

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OZBURN-HESSEY LOGISTICS, LLC

and

Case 15–CA–165554

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS a/k/a UNITED STEEL WORKERS
UNION

William T. Hearne, Esq., for the General Counsel.
Ben H. Bodzy and Stephen D. Goodwin, Esqs., (*Baker,*
Donelson, Bearman, Caldwell & Berkowitz, PC),
for the Respondent.
Benjamin Brandon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The complaint arises from unfair labor practice (ULP) charges that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steel Workers Union (the Union) filed against Ozburn-Hessey Logistics, LLC (the Respondent), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) at the Respondent's Memphis, Tennessee facilities.

Pursuant to notice, I conducted a trial in Memphis, Tennessee, on July 6 and 7, 2016, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

1. Did the Respondent in mid-October 2013, following an election but prior to the Union's certification, violate Section 8(a)(5) and (1) by admittedly unilaterally announcing and implementing a change in the number of attendance points assessed for employees leaving work early?

2. Should the General Counsel be permitted to amend the complaint to add the allegation that in mid-October 2013, the Respondent announced and implemented another undisputed unilateral change in attendance policy, i.e., reducing the number of points required to discharge probationary employees?
3. Was Jermaine Brown discharged on July 1, 2015, because the Respondent relied on attendance points that he received as a result of the unilateral change in assessing leave early points?

The General Counsel does not dispute that Brown committed the attendance violations for which he was assessed points, or contend that his discharge was due to any protected activity on his part or the result of disparate treatment for an improper motive. The Respondent’s sole basis for the discharge was his attendance record

Witnesses and Credibility

Witness titles are given as of the relevant time period.

The General Counsel’s witnesses included Brown; Benjamin Brandon, international organizer for the Union; and Troy Hughlett, a current employee with whom Brown worked on the Fiskars F.A.S.T. Gerber Legendary Blades (Fiskars) account in the building located at 5510 East Holmes Road (the 5510 building).

The Respondent called Shannon Miles, senior manager of human resources (HR) for the southern region, including the Memphis facilities; Lisa Johnson, regional HR manager for the Memphis facilities; Kenneth (Chris) Brawley and Kyle Perkins, directors of operations for the 5510 building at different times; and Verdia Jones, Brown’s supervisor. The Respondent also called Brandon and Richard Rouco, the Union’s attorney, as adverse witnesses under Section 611(c).¹

At the outset, I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness’ testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. *Id.* at 798–799; see also *MEMC Electronic Materials*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950), regarding witness testimony, “[N]othing is more common in all kinds of judicial decisions than to believe some and not all.”

¹ Rouco testified by telephone by agreement of all parties.

Credibility in this case is germane to the issue of whether the Respondent, after mid-October 2013, further changed the attendance policy in the assessment of points for leaving early. More specifically, witnesses of the Respondent averred that in mid-October 2013, when Johnson distributed written changes to the attendance policy that included changing 3 attendance points for leaving early to one point, she orally stated that henceforth leaving early up to 2 hours into the shift would result in two points, and after 2 hours would result in one point. To the contrary, Brown and Hughlett testified that they first learned of this “2-hour rule” in 2014.

Regardless, the General Counsel does not allege any changes after mid-October 2013 as additional violations. Although the timing of the announcement and implementation of the 2-hour rule does not affect my ultimate conclusions in this case, I will address credibility in the event that a reviewing authority deems credibility resolution on the issue material.

For the following reasons, I credit Brown and Hughlett. As to Hughlett, I take into account that “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.” *PPG Aerospace Industries, Inc.*, 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employee status may serve as a “significant factor,” among others, on which reliance can be placed in resolving credibility issues. *The Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 fn. 2 (2014); *Flexsteel*, *ibid.* Moreover, Hughlett appeared candid, and he answered questions on direct and cross-examination without any discernible attempt to slant his answers for or against the Respondent. I therefore conclude that he was a reliable witness.

Brown also struck me as sincere and as not embellishing or exaggerating his testimony to further his case. He did get confused at times as to the sequence of events and when he first learned of the change in attendance policy to one point for leave early. However, he did provide well-detailed, unequivocal accounts of his various conversations with Jones and other representatives of management; and his testimony with regard to when employees learned of the 2-hour rule and when he first spoke to Brandon, was consistent with that of Hughlett and Brandon, respectively.

