hours and days of work. By acting unilaterally, it violated Section 8(a)(5) of the Act.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Palm Beach Metro Transportation, LLC, West Palm Beach, Florida, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, post at its West Palm Beach, Florida facility—and duplicate and mail, at its own expense, to all full-time and regular part-time operators performing para-transit duties for Palm Beach County, working out of the Belle Glade area—copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting and mailing of paper notices, notices shall be

⁵ We do not rely on the judge's statement that, “Even if a past practice [regarding the reduction of hours and days of work] could be shown, ... the time frame from February 13, 2005, until April 28, 2008, would not show a ‘long term’ past practice.”

⁶ Member Hayes notes that the Respondent does not contend that it was confronted with an economic exigency excusing it from bargaining to impasse prior to taking unilateral action.

distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2008.”

Dated, Washington, D.C. July 26, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Karen M. Thornton, Esq., for the Government.¹

John M. Camillo, Esq., for the Company.²

Dwight Mattingly, Business Agent, for the Union.³

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This a unilateral change case which I heard in trial in West Palm Beach, Florida, on January 21 and 22, 2010.⁴ Case 12-CA-25842 originates from a charge filed on May 1, 2008, by the Amalgamated Transit Union, AFL-CIO, Local 1577 (the Union). The prosecution of the case was formalized on October 22, 2009, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board’s General Counsel, issued an order consolidating cases,

¹ I shall refer to Counsel for General Counsel as Counsel for the Government and General Counsel as the Government.

² I shall refer to Counsel for the Respondent as Counsel for the Company and shall refer to the Respondent as the Company.

³ I shall refer to the Charging Party as the Union and to its Representative as Union Representative.

⁴ At trial the Parties entered into an Informal Settlement Agreement, which I approved on the record, covering the allegations set forth in the Consolidated Complaint that were based on Cases 12-CA-25866 and 12-CA-25969. I severed those cases from the complaint and remanded same to the Regional Director for Region 12 of the Board to oversee compliance. A copy of the agreement was entered into the record as Judge’s Exhibit 1.

consolidated complaint and notice of hearing (complaint) against Palm Beach Metro Transportation, LLC (Company).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

The single allegation litigated concerns the Company’s reduction of the number of hours and days of work of its employees on about April 28, 2008, in an appropriate unit represented by the Union without prior notice to the Union and without providing the Union an opportunity to bargain with regard to the conduct and the effects of such conduct. It is alleged the Company, by the above described conduct, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act)

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record,⁵ the post-trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS AND BARGAINING UNIT.

The Company is a Florida corporation with an office and place of business in West Palm Beach, Florida, where it has been, and continues to be, engaged in the business of operating an intrastate Para-transit service for Palm Beach County, Florida. During the past 12 months ending October 1, 2009, a representative period, the Company purchased and received directly from points located outside the State of Florida, goods and services valued in excess of \$10,000. During the same period of time it also had gross revenues in excess of \$250,000. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit and/or do not dispute, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted that the following employees of the Company, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time operators employed by the Company performing Para-transit duties for Palm Beach County out of its facility located at 1635 Meathe Drive⁶, West Palm Beach, Florida; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

⁵ I grant the Government’s unopposed Motion to correct the transcript at page 111 line 11 to delete “four-hours” and insert “forty hours.”

⁶ Formerly 6620 Lakeside Road.

The Facts

Following a representation election held on August 10, 2007, the Union was certified as the exclusive collective-bargaining representative of the Unit (Case 12–RC–9265) on February 29, 2008, and at all times since that date, based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the Unit. As the Board noted in *Palm Beach Metro Transportation, LLC* 352 NLRB No. 70 (May 30, 2008), that about March 6, 2008, by letter, the Union requested the Company recognize and bargain with it as the exclusive collective-bargaining representative of the Unit. About March 17, 2008, by letter, the Company advised the Union it would not bargain with it. On March 20, 2008, the Union filed a charge (Case 12–CA–25789) against the Company based on its refusal to bargain. The Government issued a complaint against the Company on March 28, 2008, alleging the Company has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification. On April 21, 2008, the Government filed a Motion for Summary Judgment with the Board and on April 23, 2008, the Board issued an order transferring the proceedings to the Board with a Notice to Show Cause why the motion should not be granted. In its answer and response, the Company admitted its refusal to bargain, but contested the validity of the Union’s certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. The Board concluded all representation issues raised by the Company were, or could have been, litigated in the prior representation proceeding and further concluded the Company failed to offer to adduce any newly discovered and previously unavailable evidence nor any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. The Board concluded the Company raised no representation issue that was properly litigable before it in the unfair labor practice proceeding. On May 30, 2008, the Board issued its decision finding that by failing and refusing since about March 17, 2008, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit employees, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act. *Palm Beach Metro Transportation, Supra*. The United States Court of Appeals for the Eleventh Circuit, in an unpublished Order (11th Cir. 08–13447–JJ dated November 21, 2008) granted the Government’s motion for summary entry of judgment against the Company enforcing the Board’s decision of May 30, 2008.

