

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1278, 04-1297, 04-1316

BREWERS & MALTSTERS, LOCAL UNION NO. 6, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

ANHEUSER-BUSCH, INC.

Intervenor

ANHEUSER-BUSCH, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

BREWERS & MALTSTERS, LOCAL UNION NO. 6, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petitions of Brewers and Maltsters, Local Union No. 6, affiliated with the International Brotherhood of Teamsters (“the Union”), and Anheuser-Busch, Inc. (“the Company”), to review an order of the National Labor Relations Board (“the Board”) issued against the Company. The Board has filed a cross-application for enforcement of its order. The order found that the Company violated the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-69 (“the Act”), by unilaterally installing hidden surveillance cameras in work and break areas and by failing to timely respond to the Union’s written request for information regarding the installation and use of hidden surveillance cameras. (A 1.)¹

The Board had subject matter jurisdiction under Section 10(a) of the Act, 29 U.S.C. § 160(a). The Board’s Decision and Order issued on July 22, 2004 and is reported at 342 NLRB No. 49. The Board’s order is final with respect to all parties under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which allows a party aggrieved by a final order of the Board to file a petition for review in this

¹ Record references in this brief are to the Joint Appendix; references are abbreviated as set forth in the Glossary. When a reference contains a semicolon, references preceding the semicolon are to findings of the Board, and references following the semicolon are to the supporting evidence.

Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Union filed its petition for review on August 19, 2004 and the Company filed its petition for review on September 1, 2004. The Board cross-applied for enforcement on September 15, 2004. The petitions and the cross-application were timely because the Act places no time limit on filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act by:

(a) installing and using hidden surveillance cameras in the workplace without notifying the Union or bargaining over the issue; and

(b) failing to timely provide information regarding its use of hidden surveillance cameras in the workplace upon the Union's written request.

2. Whether the Board abused its remedial discretion in declining to rescind the discipline imposed on 16 employees whose misconduct was detected through the Company's hidden surveillance cameras.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union against the Company, the Board's General Counsel issued a complaint alleging that the Company violated its duty to bargain in good faith under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (A 505-09.) After a 2-day hearing, an administrative law judge issued a recommended decision and order finding that the Company violated the Act by unilaterally installing and using hidden surveillance cameras and by failing to timely respond to the Union's written request for information concerning hidden surveillance of bargaining unit employees. (A 7-9.) The administrative law judge found that the Company did respond to an earlier, oral request for information by the Union, and dismissed that allegation of the complaint. (A 8.)

The Company, the Union, and the Board's General Counsel each filed exceptions to the judge's recommended decision and order. The Board rejected all of the parties' exceptions and adopted the administrative law judge's decision. (A 1.) The Union and the Company then petitioned for review of the Board's order, and the Board cross-applied for enforcement. This Court consolidated these cases on its own motion.

The pertinent facts, and a more detailed summary of the Board's conclusions and order, follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Collective-Bargaining Relationship

The Company—which brews and distributes beer at its St. Louis, Missouri, brewery—has a mature collective-bargaining relationship with the Union, which has represented the Company's brewery and draft employees since 1948. (A 6; A 75, 77.) The most recent collective-bargaining agreement prior to the events at issue here expired in February 1998. (A 6; A 523.) Its terms were extended by mutual agreement while the parties attempted to negotiate a successor agreement. (A 6; A 76, 123-24.) After those negotiations failed, the Company implemented the terms of its final contract offer. (A 6; A 468-69.)

B. The Roof of Stockhouse 16 Is a Work and Break Area

The events at issue in this case involved the eighth-floor roof of Stockhouse 16, one of the Company's brewing facilities, and, in particular, the area in and around the elevator motor room, a structure located on the roof. The roof of Stockhouse 16, including the elevator motor room, is an area where employees both take breaks and perform work. (A 1, 8.)

The elevator motor room is accessed via a short staircase on the eighth-floor rooftop. It houses the electrical motors and systems that operate the building's elevators. (A 1, 8; A 160, 357-58.) On a monthly basis, the Company

assigned at least two bargaining-unit employees to perform a lock-out/tag-out procedure in the elevator motor room. (A 1, 8; 105, 190-91, 655-81.) The lock-out/tag-out procedure—which immobilizes the elevators so that the elevator shafts and pits can be safely cleaned—is a safety measure required by written company policy, and the failure to perform the procedure is a basis for discipline. (A 8; A 649-52, 105-06, 195, 246.)

Employees regularly frequent the roof area during their breaktime in order to provide relief from the extreme temperatures in some areas of the stockhouse. (A 1, 8; A 95-98, 100-04, 234-35.) And, because the roof is one of the few areas of the St. Louis facility where smoking is permitted, employees frequently visit the roof in order to smoke cigarettes during their breaktime. (A 8; A 98, 251.) In addition, the Company occasionally assigns employees to clean the roof of debris such as aluminum cans and cigarette butts, and it also provides trash receptacles on the roof. (A 8; A 104-05, 419-20.)

The fact that employees use the roof as a break area was well known to management. (A 8; A 418-19.) Company supervisors themselves took breaks on the roof and talked with employees who also were spending their break time on the roof. (A 8; A 102-0-3, 235-36.) There were no signs on the doors to the roof limiting access, and the Company issued no instructions prohibiting the use of the roof as a break area. (A 1, 8; A 102-04, 424.) Indeed, a management official,

Assistant Brewmaster Melvin Harris, acknowledged that “[t]o go out [on the roof] to smoke a cigarette or take a small personal break was fine.” (A 434.)

**C. The Company, Without Notifying the Union or Bargaining,
Installs Hidden Surveillance Cameras on the Roof of Stockhouse
16**

In late April or early May 1998, a company supervisor alerted Assistant Brewmaster Harris to the fact that he had found a table, chairs, and a number of mattress-sized foam pads and cardboard mats in the elevator motor room. (A 7; A 361.) Harris notified the Company’s Captain of Security, William Daugherty, and the two toured the elevator motor room, accompanied by Human Resources Manager David Mulherin. (A 7; A 363.)

The presence of these articles in the elevator motor room led Harris and Daugherty to suspect that it was being used as a location for activities “inconsistent with any work assignment for employees of the Brewery,” including, possibly, drug use. (A 6-7; A 631-36, 296-97, 363.) As a result, the Company decided to institute hidden surveillance and, on May 17, the Company installed a “pin-hole” camera on the roof, which was directed toward the stairs leading from the roof to the entrance to the elevator motor room. (A 7; A 296, 358-59, 376.) The Company installed a second hidden surveillance camera in early June, this one inside the elevator motor room itself. (A 7; A 300.) The video surveillance ran

continuously—24 hours a day, 7 days a week—until June 30, 1998, when the surveillance ceased and the cameras were removed. (A 7; A 300, 316, 481.)

From its periodic review of the surveillance videotapes, the Company concluded that a number of employees had engaged in misconduct in violation of company rules; the misconduct included drug use, urination on company property, and extended absence from work areas. (A 7; A 339, , 367, 437, 964-1226.) In addition to recording these instances of misconduct, the video surveillance also recorded the activities of four hourly employees who were not engaged in any misconduct while on the roof. (A 8; A 413-17.) Two were recorded as they performed the lock-out/tag-out procedure in the motor room; the other two were on the roof but not engaged in any work assignment. (A 1, 8; A 413-14, 416-17.) Harris acknowledged that those employees “weren’t doing anything wrong by being on the roof.” (A 8; A 417.)

