

Nos. 15-1437, 16-1006

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

NEW YORK UNIVERSITY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNION OF CLERICAL, ADMINISTRATIVE AND
TECHNICAL STAFF AT NYU,
LOCAL 3882, NYSUT, AFT, AFL-CIO**

Intervenor

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

**CORRECTED FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici: New York University was the respondent before the Board and is the petitioner/cross-respondent before the Court. Union of Clerical, Administrative and Technical Staff at NYU was the charging party before the Board and is the intervenor before the Court. The Board's General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on NYU's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on November 30, 2015, and reported at 363 NLRB No. 48. The Board's Order can be found at pp. 310-17 of the Joint Appendix.

C. Related Cases: The ruling under review has not previously been before this Court or any other court. Board counsel is unaware of any related case currently pending before this Court or any other court.

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GLOSSARY

ADRSS Access, Delivery, and Resource Sharing Services Department

NYU New York University

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**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**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of New York University to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against NYU. In its Order, the Board found that NYU

violated the National Labor Relations Act by failing to bargain with the Union of Clerical, Administrative and Technical Staff at NYU, Local 3882, NYSUT, AFT, AFL-CIO (“the Union”), which represents its clerical and technical employees, over the effects of NYU’s decision to change the job duties and job descriptions of employees in Bobst library. (JA 310.)¹ The Board’s Decision and Order issued on November 30, 2015, and is reported at 363 NLRB No. 48. (JA 310-17.)

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), 29 U.S.C. § 160(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

NYU filed its petition for review on December 3, 2015, and the Board filed its cross-application for enforcement on January 11, 2016. Both NYU’s petition and the Board’s cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ In this final brief, JA references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

An employer is obligated to bargain over the effects of any decision that affects bargaining-unit employees' terms and conditions of employment. NYU did not bargain with the Union over the effects of its decision to change the job duties and job descriptions of certain employees. Does substantial evidence support the Board's finding that NYU's failure to bargain with the Union over the effects of its decision violated Section 8(a)(5) and (1) of the Act?

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that NYU violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to bargain with the Union over the effects of its decision to change the job duties and job descriptions of library employees. After a hearing, an administrative law judge found the violation of the Act as alleged. On review, the Board affirmed the judge's rulings, findings, and conclusions and adopted her recommended order with some modification. (JA 310 & n.3.) Below are summaries of the Board's findings of fact and the Board's conclusions and order.

I. THE BOARD'S FINDINGS OF FACT

A. The Parties' Collective-Bargaining Agreement

The Union represents NYU's clerical, administrative, and technical employees, including approximately 30 who work in the Bobst Library. (JA 312; JA 19, 42.) The parties' most recent collective-bargaining agreement is in effect from November 1, 2011 through October 31, 2017. (JA 312; JA 82.) Two articles of the collective-bargaining agreement have particular relevance here. Article 39, a management-rights clause, states that the "supervision and direction of employees are and shall continue to be solely and exclusively the functions and prerogatives of [NYU]." (JA 312; JA 119.) Article 39 gives management the right, among other things, "to assign, transfer, supervise and direct all working forces." (JA 312; JA 119.) Article 9 provides that each employee will have a written job description. The job description is intended as an illustration only and "does not limit the assignment of related duties not mentioned." (JA 312; JA 93.) Under Article 9, NYU has the right to change job descriptions to meet operating requirements or to reflect changes in job duties, and the article specifies that neither the Union nor employees "may grieve or arbitrate with respect to the content or description of any job." (JA 312; JA 93.)

B. NYU Changes the Job Duties and Job Descriptions of Library Employees; the Union Requests Information about the Effects of those Changes

Prior to late November 2013, the approximately 30 employees at NYU's Bobst Library worked in the Access, Delivery, and Resource Sharing Services (ADRSS) Department and were assigned to work in one of six units: course reserves, circulation, stacks, library privileges, off-site processing and resources sharing, and delivery services. (JA 312; JA 136-39.) Employee job titles and job descriptions reflected the duties in their assigned departments: inter-library loan lending assistant, reserve assistant, stacks assistant, circulation assistant, library privileges assistant, and global delivery services assistant. (JA 312; JA 143-61, 162-72.)

In July 2013, NYU's assistant vice president for employee relations, Barbara Cardeli-Arroyo, notified the Union via email that NYU had revised the job descriptions for ADRSS employees. Instead of multiple job descriptions tailored to specific job titles, NYU would use a single job description for all ADRSS employees. The new, "much broader" job description was titled Access, Delivery and Resource Sharing Services Assistant, and employees would be expected to work in up to two units, rather than one, on a regular basis. (JA 312-13; JA 136-39.) The email explained that, since 2011, about half of the employees had participated in a voluntary program to cross-train and work in other units, and

NYU had recently hired two new employees to work in a “blended” position, which required them to work in two or three units regularly. (JA 313; JA 136-39, 49-50.)

