Nos. 11-13681-FF, 11-14314-FF

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PALM BEACH METRO TRANSPORTATION, LLC

Petitioner-Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent-Cross Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
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PALM BEACH METRO TRANSPORTATION, LLC	)	
Petitioner-Cross Respondent,	)	
	)	Nos. 11-13681-FF
v.	)	11-14314-FF
NATIONAL LABOR RELATIONS BOARD	)	Board Case No. 12-CA-25842
Respondent-Cross Petitioner.	)	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

Amalgamated Transit Union, Local 1157 (Charging Party)

Broido, Julie (counsel for the Board)

Cates, William N. (Administrative Law Judge)

Camillo, John M. (counsel for Petitioner)

Diaz, Margaret (Regional Attorney, National Labor Relations Board Region 12)

Dreeben, Linda (Deputy Associate General Counsel for the Board)

Hayes, Brian E. (Board Member)

Kentov, Rochelle (Regional Director, National Labor Relations Board Region 12)

Liebman, Wilma B. (Board Chairman)

Markle, Jeanette (counsel for the Board)

Mattingly, Dwight (Business Agent, Amalgamated Transit Union, Local 1157)

Metro Mobility Management Group, LLC (operator of Palm Beach Metro Transportation, LLC's business subsequent to the purchase of assets)

National Labor Relations Board (Respondent)

Palm Beach Metro Transportation, LLC (Petitioner)

PTG Enterprises, LLC (purchaser of assets of Yellow Cab Service Corporation)

Pearce, Mark Gaston (Board Member)

Solomon, Lafe E. (Acting General Counsel for the Board)

Thornton, Karen M. (Field Attorney, National Labor Relations Board Region 12)

Villanueva, Jairo F. (counsel for Petitioner)

Yellow Cab Service Corporation (parent company of Petitioner)

s/ Linda Dreeben

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Dated at Washington, D.C.
this 20th day of December 2011

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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Nos. 11-13681-FF, 11-14314-FF

PALM BEACH METRO TRANSPORTATION, LLC

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Palm Beach Metro Transportation, LLC ("the Company") to review and the cross-application of the National Labor Relations Board ("the Board") to enforce a final Board order issued

against the Company, on July 26, 2011, and reported at 357 NLRB No. 26. (DO 1-2.)[1]

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) ("the Act"). The Board's Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e), 160(f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and 10(f) of the Act because the unfair labor practices occurred in West Palm Beach, Florida, where the Company operates an intrastate para-transit service.

The Company's petition for review, filed on August 15, 2011, and the Board's cross-application for enforcement, filed on September 9, 2011, were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves well-settled principles that are fully presented in the briefs, and therefore that argument would not be of material

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[1] "DO" refers to the Board's July 26, 2011 Decision and Order, which can be found at Tab 11 of the Board's Volume of Pleadings. Other documents are identified solely by the tab number ("T") under which they are placed in the Volume of Pleadings. "BDX" refers to Board exhibits, "ERX" to employer exhibits, "Tr." to the transcript of the unfair labor practice hearing, and "Br." to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

assistance to the Court. If, however, the Court believes that argument is necessary, the Board is fully prepared to participate, and to assist the Court in its understanding and resolution of this case.

STATEMENT OF ISSUE PRESENTED

It is unlawful under Section 8(a)(5) and (1) of the Act for an employer to make changes to wages, hours, and other terms and conditions of work without bargaining with the collective-bargaining representative of its employees. Here, after the Union was elected and certified, the Company reduced employees' hours and days of work without notifying or bargaining with the Union. The issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by making the unilateral changes.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS

A. The Prior Unfair Labor Practice Proceeding

In *Palm Beach Metro Transportation, LLC*, 352 NLRB No. 79 (2008) ("*Palm Beach I*"), the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Amalgamated Transit Union, Local 1577 ("the Union") following its certification as the collective-bargaining representative of a unit of company drivers. (DO 3; BDX 4 at 1-2.) Briefly, in *Palm Beach I*, the Board's Regional

Director found that the unit employees selected the Union in a Board-conducted election that took place in August 2007. The Regional Director certified the Union as their representative in February 2008. (DO 3; BDX 4 at 1.) The Union then requested that the Company recognize and bargain with it, but the Company refused. (DO 3; BDX 4 at 2.) The Board found that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (*Id.*)

Thereafter, this Court granted the Board's motion for summary entry of judgment, and issued an unpublished order enforcing the Board's Decision and Order in *Palm Beach I*. *See Palm Beach Metro Transp., LLC v. NLRB*, No. 08-13447-JJ (11th Cir. Nov. 21, 2008). After the Company refused to comply with this Court's order, the Board initiated contempt proceedings. On August 16, 2011, this Court adjudicated the Company in civil contempt of its November 21, 2008 order. *See Palm Beach Metro Transp., LLC v. NLRB*, No. 08-13447 (11th Cir. Aug. 16, 2011).