At no time prior to the installation and use of the cameras did the Company inform the Union of its intent to institute hidden-camera video surveillance of the employees. (A 1, 7; A 89, 410-11.) The Company adhered to the position that it had no obligation to notify the Union of, or to bargain over, the installation and use of hidden surveillance cameras. (A 7; A 369-40, 84, 89, 145, 468.)

D. The Company Disciplines 16 Hourly Employees; the Union Grieves the Disciplinary Actions and Requests Information Regarding Hidden Surveillance Cameras; the Company Fails To Provide Responsive Information Until after Three Grievance Arbitrations Had Concluded

On July 1, after the surveillance was discontinued, Harris met with the Union's Secretary-Treasurer, Edward Polster. (A 7; A 77.) During that meeting, Harris informed Polster, for the first time, that the Company had installed hidden surveillance cameras on the roof and had thus captured a number of instances of employee misconduct. Polster "strenuously objected" to the Company's failure to notify the Union in advance of its intent to use hidden surveillance cameras. Polster pointed out that had the Company done so, he was sure that any issues could have been worked out. (A 7; A 78-80, 448.) Harris responded that the Company had no obligation to notify the Union or bargain over the matter; he then informed Polster that he was scheduling investigatory meetings with the employees who were recorded on the videotapes, commencing on the following day. (A 7; A 80-81.)

The first such investigatory meeting was held the following day. Polster attended that meeting and again asked why the Company had failed to notify the Union before installing the cameras. (A 7; A 82.) Mulherin replied that this was a matter of "corporate security" and reiterated his position that the Company was under no obligation to notify the Union in advance or to bargain over the issue. (A

7; A 82, 84, 227-28.) From July 2 through August 1998, the Company conducted interviews with the employees who had been videotaped. (A 82.) In each interview, the Company confronted the employee with the videotape evidence; 16 employees admitted misconduct in the course of the interviews. (A 172-74.)

Following the investigatory interviews, the Company disciplined 16 employees: 5 were terminated for violating the Company's drug use policy by smoking marijuana; 7 were issued last-chance agreements for conduct that included leaving assigned work areas for prolonged periods, sleeping, and urinating on the roof; and 4 were suspended for leaving assigned work areas for prolonged periods. (A 1, 7; A 964-1226.) The Company did not discipline the two employees who were recorded while accessing the motor room to perform the lock-out/tag-out procedure or the two other employees who were seen on the roof, but who, although not performing any work assignment, were not engaged in any misconduct. (A 8; A 187-80, 468.)

The Union filed grievances on behalf of all of the disciplined employees. (A 9; A 85.) On October 5, prior to the first arbitration hearing, the Union wrote to the Company requesting 14 items of information "[i]n order to carry out its responsibility under the Collective Bargaining Agreement and to properly investigate the grievance and prepare for the arbitration." (A 7; 629-30.) Request numbers 11-14 sought information concerning the installation and use of

surveillance cameras by the Company—including information regarding all other instances of video surveillance other than on the eighth-floor roof of Stockhouse 16. (A 7, 9; 629-30.) The Union issued eight separate sets of information requests, each one relating to a discrete employee grievance. (A 629-32.)

The Company wrote back to the Union on October 22. (A 7; A 631-32.) While providing information regarding the installation of the two cameras on the roof of Stockhouse 16—information that had already been orally conveyed to Polster prior to the July 2 investigatory interview—the Company stated that it was “still in the process of determining whether there is any additional information responsive to request numbers (11) through (14).” (A 7; A 631-32.)

The parties proceeded to arbitration on three employee discharges. In each case, the arbitrator upheld the discharge, while declining to address the refusal-to-bargain issue. (A 9; A 977-1002, 1014-25, 1085-99.) The Company supplied no information regarding any other surveillance of the workplace—as requested in the Union’s October 5 information request—prior to the arbitrations. (D&O 7, 9; A 135-36.)

It was not until May 25, 1999—the first day of the unfair labor practice hearing before the Board’s administrative law judge—that the Company finally provided the Union information pertaining to hidden surveillance of areas other than the roof of Stockhouse 16. (A 9; A 135-36, 878-79.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Walsh, Member Schaumber dissenting), in agreement with the administrative law judge, found that the Company violated its duty to bargain under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5) and (1), by installing hidden video surveillance cameras in work and break areas without notifying the Union or bargaining over the issue. The Board also unanimously concluded that the Company violated Section 8(a)(5) and (1) by failing, on the Union's written request, to timely provide information regarding its use of surveillance cameras. (A 1.)

As to the remedy, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting) agreed with the administrative law judge's determination that it was inconsistent with the policies of the Act to order the Company to rescind the discipline imposed on the 16 employees whose misconduct was detected through the use of the surveillance cameras. (A 2.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, and to cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in their exercise of their statutory rights. Affirmatively, the order directs the Company: (1) to bargain collectively, on request, respecting the installation and use of surveillance cameras and other mandatory subjects of bargaining; (2) to respond in a timely and

complete fashion to the Union's written information request; and (3) to post appropriate remedial notices. (A 3, 10-11.)

SUMMARY OF ARGUMENT

I. The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) is supported by substantial, indeed undisputed, evidence. In court-approved prior precedents, the Board has reasonably interpreted Section 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) to hold that an employer's use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining. Applying those precedents and their reasoning to the undisputed facts here, the Board concluded that the Company had a duty to bargain over its decision to utilize hidden surveillance cameras in an area of the plant where employees performed work and took their breaks, and that the Company's failure to notify the Union or bargain over the issue thus constituted a violation of the Act.

The Company's contention that the Board's construction of the Act is not reasonably defensible because the Act embodies a congressional policy against bargaining over security matters is meritless. Neither the text of the Act nor the case law interpreting it supports the Company's theory. The Company's efforts to distinguish the Board's court-approved prior precedents on this issue also fail, inasmuch as the Company's arguments are based on a misreading of those

decisions or on grounds that are of no legal consequence. Finally, the Company's contention that bargaining in these circumstances would defeat the purpose of using hidden surveillance cameras is meritless because the Board has taken legitimate employer concerns into account, and its rule accordingly does not require an employer to reveal the precise locations of its surveillance cameras or to relinquish any legitimate employer prerogatives.

Substantial evidence likewise supports the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to timely provide the Union with information concerning hidden surveillance of bargaining-unit employees. The Company failed to turn over information responsive to the Union's request until the first day of the unfair labor practice hearing, at which point the Union had already completed 3 arbitrations resulting from the Company's surveillance. The Company's challenge to the relevance of the information requested is meritless because it is well established that information concerning mandatory bargaining subjects is presumptively relevant. The Company's contention that it committed no violation because it bargained over whether it would provide the information also is meritless, as it is settled that the employer's duty is to provide relevant information.

II. The Board soundly exercised its broad remedial discretion in determining that it would not order the Company to rescind the discipline imposed

on 16 employees for misconduct detected through the hidden surveillance. The Board determined that it would not be consistent with the policies of the Act to reward persons who had engaged in unprotected conduct, such as the violations of plant rules committed here, by rescinding the discipline. In so doing, the Board looked to analogous prior precedent in which it denied reinstatement and backpay to employees who were discharged for cause, notwithstanding the employer's violation of their right to union representation in investigatory interviews. And, the Board found that its approach is consistent with the remedial restriction in Section 10(c) of the Act, which prohibits the award of reinstatement and backpay to employees terminated for cause.