In its initial response to Cardeli-Arroyo’s email, the Union asserted that the changes to the job descriptions constituted a unilateral change in working conditions. The Union also requested bargaining over the changes. (JA 313; JA 136-39.) In subsequent emails, the Union again requested bargaining and made detailed information requests concerning the changes and the effects of those changes on employees’ working conditions, including information about the frequency of the job sharing, scheduling, training, pay, staffing levels, and the effects of the changes on performance evaluations. (JA 313; JA 6-14, 140-42, 173, 174-82, 183, 184-95.) NYU provided much of the requested information. (JA 313; JA 143-61, 162-72.)

On September 9, 2013, NYU and Union representatives met to discuss the proposed changes. During the meeting, the Union representatives questioned NYU regarding the effects of the job changes. Specifically, the Union asked how staffing would be affected during the training period; how employees would be assigned to their secondary units; and how employee evaluations and requests for leave would be handled with multiple supervisors. NYU gave general answers and

referred the Union to Kristina Rose, head of the ADRSS department, who did not attend the meeting. (JA 313; JA 15-16, 26-27.)

In late November 2013, Rose and other managers met with employees to explain the changes that the new job description implemented. (JA 313; JA 17, 28, 196-224.) The new job description specified that the ADRSS assistants “will be assigned to work in other units on a regular basis to meet workflow demands.” (JA 313; JA 188-89, 196-224, 266-70.) The new job description listed required job duties, including circulating library materials, processing user requests and payments, responding to user inquiries, and training part-time staff in the work of the units. (JA 313; JA 196-224, 266-70.) Rose emphasized that employee hours and days of work, home department, attendance policies, and grade of work would not change. (JA 313; JA 196-224.) Rose told employees that they would be assigned to work in their secondary units from 8 to 14 hours per week. (JA 313; JA 28, 196-224.)

During the meeting, employees asked Rose about leave approvals, performance expectations, pay, effect on the collective-bargaining agreement, and work load. Rose informed the employees that while the issue was not yet settled, she believed leave requests would be approved by their primary supervisor. She further told employees that they would be expected to perform at the same level as the recently hired “blended” employees with no increase in pay. Supervisor

Deborah Caesar told employees that there would be no decrease in work assignments at the primary job to accommodate the new duties in the secondary job. Rose also indicated that she did not know what effect the changes would have on their collective-bargaining agreement. (JA 313; JA 29-30.)

Rose announced a three-week cycle of training, which included one week of training with the employees' secondary unit supervisor, a week of shadowing a more experienced employee in the secondary unit, and a week of working regularly in the secondary unit. (JA 313; JA 41, 196-224, 225-239.) The three-week training began in early December for employees training in the Reserves unit and continued on a staggered basis for other units. At the end of the training, employees were expected to work independently in their secondary units. (JA 225-239.) When the meeting concluded, employees received their new secondary assignments and met with their secondary supervisors. (JA 313; JA 30.)

C. NYU Responds to Employee Concerns by Modifying Effects of the Job Changes but Without Bargaining with the Union

After NYU implemented the new job description, employees discussed the changes and their effects among themselves and with their supervisors. Those issues included scheduling, training, inability to complete work in both units in a timely manner, and fears about the adverse impact on their evaluations. (JA 314; JA 245-46, 248, 250, 254, 256, 255.) Some supervisors held an employee meeting to respond to employee questions, and Rose addressed employee concerns in

email. (JA 314; JA 240, 241-42, 247, 253.) As a result of employee concerns about their assignments being “in addition” to their regular work, Rose told employees that their primary duties “will be adjusted to accommodate” the new work. (JA 314; JA 247.) Rose thanked employees for their suggestions about scheduling and training and noted that she had shared those suggestions with supervisors. (JA 247.)

On November 27, 2013, the Union requested bargaining over the change in job duties. (JA 314; JA 183.) NYU responded that it was not required to bargain over the changes because the Union had waived its right to bargain through the collective-bargaining agreement’s management-rights and job description clauses. (JA 314; JA 184-95.)

