

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

SECURITY WALLS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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* No. 17-13154

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Certificate of Interested Persons

Pursuant to FED. R. APP. R. 26 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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5. Heaney, Elizabeth, Attorney for the NLRB
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7. Jones, Milton Douglas, Attorney for Petitioner
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Dated at Washington, D.C.
this 15th day of March 2018

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument will aid the Court in deciding the issues presented in this case.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Security Walls, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against the Company finding that it unlawfully made unilateral changes to its disciplinary policy and failed to bargain with the International Union, Security Police and Fire Professionals of America (“the Union”) following the discharge of three employees. The Board

had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a) (“the Act”). The Board’s Decision and Order issued on June 15, 2017, and is reported at 365 NLRB No. 99. (A3 pp.116-35.)¹

The Court has jurisdiction over this proceeding because the Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petition and application were timely, as the Act provides no time limits for such filings.

STATEMENT OF THE ISSUES

1. Did the Board reasonably determine that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing its disciplinary policy when it discharged the three security guards?

2. Did the Board reasonably determine that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union post-discharge?

3. Did the Board act within its discretion in rejecting the Company’s motions to reopen the record to adduce additional evidence and to amend its answer?

¹ Consistent with 11th Circuit Rule 28-5, references are to the three-volume appendix and the page number. For example, “A3 p.112” denotes Appendix Volume 3, page 112. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Starting in March 2014, the Company began providing security guards at an Internal Revenue Service (“IRS”) Austin, Texas facility, succeeding another employer that had a collective-bargaining agreement with the Union. The Company did not adopt its predecessor’s agreement and instead commenced bargaining with the Union to reach a new agreement. Before the Company and the Union reached an initial collective-bargaining agreement, the Company discharged three employees, prompting the Union to file an unfair-labor-practice charge. The Board’s General Counsel issued a complaint alleging that the Company’s failure to notify and bargain with the Union prior to discharging the employees violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The General Counsel also alleged, alternatively, that the Company violated Section 8(a)(5) and (1) by unilaterally changing its progressive discipline policy.

After a one-day hearing, the administrative law judge issued a decision and recommended order finding support for the General Counsel’s alternative theory that the Company unlawfully implemented unilateral changes to the progressive discipline policy. The judge did not determine whether the Company’s failure to bargain pre-discharge violated the Act; instead, the judge found that the Company unlawfully failed to engage in post-discharge bargaining with the Union.

The Company, the General Counsel, and the Union filed exceptions to the judge's decision. The Company also filed a motion to reopen the record and remand the case to the judge in light of "further evidence." The Company subsequently filed a supplemental motion seeking to withdraw its answer to the complaint, wherein it admitted that its decision to terminate the three guards was discretionary. The Company claimed that "recent evidence" precluded any finding that the discharges were discretionary. That evidence consisted of post-hearing events, including the Company's attempt to reinstate the discharged employees, and the IRS's notification to the Company that it would not allow reinstatement. The General Counsel opposed both motions.

On review, the Board affirmed the judge's findings and modified the recommended remedy. The Board agreed with the judge that the Company had "unilaterally changed its progressive disciplinary policy [by treating] the discharge of the three guards as a mandatory penalty." (A3 p.118.) Further, the Board agreed with the judge that the Company had unlawfully refused to bargain with the Union after discharging the three guards. The Board also denied the Company's motion to reopen the record to introduce evidence obtained after the judge issued his recommended decision and its request to withdraw and amend its answer.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the parties

The Company, based in Tennessee, provides security and private investigation services. Its chief manager is Juanita Walls. Effective March 1, 2014, the Company assumed a contract from a predecessor contractor to provide armed security guard services at the IRS facility in Austin, Texas. Scott Carpenter was the Company's project manager for the contract between the Company and the IRS, and John Sears was the contracting officer representative ("COR"), the IRS official responsible for the administration of the contract. (A3 pp.116-17; A1 pp.27, 58, A2 pp.11, 12, 24.)

As noted above, the predecessor contractor had a collective-bargaining agreement with the Union for a unit of security guards. The Company declined to adopt that agreement. The parties started negotiating for a new collective-bargaining agreement, ultimately signing an agreement that was effective September 1, 2015. (A3 p.116 n.2; A1 p.156, A2 p.168.)

B. The IRS and the Company Execute a Performance Work Statement

In March 2014, shortly after assuming the contract at the Austin IRS facility, the Company posted at that facility a "Performance Work Statement" ("PWS"), which was part of the Company's agreement with the IRS to provide guard services at the Austin facility. The PWS included a "Standards of Conduct"

section, which laid out the responsibilities of the Company and the IRS with regard to employees providing guard services. Generally, the PWS required the Company to ensure certain levels of employee performance and conduct. (A3 pp.116-17; A1 p.116, A2 pp.31-95.)