The Union's argument that a make-whole remedy is necessary to deter future violations, and that the Board therefore abused its discretion in denying such a remedy, is meritless. The Board is not required to order reinstatement and backpay in every case and, in any event, the Board's order affirmatively requiring the Company to bargain with the Union, on demand, is a sufficient deterrent because a violation of that order can be enforced in contempt proceedings. Equally unavailing is the Union's contention that the Board has departed from its prior precedents. The Board correctly concluded that each of the cases cited by the Union is distinguishable because each involved a unilateral change to the rule or policy that prompted the employee discipline.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY INSTALLING HIDDEN SURVEILLANCE CAMERAS AND BY FAILING TO TIMELY PROVIDE RELEVANT INFORMATION RESPONSIVE TO THE UNION’S WRITTEN INFORMATION REQUEST

A. Substantial Evidence Supports the Board’s Finding that the Company Violated Section 8(a)(5) and (1) of the Act by Unilaterally Installing Hidden Surveillance Cameras in the Workplace

1. Governing principles and standard of review

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(d), in turn, defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d).

The Section 8(a)(5) duty to bargain is “mandatory” with respect to the subjects identified in Section 8(d)—that is, “terms and conditions of employment.” *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Mandatory subjects of bargaining are those that are “plainly germane to the working environment” and are “not among those

managerial decisions . . . at the core of entrepreneurial control.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (citation and quotation marks omitted).

It is settled that, as a corollary to these principles, “[a]n employer violates sections 8(a)(5) and 8(a)(1) of the Act if it makes a unilateral change in a term or condition of employment . . . without first bargaining to impasse.” *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 872 (D.C. Cir. 2000) (quoting *NLRB v. United States Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir.1993)).² *Accord Litton Financial*, 501 U.S. at 198; *Katz*, 369 U.S. at 742-43. This principle applies with full force “where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Litton Financial*, 501 U.S. at 198.

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), where, as here, the plain terms of the statute do not specifically address the precise issue, the courts must defer to the Board’s reasonable interpretation of the Act, and “must respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with

² An employer’s failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights.” See *Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 207 (D.C. Cir. 2004); *NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 n.1 (3d Cir. 1941).

nearly equal reason [might] be resolved one way rather than another.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted).

In particular, “because Congress assigned to the Board the primary task of construing [Section 8(a)(5) and Section 8(d)], and because the ‘classification of bargaining subjects as “terms or conditions of employment” is a matter concerning which the Board has special expertise,’ its judgment as to what is a mandatory bargaining subject is entitled to considerable deference.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (citation omitted). Thus, the Court must uphold the Board’s construction of the statutory terms “wages, hours, and other terms and conditions of employment” so long as it is “reasonably defensible.” *Id.* at 497. *Accord Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 307 (D.C. Cir. 2003).

The Board’s factual findings—such as, in this case, whether the area surveilled by the Company was a work and break area—are “conclusive” under Section 10(e) of the Act if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Under this standard, a reviewing court “may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

2. The Board’s Conclusion that the Company Violated Section 8(a)(5) and (1) of the Act by Unilaterally Installing Hidden Surveillance Cameras in the Workplace is Based on a Reasonable Construction of the Act Applied to Undisputed Facts

As we show in the following, the Board’s order merits enforcement because it rests on a reasonable construction of the Act—as developed in the Board’s court-approved precedents on the same issue—applied to the undisputed facts.

The Board first addressed whether an employer’s use of hidden surveillance in the workplace is a mandatory subject of bargaining in *Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997). In that case, the employer set up hidden cameras in a restroom and in an exercise facility at the workplace. *Id.* The Board concluded, based upon a careful analysis of the issue under the standards enunciated by the Supreme Court in *Ford Motor*, that the “installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining.” *Id.*

The Board concluded that such workplace surveillance is “germane to the working environment,” under the *Ford Motor* test, for two independent reasons. First, the Board found that surveillance cameras in the workplace, like other investigatory techniques, allow an “employer to ascertain whether any of its employees has engaged in misconduct,” which can be a basis for discipline. 323 NLRB at 515. The Board reasoned that hidden surveillance thus “is analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing,

all of which the Board has found to be mandatory subjects of bargaining.” *Id.* (footnotes omitted). The Board therefore concluded that “the installation and use of surveillance cameras has the potential to affect the continued employment of employees whose actions are being monitored.” *Id.* Second, the Board also observed that the particular locations of the cameras in that case—in a restroom and in a fitness facility, each of which was “part of the working environment”—“raise[d] privacy concerns which add to the potential effect on employees.” *Id.*

The Board next considered, as required by *Ford Motor*, whether a decision over “the installation and use of surveillance cameras in the workplace” is within “that class of managerial decisions that lie at the core of entrepreneurial control.” *Id.* Taking direction from Justice Stewart’s concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222-23 (1964) (defining the “core of entrepreneurial control” as “those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security”), the Board reasoned that “[t]he use of surveillance cameras is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and impinges directly on employment security.” 323 NLRB at 515.

Subsequent to this analysis in *Colgate-Palmolive*, the Board reaffirmed and applied this holding in *National Steel Corp.*, 335 NLRB 747, 747 (2001), a case in

which the employer used hidden surveillance in a working area to “investigate suspected theft or other instances of wrongdoing.” Specifically at issue was a camera the employer had concealed in a manager’s office, used to determine who was accessing the office at night while the manager was not at work. *Id.* The surveillance revealed that a bargaining-unit employee was using the office at night to make unauthorized personal long-distance calls, and the employee was discharged as a result. *Id.*

Finding that *Colgate-Palmolive* was “not distinguishable in any material respect,” the Board concluded that “[i]t is clearly relevant to the working environment of the [u]nion’s members if they are under surveillance even in their normal work areas,” and thus that the installation of hidden cameras in a work area constitutes a mandatory subject of bargaining. 335 NLRB at 747, 751.³

The Seventh Circuit enforced the Board’s order in a published opinion, *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003). The court approved the Board’s construction of Section 8(d)—as developed in *Colgate-Palmolive* and applied in *National Steel*—holding that “the Board’s legal conclusion, that the use of hidden surveillance cameras in the workplace is a mandatory subject of

³ The Board also found that the employer violated Section 8(a)(5) and (1) by “refus[ing] to provide the [u]nions with information pertaining to existing hidden surveillance cameras.” *Id.* at 748. We discuss this holding at p. 39 below.

collective bargaining under the standards set out in *Ford*, [is] objectively reasonable and wholly supported.” *National Steel*, 324 F.3d at 932.

The Board’s construction of the Act is, as the Seventh Circuit held, reasonable. The Board’s careful analysis demonstrates that the use of surveillance cameras in working areas (as in *National Steel*) and in non-working areas that employees regularly and permissibly frequent (as in *Colgate-Palmolive*), has an obvious potential to affect employees’ job security because such surveillance can be a basis for employee discipline. And, the Board’s *Colgate-Palmolive/National Steel* analysis also demonstrates that the use of hidden surveillance in the workplace is not fundamental to the direction of a business enterprise so as to be within the “core of entrepreneurial control.”