D. The Union Appeals the General Counsel’s Refusal To Issue Complaint Alleging that NYU Failed To Bargain over the Job Changes

The Union filed an unfair-labor-practice charge alleging that NYU violated the Act by “requiring employees to cross-train and to rotate work assignments, without bargaining in good faith concerning such requirement or its effects.” (JA 314; JA 77.) The General Counsel issued complaint on the Union’s allegation that NYU failed to bargain over the effects of the job changes. (JA 314; JA 78-81.) The Union appealed the failure to issue complaint alleging NYU’s refusal to bargain over the decision to make the changes. On June 17, 2014, the Board’s

Office of Appeals denied the Union's appeal, finding that the "assignment of additional related duties falls within the language of [the management-rights clause]." The Office of Appeals concluded that "further proceedings on the allegations not included in the complaint are unwarranted." (JA 314; JA 257-58.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge, that NYU violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of NYU's decision to change the job duties and descriptions of library employees.

The Board's Order requires NYU to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (JA 310.) Affirmatively, the Board's Order directs NYU, on request, to bargain in good faith with the Union over the effects of its decision to change the job duties and job descriptions of library employees; to remove all adverse comments from the job evaluations of affected employees; and to post a notice. Finally, the Board modified the administrative law judge's recommended order and ordered NYU to rescind any of the effects of the changes, but only if requested by the Union. (JA 310 & n.1.)

SUMMARY OF ARGUMENT

The Board has long interpreted Section 8(a)(5) of the Act to require that employers bargain with their employees' bargaining representative over the effects of decisions concerning terms and conditions of employment. The distinction between bargaining over a decision and its effects has been recognized by the Supreme Court. Even where the parties' collective-bargaining agreement gives the employer the right to make a certain decision, the employer may still be required to bargain over the effects of that decision. Here, the Board found that NYU violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of NYU's decision to change employee job duties and job descriptions.

Applying its longstanding clear and unmistakable waiver doctrine, the Board determined that although the collective-bargaining agreement gave NYU the authority to change employees' job duties, it did not waive the Union's right to bargain over the effects of that decision. Specifically, the Board found that the management rights and job description clauses relied upon by NYU made no reference to effects bargaining and could not have waived the Union's rights to bargain over effects. Further, the Union identified effects over which it wanted to bargain, and NYU negotiated over those effects with individual employees.

Finally, contrary to NYU's claims, the Board's decision does not conflict with a prior decision of the Office of Appeals. In its decision, the Office of

Appeals affirmed the exclusion of an allegation regarding NYU's failure to bargain over changes to employees' job descriptions and job duties. But that decision did not restrict the General Counsel's ability to go forward with the allegation that NYU failed to bargain over the effects of those changes. The Board further reasonably found that those effects—including assignments to work in a second unit, increases in work load, and negative comments in at least one employee's performance review—were not *de minimis*.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."² The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts."³ Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*."⁴ When reviewing the Board's order, the Court grants deference to the Board's findings and the "reasonable inferences that the

² *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

³ *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

Board draws from the evidence.”⁵ The Court will uphold the Board’s legal conclusions if they are “reasonable and consistent with controlling precedent.”⁶

While the Board has the authority to interpret collective-bargaining agreements in order to resolve unfair labor practice cases,⁷ this Court accords “no special deference” to the Board’s interpretation of agreements, and decides *de novo* what the contract means.⁸ But the Board’s factual findings on matters bearing on the intent of the parties to the contract are entitled to the same deference as any other factual findings.⁹

⁵ *U.S. Testing*, 160 F.3d at 19.

⁶ *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007).

⁷ *See NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967).

⁸ *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991).

⁹ *Id.* at 640; *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NYU VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION OVER THE EFFECTS OF ITS DECISION TO CHANGE EMPLOYEES' JOB DUTIES

Contrary to NYU's suggestions throughout its brief, the Board found that NYU has no obligation to bargain over the decision to change employee job duties. The issue here is whether NYU has an obligation to bargain over the effects of that decision. Under Board law, where an employer has no obligation to bargain about a decision, it may nonetheless violate Section 8(a)(5) and (1) of the Act by failing to bargain with its employees' bargaining representative about that decision's effects on employees' terms and conditions of employment.¹⁰ As shown below, substantial evidence supports the Board's finding that NYU violated the Act by failing to bargain over the effects of its decision to change employees' job descriptions and job duties.

A. The Board Reasonably Interprets the Act To Require an Employer To Bargain over the Effects of a Decision Affecting Wages, Hours, or Terms and Conditions of Employment

Section 7 of the Act gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer

¹⁰ See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981). See also *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003); *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972).

on their behalf.¹¹ Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.¹² In turn, Section 8(d) of the Act defines the "duty to bargain collectively" as "the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."¹³

The Board has also long interpreted the Act's obligation to engage in collective bargaining as encompassing an obligation to engage in both "decisional bargaining" about an employer's underlying decision and "effects bargaining" about the effects that an employer's decision will have on the terms and conditions of employment.¹⁴ In *First National Maintenance*, the Supreme Court ratified that decisional-bargaining and effects-bargaining distinction by holding that an

¹¹ See 29 U.S.C. § 157.