The Respondent’s admitted failure to document in any way any 2-hour rule prior to when it purportedly was announced to employees in mid-October 2013 is extremely suspicious. Indeed, the first document of record in which the 2-hour rule was articulated was an email of September 3, 2014, from Johnson to Memphis management (GC Exh. 21).

Thus, Miles testified as followed. In October 2013, Corporate Vice President Andrew Tidwell approved changes in the employee handbook and in attendance policies, which affected approximately 8,000 hourly employees nationwide. One of the stated changes was that leave early would now be assessed one attendance point instead of three. Miles had authority over approximately 40–45 facilities throughout the southern United States.

According to Miles, over the weekend prior to October 14, 2013, she made the decision on her own to add the 2-hour rule to the new attendance policy, in response to a question from

Manager Johnson about how to treat an employee who worked only 5 minutes before leaving. She informed Johnson of this when the latter called her on Monday morning, October 14, 2013, prior to Johnson’s first meeting with employees on the new attendance policy. However, inexplicably, Shannon did absolutely nothing to memorialize in writing what she had stated to Johnson, and she took no steps whatsoever to convey this in writing to other HR managers.

Shannon’s explanation that it would have been too much trouble to make the change in writing and that Tidwell told her, “It’s gone out; just make sure everybody talks about it,”² was unconvincing. She had prior email communications with HR managers about the new attendance policy and very easily could have sent out an email to them advising them of her decision to modify the new leave early provision. Yet, Shannon, an experienced HR professional with responsibility over 40–45 locations, failed to put anything in writing concerning her purported change to the new written policy. Equally unexplainable is that Tidwell issued nothing in writing on a national basis to announce such a 2-hour rule even though the new attendance policy applied to all hourly employees across the country. I find this wholly incredulous.

I also credit Hughlett’s testimony, over Brawley’s, as follows. When Brawley told Fiskars employees at a meeting in approximately early November 2014 that they had to work at least 2 hours to receive one point instead of two, Hughlett and a couple of other employees protested that was not right because the handbook stated that leaving early was one point. They would not have said that in November 2014 had such a policy been made clear to them in mid-October 2013.

In sum, I do not believe management’s witnesses that as of October 2013 the Respondent adopted the 2-hour rule and announced it to employees.

Similarly, I credit Brown and Hughlett where their testimony diverged from Supervisor Jones, who was frequently vague, nonresponsive and/or evasive in her answers. Moreover, certain aspects of her testimony made no sense. Thus, she testified that when she told Brown on October 15, 2014, to come to her office after work, he did not ask why, and she gave no reason. However, she could not recall if he showed her the written attendance policy prior to his coming to her office. And, despite her testimony that she earlier said nothing about the reason, she further testified that when he came to her office, she said, “[O]kay, I think you know what this is all about,” and he said, “Yes.”³ In the absence of evidence that Brown was clairvoyant, I do not accept this as credible. Nor do I credit her testimony that she and Brown had no discussion of the attendance policy at their meeting in her office that day.

Further, her testimony was confusing, to the point of incoherence, on how and why the subject of the 2-hour rule arose at the October 16, 2013 meeting on the new attendance policy that Johnson conducted with Fiskars employees:

² Tr. 375.

³ Tr. 243.

5 “[I]f the question came up, everybody—the question came up. When she first said, when she was first explaining it to them, the same way you just read it [1 point in the written document], the question came up. So that’s when she went back, and she thoroughly explained it to them, to all of us, exactly what it meant in detail.⁴

Facts

10 Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and the parties’ stipulations, I find the facts as follows.

15 The Respondent is a limited liability company with an office and places of business in Memphis, Tennessee, where it is engaged in providing transportation, warehousing, and logistic services. The Respondent admits jurisdiction as alleged in the complaint, and I so find. The Respondent employs about 8,000 hourly employees nationwide.