B. The Instant Unfair Labor Practice Proceeding

The instant case was initiated when the Union filed an unfair labor practice charge alleging that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing employee hours and days of work in April 2008, following the Union's election victory. (DO 2; BDX 1(a).) After the Board's General

Counsel issued a complaint, a hearing was held before an administrative law judge, who issued a recommended decision finding merit to the complaint allegation. (DO 2, 6-7; BDX 1(p), T 1.) The Company filed timely exceptions. (DO 1; T 5.)

On July 26, 2011, the Board issued its Decision and Order affirming the administrative law judge's rulings, findings, and conclusions, and adopting his recommended remedy with modifications. (DO 1-2.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Business and Its Practice of Giving Drivers as Much Work as They Wanted

The Company operates a para-transit service, primarily transporting persons with disabilities and the elderly to their places of employment and for other purposes, such as for medical visits, shopping, or recreation. (DO 3; Tr. 27-28, 45.) It has a contract with Palm Beach County, Florida, to provide para-transit services to Palm Tran, Inc., a county-owned entity. (DO 3; ERX 1 at 1, Tr. 48-49.)

From the Company's inception in 2005 through April 2008, there was enough work available so that drivers could work five to seven days per week. During this period, drivers received at least 40 hours of work per week, plus a lot of overtime. The Company gave its drivers the opportunity to work as much as they wanted. (DO 1, 3, 5; Tr. 26, 33-34, 66, 68-69.)

B. Without Notifying or Bargaining with the Newly Certified Union, the Company Unilaterally Reduces Its Drivers' Hours and Days of Work

Starting in April 2008, the Company reduced its drivers' work hours and days of work, cutting their work schedules "down to four to five days [per week]." (DO 3, 5; Tr. 108-09, 111.) The Company reduced employee hours in April 2008 for several reasons, including a decline in available work and its decision to hire additional drivers. (DO 3, 5; Tr. 35.)

At the time that the Company reduced unit employees' hours and days of work, it was in the process of contesting the Union's February 2008 certification as the employees' collective-bargaining representative. (DO 3, 5; BDX 4.) *See* pp. 3-4 above. Before making the changes, the Company did not notify the Union or bargain over them. (DO 4-5; Tr. 68, 71.) The Union did not learn about the changes until employees reported them to the union president around April 28, 2008. (DO 4; Tr. 126-28.)

The Company's reduction in hours and days of work had a substantial impact on unit employees. For example, in April 2008, the Company informed driver Willie Mae Brown, who previously had worked six days and 60 to 70 hours per week, that it was cutting her schedule down to four days per week. (DO 4-5; Tr. 152-53.) Brown subsequently worked only 33 to 37 hours per week. (DO 4-5; Tr. 153-54.) Likewise, Driver Inez Turton had worked five days and over 40 hours per week from 2005 until April 2008, when the Company changed her schedule to

four days and less than 40 hours per week. (DO 4-5; Tr. 136-37, 139, 141.) Similarly, before April 2008, Driver Monica Siverain had worked six to seven days per week, and the Company's trainer had promised her at least 12 hours of work per day. (DO 4-5; Tr. 158-59.) In April 2008, the Company reduced Siverain's schedule to four days per week. (DO 4; Tr. 158-60.) After the change, Siverain attempted to work as many hours as possible, but did not reach 40 hours in an average week. (DO 4-5; Tr. 160-61.) And when Driver Janice Jarrell began her employment, the Company had promised her 12-hour days and six days of work per week. In May 2008, the Company reduced her schedule to four days per week. (DO 4; Tr. 165.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, Members Pearce and Hayes) found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally reducing the hours and days of work of unit employees. (DO 1, 6.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (DO 6.) Affirmatively, the Board's Order requires the Company to make employees whole for any loss of earnings and other benefits suffered as a result of the unilateral reduction in hours and days of work, bargain with the Union

upon request as the exclusive bargaining representative of the bargaining-unit employees, provide records that are necessary to analyze the backpay due, and post a remedial notice. (DO 1, 6-7.)