Applying its *Colgate-Palmolive/National Steel* construction of the Act here, the Board concluded—based on substantial, indeed undisputed evidence—that the Company’s unilateral use of hidden surveillance in the workplace violated Section 8(a)(5) and (1). There is no question but that the Company installed hidden surveillance cameras without prior notice to the Union and, perforce, without bargaining over the issue. And the Board found, on the basis of undisputed evidence, that the area surveilled was part of the “working environment” because it was a “work and break area” (A 1, 8): Employees performed assigned work in the motor room on a monthly basis, as the surveillance recorded, and the Company

was aware that it was a long-established practice among employees, and even some supervisors, to take breaks on the eighth-floor rooftop.

As the Board reasoned (A 8), the rooftop break area—where the Company permitted employees to spend non-working time—is analytically indistinguishable from the exercise facility in *Colgate-Palmolive*. And, the elevator motor room—where employees regularly performed work—is equally indistinguishable from the work area surveilled in *National Steel*. See A 1-2, 8. In each instance, the surveillance was conducted “within the working environment,” and it not only had “the potential to affect the continued employment of the employees being monitored,” *Colgate-Palmolive*, 323 NLRB at 515-16, but also it in fact did, as the Company disciplined 16 employees as a result of the surveillance.

The Board’s conclusion is thus properly based on its application of the Board’s “objectively reasonable and wholly supported [construction of the Act],” *National Steel*, 324 F.3d at 932, to the undisputed facts. Given that the Company makes no serious effort to dispute the Board’s findings of fact, the Board’s order is entitled to enforcement unless the Company can establish some other valid defense. As shown below, the Company fails to raise any viable defense to the Board’s order.

3. The Company's Challenge to the Board's Order Is Meritless

The Company's challenge to the Board's order is, for analytic purposes, in three parts. First, the Company mounts a broad challenge to the reasonableness of the Board's construction of Section 8(d), arguing that the Act manifests a general policy exempting security measures, such as the hidden surveillance cameras deployed here, from the duty to bargain. Co. Br. 27-30, 35-36. The Company also urges that this case is distinguishable from *Colgate Palmolive* and *National Steel*, and that the Board therefore erred in applying those precedents here. Co. Br. 31-32, 34, 38-40. And finally, the Company contends that the Board's order should be set aside because, in its view, bargaining over the issue would as a practical matter defeat the purpose of hidden surveillance. Co. Br. 36-38. We address these contentions in turn and show that each is without merit.

a. The Act does not exempt employer security measures from collective bargaining

There is no merit to the Company's sweeping assertion that the Act manifests a general congressional policy mandating that "matters of security [are] outside the scope of bargaining," such that the Board's construction of the Act is "not reasonably defensible." Co. Br. 29-36.

Seeking support from the Act's text, the Company first points to Section 9(b)(3) of the Act, 29 U.S.C. § 159(b)(3), which prohibits the Board from deciding that a bargaining unit composed of both rank-and-file employees and guards is an appropriate unit and/or from certifying a union as the representative of a guard unit if that union admits non-guards into membership or is affiliated with a union that does so.⁴ The Company's reliance on this provision is unavailing.

Section 9(b)(3) was not enacted pursuant to any general policy against collective bargaining over security matters; it was enacted to address a specific concern about conflicts of interest among employees within a unit. "Congress drafted this provision 'to minimize the danger of divided loyalty that arises when a

⁴ Section 9(b) provides, in relevant part, as follows:

[T]he Board shall not

. . . .

(3) decide that any unit is appropriate for [collective-bargaining] purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. [29 U.S.C. § 159(b).]

guard is called upon to enforce the rules of his employer against a fellow union member.”” *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 546 (D.C. Cir. 1999).

Accordingly, Section 9(b)(3) does not address bargaining *subjects* at all, but rather, as noted, addresses the divergent interests between guard and non-guard *employees*. And, within that specific area of concern, the provision does not even exclude security guards—let alone all “matters of security” (Co. Br. 29)—from collective bargaining. An employer is required to bargain with a union certified to represent its security employees just as it is required to bargain with a union certified to represent non-security employees. *See, e.g., Swanson Group, Inc.*, 312 NLRB 184, 185 (1993); *J. W. Mays, Inc.*, 253 NLRB 717, 718 (1980).⁵

The Company fares no better in its effort to draw support from the case law. None of the cases cited by the Company for the proposition that the Board “has understood that matters of security are not mandatory subjects of bargaining” (Co.

⁵ Section 9(b)(3) does not even prohibit an employer from voluntarily recognizing and bargaining with a union representing a unit consisting of both guards and non-guards. *See General Service Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909, 913 (7th Cir. 2000) (“Nothing in section 9(b)(3) . . . forbids an employer from voluntarily recognizing [a mixed guard/non-guard] union.”); *Stay Security*, 311 NLRB 252, 252-253 (1993) (same).

Br. 30) lends the slightest support for this erroneous assertion; indeed, as we show in the margin, none of those cases treats with that issue at all.⁶

Equally unavailing is the Company's claim that the Board's holding is "inconsistent with" (Co. Br. 35) the Board's Section 8(a)(1) unlawful-surveillance decisions. In unlawful-surveillance cases, the question is whether an employer's *overt* videotaping or photographing of employees' protected, concerted activities (such as picketing or handbilling) "interfere[s] with, restrain[s], or coerce[s]," 29 U.S.C. § 158(a)(1), employees in their right to engage in such activities. *See National Steel & Shipbuilding Co.*, 324 NLRB 499, 499-500 (1997), *enforced*, 156

⁶ • *Kono-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1008 (1967), holds that an employer has no mandatory duty to bargain over an employer's promotion of two persons to supervisory positions.

• *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971), holds that retirees are not statutory "employees" under Section 2(3) of the Act, 29 U.S.C. § 152(3), and cannot be included in a bargaining unit with active employees.

• *Keystone Steel & Wire v. NLRB*, 41 F.3d 746, 753 (D.C. Cir. 1994), deals with the question whether an employer had a mandatory duty to bargain with its employees' union over changes made to its management pension plan.

• *Nynex Corp.*, 338 NLRB 659, 659 (2002), holds that an employer did not violate its bargaining obligation by changing its non-employee access policy to require union representatives, like other visitors, to show identification before entering the facility; the Board held that the change did not deny the union access to the employees and thus did not work a "material, substantial, and significant" change in working conditions.

F.3d 1268 (D.C. Cir. 1998). And, when such overt surveillance is found unlawful, an employer is prohibited from using it altogether.⁷

By contrast, the inquiry here is whether an employer's use of *hidden* surveillance in the workplace affects the "terms and conditions of employment" so as to trigger a Section 8(a)(5) bargaining obligation. Not only is that a qualitatively different question, but the consequence of a Section 8(a)(5) violation—a requirement that the employer simply bargain over the issue—does not prevent the employer from using such surveillance. Accordingly, the Company's observation—that "absent in [the Board's Section 8(a)(1) unlawful surveillance cases] is any suggestion that the employer should also have bargained [over the surveillance]" (Co. Br. 36)—proves only that the Board did not address an issue that was no part of those cases. Indeed, any such discussion would be pointless in unlawful-surveillance cases, because coercive surveillance in violation of Section 8(a)(1) is not rendered lawful by bargaining.