20 On July 27, 2011, a representation election was conducted among the Respondent’s employees in the following unit:

25 All fulltime custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at [six Memphis, Tennessee facilities, including the 5510 building]; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

30 The tally was 165 votes for the Union, 164 against, with 14 challenged ballots. Subsequently, both the Respondent and the Union filed objections to each other’s preelection conduct. Judge Robert A. Ringler addressed these challenges and objections, as well as ULP charges that the Union had filed against the Respondent, in his decision of May 15, 2012. The Board, in 359 NLRB 1025 (2013), affirmed his findings that the Respondent had committed a number of ULPs and engaged in objectionable preelection conduct, and it adopted his order that the Regional Director open and count six of the challenged ballots: if the Union was designated by a majority of the votes counted, a certification of representative
35 would issue; if not, the July 27, 2011 election would be set aside and a new election would be conducted when a fair and free election could be held.

40 On May 14, 2013, the Regional Director issued a revised tally of ballots, with 169 votes for the Union, and 166 against; and 10 days later, the Acting Regional Director issued a certification of representative.

⁴ Tr. 255–256.

Following the Supreme Court’s decision in *NLRB v. Noel Canning, et al.*, 134 S. Ct. 2550 (2014), the Board, on June 27, 2014, set aside its May 2, 2013 decision (2014 WL 2929772). On November 17, 2014, in 361 NLRB No. 100 (2014), the Board reaffirmed that decision and, in light of the revised tally of ballots, certified the Union as the collective-
 5 bargaining representative of unit employees.

In a subsequent refusal-to-bargain case, *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 118 (2015), enfd. –F.3d – 2016 WL 4409353 (D.C. Cir. Aug. 19, 2016),⁵ the Board granted the General Counsel’s motion for summary judgment, rejecting any arguments that
 10 the Respondent made concerning issues that were or could have been litigated in the prior representation proceeding.

The Respondent’s answer raised affirmative defenses contesting the validity of the certification. See also Tr. 24–25. However, the Respondent’s brief does not renew any such
 15 argument, which I therefore consider withdrawn.

Building 5510 and the Fiskars Account

Building 5510, a warehouse, services four primary accounts, including Fiskars.
 20 Employees are generally assigned to one account, although they may be called to work on others if the need arises. Johnson’s HR department is located near the break room in the upstairs of the building. Building 5540 is located on the same premises.

At all times material, there were approximately 30 Fiskars employees. Each morning,
 25 Supervisor Jones held a daily startup or preshift meeting with them in the Fiskars account receiving area, to go over the day’s agenda.

The Attendance Policy prior to October 2013

The attendance policy in effect before the October 2013 changes was the revised
 30 policy of February 1, 2011.⁶ It provided a system of imposition of disciplinary points for absenteeism and tardiness, with leaving early from work without the supervisor’s approval being assigned three points. No distinction was made between regular and probationary
 35 employees. It also set out a schedule for progressive discipline, to be evaluated over a 52-week rolling basis (points were excised after 1 year of their accrual): (1) a written warning for four points; (2) a second written warning for eight points; (3) a final written warning for 12 points; and (4) termination for 13 combined points within a 52-week rolling period.

⁵ The General Counsel on September 12, 2016, filed a motion that I take judicial notice of the court’s decision. but I need not decide whether such decision is an “adjudicative fact” within the meaning of Federal Rules of Evidence Rule 201. See 150 A.L.R. Fed. 543 §6[a] (originally published in 1998).

⁶ GC Exh. 6.

The mid-October 2013 Announcement and Changes

Prior to September 30, 2013, the Respondent’s corporate headquarters made the decision to make certain changes in the employee handbook and in the attendance policy, for all hourly employees, effective October 1. Miles stated in an email of September 30 to various members of management,⁷ that the most significant changes included:

- (1) Employees would receive only one point for a “leave early”;
- (2) Employees would be allowed to leave messages, text or email, etc. when calling out for a shift if preapproved by their supervisor; and
- (3) An introductory period was being added to the policy: during the first 90 days of employment, an employee who accumulated six points could be terminated for excessive absenteeism.

During the week of October 14, 2013, Johnson held special mandatory meetings with buildings 5510 and 5540 full-time employees on changes in the attendance policy and in the employee handbook.⁸ The meeting with Fiskars employees was held on October 16 in the upstairs break room. Employees were provided with the new attendance policy that contained the above changes, and signed an acknowledgment that they had received it.⁹

The Respondent did not provide the Union with prior notice of the announcement and implementation of the changes or, therefore, an opportunity to bargain over them.