¹² See 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

¹³ 29 U.S.C. § 158(d). See also *Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 209-10 (D.C. Cir. 2004).

¹⁴ See, e.g., *McLoughlin Mfg. Corp.*, 182 NLRB 958, 959 (1970), enforced *sub nom. Int'l Ladies' Garment Workers Union, AFL-CIO v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972); *Challenge-Cook Bros.*, 282 NLRB 21, 26 (1986), enforced, 843 F.2d 230, 232-33 (6th Cir. 1988); *Holiday Inn of Benton*, 237 NLRB 1042, 1042-43 (1978), enforced in relevant part *sub nom. Davis v. NLRB*, 617 F.2d 1264, 1267-70 (7th Cir. 1980).

employer's decision to terminate part of its business was a core entrepreneurial decision falling outside the scope of Section 8(d)'s mandatory bargaining subjects, even though the employer retained the distinct "duty to bargain about the results or effects of its decision."¹⁵ The Court explained that the responsibility to bargain over effects is a statutory one, "mandated by § 8(a)(5)".¹⁶

The statutory responsibility to bargain over effects exists whether or not the parties have a collective-bargaining agreement.¹⁷ Moreover, contractual language waiving a union's right to bargain over the change in job duties "does not constitute a waiver of the right to bargain over that decision's effects."¹⁸ In other words, "[e]ven when a particular managerial decision is not itself a mandatory subject of bargaining, the decision's forecasted impact on salaries, employment levels, or other terms and conditions of employment . . . constitute[s] a mandatory subject of collective bargaining."¹⁹ As the Court has recognized, an employer's

¹⁵ 452 U.S. at 676-77 & n.15, 686.

¹⁶ *Id.* at 681. *Accord NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 233 (6th Cir. 1988) (duty to bargain over effects "is a statutory duty that derives from §8(a)(5)").

¹⁷ *See, e.g., Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 83-84 (2d Cir. 2013); *Challenge-Cook Bros.*, 843 F.2d at 233. *Accord Natomi Hosps. of California, Inc. (Good Samaritan Hosp.)*, 335 NLRB 901, 902 (2001).

¹⁸ *Good Samaritan Hosp.*, 335 NLRB at 903.

¹⁹ *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996).

failure to give a union the opportunity to bargain about the effects of a decision affecting employees' working conditions effectively "denigrate[s] the Union and the viability of the process of collective bargaining itself, in the eyes of unit employees."²⁰

B. The Union Did Not Clearly and Unmistakably Waive Its Right To Bargain over the Effects of NYU's Changes to the Employees' Job Duties

NYU admittedly failed to bargain with the Union over the effects of its changes to employee job descriptions and job duties. Under Board law, such a failure to bargain over effects violates the Act unless the Union waived its right to bargain. In determining whether the Union waived that right, the Board applied its longstanding clear and unmistakable waiver analysis. As shown below, the Board found that the Union did not clearly and unmistakably waive its right to bargain. (JA 315.)

The "clear and unmistakable waiver" standard first appeared in *Tide Water Associated Oil Co.*, a Board decision issued shortly after the enactment of the Taft-Hartley Act.²¹ In the more than 60 years since *Tide Water*, the Board has consistently adhered to the position that contractual waivers of statutory bargaining

²⁰ *Vico Prods.*, 333 F.3d at 208.

²¹ *See Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949) (rejecting contention that contractual "management functions" clause privileged employer's unilateral changes in pension plan).

rights must be clear and unmistakable.²² The consistency of the Board’s interpretation of the Act renders it especially worthy of judicial deference.²³

Under the Board’s clear and unmistakable waiver analysis, an employer asserting that a union has waived its bargaining rights has the burden of proving a clear and unmistakable waiver.²⁴ A finding of waiver may be based on contractual language, bargaining history, or a combination of the two. However, contractual language must be “clear and unmistakable” to be treated as a waiver of statutory bargaining rights.²⁵ A finding of waiver “requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term”²⁶

The Board applies the same clear and unmistakable waiver analysis to determine whether a union has waived its right to bargain over the effects of a decision and “has repeatedly held that generally worded management-rights clauses or ‘zipper’ clauses will not be construed as waivers of statutory bargaining

²² See *Provena Hosps.*, 350 NLRB 808, 812 & n.19 (2007).

²³ See *Pattern Makers v. NLRB*, 473 U.S. 95, 115 (1985).

²⁴ *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) (citations omitted), enforced sub nom. *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001).