The PWS also reserved to the IRS the right to request that the Company remove immediately any employee who “has been disqualified for either employment suitability, performance suitability, or security reasons, or who is found to be unfit for performing security duties during his/her tour of duty.” (A3 p.116; A2 p.75.) Further, the PWS authorized the contracting officer (“CO”) and COR to cause the removal of any contract employee for failure to adhere to the standards of conduct. (A3 p.116; A2 p.75.) The standards also set forth certain employee conduct that is grounds for the IRS to immediately remove the Company from performing under the contract, including: “Neglecting duties by sleeping while on duty, failing to devote full-time and attention to assigned duties . . . or any other act that constitutes neglect of duties.” (A3 p.117; A2 p.77.) Under certain circumstances, PWS violations allow the IRS to terminate its contract with the Company for guard services. (A3 p.116; A2 pp.74-75.)

C. The Company Issues a Disciplinary Action/Policy Statement in April 2014 that Superseded All Other Policies

On April 25, 2014, without bargaining with the Union, the Company unilaterally adopted a “Disciplinary Action/Policy Statement” (“the Policy

Statement”) that applied to all guards working at the Austin IRS facility.

Carpenter and Walls were the signatories on the Policy Statement. It provided:

“This policy statement is the official policy of [the Company] and supersedes all other policies concerning this subject.” (A3 p.117; SA p.4.²)

The Policy Statement established a detailed progressive disciplinary system and listed specific violations and corresponding disciplinary actions. Lesser violations resulted in verbal counseling, whereas serious violations resulted in immediate termination. Violations warranting immediate termination, even upon first offense, were: refusal to cooperate in an investigation; sleeping on duty; sexual activities on the job; falsification, unlawful concealment, removal, mutilation, or destruction of any official document or record; or concealment of material facts by willful omission from official documents, records or statement. Under the progressive system, if a violation of written rules resulted in a breach of security, then that violation “counts as a third or fourth offense based on previous offenses.” A third offense called for a two-day suspension, and a fourth offense called for termination. (A3 p.117; SA pp.2-3.)

² SA refers to the Supplemental Appendix filed by the Board simultaneously with this brief.

D. Two Separate Incidents Involving Unauthorized Persons Entering the Facility Occur; the Company Investigates both Incidents

On April 15, 2015, after the progressive disciplinary policy had been in effect for one year, security guard Jason Schneider relieved fellow guard and union president John Klabunde, who was scheduled to take a break. Both guards had to sign in and out of a logbook. Klabunde made an error while signing out, and as the two guards were “momentarily” focused on correcting the error, a woman walked into the Austin IRS facility undetected. That same day, the Company opened an investigation, and the next day, it suspended Klabunde and Schneider. Neither had ever previously been disciplined. (A3 p.117; A1 pp.82-85, 107-09, A2 pp.182-83.)

On April 19, Klabunde, acting as union president, contacted Site Supervisor Frederico Salazar and requested information about his and Schneider’s suspensions. Among other things, Klabunde asked which company policy the two guards allegedly violated, why the two guards with “clean records” were suspended, and why the suspension exceeded two days when company policy included only two-day suspensions. The Company does not appear to have responded to Klabunde’s email. (A3 p.117; A2 pp.203-04.)

On April 22, while security guard Christopher Marinez was adjusting his chair to improve his sightline for guard duty, a woman and child walked into the Austin IRS facility undetected. The Company suspended Marinez the same day

and opened an investigation into the incident. Like the other two guards, Marinez had never received any prior discipline. (A3 p.117; A1 pp.125-26, A2 pp.185-86.)

E. The Union Files a Grievance Over the Suspensions; the Company and COR Sears Discuss the Incidents; the IRS Does Not Ask the Company To Discharge Any of the Three Guards

On April 23, the Union filed a grievance concerning all three suspensions, alleging that the Company had failed to adhere to its disciplinary policy. That same day, COR Sears emailed Carpenter, the Company's project manager, to discuss the second security breach in one week. Sears expressed concern that there was another breach in such a short time and told Carpenter that he hoped the Company had an effective discipline system to deter future violations. Sears indicated that he was also unwilling to "accept substandard services and that those associated with this contract need to understand that," but he hoped that he and Carpenter could "make some significant progress" when Carpenter was at the facility the next day. (A3 p.117; A2 pp.188-90.)