For reasons earlier stated, I discredit the Respondent’s witnesses’ testimony that Johnson articulated the 2-hour rule at these meetings, noting in particular the Respondent’s failure to provide any written documentation whatsoever showing that a 2-hour rule was adopted in mid-October 2013. I therefore credit Brown and Hughlett and find that as far as leave early, Johnson stated only that henceforth employees would receive one point rather than three as per the new written policy.

On September 3, 2014, almost a year later, Johnson sent an email to Memphis management regarding the attendance policy.¹⁰ Therein, she stated, “You MUST also make it clear by stating to that employee the number of points they will receive for leaving work,” bold-faced the 2-hour rule, and then asked, “Am I clear?” She marked the email as “importance high.”

Brown’s Employment

Brown, initially a temporary employee referred by an employment agency, became a full-time regular employee on April 22, 2013, and received the attendance policy then in

⁷ GC Exh. 16 at 3.

⁸ R. Exh. 4.

⁹ GC Exh. 7; R. Exh. 1 (Brown’s acknowledgment).

¹⁰ GC Exh. 21.

effect. He was always assigned to the Fiskars account and responsible for putting on bar codes and price tags and assembling cases that would go out to stores. At times, he was assigned work for customers other than Fiskars.

5 At about 9:30 a.m. on October 15, 2014, Jones came to Brown’s workstation and told him to come to her office after work. Later that morning, he went to her desk in the Fiskars work area and asked what was going on. She replied that Johnson in HR had told her that she had to give him four points for leaving early on two occasions (on July 28 and October 10, 2014). He asked for permission to see Johnson, which she gave him.

10 Immediately afterward, Brown went to Johnson’s office in HR. He asked what was going on with the points and why he was receiving two points rather than one for leave early. She replied, that was stated at a meeting in the break room. He responded that he did not remember that. She produced the acknowledgment that he had signed on October 16, 2013. 15 Brown pointed out that the policy clearly stated one point for leaving early without permission. She read the absence line (which states two points for “[a]n employee’s failure to report to work as scheduled after missing over two hours of the workday.”). He asked for permission to see Phil Smith, director of operations, and she gave it.

20 On the way to Smith’s office in the 5540 building, Brown encountered Smith in the parking lot and showed him the policy stating one point for leave early. Smith responded that the policy did not say two points but that was what it meant. Brown then returned to Johnson’s office and asked if she was really going to give him four points instead of two for leaving early, and she replied that she had to. Immediately after that, he encountered Smith in 25 the break room adjoining the HR office. He stated that it made no sense that an employee received two points for leaving early, but an employee who failed to come to work at all also received two points. Smith did not verbally respond. At approximately 11 a.m., Brown returned to Jones’ desk and showed her the policy, repeating what he had said to Smith and stating that he would fight it. She responded that she did not see any reason why he should 30 not.

 After the end of the workday, at about 4:50 p.m., Brown went to Jones’ office, where she handed him a second written warning for attendance, for nine combined points, including 35 four for 1.75 hours early leave on July 28 and November 10, 2014.¹¹ He refused to sign it.

 About 10 days later, Brown encountered Director of Operations Brawley, who had recently assumed that position. Brown explained that he had received two points for leaving early, but the policy stated that it should have been one. Brawley replied that he would look 40 into it and get back to him.

 In approximately early November 2014, Brawley spoke to Fiskars employees on the subject of the 2-hour policy, in conjunction with a regular morning startup meeting. Brawley stated that an employee had to stay over 2 hours—2 hours and 1 minute—in order to receive

¹¹ GC Exh. 11.

points for employees leaving early from work?

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally making substantial changes on subjects of mandatory bargaining; to wit, employees' wages, hours, or other terms and conditions of employment, without first affording notice and a meaningful opportunity to bargain to the union representing the employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

The Board has long held that leave or attendance policies are mandatory subjects of bargaining. See, e.g., *Chino Valley Medical Center*, 363 NLRB No. 32, slip op. at 1 fn. 1 (2015); *Dorsey Trailers, Inc.*, 327 NLRB 835, 852 fn. 26 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.3d 1120 (3d Cir. 1983).