⁷ In overt-surveillance cases, employers are accorded a narrow "necessity" defense. That is because a "reasonable, objective justification for video surveillance mitigates its tendency to coerce," *National Steel & Shipbuilding*, 156 F.3d at 1271, and because, as noted, Section 8(a)(1) would otherwise work an outright prohibition against such surveillance. The necessity defense is thus particular to the Section 8(a)(1) overt-surveillance context, and has no application to the bargaining requirement here.

Further, the Company's claim that it had a legitimate reason to install the surveillance cameras does not excuse its failure to notify the Union and bargain over that decision. The Board's analysis expressly recognizes an employer's legitimate interest in instituting surveillance for security reasons. Accordingly, the Board here made it clear that the bargaining duty does not require disclosure of the precise location(s) of the planned surveillance. *See* D&O 2 n.7. But the Board also recognizes a compelling, countervailing employee interest that makes the matter a mandatory bargaining subject. *See National Steel*, 335 NLRB at 747-48 & n.5; *Colgate-Palmolive*, 323 NLRB at 516 & n.10. As the Seventh Circuit summarized the matter in *National Steel*, the Board's conclusion that an employer must bargain over the issue of hidden surveillance in the workplace does not suggest "that [the employer] must yield any prerogatives, other than the right to proceed exclusive of consultation with the union." 324 F.3d at 933.⁸

⁸ There is no substance to the Company's contention that the Board's interpretation of the Act results in an "expansive[]" definition of "the working environment" requiring bargaining over "any surveillance camera for any purpose" including in "parking lots, loading docks and entryways." Co. Br. 34. The Board's rule does not encompass "any" surveillance; it pertains only to *hidden* surveillance *in the workplace*, encompassing working areas and areas of the employer's property where employees are permitted to spend non-working time. The question whether this rule applies to all "parking lots, loading docks, and entryways" was not decided in this case, and proper consideration of any such application depends on concrete facts not before the Board or this Court.

b. The Company's Efforts to Distinguish *Colgate-Palmolive* and *National Steel* Lack Merit

In the alternative, the Company implicitly concedes that *Colgate-Palmolive* and *National Steel* were correctly decided, but argues that the Board erred in applying those precedents here. The Company, however, offers no legally consequential grounds for distinguishing those precedents.

The Company first seeks to narrow the Board's *Colgate-Palmolive* decision by arguing that it turned on privacy concerns raised by the "particular locations of the cameras" (Co. Br. 31), namely, a restroom and an exercise facility. Nothing in the *Colgate-Palmolive* decision, however, suggests that its holding is limited to cases involving particular camera locations in the workplace. To the contrary, as set forth above, the Board stated its holding in terms of a rule "that the installation and use of hidden surveillance cameras in the workplace is a mandatory subject of collective bargaining." 323 NLRB at 515. The touchstone for the applicability of this rule is the placement of hidden surveillance cameras "in the workplace"—not just in restrooms or fitness rooms. Indeed, the Board concluded that the employer had a duty to bargain over cameras installed in those particular locations precisely

because it found that “these areas are part of the work environment.” *Id.* (emphasis added).⁹

The Company also seeks to distinguish this case from *National Steel* on the ground that here, the Company insists, it instituted surveillance in response to “unknown perpetrators” rather than out of a desire to monitor employees. Co. Br. 35, 40. This proffered distinction, however, is of no legal consequence. Indeed, the employer in *National Steel* advanced the same argument—to wit, “that the cameras were not used solely to catch union employee misbehavior but whatever unknown person committed the crime,” 324 F.3d at 932 n.2—without success. That is because the analysis does not turn on the employer’s *motive* for instituting the surveillance; it focuses on whether the employer’s action affects the “terms and conditions of employment,” which is analyzed according to whether the action is “germane to the working environment” but is not within “the core of

⁹ To be sure, the Board also observed that the location of the cameras in that case “raise[d] privacy concerns which add to the potential effect on employees.” *Id.* But, as set forth at p. 20 above, that was an *additional* consideration, not the Board’s primary rationale. Indeed, if there were any room for doubt about the breadth of the *Colgate-Palmolive* decision, the Board and court decisions in *National Steel* leave no room for doubt that the Board subsequently construed Section 8(d) to mean that an employer’s use of hidden surveillance cameras in the workplace constitutes a term or condition of employment and thus is a mandatory subject of bargaining. *See* 335 NLRB at 747, 751.

entrepreneurial control.” *National Steel*, 324 F.3d at 932. *See also Colgate-Palmolive*, 323 NLRB at 515-16.¹⁰

The Company’s final effort to distinguish *National Steel* and *Colgate-Palmolive* rests on the contention that here, in contrast to those cases, the Board made no finding that the Union demanded bargaining upon learning of the cameras. Co. Br. 38-40. This argument is meritless because, under settled principles, the Union was under no obligation to demand bargaining in the face of the Company’s unilateral action. A union is obligated to demand bargaining only “[i]f an employer gives a union advance notice of its intention to make a change to a term or condition of employment.” *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003). If, on the other hand, “it is clear that an employer has made its decision and will not negotiate,” a union is under no obligation “to go through the motions of requesting bargaining.” *Id.* (quotation marks and citation omitted). Such “futile gestures” are not required “because ‘[n]otice of a *fait accompli* is

¹⁰ In any event, the record is at odds with the Company’s assertions regarding its intent. Although the Company now claims that catching employees on videotape was inadvertent and unexpected, the Company contemporaneously explained its decision to install the cameras in terms of a suspicion regarding *employee* misconduct. The Company stated that the items found in the elevator motor room suggested that the room was being used “for reasons inconsistent with any *work assignment for employees of the brewery*.” (A 632 (emphasis added).) And the Company of course knew that employees worked in the motor room and took breaks on the roof. *See pp. 6-7 above.*

simply not the sort of timely notice upon which the waiver defense is predicated.”
Id. (quoting *International Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)).¹¹

It is undisputed that the Company did not notify the Union in advance of its intent to install and use hidden surveillance cameras. Indeed, the Company did not inform the Union of its surveillance until after it had already conducted 6 weeks of continuous surveillance, removed the cameras, and taken steps toward disciplining 16 employees for misconduct detected by the hidden surveillance. Upon informing the Union of this *fait accompli*, and being met with the Union’s strenuous objection, the Company steadfastly adhered to the position that it was under no obligation to notify the Union or to bargain about the issue. *See* p. 9 above. As this Court has held, in terms fully applicable here: “It is clear that the [c]ompany did not fulfill its bargaining obligation to the [u]nion regarding the change . . . because it did not present the change to the [u]nion as a proposal, but as a *fait accompli*.” *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

The Company nevertheless seeks to avoid its bargaining duty by maintaining that its installation and use of the hidden surveillance cameras was not “a change to

¹¹ Contrary to the Company’s assertions, however, the record does show that the Union nonetheless did demand bargaining after the fact. (A 89.)

the status quo.” Co. Br. 39. This is so, the Company contends, because it had a “practice” of using such surveillance—purportedly evidenced by the maintenance of “other cameras” at the brewery and the use of hidden surveillance cameras on two prior occasions—without the Union having demanded bargaining in the past. (Co. Br. 39-40.) As an initial matter, this argument need not detain the Court, as the Company did not raise it in its exceptions to the administrative law judge’s decision. This argument is thus waived, and under Section 10(e) of the Act, the Court is without jurisdiction to entertain its merits. 29 U.S.C. § 160(e) (“[N]o objection that has not been urged before the Board . . . shall be considered by the court”); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 887 (D.C. Cir. 1997) (“[S]ection 10(e) requires that petitioners at least apprise the Board that the party intends to press the question on appeal by noticing an objection.” (internal quotation marks omitted)).