SUMMARY OF ARGUMENT

It is well established that after a union has won an election, and the employer's challenge to the union's certification fails, the employer's duty to bargain relates back to the date of the election. During this period, the employer acts at its peril, and any unilateral material changes it makes to employees' terms and conditions of employment will be found unlawful. Applying this settled principle, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by cutting employee hours and days of work in April 2008 without notifying the newly certified union and bargaining over the change.

Substantial evidence supports the Board's finding. Thus, it is undisputed that when the Company made the changes, the Board had already certified the Union as the unit employees' duly elected collective-bargaining representative. Further, the Company failed in its challenge to the Union's certification. It is also undisputed that the material changes made by the Company to hours and days of work concerned mandatory subjects of bargaining, and were made unilaterally. Indeed, company officials admitted outright to making substantial cuts in employee hours and days of work in April 2008 without notifying or bargaining with the

Union. On this record, the Board had ample grounds for finding that the Company's admittedly unilateral reduction in hours and days of work was unlawful.

The Board's conclusion that the Company failed to meet its heavy burden of showing that it was privileged to act unilaterally is supported by substantial evidence. As the Board concluded, the Company was unable to prove its claim that it had a regular and automatic practice of radically reducing employee schedules in response to drops in available work. As the Board noted, given the Company's admission that work and overtime opportunities were abundant before April 2008, it simply could not show that it had any sort of established practice for dealing with marked fluctuations in the amount of available work. The Company failed to identify even one example where it abruptly and dramatically reduced employee hours before April 2008. Instead, on review the Company harps on provisions in its contract with Palm Beach County that impacted the overall availability of work, mistakenly suggesting that these contractual provisions somehow establish legally cognizable past practices.

The Company's other defense—that it had no duty to bargain because Palm Tran purportedly controlled employees' work schedules—cannot succeed without rendering the legal and factual landscape unrecognizable. Legally, an employer cannot avoid bargaining simply because its contract with an outside entity affects

its operations. Factually, the Company overstates the extent to which Palm Tran "controlled" hours. In truth, Palm Tran merely provided the Company with daily driver manifests mapping out routes and customer pickup times, and set the total amount of available work under the contract. But the Company decided how many employees it needed and how many hours and days per week they would work. Indeed, company officials admitted that they reduced employees' hours in April 2008 in part because they had hired additional, apparently surplus, drivers. In these circumstances, the Board reasonably rejected the Company's feigned powerlessness in determining its employees' hours and days of work.

STANDARD OF REVIEW

Courts have a "narrow role" when reviewing orders of the Board. *Ga. Power Co. v. NLRB*, 427 F.3d 1354, 1358 (11th Cir. 2005). The Board's interpretation of the Act is entitled to deference if it is "rational and consistent with the Act." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991). This is especially true where a case concerns the duty to bargain, as here, because Congress made a "conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Indeed, construing and applying the duty to bargain lies "at the heart of the Board's function." *Id*. at 497.

The Board's fact findings are conclusive so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence exists if a reasonable jury could have reached the Board's conclusion. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998); *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 (11th Cir. 1999). If substantial evidence exists, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. Thus, the Court may not overturn the Board's determinations, so long as it "has made a plausible inference from the record evidence." *NLRB v. United States Postal Service*, 526 F.3d 729, 732 (11th Cir. 2008).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING EMPLOYEES' HOURS AND DAYS OF WORK

A. The Act Prohibits Changing Employee Hours and Days of Work without Notifying and Bargaining with the Union

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of [its] employees." To fulfill this collective-bargaining obligation,

the parties are required under Section 8(d) of the Act (29 U.S.C. § 158(d)) to "meet . . . and confer . . . with respect to wages, hours, and other terms and conditions of employment." These categories, "wages, hours, and other terms and conditions of employment," are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). There can be no doubt that work schedules—including the quantity of hours, as well as the particular days and hours—are mandatory bargaining subjects. *See, e.g., NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427, 432 (5th Cir. 1976); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381 (8th Cir. 1993); *United Cerebral Palsy of N.Y. City*, 347 NLRB 603, 607 (2006); *accord Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965).[2]

Consequently, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employee hours and days of work. Such unilateral action "is a circumvention of the duty to negotiate which frustrates the objective of [Section] 8(a)(5) much as does a flat refusal" to negotiate on the subject of hours. *Katz*, 369 U.S. at 743. Moreover, unilateral action "minimizes the influence of organized bargaining" and "interferes with the right of selforganization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). For this reason, a violation of

[2] Decisions of the former Fifth Circuit, issued before October 1, 1981, are binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act: unilateral changes tend to "interfere with, restrain, or coerce employees in the exercise of" their right to engage in concerted activity. 29 U.S.C. § 158(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004) (noting that Section 8(a)(1) violation is derivative of unlawful refusal to bargain).