²⁵ *Local Union 36*, 706 F.3d at 81-82; *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

²⁶ *Provena*, 350 NLRB at 811.

rights.”²⁷ The Supreme Court approved the clear and unmistakable waiver standard in *Metropolitan Edison Co. v. NLRB*, a case involving discrimination under Section 8(a)(3) and (1) of the Act.²⁸ The Board applied the same standard in a case arising under Section 8(a)(5) which ultimately reached the Supreme Court.²⁹ The propriety of the “clear and unmistakable waiver” standard was not squarely in issue in the Supreme Court. Nevertheless, the Court stated that “[w]e cannot disapprove of the Board’s approach.”³⁰

Applying those principles, the Board reasonably found that the Union did not clearly and unmistakably waive its right to bargain over the effects of NYU’s decision to change job duties. (JA 314-15.) NYU is simply incorrect when it argues (Br. 23-24) that the Union waived its right to bargain over the effects of its changes in employee job duties as evidenced by the contract’s management-rights and job-description clauses. Contrary to NYU’s argument, those clauses (JA 119-20) make no reference to effects bargaining and fall far short of demonstrating that the Union exercised its right to bargain over the effects of employees’ changed job

²⁷ *Id.* at 822.

²⁸ 460 U.S. 693, 708 n.12, 709 (1983).

²⁹ *See C&C Plywood Corp.*, 148 NLRB 414, 416 (1964), *enf. denied*, 351 F.2d 224 (9th Cir. 1965), *reversed*, 385 U.S. 421 (1967).

³⁰ *C&C Plywood*, 385 U.S. at 430.

duties.³¹ In addition, while NYU argues (Br. 30-31) that the entire-agreement clause (JA 120) also constitutes a waiver by the Union, it failed to make that argument to the Board in its exceptions to the judge’s decision. Accordingly, Section 10(e) of the Act prohibits the Court from considering that argument.³²

NYU further claims (Br. 31) that because Article 9 of the collective-bargaining agreement bars the Union from filing a grievance over changes to the job descriptions, the Union has waived its right to bargain over effects. As the Board explained (JA 315 n.4), the fact that a subject is excluded from the parties’ grievance and arbitration procedure does not, in itself, constitute a clear and unmistakable waiver of the Union’s right to bargain.³³

The parties’ agreement fails to address effects bargaining at all and, therefore, NYU’s argument that the agreement waived the Union’s right to engage

³¹ See *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003) (noting that employer’s actions were “not embraced by the literal language” of the contract).

³² 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”). See also *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

³³ See *Omaha World-Herald & Teamsters Dist. Council 2, Local 543m*, 357 NLRB 1870, 1871 (2011); *Bonnell/Tredegar Indus., Inc.*, 313 NLRB 789, 791 (1994), *enforced*, 46 F.3d 339 (4th Cir. 1995).

in effects bargaining must be rejected.³⁴ Because the effects of the change in job duties are not matters that were covered by the parties' agreement, the contract coverage doctrine does not play a role. Instead, the Board reasonably found that the Union did not clearly and unmistakably waive its right to bargain over the effects of NYU's decision to change employee job duties.

C. Under the Court's *Enloe* Decision, NYU Had an Obligation To Bargain over Effects

NYU, relying on *Enloe Medical Center*,³⁵ claims that it did not violate the Act because the language of the collective-bargaining agreement relieved it of its obligation to engage in effects bargaining. Specifically, NYU argues (Br. 23) that there is no contractual language or bargaining history showing that the parties intended to treat effects bargaining differently than decisional bargaining. The Board, however, properly rejected NYU's argument.

The Court's contract coverage doctrine, which NYU argues the Board should have applied, explicitly presupposes that the parties have exercised, rather than waived, their statutory right to bargain. Under that doctrine, "[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of

³⁴ See *Challenge-Cook Bros.*, 843 F.2d 230 at 233 (finding that although contract allowed employer to make certain decisions it was "completely silent with respect to the duty to bargain over the *effects* of these decisions") (emphasis in original).

³⁵ *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005).

an agreement, with respect to a matter covered by the contract.”³⁶ In *Enloe*, the Court applied its contract coverage analysis and found that the employer had no duty to bargain over either the decision to adopt a new policy or the effects of that decision. The Court agreed with *Enloe* that the management-rights clause “justifie[d] its refusal to bargain over effects because the agreement authorized *Enloe* to ‘implement’ its mandatory on-call policy.”³⁷

But the Court in *Enloe* went further. It noted that “[i]t would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision, but as reserving a union’s right to bargain over the effects of that decision” unless there were “some language or bargaining history to support the proposition that the parties intended to treat the issues separately.”³⁸ The Court concluded that the union’s failure to identify “any particular discrete effect about which it was seeking bargaining” demonstrated that the parties “never contemplated a dichotomy” between decisional and effects bargaining.³⁹

³⁶ *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836, 838 (D.C. Cir. 1993).