Company Director Robert Glaeser testified the Company was formed in June 2004. The Company is a division of Yellow Cab Service Corporation. Glaeser describes the Company as a para transit ground service primarily transporting disabled, elderly, wheelchair, ambulatory, and stretcher confined customers. Those using the services are transported to and from, for example, medical and dialysis treatments, as well as for employment, shopping, and recreational needs. Director Glaeser estimated 30 percent of all transportation provided to its customers is for medical related reasons. The Company’s contract for services with Palm Beach County Florida calls for the Company to provide its Para transit services exclusively to

Palm Tran, Inc., a not-for-profit entity, owned by Palm Beach County Florida. The Company’s contract with Palm Beach County calls for participation, of at least 15 percent, by a Disadvantaged Business Enterprise. The Company’s contract with Palm Beach County also specifies the types of vehicles to be used by the Company in providing the services contracted for. Eighty percent of the vehicles utilized are large buses accommodating either 6 or 12 ambulatory and two wheelchair passengers, with the remainder of the fleet being mini buses. Director Glaeser stated the Company started with a fleet of new Ford diesel vehicles but “system failures” “brake failures” and “constantly overheat[ing]” caused problems for the Company. Glaeser said the vehicle problems resulted in having to utilize two drivers for the same route, with one driver staying with the out of service vehicle while a replacement vehicle with a second driver vehicle finished the route for the original driver. The Company began a program of replacing the defective vehicles starting with the replacement of 38 vehicles around August to October 2007 with the remainder being swapped out about a year later in 2008.

The Company also, from July 2007 until January 2008, provided services directly to Medicaid.

Director Glaeser testified that from the start of the Company employees were scheduled to work 4 days per week but explained there was enough work available so that employees worked 5 to 7 days per week. Glaeser specifically stated that from about 2005 to 2008 drivers were getting 40 hours work per week plus lots of overtime. Glaeser explained that from the inception of the Company through April 2008 unit employees had an opportunity to work as much as they wanted.

According to Glaeser, Palm Tran Inc., prepares driver manifests daily reflecting the routes and hours for each driver including pickup and drop off locations for each customer of its services.

Company Operations Manager Jimmy Sherrod, who has been with the Company from its inception, started as a driver, then supervisor and for the past 2 1/2 years has been its operations manager, helps “oversee the operation of the daily activities” at the Company. Sherrod testified that before April 2008 employees worked 5, 6, or 7 days per week but after April 2008 “things went down to four to five days.” According to Sherrod “drastic cuts” came from Palm Tran Inc., resulting in the number of hours available for the drivers to be “drastically” reduced. Sherrod explained that the number of hours worked has always been, and continues to be, controlled by Palm Tran, Inc.

Company Director Glaeser testified the Company lost approximately 15 Medicaid routes in January 2008 resulting in hours for the drivers being slowly reduced. Glaeser opined that the hours of work for Unit employees was further reduced in April 2008 probably as a result of the Company hiring additional drivers which resulted in it taking a while for the routes and assignments for the drivers to level out. Glaeser explained the hiring of additional drivers in conjunction with fewer employees quitting their employment caused the Company to realize it needed to reduce the hours of work for its Unit employees.

Director Glaeser testified the Company experienced performance difficulties with the first Disadvantaged Business

Enterprise, Imperial Transportation, it contracted with. Glaeser said that as a result of its difficulties with Imperial Transportation he reduced the routes assigned to that company from 15 percent of the overall business to about 4 or 5 percent of the business. According to Glaeser, Palm Beach County thereafter required the Company to come into compliance with its Disadvantaged Business Enterprise obligations. This resulted in the Company having to obtain a substitute company, "in around July 2008," in order to meet its Disadvantaged Business Enterprise requirements. Glaeser said that as of the trial herein, the Disadvantaged Business Enterprise was again being assigned the required 15 percent of the Company's overall business.