The prohibition against unilateral changes obligates an employer to "preserve the status quo" with respect to mandatory subjects of bargaining absent special circumstances. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988); *NLRB v. S. Coach & Body Co.*, 336 F.2d 214, 217 (5th Cir. 1964). An employer "acts at its peril" by unilaterally changing working conditions while election issues are pending. *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). In other words, when the final determination of election challenges results in the union's certification, the employer's "duty to bargain relates back to the date of the election, and the employer's unilateral actions while objections were pending are automatic" violations of Section 8(a)(5) and (1). *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 654 (5th Cir. Nov. 1981).

As shown below, substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing

employee hours and days of work. We also show below that the Board reasonably rejected the Company's defenses that the change was privileged by past practice or by a purported lack of control over hours and days of work. The Company failed to offer evidence showing it had a regular and automatic practice of cutting employee schedules in response to drops in available work. In fact, the dramatic drop in work that triggered the April reduction was a first-time event. In addition, a lack of control does not excuse bargaining as a legal matter. Furthermore, the Company presented little, if any, evidence supporting its contention that Palm Tran, and not the Company, controlled employees' weekly hours and days of work.

B. Substantial Evidence Supports the Board's Finding that the Company Unilaterally Reduced Employee Hours and Days of Work

The legal principles and factual findings that undergird the Board's conclusion that the Company violated the Act by unilaterally reducing employee hours and days of work in April 2008 are largely uncontroverted. The Company does not dispute the settled principles that days and hours of work are mandatory subjects of bargaining and that an employer's duty to bargain over such subjects relates back to the date of the election once the union is duly certified. Nor can the Company seriously dispute that it gave employees as much work as they wanted before April 2008, discontinued this practice in April for the first time, and failed to notify and bargain with the Union over the change. Accordingly, as we

now show, the Company acted unlawfully by making the unilateral changes in April 2008.

Thus, substantial evidence supports the Board's finding that prior to the election, there was enough work available for all unit employees to work as much as they wanted, five to seven days a week, with a lot of overtime. (DO 1.) Indeed, the Company's own director, Robert Glaeser, admitted as much at the hearing. (DO 3, 5; Tr. 26, 33-34, 66, 68-69.) The Company's Operations Manager, Jimmy Sherrod, also testified that before April 2008, employees worked five, six, or seven days per week. (DO 3, 5; Tr. 107-08, 111.) The uncontroverted testimony of individual drivers corroborates the admissions of company officials. For instance, drivers Brown, Siverain, and Jarrell testified that prior to April 2008, they worked six or more days per week and were promised, or worked on average, 10 to 12 hours per day. (DO 4-5; Tr. 152-53, Tr. 158-59, 165) Driver Turton testified that until April 2008, she worked five days and over 40 hours per week. (DO 4-5; Tr. 136-37, 141.)

The record also supports the Board's finding that the Company made a "material, substantial, and significant change" in employees' terms and conditions in April 2008, when it abruptly reduced employee hours and days of work. (DO 5.) Indeed, the Company's own witnesses support this finding. Thus, Manager Sherrod testified that in April 2008, employee schedules "went down to four to

five days [per week]." (DO 3, 5; Tr. 108-09, 111.) In addition, the credited testimony of four drivers consistently showed that, around this time, the Company reduced their schedules to just four days per week, down from five to seven days per week. (DO 4-5; Tr. 137, 141, 152-53, 158-60, 165.) After the change, the drivers often worked less than 40 hours per week. (DO 4-5; Tr. 141, 154, 160.) Given this undisputed evidence, the Company cannot quibble with the Board's finding that it abruptly reduced employee schedules in April 2008.