The Board also has long held that, absent compelling economic considerations, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. Thus, where the final determination on the objections results in the certification of a representative, the employer is held to have violated Section 8(a)(5) and (1) for having made such unilateral changes. *Alta Vista Regional Hospital*, 357 NLRB 326, 327 (2011); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975) ("Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative in the event a certification is issued."). Here, the Board on November 17, 2014, certified the Union as the collective-bargaining representative of unit employees, and the United States Court of Appeals for the District of Columbia upheld this determination on August 16, 2016. As noted, the Respondent's brief does not pursue the averment that the Union's certification was invalid.

Accordingly, the Respondent violated Section 8(a)(5) and (1) by announcing and changing its attendance policy in mid-October 2013, to wit, changing the points assessed for leaving early, without providing the Union with prior notice or an opportunity to bargain.

II. Should the General Counsel be permitted to amend the complaint to add the allegation that in mid-October 2013, the Respondent announced and implemented another undisputed unilateral change in attendance policy, i.e., reducing the number of attendance points for which probationary employees could be terminated?

The original and amended charges all aver that the Respondent "unilaterally changed its attendance policy" and thus do not specify any particular provisions. On the second and last day of trial, the General Counsel, after presenting all of his witnesses and prior to resting his case, moved to amend the complaint to add the above as paragraph 7(a)(iii).

Amendments to a complaint before, during, or after a hearing are allowed "upon such terms as may be deemed just." Board's Rules, Section 102.17. Under this provision, a judge

has wide discretion to grant or deny such motions. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015); *Bruce Packing Co.*, 357 NLRB 1084, 1084 at fn. 2 (2011), enforcement denied on point, 795 F.3d 18 (DC Cir. 2015).

5 Whether it is just to grant a motion to amend a complaint during a hearing is based on three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Remington Lodging & Hospitality, LLC*, 363 NRB No. 112, slip op. at 1
 10 fn. 1 (2016) (motion made 2 days before the hearing closed); *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171 (2006), enfd. after remand, 315 Fed.Appx. 318 (4th Cir. 2009) (motion made at the end of the hearing) ; *Cab Associates*, 340 NLRB 1391, 1397 (2003) (motion made after all parties had rested their cases and during adjournment for the testimony of rebuttal witnesses).

15 The Respondent’s Co-Counsel Bodzy objected to the amendment on the ground that the General Counsel was provided with GC Exhs. 6 and 7 (the 2011 and 2013 attendance policies) in early February 2016, and because the General Counsel previously advised him that the only unilateral change being alleged was the change in attendance points for leaving early. To support this representation, he proffered R. Exh. 19, a March 1, 2016 email string
 20 between him and the General Counsel. I rejected that exhibit at trial but, on further reflection, I reverse my ruling and admit it for the limited purpose for which it was offered.

 The General Counsel responded that the Union had never seen the mid-October 2013 written policy prior to the hearing and that the General Counsel could not solicit an amended
 25 charge earlier.

 However, even if the General Counsel did not meet with Brandon until the day of the trial, he could have discussed this with him before the trial opened and made a motion to amend at the outset and before any testimony was taken.
 30

 R. Exh. 19 is significant. Therein, the General Counsel notified Attorney Bodzy on March 1 that the Region had found merit to the allegations that “the Employer made an unlawful unilateral change concerning the attendance policy and discharged employee Jermaine Brown” Bodzy asked, “What specifically is the alleged unilateral change to the
 35 attendance policy ...?” In response, the General Counsel addressed only the change in attendance points to employees who leave work early, saying nothing about probationary employees. The record does not reflect that the General Counsel advised the Respondent’s counsels at any time thereafter of any change in this position, prior to concluding the testimony of the General Counsel’s witnesses.
 40

 I recognize that the undisputed change in policy on probationary employees was in writing and known to the Respondent. Nevertheless, this does not preclude the possibility that the Respondent’s counsels might have had cross-examination for the General Counsel’s witnesses on that particular subject, and might have had other witnesses and documents to
 45 present in defense had they been provided adequate notice of the General Counsel’s intention to amend.

For the above reasons, I conclude that the General Counsel failed to meet any of the three pertinent factors described above, and I therefore deny the motion to amend. In light of this conclusion, I need not address the Respondent’s argument (R. Br. at 20–21) that the amendment should be barred as untimely under Section 10(b) of the Act because no charge was ever filed concerning the change to the points required to terminate probationary employees.¹⁵

III. Was Brown discharged on July 1, 2015, because the Respondent relied on attendance points that he received as a result of the unilateral change in assessing leave early points?