But even if the Court were to consider the Company’s argument on the merits, it is wrong because the law is clear that “a union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” *Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004). As the Seventh Circuit held, while rejecting an identical argument in *National Steel*: “The failure to demand bargaining in the past, without more, does not amount to a waiver if it does not unmistakably show that the union intended to

permanently give up its right to bargain in the future.” 324 F.3d at 934 (citation omitted). There is no evidence showing—let alone showing “unmistakably”—that the Union affirmatively waived its right to bargain in this case.

While the foregoing is dispositive, the factual predicate for the Company’s argument is also in error. First, the record shows that the other surveillance cameras the Company refers to were “in plain view,” that is, “not hidden.” (A 473-74.) Such cameras could not establish a comparable practice, as the bargaining duty at issue here relates only to *hidden* surveillance cameras. Second, the Company points to only two prior instances of *hidden* camera use (Co. Br. 7, 39), which occurred 8 and 5 years before the events at issue here (A 1236-45, 314-15, 450-51). Two isolated, remote-in-time instances of hidden camera use likewise fail to show an established practice. Thus, the Company cannot even accurately claim that the use of hidden surveillance cameras was “the status quo.”

c. The Company’s contention that bargaining will defeat the purpose of using hidden surveillance is meritless

The Company urges that the Board’s bargaining requirement is “impractical” and “unworkable” in the circumstances here because, in its view, bargaining “undercuts an employer’s legitimate need for promptness and secrecy.” (Co. Br. 37.) In so doing, the Company proceeds as if the Board has not taken any legitimate employer concerns into consideration. To the contrary, the Board made clear in this case that the bargaining obligation does not mean that “the employer

must, in bargaining, apprise the union of the location of the cameras or the time in which they will be in use”; rather, the Board held that “the employer must apprise the union of its proposal to use such cameras and the general reasons for the proposal,” and left it to the parties to reach an “[e]ffective accommodation.”” (D&O 2 n.7 (quoting *National Steel*, 324 F.3d at 933 n.3).)

While the Company asserts a “[l]ack of precedent” (Co. Br. 37) for this approach, it is in fact consistent with *Colgate-Palmolive* and *National Steel*. Indeed, the very arguments that the Company presses here concerning the practicality of the bargaining requirement have already been thoroughly refuted by those Board decisions, and by the Seventh Circuit’s decision endorsing the Board’s approach. As the court put the matter in *National Steel*:

In *Colgate-Palmolive*, the Board acknowledged an employer’s need for secrecy if hidden surveillance cameras are to serve a purpose. The Board’s order to National Steel preserves those managerial interests while also honoring the union’s collective bargaining rights. It only requires National Steel to negotiate with the unions over the company’s installation and use of hidden surveillance cameras and, as in *Colgate-Palmolive*, does not dictate how the legitimate interests of the parties are to be accommodated in the process. . . . We agree with the Board that effective accommodation is necessarily dependent on the facts of the individual case and the course of bargaining itself. [324 F.3d at 932-33 (citations omitted).]

The Company’s related claim that the bargaining requirement is unworkable because it may result in “instance-by-instance bargaining” has likewise been considered and rejected by the Board and by the Seventh Circuit. Indeed, as the

court made clear, this argument runs aground on the Supreme Court’s decision in

Ford Motor:

We reject National Steel’s argument that the collective bargaining process is so cumbersome that requiring such bargaining is equivalent to prohibiting any meaningful use of hidden cameras. In *Ford*, the Supreme Court rejected the employer’s similar argument that the Board’s position would result in “unnecessary disruption because any small change . . . will trigger the obligation to bargain . . . possibly requiring endless rounds of negotiation over [minor] issues.” 441 U.S. at 501-02. The Court upheld the Board’s determination that such concerns were “exaggerated,” finding that “it is sufficient compliance with the statutory mandate if management honors a specific union request for bargaining about changes that have been made or are about to be made,” and that “problems created by constantly shifting [conditions] can be anticipated and provided for in the collective bargaining agreement.” *Ford*, 441 U.S. at 501-02. [324 F.3d at 933.]

In sum, settled law demonstrates that there is no room for the Company’s contention that the bargaining requirement should be rejected as too burdensome.

B. Substantial Evidence Supports the Board’s Finding that the Company Violated Section 8(a)(5) and (1) by Failing to Timely Supply the Union with Information Concerning Hidden Surveillance Cameras

1. Governing principles and standard of review

It is settled that “[t]he duty to bargain in good faith also includes the obligation to provide the union with information relevant to the collective bargaining process.” *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1439 (D.C. Cir. 1997). *Accord NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). This duty unquestionably applies to information “relevant to the processing of existing

grievances and the investigation of potential grievances.” *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002).

It is equally settled that this duty requires an employer to provide relevant information in a timely manner. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). “An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Woodland Clinic*, 331 NLRB 735, 736 (2000). *Accord Valley Inventory Service*, 295 NLRB 1163, 1166 (1989); *Bundy Corp.*, 292 NLRB 671 (1989).

“While the information must be relevant, ‘[t]he threshold for relevance is low.’” *DaimlerChrysler*, 288 F.3d at 443 (quoting *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000)). A liberal, “discovery-type standard” is applied. *Acme*, 385 U.S. at 437. Under this standard “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted).

Where, as here, the information requested “concern[s] the terms and conditions of employment,” its “relevance . . . is presumed.” *ConAgra*, 117 F.3d at 1439. *Accord DaimlerChrysler*, 288 F.3d at 443 (“‘[I]nformation related to the wages, benefits, hours, [and] working conditions’ of unit employees is presumptively relevant.” (citation omitted)).

In *National Steel*, the Board made clear that where an employer decides to use hidden surveillance cameras in the workplace, information regarding those cameras “is relevant to the Union’s discharge of its statutory duties and responsibilities.” 335 NLRB at 752. This conclusion flows directly from the Board’s conclusion that hidden surveillance in the workplace is “germane to the working environment” and thus is a mandatory subject of bargaining. *Id.* And as we have shown in detail above, the Board’s construction of Act, as articulated in its prior precedents on this issue, is “objectively reasonable and wholly supported.” *National Steel*, 324 F.3d at 932.

That being the case, the Board’s order must be upheld as long as it is supported by “substantial evidence on the record as a whole.” 29 U.S.C. § 160(e).

2. The Company violated Section 8(a)(5) and (1) by failing to supply the Union with relevant information concerning hidden surveillance cameras until after three arbitrations had concluded

Substantial evidence supports the Board’s conclusion that the Company failed to provide the Union with relevant information in a timely manner. The Union requested information and documents concerning any surveillance of bargaining-unit employees for the express purpose of discharging its duties as collective-bargaining agent, including its duties respecting a number of grievance proceedings. While the Company timely supplied information concerning the Stockhouse 16 cameras, it failed to provide the Union with information pertaining

to surveillance in any other areas of the brewery until the first day of the unfair labor practice hearing in this case—which was well after three discharge arbitrations had already concluded. *See* p. 11 above.