Company witnesses freely admitted that they reduced work schedules unilaterally—that is, without notifying and bargaining with the Union. For instance, Director Glaeser testified that he knew the Union had been certified as the unit employee's representative, but that he did not notify the Union or bargain over the reduction in work. (DO 4-5; Tr. 71.) The Union only learned of the change after it occurred, when employees reported the problem to the union president. (DO 4; Tr. 126-28.) Indeed, by the time the Company reduced its employees' hours and days of work in April 2008, it had already flatly refused to bargain with the Union for a first contract, instead launching an unsuccessful bid to test the Union's certification. (DO 3; BDX 4.) In doing so, the Company took the risk that the Board would find unlawful, as it did, the Company's failure to notify the Union and bargain over the changes during the pendency of its unsuccessful

challenge to the Union's certification. *See Dow Chemical Co. v. NLRB*, 660 F.2d 637, 654 (5th Cir. Nov. 1981).

Therefore, the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing employees' hours and days of work, unless it could prove its defense that the changes were privileged. As shown below, the Board reasonably found that the Company failed to meet its burden of showing that it was privileged to act unilaterally.

C. The Board Reasonably Found that the Company Failed to Meet Its Burden of Showing that It Was Privileged to Unilaterally Change Employees' Hours and Days of Work

The Company steadfastly argued without success to the Board, and claims again before this Court, that it was privileged to make the unilateral changes in hours and days of work. Thus, the Company erroneously contends (Br. 18-19, 23) that when it reduced employees' hours and days in April 2008, it was merely continuing a settled practice of changing work schedules. The Company also repeats its meritless claim (Br. 21-22) that it had no duty to bargain because the availability of work purportedly was controlled by Palm Tran, the entity to whom the Company provided para-transit services under its contract with Palm Beach County. The Board reasonably rejected both defenses. As we now show, substantial evidence supports the Board's conclusion that the Company failed to demonstrate that it had a past practice of changing drivers' work schedules in

response to comparable declines in available work. And the Board properly rejected the Company's assertion that Palm Tran's limited control over available work and daily schedules nullified the Company's bargaining duty.

1. Substantial evidence supports the Board's determination that the Company failed to meet its burden of proving that it had a past practice of reducing hours and days of work in response to dramatic fluctuations in available work

The Board's conclusion that the Company did not prove it had a regular and automatic practice of radically reducing employee schedules in response to drops in available work is supported by substantial evidence. (DO 1, 5-6.) To be sure, as the Board noted (DO 4), after a union comes on the scene, an employer may continue making changes that are consistent with a past practice because such changes preserve the status quo. *See NLRB v. Katz*, 369 U.S. 736, 746 (1962). However, an employer has a heavy burden of establishing this affirmative defense. *City Cab Co. of Orlando v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 403 (5th Cir. Feb. 1981). To prove that a practice of making changes is a "mere continuation of the status quo," the practice cannot be "ad hoc," "unpredictably episodic," or "sporadic." *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 864 (6th Cir. 1990). If an employer cannot meet its burden of proof, its past practice defense necessarily fails.

Applying these settled principles, the Board found that the Company lacked a settled practice of dealing with dramatic shifts in available work by altering

employees' hours and days. (DO 1, 5-6.) As the Board emphasized, given the Company's admission that work and overtime opportunities were abundant before April 2008, it simply could not show that it had any sort of established practice for dealing with marked fluctuations in the amount of available work. (DO 1.) Indeed, Company Director Glaeser admitted that from the Company's inception in 2005, and until April 2008, the amount of work was fairly steady, and employees were consistently able to work as much as they desired, with a lot of overtime. (DO 1; Tr. 66, 68-69.) He also testified that employees still had ample work and overtime opportunities even after the Company claimed there was a drop in available work. (Tr. 68-69.)

The consistent and mutually corroborative testimony of company employees also fatally undermines the Company's claim that it had a settled practice of responding to drastic shifts in the availability of work by reducing employees' hours and days. Thus, Driver Brown, in testifying about the Company's pre-April 2008 practices, noted that she had volunteered to work an extra day per week when she was hired, giving her 60 to 70 hours of work over six days. (Tr. 152-53.) Likewise, Driver Siverain testified that before April 2008, she worked up to seven days per week, and that the Company's trainer had promised her a certain number of days per week. (Tr. 158-59.) And Driver Turton testified that before April 2008, employees could choose whether or not to work on days they were

scheduled to be off. (Tr. 147-48.) Given this uncontroverted testimony, ample evidence supports the Board's finding that the substantial reduction in available work that led to the April 2008 schedule changes was a "first-time event" with "no established past company practice for dealing with it." (DO 1.)