The General Counsel alleges only the mid-October 2013 change in attendance points as a violation, regardless of any later additional unilateral changes. The basis for determining whether the Respondent’s unilateral action harmed Brown has to be the policy before and after the mid-October 2013 change, not whether any later unilateral modifications of that change worked to his detriment.

There is no dispute that Brown committed all of the attendance infractions for which he was ultimately terminated. It is true that his discharge on July 1, 2015, was based in part on the imposition of four points for the two occasions that he left 1.45 hours early. However, the two points that he received for each violation did not represent increased points vis-à-vis the pre-mid-October 2013 policy, which would have assigned three points each. Rather, they represented an increase over the original mid-October 2013 revision to the attendance policy that resulted from the Respondent’s later implementation of the 2-hour rule in place of a set one point for all leave early occurrences.

Thus, under either the original mid-October 2013 change, or the 2-hour rule into which it evolved, Brown benefitted in that he accrued the 13 points at a later time and thus delayed rather than hastened his discharge.

Accordingly, I cannot conclude that Brown’s discharge was caused by any unilateral change in the Respondent’s attendance policy and therefore recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

¹⁵ Although the Respondent’s answer asserted a 10(b) bar to the allegations in the existing complaint, the Respondent’s brief does not raise this defense, and I deem it withdrawn.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act: Unilaterally announced and changed the number of points assessed for employees leaving work early, in mid-October 2013, without first having afforded the Union notice and an opportunity to bargain.

REMEDY

Because the Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Board’s standard remedy in Section 8(a)(5) cases involving unilateral changes resulting to losses to employees is to make whole any employees affected by the change. *Grand Rapids Press*, 325 NLRB 916 (1998), enfd. mem. 208 F.3d 214 (2000); *North Star Steel v. NLRB*, 974 F.2d 68, 70–71 (8th Cir. 1992), enfg. 305 NLRB 405 (1991). However, inasmuch as the unilateral change regarding points assessed for leaving work early benefitted, rather than harmed, unit employees, such a remedy is inapplicable.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Osburne-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and implementing changes in the number of attendance points assessed for employees leaving work early.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the following bargaining unit:

¹⁶ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 All fulltime custodians, customer service representatives, senior customer
service representatives, cycle counters, inventory specialists, maintenance,
maintenance techs, material handlers, operators 1, operators 2, operators 3,
quality assurance coordinators, returns clerks, and team leads employed at [its
six Memphis, Tennessee facilities]; excluding all other employees, including
office clerical and professional employees, guards, and supervisors as defined
in the Act.

10 (b) Upon the Union’s request, rescind the mid-October 2013 change in the
number of attendance points assessed for employees leaving work early.

15 (c) Within 14 days after service by the Region, post at its facilities in
Memphis, Tennessee, copies of the attached notice marked “Appendix.”¹⁷ Copies of the
notice, on forms provided by the Regional Director for Region 15, after being signed by the
Respondent’s authorized representative, shall be posted by the Respondent and maintained for
60 consecutive days in conspicuous places including all places where notices to employees
are customarily posted. In addition to physical posting of paper notices, notices shall be
distributed electronically, such as by email, posting on an intranet or an internet set, and/or
other electronic means, if the Respondent customarily communicates with its employees by
20 such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are
not altered, defaced, or covered by any other material. In the event that, during the pendency
of these proceedings, the Respondent has gone out of business or closed the facility involved
in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of
the notice to all current employees and former employees employed by the Respondent at any
25 time since October 14, 2013.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations
of the Act not specifically found.

35 Dated, Washington, D.C. September 22, 2016



Ira Sandron
Administrative Law Judge

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

An employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages, hours, and working conditions.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steelworkers Union (the Union), is the certified bargaining representative of a unit of our employees in the following unit:

All fulltime custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at our six Memphis, Tennessee facilities; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT announce or implement changes in the number of attendance points that you are assessed for leaving work early, without first giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL, before announcing or implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the above unit.

WE WILL, upon the Union's request, rescind the mid-October 2013 change that we made in the number of attendance points that you are assessed for leaving work early.

OSBURNE-HESSEY LOGISTICS, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3408
Telephone: (504) 589-6361; Hours: 9:00 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CA-165554 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 321-9474.