Two hours later, COR Sears emailed again. In that message, he indicated that he had watched the video footage of the breach occurring during Marinez's shift, and "[l]ike the previous incident last week, it was a matter of the breach occurring when [Marinez] turned his back momentarily to apparently adjust his chair." Sears explicitly stated that, in his opinion, "[i]t was not a matter of careless behavior." Sears then concluded with: "I hope [the Company] can address

this so the guards are paying greater attention to details so we don't miss these types of incidents.” (A3 p.117; A2 pp.188-90.)

Carpenter replied that he would review the footage the next day with Sears, and that, in his view, the security guards “neglected their most primary duty.” Sears replied the next morning, April 24, and simply noted his agreement. (A3 p.117; A2 pp.188-90.)

F. The Company Finalizes Its Investigation and Recommends Discharge for All Three Guards

On April 24, Carpenter finalized his two investigative reports, which are identical in all relevant, substantive respects. He concluded that Klabunde, Schneider, and Marinez each committed a “serious breach of security” by neglecting “to devote full time attention to [] primary duties.” Carpenter determined that the “neglectful actions” of the three guards violated two PWS provisions – Section 6.6.4.12 (violation of security procedures) and 6.6.4.21 (neglecting duties). (A3 p.117; A2 pp.182-83, 185-86.)

In the recommendation, Carpenter first cites that provision of the PWS that allows the IRS to request the Company to remove an employee for specific reasons. (A3 p.117; A2 pp.182-83, 185-86.) The reports do not indicate that the IRS made any such a request for any of the three guards. The reports then reference the PWS provision that obligates the Company to “ensur[e] that [its] employees conform to acceptable standards of conduct.” (A3 p.117; A2 pp.182-

83, 185-86.) According to the reports, Carpenter viewed the violations as cause for immediate removal and determined that the Company's obligation to ensure that employees conform to acceptable standards of conduct was "non-discretionary and necessarily supersede[d] and [took] precedence over any other policy or standard not contained in the PWS, including [the Company's] internal disciplinary standards and policies." (A3 p.117; A2 pp.182-83, 185-86.) The reports then recommended that all three guards "be relieved of [their] duties and terminated from employment with [the Company]." (A3 p.117; A2 pp.182-83, 185-86.)

G. Site Supervisor Salazar Tells the Three Guards They Are Discharged; the Company Denies the Union's Grievance and Indicates that the Discharges Are Only Recommendations Pending Final Decision by Chief Manager Walls

On April 28, Salazar held a meeting with the three guards and Union Steward Orlando Marquez. At the meeting, Salazar told the guards that they were discharged, and he gave them supporting documents, including Carpenter's investigative reports. (A3 pp.117, 130; A1 pp.32, 88, 109-11, 136-37.)

On April 29, counsel for the Company, Ed Holt, responded to the Union's April 23 grievance. The response notifies the Union that Carpenter's investigative reports recommended the guards' termination "due to violation of specific requirements set out in the Standards of Conduct contained in the [PWS]." According to the response, "the alleged violations . . . fall under specifications of the PWS, and are outside the conduct defined in [the Company's] internal

Disciplinary Action/Policy Statement.” The Company’s position, then, was that the “appropriate disciplinary action is neither specified in, nor controlled by company policy [and] is based upon the provisions of the PWS.” The grievance response stated further that discharge was a “recommendation[] only” and not a “final action or outcome.” The Company advised the Union that the three guards would remain on suspension pending Walls’ final decision. The Company also informed the Union that the response was “not an offer to bargain [or] to invoke the grievance procedure.” (A3 pp.117-18; A2 pp.195-96.)

On May 1, Holt emailed Marquez and told him that Salazar did not have the authority to discharge the guards and that the three guards were not yet discharged. On May 3, the Union demanded reinstatement for the three guards, which the Company ignored. The Company never notified the Union of Walls’ final decision. (A3 p.118; A1 pp.190-91, SA pp.5-7.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On June 15, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting) issued a Decision and Order affirming the judge’s rulings and conclusions and adopting the recommended order, as modified. (A3 pp.116-22.) The Board found that the Company had violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union over the discharges of the three guards and by unilaterally changing its discipline policy in discharging the

guards. (A3 pp.118-21.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (A3 p.122.) Affirmatively, the Board's Order requires the Company to rescind the unilateral change to its progressive discipline policy and to offer reinstatement to Schneider, Klabunde, and Marinez. (A3 p.122.) The Order also requires the Company to make the three guards whole and to remove any reference of the unlawful discharges from their personnel files. (A3 p.122.) The Board also directed the Company to post a remedial notice. (A3 p.123.)

