

Goya Foods of Florida and UNITE HERE, CLC. Cases 12–CA–23524, 12–CA–25198, 12–CA–25286, and 12–CA–25305

June 22, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER,
PEARCE, AND HAYES

On July 25, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 884 (2008).¹ The Respondent filed two Motions for Reconsideration, which the Board denied on October 16, 2008, and August 24, 2009, respectively. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified² and set forth in full below for the reasons stated in the decision reported at 352 NLRB 884 (2008), which is incorporated herein by reference. However, as described below, we shall modify the remedy. Specifically, in contrast to the prior remedy, we shall order the Respondent to make whole the unit employees for all losses they suffered as a result of the Respondent's two unlawful changes in health insurance plans regardless of whether the Union requests rescission

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

² We shall modify the judge's recommended Order to conform to the Board's standard remedial language, including for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Additionally, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge's recommended Order by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

of the unlawful changes and restoration of the status quo plan.³ In issuing this remedy, we overrule *Brooklyn Hospital Center*, 344 NLRB 404 (2005), and similar cases to the extent they deny make-whole relief to employees in circumstances when a union does not demand rescission of the unlawful change and restoration of the status quo plan.⁴

I. FACTS

As more fully set forth in the judge's decision, the Respondent is a large wholesaler of food products with a facility in Miami, Florida. Since 1998, UNITE HERE, CLC (the Union) has been the certified exclusive collective-bargaining representative of the Respondent's employees in two bargaining units.⁵ Employees in both units were covered by a health maintenance organization (HMO) plan provided by Blue Cross/Blue Shield until November 30, 2003.⁶ Without giving the Union notice and an opportunity to bargain, the Respondent thereafter twice changed health insurance plans covering employees in both units. On December 1, the Respondent replaced the Blue Cross HMO with an HMO from Neighborhood Health Partnership. The Neighborhood HMO had different providers, copayments, coverage, out-of-pocket maximums, and premiums. For example, while the Blue Cross plan fully covered hospitalization, the Neighborhood plan required employees to make copayments of \$250 per day for the first 5 days.⁷ Additionally, employee copayments for primary care visits under the

³ We shall modify the judge's remedy to provide that the Union be required to decide, within 60 days of the date the Respondent notifies the Union in writing that it will comply with the Board's Order, whether the Respondent must restore the coverage in effect immediately before the January 2005 unilateral change or the coverage in effect immediately before the December 2003 unilateral change, unless the Union can demonstrate special circumstances warranting a period longer than 60 days. E.g., *Scott Bros. Dairy*, 332 NLRB 1542, 1554 (2000).

⁴ Having carefully considered the matter, we also reaffirm the Board's earlier decisions to deny the Respondent's two motions for reconsideration.

⁵ The first bargaining unit includes "All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami Florida 33172; excluding all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act."

The second bargaining unit includes "All sales representatives and merchandising employees employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami Florida 33172; excluding all office clericals, managerial employees, guards and supervisors as defined in the Act."

⁶ All dates are in 2003, unless noted otherwise.

⁷ The Respondent alleges that it had a policy of reimbursing employees \$150 of that \$250 daily charge. Even if true, employees were still obligated to pay \$100 per day for the first 5 days of hospitalization under the Neighborhood plan.

Neighborhood plan increased from \$5 to \$15, and employee copayments for emergency room visits increased from \$50 to \$100.

On January 1, 2005, the Respondent replaced the Neighborhood HMO with an HMO from AvMed Health Plans. As before, the Respondent did not provide the Union with notice and an opportunity to bargain before making this change. The AvMed HMO had different providers, copayments, coverage, out-of-pocket maximums, and premiums than those contained in the Neighborhood HMO. For example, AvMed, unlike Neighborhood, charged employees a \$10 copayment for diagnostics and X-rays.

II. THE DECISIONS OF THE JUDGE AND THE TWO-MEMBER BOARD

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act both in December 2003 and January 2005, by changing unit employees' health insurance plans without providing the Union with notice and an opportunity to bargain over the changes. To remedy those two violations, the judge ordered the Respondent to cease and desist from changing unit employees' terms and conditions of employment without giving the Union notice and an opportunity to bargain. The judge further ordered the Respondent to restore, upon the Union's request, the health insurance coverage that unit employees enjoyed before either of the two unlawful changes. The Union had the option of choosing either of the two previous plans. Finally, the judge ordered the Respondent to make whole unit employees for all losses they suffered as a result of the unlawful changes in health insurance plans. The judge's order of make-whole relief was not contingent upon whether the Union requested restoration of either of the two previous health insurance plans.