The Company's remaining contentions do nothing to overcome this basic defect in its past practice defense. Thus, the Company erroneously labels as past practices certain features of its contract with Palm Beach County. For instance, the Company (Br. 18-20) mistakenly characterizes as a longstanding practice its contractual duty to utilize a particular type of vehicle that turned out to be prone to breakdowns. The Company (Br. 18-20) likewise errs in characterizing as a past practice its obligation to award 15 percent of its assigned work to a Disadvantaged Business Enterprise ("DBE"). As the Board explained (DO 5), although contractual obligations to a third party could affect an employer's decision to reduce employees' work schedules, such obligations, without more, do not constitute a legally-cognizable past practice. The mere fact that an employer has such contractual duties does not establish that it followed a pattern of changing employees' hours and days of work in response to the contract. Indeed, the Company does not even argue that it reduced employees' hours and days of work concurrently with its replacement of defective vehicles. It cites no instances prior to April 2008 where it substantially cut employees' hours and days of work in

response to the vehicle replacement program. Nor did the Company show that it reduced hours and days of work based on its contractual duty to utilize a DBE. Indeed, because the Company did not honor its obligation to award work to a DBE until July 2008, its belated action could hardly have explained the April 2008 unilateral changes. (DO 3-4; Tr. 51.)

The three cases cited by the Company (Br. 18-19) in support of its past practice defense do not aid its claims. Two of the cases are distinguishable because they involved regularly scheduled changes to terms and conditions of employment. *See Courier-Journal*, 342 NLRB 1093, 1094 (2004) (ten-year history of regular changes in healthcare both during the collective bargaining agreement and hiatus periods); *NLRB v. S. Coach & Body Co.*, 336 F.2d 214, 217 (5th Cir. 1964) (policy of granting automatic raises to new hires at three- and six-month anniversaries adhered to for some time prior to union certification). And in the third case, the court agreed with the Board that the employer lacked a past practice because its policy was not firmly established and had only resulted in raises on a single prior occasion. *See Queen Mary Rests. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977).

In sum, the Company failed to offer evidence of prior reductions in employee schedules, let alone evidence of the sort of regular and automatic reductions that would establish a longstanding past practice. Instead, as the Board

noted (DO 1), the dramatic reduction in available work that occurred in April 2008 was a "first-time event." Accordingly, the Board reasonably rejected the Company's claim that it was merely following a longstanding practice of cutting employees' hours and days.

2. The Board reasonably concluded that Palm Tran's role in setting daily routes and manifests did not excuse the Company from bargaining

The Company also argues (Br. 21-23) that its reduction of employee hours and days in April 2008 was not subject to bargaining because Palm Tran, not the Company, set the drivers' routes and hours of work. As we now show, the Company's argument is legally unavailing and rests on factual claims that are unsupported in the record.

As a legal matter, external factors do not insulate an employer from bargaining over changes to terms and conditions of employment. As the Board explained (DO 5), although external difficulties might contribute to an employer's decision to reduce work schedules, they do not excuse bargaining. Similarly, in *City Cab*, this Court rejected an employer's claim that it was privileged to make unilateral changes because outside factors purportedly placed bargaining subjects "beyond its control." 787 F.2d 1475, 1480 (11th Cir. 1986). The employer in *City Cab* argued that changes in cab rental rates were necessitated by changes in consumer demand and city-dictated fare allowances. *Id.* But this Court rightly

rejected this contention because, "[w]hatever the origin of these factors, the changes . . . were not the 'automatic' changes contemplated" by legal precedent excusing unilateral changes when an employer had committed itself to a "fixed practice." *Id.* at 1480-81.