³⁷ *Enloe*, 433 F.3d at 838.

³⁸ *Id.* at 839. See also *Heartland Plymouth Court MI, LLC v. NLRB*, __F.App’x__, 2016 WL 3040451, *1 (D.C. Cir. May 3, 2016) (per curiam) (unpublished).

³⁹ *Enloe*, 433 F.3d at 839.

NYU argues (Br. 34) that because there is no obligation to bargain over the decision, there “can be no effects bargaining obligation.” But this is simply incorrect. The Board and courts, including this one, have long concluded that there is a separate effects bargaining obligation.⁴⁰ While the effects bargaining obligation can itself be waived, the waiver of the decisional bargaining does not automatically waive the effects bargaining obligation. Under *Enloe*, if it can be shown, as it was here, that the Union did identify “particular discrete effect[s] about which it was seeking bargaining,”⁴¹ then the fact that the contract gave NYU the right to make the decision did not extinguish the Union’s right to bargain over the effects of that decision.

Unlike in *Enloe*, there is record evidence in this case that the Union identified discrete effects about which it wanted to bargain. Moreover, these discrete effects were patent and known by NYU, as demonstrated by NYU’s efforts to negotiate with individual employees over, and subsequently modify, those effects. Indeed, as NYU prepared the new job descriptions, managers

⁴⁰ *First Nat’l Maint.*, 452 U.S. at 681; *Local Union 36*, 706 F.3d at 83-84; *Vico Prods.*, 333 F.3d at 208; *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, Int’l Bhd. of Teamsters*, 989 F.2d 1077, 1081 (9th Cir. 1993); *Challenge-Cook Bros.*, 843 F.2d at 233; *Int’l Ladies’ Garment Workers*, 463 F.2d at 917. *Cf. Enloe*, 433 F.3d at 839 (noting that bargaining history and other evidence could lead to conclusion that parties intended to bargain effects separately); *Heartland*, 2016 WL 3040451, *1 (same).

⁴¹ *Enloe*, 433 F.3d at 839.

discussed sending the changes to the Union for “review” and “discuss[ion].” (JA 276-77.) As shown below, the Board reasonably determined that the Union did not clearly and unmistakably waive its right to bargain over the effects.

As an initial matter, while it is true that its bargaining requests did not explicitly demand bargaining over effects, the Union did—in meetings with NYU and through its information requests—identify specific effects about which it wanted to bargain. Specifically, the Union requested information on effects of the change in job duties, including:

- current and proposed staffing levels;
- consequences for employees failing to meet expectations in the new unit;
- role of primary and secondary supervisors in determining work assignments, workload, schedule, and performance evaluations;
- proposed compensation for employees who trained others;
- proposed compensation for the new positions;
- description of how changes would affect staff training, workflow, and other conditions;
- timeline for staff training; and
- description of effects on employees’ individual project assignments.

(JA 140-42, 173.) In addition, union steward Jasmin Smith testified that soon after

the job duty changes were announced, she met with union officials to discuss which issues they would demand bargaining over. That list included “how people were assigned to a secondary department, the hours, the training, compensation. Whether or not people would be able to change their secondary department based on what their strengths or weaknesses were. How employees would be evaluated.” (JA 39.) Similarly, in their first meeting with NYU about the upcoming changes, the Union representatives questioned how the changes would affect staffing, assignments, evaluations, leave requests, and supervision. (JA 316; JA 15-16.) By requesting information and bargaining over specific effects related to the change in job duties, the Union did, unlike the union in *Enloe*, identify “particular discrete effect[s] about which it was seeking bargaining.”⁴²

In attacking the Board’s finding that it unlawfully refused to bargain over the effects of the job duty changes, NYU does not acknowledge the above evidence. Instead, NYU argues (Br. 36) that the Union waived its right to bargain over the effects of the job duty changes because the union steward drafted a petition that demanded bargaining over the decision itself and because the Union never demanded bargaining over effects. But the Board reasonably concluded, based on the fact that the Union never distinguished between decisional and effects bargaining in its bargaining requests and made multiple demands for information

⁴² *Enloe*, 433 F.3d at 839.

regarding the effects of the decision, that the Union effectively did demand bargaining over effects. (JA 316.)

Furthermore, substantial evidence supports the Board's finding (JA 315) that NYU addressed the specific concerns of individual employees related to the job duty changes and that these were bargainable issues that could—and should—have been raised with the employees' representative, the Union. NYU's decision to explore alternatives directly with employees deprived employees of representation at the time when they "had the greatest need" for that representation. (JA 315.)