Because the use of surveillance cameras in the workplace concerns a “term and condition of employment,” as shown in detail above, the Union’s information request is “presumptively relevant.” *DaimlerChrysler*, 288 F.3d at 443. The information also is relevant in a more particular sense “to the processing of existing grievances and the investigation of potential grievances,” *id.*, as the Union was processing numerous grievances concerning the Stockhouse 16 surveillance at the time, and certainly would have been entitled to file further grievances had it learned of other surveillance. In these circumstances, the Board correctly found (D&O 1, 9) that the Company’s 8-month delay in producing that relevant information was unreasonable.

3. The Company’s arguments are meritless

The Company offers two arguments against this Board finding, neither of which merits extended discussion. The Company first challenges the relevance of the information requested, claiming that the Board never engaged in an analysis of “whether the information was in fact relevant and necessary to [a particular] grievance and arbitration.” Co. Br. 42-43. This argument fails because it is based on a complete misconception of the relevance standard in this setting. As shown

above, where, as here, the information requested concerns the “terms and conditions of employment,” the relevance of the information is “presumed.” *ConAgra*, 117 F.3d at 1439. Hence, no further showing of relevance, let alone “necess[ity],” is required. *See Crowley Marine Services*, 234 F.3d at 1297 (“[T]he Union was not required to show conclusively that the information it sought was technically ‘relevant’ or that its request was based on a meritorious grievance.”).

The Company also errs in suggesting that all it was required to do was bargain over whether it would produce relevant information. Co. Br. 44. Quite simply, the Company’s Section 8(a)(5) duty here is to provide the Union with relevant information, on request, not simply to bargain over whether such information will be provided. *See, e.g., Crowley Marine Services*, 234 F.3d at 1297; *Country Ford Trucks*, 229 F.3d at 1191-92. Indeed, on the Company’s theory, all an employer need do to satisfy its Section 8(a)(5) duty is question the relevance of an information request.

We note as well that there is no record support for the Company’s suggestion (Co. Br. 44) that the Union essentially abandoned its information request. The record shows that when nothing came of the Company’s October 22, 1998 representation that it was continuing to determine “whether there is additional information responsive to [the Union’s request],” (A 632), the Union wrote the Company in November, pointing out that “we still have not been provided with”

the information previously requested on October 5 (A 638). The Company then responded by refusing to provide further information regarding hidden surveillance on the asserted ground that it was irrelevant. (A 639.) And when the Company finally did turn over responsive information, it did so some 8 months after the Union's initial request, on the first day of the unfair labor practice hearing (A 135-36), in an apparent effort to forestall an unfair-labor-practice finding.

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY DECLINING TO RESCIND THE DISCIPLINE IMPOSED ON 16 EMPLOYEES WHOSE MISCONDUCT WAS DETECTED THROUGH THE USE OF HIDDEN SURVEILLANCE CAMERAS

A. Governing Principles and Standard of Review

In Section 10(c) of the Act, Congress granted the Board, upon finding a violation of the Act, the authority to order an employer “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act],” subject to the limitation that “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c).

The Supreme Court has long emphasized that the authority to craft such affirmative remedies “as will effectuate the policies of [the Act]” was “committed to the Board, subject to limited judicial review,” in recognition of the fact that “the relation of remedy to policy is peculiarly a matter for administrative

competence.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Consequently,

the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board not the courts to determine.

Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539 (1943) (citations and quotation marks omitted). It follows that the Board’s remedy is reviewed only for abuse of discretion, and the Board’s choice of remedy must be upheld on review “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Id.* at 540.

Accord O’Dovero v. NLRB, 193 F.3d 532, 537-38 (D.C. Cir. 1999).

B. The Board Acted Within Its Broad Remedial Discretion in Declining to Rescind the Discipline Imposed on 16 Employees Whose Misconduct Was Detected Through the Company’s Hidden Surveillance

The Board, having found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally installing and using hidden surveillance cameras in the workplace, entered a cease-and-desist order and affirmatively ordered the Company to bargain over the hidden surveillance issue, on request, and to post remedial notices. (A 3, 10.) At the same time, the Board exercised its broad discretion to decide that it would not order the Company to rescind the discipline

it imposed on the 16 employees whose misconduct was detected through the hidden surveillance cameras. (A 2.) As we now show, that was a thoroughly reasoned and sound exercise of the Board’s discretion.

The Board, first of all, found that all of the employee misconduct observed by the surveillance cameras—which included drug use, sleeping on the job, and urinating on the Company’s property—violated plant rules that had long been a basis for discipline. (A 2.) The Board then agreed with the administrative law judge’s conclusion that “it is inconsistent with the policies of the Act, and public policy generally, to reward parties who engage in [such] unprotected conduct.” (A 2.)

The Board explained that it would not apply an exclusionary rule that reverses discipline for misconduct simply because the evidence of the misconduct was the “fruit of the unlawful surveillance.” (D&O 2.) In so doing, the Board looked to its decision in *Taracorp*, 273 NLRB 221 (1984), where it followed the same course in an analogous context—that is, where an employee was guilty of misconduct but where an employer also had violated the employee’s right to union representation in an investigatory interview (otherwise known as the “*Weingarten*

right,” after *NLRB v. J. Weingarten*, 420 U.S. 251 (1975)). (A 2.)¹² The Board reasoned that, just as it had concluded in the *Weingarten* context, there is “an insufficient nexus between the [Company’s] installation and use of the cameras and the employees’ misconduct to warrant a make-whole remedy.” (D&O 2.) Finally, the Board reasoned that this approach is consistent with “[t]he principle . . . embodied in the remedial restrictions in Section 10(c) of the Act,” to wit, that the Board shall not order reinstatement or backpay for a suspended or discharged employee “if such individual was suspended or discharged for cause.” (A 2 (quoting 29 U.S.C. § 160(c)).

At a minimum, the Board’s exercise of its remedial discretion here represents “a reasoned selection among the remedies open to the Board,” *Communication Workers Local 5008*, 784 F.2d at 851, and is certainly not “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act,” *Virginia Electric*, 319 U.S. at 540.

¹² The Board in *Taracorp* reversed prior precedents to hold that, in *Weingarten* cases, if an employee is discharged for cause, and that discharge is “not, itself, an unfair labor practice,” the Board will not order reinstatement and back pay simply because the employer denied the employee his or her *Weingarten* right. 273 NLRB at 223-24. The Board’s *Taracorp* policy was endorsed by the Seventh Circuit in *Communication Workers of America, Local 5008 v. NLRB*, 784 F.2d 847, 852-53 (7th Cir. 1986), as “a reasoned approach.”

C. The Union's Challenge to the Board's Exercise of its Remedial Discretion is Meritless

The Union offers two arguments that, it contends, warrant setting aside the Board's remedial order. First, the Union urges that the Board abused its discretion by declining to order a reinstatement and make-whole remedy because such a remedy is, in its view, necessary to effectuate the Act. U. Br. 13-16. Second, the Union charges that the Board's remedial approach in this case departed from prior precedent. U. Br. 24. We address these contentions below and show that neither has merit.