On exceptions,⁸ the two-Member Board modified the remedy, explaining that, if the Union selects continuation of the final unilaterally implemented health insurance plan, make-whole relief would be inapplicable. *Goya Foods of Florida*, 352 NLRB 884, 884 fn. 3 (2008). The Board cited *Brooklyn Hospital*, 344 NLRB 404, in support of that limitation on make-whole relief. Then-Member Liebman, who had dissented in *Brooklyn Hospital* on this issue, noted that *Brooklyn Hospital* was extant law and applied it solely for that reason. *Id.*

III. DISCUSSION

Section 10(c) of the National Labor Relations Act authorizes the Board to issue an order requiring a party who has engaged in an unfair labor practice to "take such af-

firmative action . . . as will effectuate the policies of th[e] Act." The remedial power vested in the Board by this provision is a "broad discretionary one." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (internal quotation mark and citation omitted). From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach. See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935), *enfd.* in relevant part 91 F.2d 178 (3d Cir. 1937), *revd.* on other grounds 303 U.S. 261 (1938). Losses relating to insurance benefits are an injury for which the Board has been making employees whole for over 65 years. See, e.g., *General Motors Corp.*, 59 NLRB 1143, 1146 (1944), *enfd.* as modified 150 F.2d 201 (3d Cir. 1945). The Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme: "[M]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)).

When remedying an unlawful unilateral change in terms or conditions of employment, the Board typically orders a respondent to cease and desist from making unilateral changes and to rescind the unlawful change, thus restoring the status quo ante. See, e.g., *Bohemian Club*, 351 NLRB 1065, 1068 (2007); *Benteler Industries*, 322 NLRB 715, 721 (1996), *enfd.* mem. 149 F.3d 1184 (6th Cir. 1998). However, when the unlawful change may have benefited unit employees, the Board orders a respondent to rescind the change only upon the union's request. See, e.g., *AK Steel Corp.*, 324 NLRB 173, 186 (1997); *Hospital San Rafael, Inc.*, 308 NLRB 605, 609 (1992), *enfd.* 42 F.3d 45 (1st Cir. 1994); *Vibra-Screw, Inc.*, 301 NLRB 371, 371 fn. 2 (1991); *San Antonio Portland Cement Co.*, 277 NLRB 309, 317 (1985). "[T]he Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), *enfd.* mem. 208 F.3d 214 (6th Cir. 2000); see also *Trim Corp. of America*, 349 NLRB 608, 609–610 (2007).

In keeping with these principles, the Board has, in cases dating back nearly 40 years, remedied unlawful unilateral changes in benefit plans by ordering the respondent to rescind the benefit plan changes upon the union's request and to make whole any employee who suffered losses as a result of the changes. See, e.g., *Chicago Metal Maintenance, Inc.*, 342 NLRB No. 79, slip op. at 2 (2004) (not included in Board volumes); *Scott Bros.*

⁸ The Respondent excepted on the merits of the 8(a)(5) plan change allegations. It did not address the judge's remedy.

Dairy, 332 NLRB 1542, 1544 (2000); *Scepter Ingot Castings, Inc.*, 331 NLRB 1509, 1510, 1517 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002); *St. Vincent Hospital*, 320 NLRB 42, 51 (1995); *Mount Hope Trucking Co.*, 313 NLRB 262, 263 (1993); *Metro Medical Group*, 307 NLRB 1184, 1193 (1992); *Lou's Produce, Inc.*, 308 NLRB 1194, 1196–1197 (1992), enfd. mem. 21 F.3d 1114 (9th Cir. 1994); *Link Corp.*, 288 NLRB No. 132 (1988) (not included in Board volumes), enfd. mem. 869 F.2d 1492 (6th Cir. 1989); *Central Washington Hospital*, 286 NLRB No. 43 (1987) (not included in Board volumes); *Suffolk Child Development Center*, 277 NLRB 1345, 1352 (1985); *Republic Engraving & Designing Co.*, 236 NLRB 1150, 1157–1158 (1978); *Condon Transport, Inc.*, 211 NLRB 297, 304 (1974). In none of these cases did the Board condition make-whole relief on the union having requested rescission of the benefit plan changes.