Before the administrative law judge, NYU conceded that it solicited feedback from employees about the changes and adjusted training schedules and duties based on that feedback. (JA 315.) Before the Court, NYU concedes (Br. 44) that it "took expedient action to address" employee concerns over the job changes. Those concerns and associated "expedient action" included adjusting the training schedule based on employee suggestions (JA 245-46, 249, 250). And while NYU initially told the Union that it would not adjust work duties to accommodate the additional work in a secondary department, NYU did exactly that after employees raised concerns. (JA 313; JA 29-30, 247.) In addition, NYU managers addressed other employee concerns, including employees' inability to complete assigned work as a result of the new schedule (JA 245-46, 255); whether performance goals should be altered because the employee no longer had time to

work on a goal (JA 248); fears that performance evaluations would be negatively affected because of inability to complete all work due to the new schedule (JA 255); lack of interest in the new assignments, including feeling that the new assignment was a “punish[ment]” (JA 245-46, 256); whether employees would have to share desks and computers (JA 253); and procedures for requesting leave (JA 253).

Given that evidence, the Board reasonably determined that the Union identified particular discrete effects about which it wanted to bargain, and NYU in fact bargained with individual employees over those effects. Under *Enloe*, then, the fact that the contract gave NYU the right to make the decision did not extinguish the Union’s right to bargain over the effects of that decision.⁴³

D. NYU’s Remaining Arguments Are Meritless

1. The Board’s Order does not conflict with the decision of the Office of Appeals

NYU’s claim that the Board’s Order in this case “effectively nullifies the valid and final decision of its own Office of Appeals” (Br. 36) misunderstands the Board’s Order and the Office of Appeals’ decision. The Union’s original unfair-labor-practice charge alleged that NYU unlawfully refused to bargain over both the job changes and the effects of those changes. When the General Counsel declined

⁴³ See *Enloe*, 433 F.3d at 839.

to include the Union’s allegation concerning decisional bargaining in the unfair-labor-practice complaint, the Union appealed. The Board’s Office of Appeals denied the appeal.⁴⁴ Specifically, the Office of Appeals found that “the evidence established that by agreeing to the language in the Management Rights clause the Union waived its right to bargain over changes to the employees’ job duties.” (JA 257-58.) The Office of Appeals then concluded that “further proceedings on the allegations not included in the complaint are not warranted.” (JA 257-58.)

Because the allegation that NYU failed to bargain over the effects of its decision was included in the complaint, proceedings on that allegation went forward. (JA 78-81.) Proceedings not included in the complaint—namely, the allegation that NYU failed to bargain over the decision itself—did not proceed. Nothing in the Office of Appeals’ decision addressed the issue of bargaining over effects.

NYU further argues (Br. 35-36) that the Board’s modified remedy, which requires NYU to rescind any of the effects of the job changes upon request rather than only the adverse effects, would “force NYU to reverse the job duties changes altogether” and “conflict with the decision of the Office of Appeals.” The Court lacks jurisdiction to consider NYU’s arguments regarding the remedy because they

⁴⁴ See Section 202.1.3, NLRB Statement of Organization and Functions, 32 Fed. Reg. 9588, as amended (July 1, 1967) (stating that Office of Appeals “reviews appeals from Regional Directors’ refusals to issue complaints in unfair labor practice cases and recommends the action to be taken thereon by the General Counsel”).

were not first raised to the Board in a motion for reconsideration.⁴⁵ In any event, nothing in the Board’s Order requires NYU to reverse the changes it made to the job descriptions or conflicts with the decision of the Office of Appeals.

2. The Board reasonably determined that the effects of NYU’s changes to employees’ job duties were not *de minimis*

NYU argues (Br. 38-45) that the effects of the change in job descriptions are *de minimis* in scope and do not require bargaining. Although it is true that a unilateral change in working conditions must be “material, substantial, and significant” to violate Section 8(a)(5),⁴⁶ NYU wrongly suggests (Br. 42) that a change is *de minimis* if it is not “permanent and systematic.” NYU relies in large part on an incorrect reading of the Board’s decision in *Fresno Bee*.⁴⁷ The permanence of the policy changes at issue in *Fresno Bee* was relevant only to the

⁴⁵ See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (appellate court lacked jurisdiction to hear aggrieved party’s challenge to Board decision on issue not expressly presented to Board by parties, in absence of motion for reconsideration); 29 C.F.R. § 102.48(d)(1) (“A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order”). *Accord Noel Foods Div., Noel Corp. v. NLRB*, 82 F.3d 1113, 1120-21 (D.C. Cir. 1996) (employer waived judicial review of issue where it “had the opportunity, and therefore the obligation, to raise its objections in a timely petition for rehearing or reconsideration”).

⁴⁶ See *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991) (citing *Rust Craft Broad. of N.Y., Inc.*, 225 NLRB 327 (1976)).