Glaeser testified he did not, nor did anyone from the Company to his knowledge, give notice to the Union regarding the need for a reduction in the routes and/or hours for the Unit employees. Glaeser specifically acknowledged, he did not give notice to and afford the Union an opportunity to bargain about the loss of work for Unit employees because he did not understand he had to. Glaeser stated he knew; however, at the time, the Union was the certified collective-bargaining representative of the Unit employees.

Union President Mattingly testified he was contacted around April 28, 2008, by Unit employees who told him they had received notification from Company management that the number of days they worked would be reduced to four per week. Mattingly testified that at no time, from the certification of the Union as the bargaining representative until April 28, 2008, did the Company give notice and opportunity to the Union to bargain about any plans or intentions for a reduction in the number of hours and days of work for the Unit employees. Mattingly said the Union was ready and available to bargain if notice and the opportunity had been made available to the Union.

The Government presented Unit employees who gave testimony regarding their hours and days of work being reduced.

Inez Turton started as a driver for the Company in April 2005 working 5 days and over 40 hours per week. Turton worked, for a period of time, for another company, Paramed, which was associated with the Company herein, but returned to work for the Company on February 28, 2008. When she returned she worked Monday through Friday for 40 hours and approximately 12 hours overtime per week. Turton was notified by her supervisor, Shirley Fordham, in April 2008, her schedule would be changed to 4 days with less than 40 hours per week.

Willie Mae Brown started at the Company on May 1, 2005, working Monday through Saturday for 60 to 70 hours per week. Supervisor Fordham told Brown in April 2008 her work schedule would be cut to 4 days per week. Brown received written notice of the reduction with an April 2008 pay check. Brown testified that from April 2008 through September 2009, she worked 33 to 37 hours per week.

Monica Siverain started at the Company on April 18, 2005, as a driver working 6 to 7 days a week. Siverain said she was promised by the individual who trained her, she would get at least 12 hours work per day. Siverain received that amount of work but it changed in April 2008. Siverain said Supervisor Fordham told her the Company was going to change her work days, and she was reduced from working 5, 6 or 7 days to 4

days per week. Siverain explained that after April 2008 she obtained as many hours as possible but was not making 40 hours per week, notwithstanding, she sometimes got more than 40, while on other occasions less than 40 hours per week.

Janice Jarrell worked as a driver for the Company from May 2005 to February 2009. Jarrell said she was promised work for 6 days per week and 12 hours per day. Jarrell's work was reduced to 4 days per week in May 2008.

III. ANALYSIS, DISCUSSION, AND CONCLUSIONS

It is well settled that unilateral decisions made by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are generally regarded as a refusal to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer's duty to bargain only arises, however, if the changes are material, substantial, and significant ones affecting terms and conditions of employment *Millard Processing Services*, 310 NLRB 421, 425 (1993). Absent "compelling economic considerations", an employer "acts at its peril" by unilaterally changing working conditions during the pendency of election issues and where the final determination has not yet been made. And where the final determination on the objections results in the certification of representative the Board will find the employer to have violated Section 8(a)(5) and (1) of the Act for having made such unilateral changes *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), *enf. denied on other grounds*, *NLRB v. Mike O'Connor*, 512 F.2d 684 (8th Cir. 1975). The Board in *Mike O'Conner Chevrolet*, *supra* at 703 explained, "Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending." Reducing the hours and days of work of employees are changes in terms and conditions of employment over which an employer must bargain, *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). Stated differently a decision to reduce or change the hours and/or particular days of work of employees represented by a labor organization is a mandatory subject of bargaining *Carpenters Local 1031*, 321 NLRB 30, 31 (1996). If the Government demonstrates an employer made a unilateral change involving a mandatory subject of bargaining the burden rests with the employer to demonstrate such a unilateral change was in some way privileged or the employer's change will violate the Act, *Pan American Grain*, 351 NLRB 1412, 1414 fn 9 (2007). In that regard, if an employer can establish that the change it made was made pursuant to a longstanding practice such may amount to a continuation of the status quo and not constitute a violation of the Act. Simply stated a longstanding practice may become a term and condition of employment and an employer would not violate the Act if it acts consistently with that practice in making unilateral changes *Courier-Journal I*, 342 NLRB 1093, 1094 (2004), and *Courier Journal II*, 342 NLRB 1148 (2004). The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred with such regularity and

frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis *Eugene Iovine, Inc.* 353 NLRB No. 36 (2008).

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing wages, hours, and other terms and conditions of employment of represented employees, as is the case herein, without providing the bargaining representative with notice and a meaningful opportunity to bargain about the changes.