1. The Union's primary contention is that a make-whole remedy is "necessary" (U. Br. 13) to afford complete relief for the violation found because, in its view, only such a remedy will deter the Company from future violations of the Act. As an initial matter, the Union's approach evidences a basic confusion between what the Board might be *authorized* to order as an affirmative remedy and what the Board is *compelled* to order. "The Act does not require the Board to 'order that which a complaining party may regard as "complete relief" for every unfair labor practice.'" *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (quoting *Shepard v. NLRB*, 459 U.S. 344, 352 (1983)). And, although it is true that affirmative remedies such as "reinstatement and back pay are the Board's usual remedies," it is also true that "[t]he historical practice is not so uniform." *Communication Workers Local 5008*, 784 F.2d at 853. Indeed,

since the infancy of the Act, the Board has frequently exercised its discretion to withhold such a remedy when, in its judgment, “it would not effectuate the policies of the Act.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941) (citing *Thompson Cabinet Co.*, 11 NLRB 1106, 1117 (1939)).¹³

But at all events, there is no merit to the Union’s contention that the Board’s awarding of a “‘prospective-only’ remedy allows [the Company] to benefit” from its violation of the Act such that the Board’s remedy could be considered an abuse of discretion. U. Br. 13. First of all, as the Board observed, there is certainly a countervailing concern that the Board not “reward [employees] who engage in unprotected conduct” (A 2), by granting a make-whole remedy for employees who have engaged in serious misconduct (some of which amounts to violations of criminal law). The Board certainly cannot be faulted for choosing, in its discretion, to avoid the latter evil rather than the former.¹⁴

¹³ See also *Precoat Metals*, 341 NLRB No. 143, slip op. at 3-4, 2004 WL 1664237, *3-*4 (May 28, 2004) (denying reinstatement and backpay to unlawfully terminated employee because the employee lied under oath during the Board’s proceeding); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) (holding that make-whole relief is not appropriate, notwithstanding unlawful termination, where there is after-acquired evidence that the employee engaged in misconduct that would have led to the employee’s termination had the employer known about it), *enforced in pertinent part*, 39 F.3d 1312, 1317 (5th Cir. 1994).

¹⁴ For the same reasons, it cannot be said that the Board abused its discretion or patently attempted to achieve ends other than those which can fairly be said to effectuate the policies of the Act by declining to apply an exclusionary rule.

Second, there is no merit to the proposition that the Board's order fails to deter the Company from violating its bargaining obligation in the future. U. Br. 20, 22. The Board, in addition to entering a cease-and-desist order, affirmatively ordered the Company to bargain collectively with the Union, on request, regarding the installation and use of hidden surveillance cameras. (A 3, 10.) Thus, all the Union need do to test whether the Company is resolved to continue to violate the Act is to demand bargaining. And, should the Company refuse a union demand for bargaining, upon enforcement of the instant Board order, the Company would be liable for contempt sanctions.

This hardly constitutes an incentive for future violations. Indeed, the Seventh Circuit came to the same conclusion when it endorsed the Board's *Taracorp* decision as a "reasoned approach." *Communication Workers Local 5008*, 784 F.2d at 852 ("*Taracorp* sets up a graduated approach to remedies. . . . Repeated violations of *Weingarten* will offend against that order, and few employers wish to incur the penalty, a citation for contempt of court. So repeated violations are handled more harshly than isolated violations.").

Nor is there any merit in the Union's contention that the Board erred in considering the remedial restriction in Section 10(c) of the Act. The Board concluded in *Taracorp* that Section 10(c) *precludes* a make-whole remedy where the employee was discharged for cause (rather than, say, for asserting his or her

Weingarten rights). 273 NLRB at 222. And a number of courts have likewise held that Section 10(c) divests the Board of any authority to order reinstatement and backpay in *Weingarten* cases. See *Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 138 (9th Cir. 1983); *General Motors Corp. v. NLRB*, 674 F.2d 576, 577-78 (6th Cir. 1982); *NLRB v. Potter Electric Signal Co.*, 600 F.2d 120, 123-24 (8th Cir. 1979). Moreover, even if Section 10(c) does not entirely preclude the Board from ordering reinstatement in such circumstances, the Board's remedial policy still "may be sustained as a reasoned selection among the remedies open to the Board." *Communication Workers Local 5008*, 784 F.2d at 851.¹⁵

2. Finally, the Union shoots wide of the mark in contending (U. Br. 24-25) that the Board's refusal to order the Company to rescind its disciplinary actions represents an unexplained departure from its prior precedents, namely, *Great Western Produce, Inc.*, 299 NLRB 1004 (1990), *enforced*, 839 F.2d 555 (9th Cir. 1988), and *Tocco, Inc.*, 323 NLRB 480 (1997). The Board was not obligated to explain a change in policy here because it properly concluded that its approach here is not in conflict with those decisions.

¹⁵ The Union would distinguish the *Weingarten* cases by asserting that in *Taracorp* and in the "typical *Weingarten* case, the employer was already aware of the misconduct at issue" before committing the *Weingarten* violation. U. Br. 21. This argument is unavailing because, as the Board observed here, the *Taracorp* policy applies in all *Weingarten* cases, even those "where the unlawful interview yield[s] information of misconduct that [forms] the basis for the discharge." (A 2.)

In *Great Western*, the employer had violated Section 8(a)(5) by, of relevance here, unilaterally altering its disciplinary rules and procedures, and then disciplining a number of employees pursuant to those unilaterally imposed rules and procedures. 299 NLRB at 1004. As a remedy, the Board ordered the employer to rescind the discipline imposed on employees whose terminations “resulted from work rules imposed in violation of Section 8(a)(5).” *Id.* at 1006. At the same time, the Board declined to order rescission of the discipline imposed on one employee because it was based on misconduct for which the employer would have discharged him without the unlawfully imposed work rules. *Id.*

Similarly, in *Tocco*, the employer changed its drug policy so as to lower the threshold for requiring employees to undergo drug testing and, pursuant to that changed policy, discharged employees who tested positive for drugs. 323 NLRB at 488. The administrative law judge concluded that this change violated Section 8(a)(5) and issued a recommended order reinstating those employees who were terminated pursuant to the new policy. *Id.* at 488-90.

As the Board correctly concluded here (A 2), in each of these cases the unilateral change was to the same rule or policy under which the employee was disciplined. Accordingly, the Board found that there was a sufficient nexus in those cases between the violation and the discipline to warrant rescinding the discipline. *Id.* In this case, by contrast, “the rules the employees violated were

unaltered and pre-existing,” and thus the Board found the nexus between the Section 8(a)(5) violation and the discipline to be insufficient to warrant rescinding the discipline. *Id.* See also *Essex Valley Visiting Nurses Ass’n*, 343 NLRB No. 92, slip op at 3, 2004 WL 2758225, *4 (Nov. 30, 2004) (following decision in this case, Board denies reinstatement to nurse discharged after unlawful, unilaterally imposed transfer, reasoning that the discharge was not the “direct result” of the transfer, but rather was “the direct result of failures to cooperate and perform in the new position”).¹⁶

The Board’s approach here is thus not a departure from precedent. Indeed, it is consistent with the Board’s most closely analogous precedent, *National Steel*, where the Board’s order granted prospective relief only, notwithstanding that the employer had discharged an employee for misconduct discovered through the hidden surveillance cameras. See 335 NLRB at 748, 752.

¹⁶ In arguing that the discipline must be rescinded because it would not have been imposed were it not for the Company’s unilateral use of surveillance, the Union would have it that the Board is *compelled* to adopt a pure but-for approach to this issue. But again, the Union confuses what might be a permissible approach with what the Board is compelled to do. See pp. 46-47 above.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment denying the petitions for review filed by the Company and the Union, and enforcing the Board's order in full.

Respectfully submitted,

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