In its 2005 decision in *Brooklyn Hospital*, supra, the Board abruptly departed from this well-established precedent. It did so without acknowledging the change in remedial policy or providing any rationale for it. In *Brooklyn Hospital*, the judge had found that the respondent violated Section 8(a) (5) and (1) of the Act by unilaterally changing the malpractice insurance plan that covered nurses in a bargaining unit. The judge's recommended Order required the respondent to restore, upon the union's request, the original malpractice insurance plan. Additionally, and consistent with *Scepter Ingot Castings, Inc.*, supra, and the other precedent cited above, the recommended Order required the respondent to make whole any employee who suffered losses, without qualification. 344 NLRB at 412. A Board majority adopted the judge's unfair labor practice finding, but modified the remedy, merely stating that "the make-whole component of the remedy shall not apply if the Union chooses continuation of the Respondent's [unilaterally implemented] malpractice insurance plan."⁹ The majority's change in course went unexplained. Indeed, although the Board has cited and applied *Brooklyn Hospital* in several subsequent cases, it has never offered a justification for its novel limitation on make-whole relief.¹⁰

⁹ Id. at 404. Then-Member Liebman dissented on this point, explaining that she would award make-whole relief to affected employees even if the union chose to leave the unilaterally implemented plan in place. Id. at 404 fn. 3.

¹⁰ See *Comau, Inc.*, 356 NLRB 75, 75 at fn. 7 (2010); *Bentonite Performance Minerals, LLC*, 355 NLRB 596 (2010), incorporating by reference *Bentonite Performance Minerals, LLC*, 353 NLRB 668, 669 fn. 5 (2008); *Pavilions at Forrestal*, 356 NLRB 5 (2010), incorporating by reference *Pavilions at Forrestal*, 353 NLRB 540, 542 fn. 7 (2008); *Laurel Baye Healthcare of Lake Lanier, LLC*, 355 NLRB 613

It is well settled that the "Board is not at liberty to ignore its own prior decisions, but must instead provide a reasoned justification for departing from precedent."¹¹ *Brooklyn Hospital* failed to satisfy this standard. We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation. We therefore feel obligated to address this issue. After careful consideration, we have concluded that *Brooklyn Hospital's* limitation on make-whole relief is unjustified. The purposes of the Act would be best served by returning to prior precedent, under which employees who have suffered losses due to a unilateral change in terms or conditions of employment shall be made whole, even if their exclusive bargaining representative decides not to demand restoration of the status quo. The policy to which we return today is preferable because it fully compensates employees for economic losses caused by respondent unfair labor practices. *NLRB v. Strong*, 393 U.S. at 359 (make-whole relief vindicates the Act's policies). That there were such economic losses in this case is evident from the nature of the Respondent's unilateral benefit plan changes: unit employees were required to pay higher monthly healthcare premiums. Additionally, the new plans called for higher employee copayments for various medical services, and the first unilaterally implemented plan had a higher out-of-pocket employee maximum than the original plan. The employees' losses are real, and the direct consequence of the Respondent's unlawful conduct, regardless of whether the Union ultimately decides, more than 5 years after the Respondent changed plans, to demand restoration of one or the other of the unilaterally discontinued plans. To condition a remedy for these losses on a judgment made by the Union long after the losses were incurred would undermine the Act's policies by leaving the victims of the unfair labor practice uncompensated for their losses, and, by doing so, benefiting the wrongdoing respondent.¹²

(2010), incorporating by reference *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB 179, 179 fn. 3 (2008); *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220 fn. 3 (2005); but cf. *Larry Geweke Ford*, 344 NLRB 628, 629 (2005), issued a month after *Brooklyn Hospital* and providing for restoration of the status quo ante health plan, upon the union's request, and reimbursement of employee expenses without limitation if the union chose to continue with the unilaterally imposed new health plan.

¹¹ *W & M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1346 (D. C. Cir. 2008) (citations omitted).