Likewise, the Supreme Court in *Ford Motor Company v. NLRB* rejected a futility argument similar to the one advanced by the Company. There the employer argued that bargaining over in-plant food service prices would be useless because a third-party supplier set those prices. 441 U.S. 488, 503 (1979). The Court disagreed, finding that the employer retained some control over food service and prices under the contract and, in any event, there were other ways the employer could affect prices, such as by providing a subsidy to the supplier. *Id.*

Here, the Company plainly retained significant control over employee hours and days of work. Palm Tran merely determined the total hours of available work under the contract,[3] and prepared daily driver manifests reflecting routes and customer pick-up times, effectively setting employees' daily start and stop times. (DO 3; Tr. 46-48, 116.) Thus, the Company's casual assertion (Br. 16, 21.) that Palm Tran "governed the work schedules, including both days and hours," and "set

[3] The Company also apparently had some influence over total available hours. Manager Sherrod testified that Palm Tran gave the Company the opportunity to turn down jobs, which would have reduced the complement of drivers needed for that day. (Tr. 113.)

the bargaining unit employees' schedules, including the days of the week they would work," reflects a cavalier treatment of the record evidence and is acutely misleading.[4] To the contrary, the record shows that the Company set the number of days that employees worked each week, and specified those days.[5] (Tr. 30-31, 139, 160.) After all, the Company's contract with Palm Beach County provided that the Company was to secure "all necessary personnel required to perform the services," and that drivers were subject to the Company's "sole direction, supervision, and control." (ERX 1, Art. 11, 47.)

Like in *Ford Motor*, the Company had more than sufficient control over the situation to justify bargaining. For example, the record shows that the Company could have forestalled the schedule reduction by hiring fewer employees in the months leading up to the change. Director Glaeser admitted that the Company's decision to hire additional employees contributed to the schedule reductions in April. (DO 3; Tr. 35, 70.) He also admitted that hiring new employees meant

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[4] Palm Beach County, via Palm Tran, undoubtedly set the number of days per week that para-transit service operated under the contract. While there is evidence that Palm Tran cut Sunday service in 2008 (Tr. 115, 117-18), the Company's assertion (Br. 21) that this occurred in April of that year is unsupported by the record.

[5] There is no evidence that Palm Tran assigned drivers to particular manifests, thereby affecting their total weekly hours. To the contrary, the evidence suggests that drivers were assigned to routes after Palm Tran submitted the manifests to the Company, given that the drivers' names were filled in by hand on the typed manifests. (ERX 2.)

reducing hours for incumbent employees. (Tr. 70-71.) Because the Company could have avoided some, if not all, of the reductions if it had factored the dwindling availability of work into its hiring plans, its claim that bargaining would have been futile is disingenuous.

The case the Company principally relies on, *NLRB v. Ralph Printing & Lithographing Co.*, is easily distinguished.[6] 433 F.2d 1058 (8th Cir. 1970). There, the court was reviewing the recommendation of a special master to adjudge an employer in contempt. The court determined that the employer violated the bargaining order by granting pay raises in such a way that did not preserve the existing wage differential between skilled and unskilled workers. *Id*. at 1062-63. The wage increase was necessary to maintain the status quo wage differential after a rise in the federal minimum wage.

The Company erroneously seizes on dicta in *Ralph Printing* to suggest a patently overbroad rule—that an employer has no bargaining obligation over issues

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[6] Likewise, the Company errs in its fleeting citation to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), which involved a matter not at issue here. In that case, unlike the instant one, the employer changed the scope and direction of the enterprise—a fundamental alteration that constitutes an exception to the general rule requiring bargaining over mandatory subjects. *Id.* at 677. If anything, *First National Maintenance* supports the Board's finding here that employee hours and days of work are mandatory subjects of bargaining. After all, the Supreme Court delineated as a category of mandatory bargaining those matters that are almost exclusively an aspect of the employer-employee relationship—and hours and days of work plainly fall within that category. *Id.*

not within its complete control. It is true that the Eighth Circuit noted that the minimum wage increase was an "external force" outside the employer's control. *Id.* But *Ralph Printing* is plainly distinguishable. As shown above pp. 18-22, the instant case does not involve a change necessary to preserve the status quo for the benefit of the employees. Nor does it involve a change compelled by a new legal mandate. Thus, the Company's attempt to escape liability by overstating Palm Tran's control over employee hours and days of work is both factually disingenuous and legally unconvincing.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment enforcing the Board's order in full.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PALM BEACH METRO TRANSPORTATION, LLC	)
Petitioner/Cross-Respondent	) Nos. 11-13681-FF) 11-14314-FF
v.	)
NATIONAL LABOR RELATIONS BOARD	)
	) Board Case No.) 12-CA-25842
Respondent/Cross Petitioner	)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,474 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
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NATIONAL LABOR RELATIONS BOARD	)	
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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2011, the Board electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and submitted to the Clerk the required number of paper copies by first-class mail. Two true and correct copies of the brief were also served by first-class mail upon the counsel at the address listed below:

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