⁴⁷ *McClatchy Newspapers, Inc. d/b/a The Fresno Bee*, 339 NLRB 1214 (2003) (“*Fresno Bee*”).

question of whether the changes were consistent with the employer's past practice of making "day-to-day changes in order to adjust to . . . changes in its operational needs."⁴⁸ The proper inquiry into whether a unilateral policy change is material turns on "the extent to which it departs from the existing terms and conditions affecting employees."⁴⁹

Here, the effects of NYU's changes in the job descriptions constitute a considerable departure from past conditions. The changes necessitated substantial training and resulted in at least one employee receiving negative comments in his performance review. (JA 314; JA 271-75.) Some employees were "ill prepared" for their secondary work, and had difficulty using the computer or handling money. (JA 314; JA 36-38.) The new assignments also increased the employees' workload, and at least two employees complained they were too busy to take their lunch breaks as a result. (JA 314; JA 35, 38.) NYU's bald claim (Br. 40) that there is "no evidence" to suggest that any employees work more than two hours per week on their secondary assignments is belied by the actual evidence in this case. Not only did Rose tell employees they were expected to work in their secondary units between 8 and 14 hours a week (JA 313; JA 28, 196-224), the

⁴⁸ *Id.* at 1215.

⁴⁹ *S. Cal. Edison Co.*, 284 NLRB 1205, 1205 n. 1 (1987), *enforced*, 852 F.2d 572 (9th Cir. 1988).

record shows the schedules of nine employees, all of whom were scheduled to work in a secondary unit between six and 14 hours per week. (JA 314; JA 243-44, 251-52, 254, 255.) Changes far more minor than those that occurred here have been held to be mandatory subjects of bargaining under this standard, including increases in the price of cafeteria items,⁵⁰ changes in the timing of lunch breaks,⁵¹ and a shift in an employee health plan to preference generic versions of drugs when available.⁵² Thus, substantial evidence supports the Board's finding (JA 316) that the effects of NYU's changes to the job descriptions were not *de minimis*.

The Supreme Court recognized nearly four decades ago that “the classification of bargaining subjects as terms or conditions of employment is a matter concerning which the Board has special expertise [and] its judgment as to what is a mandatory bargaining subject is entitled to considerable deference.”⁵³

The Board here has determined that the purposes of the Act are best served by

⁵⁰ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979).

⁵¹ *Microimage Display*, 924 F.2d at 253.

⁵² *Caterpillar, Inc. v. NLRB*, No. 10-1269, 2011 WL 2555757, at *1 (D.C. Cir. May 31, 2011) (per curiam) (unpublished).

⁵³ *Ford Motor*, 441 U.S. at 495 (internal quotations omitted). *See also Truck Drivers, Oil Drivers, Filling Station & Platform Workers Local No. 705 of Int'l Bhd. of Teamsters v. NLRB*, 509 F.2d 425, 428 (D.C. Cir. 1974) (“[W]here to draw the line of matters trivial in their impact is primarily a task for the Board and not for the court.”).

bargaining on the effects of NYU's unilateral change of job descriptions, and the Board's experience and expertise in making that evaluation deserve deference.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny NYU's petition for review.

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August 2016

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

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NEW YORK UNIVERSITY)	
Petitioner/Cross-Respondent)	
)	
v.)	
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)	Nos. 15-1437, 16-1006
and)	
)	
UNION OF CLERICAL, ADMINISTRATIVE)	
AND TECHNICAL STAFF AT NYU,)	
LOCAL 3882, NYSUT, AFT, AFL-CIO)	
Intervenor)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its corrected brief contains 7,168 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 5th day of August, 2016

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Intervenor)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
This 5th day of August, 2016

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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1. NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

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

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

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

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

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as

it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

2. THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48(d)(1):

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

3. NLRB STATEMENT OF ORGANIZATION AND FUNCTIONS

SECTION 202.1.3, 32 Fed. Reg. 9588:

Division of Enforcement Litigation. The Associate General Counsel for Enforcement Litigation is responsible for all Agency litigation in the United States Courts of Appeals and the Supreme Court of the United States, whether within the General Counsel's statutory authorization or delegated by the Board, including contempt litigation and enforcement and review of Decisions and Orders of the Board, and is also responsible for miscellaneous litigation in Federal and state courts to protect the Agency's processes and functions.

The Office of Appeals is another principal part of the Division of Enforcement Litigation. This office reviews appeals from Regional Directors' refusals to issue complaints in unfair labor practice cases and recommends the action to be taken thereon by the General Counsel. Pursuant to request, the Director of the office

may also hear informal oral presentations in Washington of argument by counsel or other representatives of the parties in support of, or in opposition to, the appeals.