First, the evidence clearly establishes the Company reduced the hours and days of work of its Unit employees in April 2008. Employees Turton, Brown, Siverain, and Jarrell testified they worked in excess of 40 hours per week from the start of their employment with the Company in 2005 until approximately late April 2008. Turton, for example, worked 5 days and approximately 12 hours overtime per week but in April 2008 was told her work week would be reduced to 4 days with less than 40 hours work. Brown worked 6 days for 60 to 70 hours per week from May 2005 until April 2008 when she was informed by management, orally and in writing, her schedule would be reduced to 4 days per week. Brown thereafter received 33 to 37 hours work per week through September 2009. Siverain was promised 12 hour days and worked 6 to 7 days per week from April 2005 until April 2008, when she was told her work week would be reduced to 4 days per week. Siverain thereafter did not average 40 hours per week. From these examples, it is clear the Company in April 2008 reduced the hours and/or days of work of Unit employees. Company management acknowledges there was a reduction of Unit work in April 2008. According to Company Director Glaeser, from the inception of the Company until April 2008, Unit employees had the opportunity to work as much as they wished, working 5 to 7 days per week, with lots of overtime. Company Operations Manager Sherrod acknowledged that before April 2008, Unit employees worked 5, 6, or 7 days per week but after April 2008 “things went down to 4 to 5 days per week” at which time “drastic cuts” were made.

Second, it is clear, and I find, the decision to reduce the hours and/or days of work of the Unit employees constitutes a material, substantial, and significant change in working conditions for the Unit employees. In fact it is difficult to think of a more dramatic change for employees other than perhaps discharge.

Third, it is admitted by and clear the Company did not give prior notice of the reduction to the Union nor did the Company afford the Union an opportunity to bargain with respect to the reduction in hours and/or days of work for Unit employees or the effects thereof. In that regard, Company Director Glaeser specifically stated he did not give notice to and afford the Union an opportunity to bargain nor did he know of anyone else from management doing so. Glaeser’s explanation, he did not understand he had to give notice to or bargain with the Union at that time, in no way justifies the Company’s lack of notice and bargaining. Glaeser acknowledged he knew, at the time of the changes, the Union was the certified collective-bargaining representative for the Unit employees. Although the April 28, 2008 unilateral changes by the Company occurred at a time when it was challenging the Union’s certification, such does

not privilege or justify its unilateral actions. The Company acted at its peril when it unilaterally changed the hours and days of work of its Unit employees during the pendency of its challenge to the Union’s certification. Here the final determination regarding the Company’s challenges resulted in the Board upholding the Union’s certification and the Board further concluded the Company had unlawfully refused to bargain with the Union in its test of the Union’s certification.

As described above, I find the Government demonstrated the Company made unilateral changes involving a mandatory subject of bargaining, namely reducing its employees’ hours and days of work, without giving prior notice to and affording the Union an opportunity to bargain about the decision and its effects. The Company’s actions violate Section 8(a)(5) and (1) of the Act absent the Company demonstrating the unilateral changes were privileged or in some manner justified. As explained below, I find the Company failed to demonstrate any justification for its actions.

The Company’s contention it had no obligation to bargain with the Union about the reduced hours and days of work because hours of work fluctuated prior to the advent of the Union is without merit. The Company may no longer unilaterally exercise its discretion with respect to hours and days of work, mandatory subjects of bargaining, for its employees, because of the intervention of the bargaining representative. See e.g., *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989). Simply stated the Company is obligated to bargain with the Union over the hours and days of work for the Unit employees.

The Company’s contention it could lawfully make the unilateral changes in April 2008 because the work schedules and assignments fluctuated, for reason beyond its control, is likewise without merit. In this regard the Company points out, in part, it had difficulties; (1) with the Ford make of busses it first utilized, (2) with the first Disadvantaged Business Enterprise company it contracted with, (3) with its hiring new drivers then experiencing a decrease in driver turn over resulting in a larger pool of drivers, and (4) with the loss of certain Medicaid work. Notwithstanding that these concerns may have contributed to the Company’s decision to reduce the hours and days of work for the Unit employees, such does not excuse the Company from its underlying obligation to give prior notice and afford the Union an opportunity to negotiate regarding the reductions. Nor may the Company justify its unilateral actions based on the fact it had to operate through, and obtain work schedules from, Palm Tran Inc. Palm Tran Inc. functions simply as a conduit for Palm Beach County Florida for whom the Company provides its services; and, the arrangement with Palm Tran Inc. does not, in some manner, insulate the Company from its bargaining obligations with the Union.