¹² Member Hayes concurs in the majority's overruling of *Brooklyn Hospital* to the extent that it conditions any make-whole relief for all employees on the Union's choice to request rescission of the unilaterally implemented benefit plan. However, he would permit the Respondent to prove in compliance that an individual employee's expenses as a result of changes from the prior plan were offset by the savings as a result of coverage under the new plan. In no instance would an employee have to reimburse the Respondent for any amount that the per-

Furthermore, awarding noncontingent make-whole relief in this context serves the Act's purposes by maintaining the longstanding financial disincentive against the commission of unlawful unilateral changes. *Kentucky River Medical Center*, 356 NLRB 6, 9 (2010) (daily compounded interest on backpay and monetary awards is preferable to simple interest because full monetary remedies deter the commission of unfair labor practices); see also *Hedstrom Co. v. NLRB*, 629 F.2d 305, 317 (3d Cir. 1980) (en banc) (“[I]t is settled that the purpose of a back pay order is to vindicate the public policy embodied in the Act and to deter further encroachments on the labor laws by making employees whole for losses suffered on account of an unfair labor practice.”).

Having decided to overrule *Brooklyn Hospital* and to return to prior law, we must also determine whether it would be manifestly unjust to apply the restored policy retroactively in this case. In deciding whether retroactivity would be unjust, we consider “the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application.” *Kentucky River Medical Center*, 356 NLRB 6, 9–10 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). Here, the Respondent could not have relied on *Brooklyn Hospital*, as both of the Respondent's changes in health insurance plans predated the issuance of that decision. Indeed, the policy we apply today was extant law when the Respondent made both changes. Moreover, because our ruling addresses only a remedial issue, and does not create a new standard for determining whether conduct constitutes an unfair labor practice, the Respondent cannot fairly be said to have relied on *Brooklyn Hospital* when deciding whether to take the unlawful action on which its liability is based. See *Kentucky River Medical Center*, 356 NLRB 6, 10. Additionally, retroactive application will promote the purposes of the Act by ensuring that adversely affected employees will be made whole. Finally, we see no “particular injustice” that will arise from retroactive application. This is especially true given that the law we apply today was extant law when the Respondent made the unlawful changes.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the

sonal savings under the latter plan exceed the losses suffered from changes in the prior plan. Such a procedure would facilitate restoring employees as closely as possible to the economic position they held prior to the unlawful change.

Respondent, Goya Foods of Florida, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that union members cannot participate in a benefit plan, including a retirement and 401(k) plan, made available to other employees.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) Unilaterally changing the terms and conditions of employment of its unit employees.

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on October 6, 2006, together with whatever updates are necessary to make the information current.

(b) Restore to bargaining unit employees the pension plan that was in effect before the Respondent discontinued it at the end of calendar year 2006.

(c) At the Union's request, restore to bargaining unit employees the health insurance coverage they enjoyed before the Respondent unlawfully changed such coverage in December 2003 and again in January 2005. Should the Union make this request, it shall have the option of deciding whether the Respondent must restore the coverage in effect immediately before the January 2005 unilateral change or the coverage in effect immediately before the December 2003 unilateral change.

(d) Make whole bargaining unit employees for all losses they suffered as a result of the Respondent's unlawful unilateral changes, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director 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, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement to employees due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Miami, Florida, copies of the attached

notice marked "Appendix."¹³ 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 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 in the position employed by the Respondent at any time since December 1, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

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

¹³ If this Order is enforced by a judgment of a 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 inform you that union members cannot participate in a benefit plan, including a retirement and 401(k) plan, made available to other employees.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on October 6, 2006, together with whatever updates are necessary to make the information current.

WE WILL restore to you the pension plan that was in effect before we discontinued it at the end of calendar year 2006.

WE WILL, at the Union's request, restore to you the health insurance coverage you enjoyed before we unlawfully changed such coverage in December 2003 and again in January 2005. Should the Union make this request, it shall also have the option of deciding whether we must restore the coverage in effect immediately before the January 2005 unilateral change or the coverage in effect immediately before the December 2003 unilateral change.

WE WILL make you whole for any losses you suffered as a result of our unlawful unilateral changes, plus interest.

GOYA FOODS OF FLORIDA