I reject the Company’s contention the reduction in Unit members hours and days of work resulted from, and was privileged by the fact the Company was following an established past practice, and maintaining the status quo. The evidence does not demonstrate an established past practice of fluctuations in hours and days of work that occurred with such regularity and frequency employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. Quite to the contrary, it appears unit employees were consis-

tently able to work as much as they desired. Even if a past practice could be shown, which it has not been established, the time frame from February 13, 2005, until April 28, 2008, would not show a “long term” past practice. One of the lead cases the Company would rely on to support of its past practice defense, *Courier-Journal I*, 342 NLRB 1093, 1094–1095 (2004), is clearly distinguishable. The employer in *Courier-Journal I* had for 10 years regularly made unilateral changes in costs and of benefits for its unit employees’ healthcare program. The employer in *Courier-Journal I* made the changes both pursuant to the parties’ collective-bargaining agreement and during hiatus periods between contracts. In each instance in *Courier-Journal I* the union did not oppose the changes but rather accepted and acquiesced in the employer’s actions. In the case herein, there was no established past practice and no prior collective-bargaining agreement. Even if there had been an established past practice, the Union herein could not be considered to have acquiesced because the Union was not certified as the bargaining representative until February 29, 2008, and the Company thereafter contested the Union’s certification.

I find, for the reasons outlined above, the Company failed to demonstrate an established past practice regarding a reduction in hours and days of work of Unit employees, nor did the Company establish any other justification for its unilateral actions on April 28, 2008. I find, for the reason outlined elsewhere herein, the Company violated Section 8(a)(5) and (1) of the Act when on April 28, 2008, it reduced the number of hours and days of work of employees in the Unit without prior notice to the Union and without affording the Union an opportunity to bargain with it with respect to this conduct and the effects of this conduct.

CONCLUSIONS OF LAW

The Company, Palm Beach Metro Transportation, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Amalgamated Transit Union, AFL–CIO, Local 1577 is a labor organization within the meaning of Section 2(5) of the Act.

At all times since February 29, 2008, the Union has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees including all full-time and regular part-time operators employed by the Company.

By, since on or about April 28, 2008, unilaterally reducing the number of hours and days of work of its unit employees the Company has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The Company’s unfair labor practices specified in 4 above, affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it necessary to order the Company to cease and desist there from and to take certain action designed to effectuate the policies of the Act. In particular, to remedy the unlawful reduction in the number of hours and days of work of unit employees, I recommend the Company be ordered to make

whole any unit employees for losses they suffered as a result of the unlawful reduction in their number of hours and days of work, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The identification of the employees affected and the precise amounts owed to them is, if necessary, left for determination at the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Company, Palm Beach Metro Transportation, LLC, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unilaterally reducing the number of hours and days of work or otherwise altering the wages, hours, and other terms and conditions of employment of its unit employees represented by Amalgamated Transit Union, AFL–CIO, Local 1577 without affording the Union notice and an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any reduction of the number of hours or days of work or other changes affecting the wages, hours, and other terms and conditions of employment of unit employees, notify and, on request, bargain with Amalgamated Transit Union, AFL–CIO, Local 1577 as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All full-time and regular part-time operators employed by the Company performing Para-transit duties for Palm Beach County out of its facility located at 1635 Meathe Drive,⁸ West Palm Beach, Florida; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral reduction in hours and days of work in the manner set forth in the remedy section of the decision.

(c) Preserve, and within 14 days of a request, or such additional time as the Regional Director for Region 12 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any back pay due under the terms of this Order.

(d) Post at its West Palm Beach, Florida location copies of

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ Formerly 6620 Lakeside Road.

the attached notice marked "Appendix."⁹ Copies of the Notice, on forms provided by the Regional Director for Region 12 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice, to all employees employed by the Company on or after April 28, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 of the National Labor Relations Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C., March 22, 2010.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

⁹ If this order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read: Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally reduce your number of hours and/or days of work or otherwise alter your wages, hours, and other terms and conditions of employment without first affording Amalgamated Transit Union, AFL-CIO, Local 1577 notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, before implementing any reduction in your hours or days of work or other changes affecting your wages, hours, and other terms and conditions of employment, notify and, on request, bargain with Amalgamated Transit Union, AFL-CIO, Local 1577, as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

All full-time and regular part-time operators employed by the Company performing Para-transit duties for Palm Beach County out of its facility located at 1635 Meathe Drive¹⁰, West Palm Beach, Florida; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of the unilateral reductions in your hours and/or days of work, plus interest.

PALM BEACH METRO TRANSPORTATION, LLC

¹⁰ Formerly 6620 Lakeside Road.