In affirming the judge's rulings and conclusions, the Board rejected the Company's motion to reopen the record to adduce additional evidence and its related supplemental motion to reopen the record to withdraw and amend its answer. (A3 pp.121-22.) The Board determined that the motions did not meet the requirements of 29 C.F.R. § 102.48(d)(1) of the Board's Rules and Regulations, and the Board therefore denied them.³ (A3 pp.121-22.) Specifically, the Board concluded that the motions did not proffer evidence that, if true, would require a

³ Effective March 2017, certain changes were made to the Board's rules and regulations. As part of those changes, 29 C.F.R. § 102.48(d)(1) was renumbered and is now 29 C.F.R. § 102.48(c)(1). While the wording of that section has also changed, the changes are not relevant to the issues presented by this case, and the Board relied on the pre-March 2017 regulation.

different result. The Board also explained that the proffered evidence was available at the time of the hearing and was therefore not “newly discovered,” as required under the applicable standard. (A3 pp.121-22.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board’s finding that the Company unilaterally changed its progressive disciplinary policy when it discharged the three security guards. The Board determined that the Company had no policy in place at the time of the discharges that compelled termination based on the guards’ conduct. In making this determination, the Board found that the Company’s Policy Statement, and not the PWS, set forth the progressive disciplinary system and that the Policy Statement did not mandate discharge for such first-time offenses of the standards of conduct. Therefore, in treating the discharges as a compulsory penalty, the Company unilaterally changed the terms and conditions of employment in violation of the Act.

The Company now claims, for the first time, that the PWS superseded the Policy Statement and, thus, the PWS governed the disciplinary process. The Court should not consider this argument because the Company failed to raise it to the Board in the first instance as required under Section 10(e) of the Act. In any event, the Board majority, in responding to a statement made only by the dissenting Board member, properly found that the plain language of the Policy Statement

established its superiority over all other existing policies. Further, according to the Board majority, even if the PWS took priority over the Policy Statement, the PWS itself did not mandate discharge. The Company's reliance on the PWS does not, therefore, change the critical underlying finding that the Company discharged the guards without an obligation to do so under any existing policy. The Company does not undermine this finding by relying on inapplicable caselaw or by implying, without any supporting record evidence, that an official other than COR Sears could have requested discharge.

2. Substantial evidence also supports the Board's finding that the Company unlawfully failed to bargain post-discharge with the Union. The Company does not challenge the Board's underlying findings that a bargaining obligation existed, that the Union requested bargaining, and that the Company refused to bargain. Instead, the Company's only defense to this violation is its meritless argument that the Board erred in denying its motions to reopen the record. Therefore, if the Court upholds the Board's denial of the Company's motions, the violation should be summarily upheld.

3. The Board acted well within its discretion in denying both the motion to reopen the record to adduce additional evidence and the related supplemental motion to reopen the record to amend the Company's answer to deny that its decision to discharge the guards was discretionary. As the Board properly

considered, the Company's motions failed to meet the requirements set forth in 29 C.F.R. § 102.48(d)(1). Specifically, neither motion offered to present evidence, if true, that would change the outcome of the Board's decision. Further, the Board determined that the Company's motions relied on proffered evidence that was both speculative and involved post-hearing events, and thus fell short of meeting the requisite standard.

ARGUMENT

I. THE BOARD REASONABLY DETERMINED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING ITS DISCIPLINARY POLICY WHEN IT DISCHARGED THE THREE SECURITY GUARDS

A. Applicable 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 representative of his employees”⁴ 29 U.S.C. § 158(a)(5); *see NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986).

Section 8(d) sets forth the parameters of this obligation, requiring that the parties

⁴ A violation of Section 8(a)(5) of the Act carries a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of [the Act].” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection” 29 U.S.C. § 157.

“meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder” 29 U.S.C. § 158(d).

Employers may not “impose new or different working conditions without first affording the employees’ representative an opportunity to bargain over them.” *City Cab Co.*, 787 F.2d at 1478; *NLRB v. Katz*, 369 U.S. 736, 747 (1972). An employer who acts unilaterally, without prior discussion with a union, has refused “to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Id.* In doing so, an employer violates Section 8(a)(1) and (5) of the Act. *See NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 357 (5th Cir. 1981) (“It is well settled that an employer violates section 8(a)(1) and (5) of the Act . . . by unilaterally changing the terms and conditions of employment without first granting its employees’ exclusive bargaining representative the opportunity to bargain about ‘mandatory’ subjects.”).⁵

Moreover, “labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining.” *Newspaper Guild v. NLRB*, 636 F.2d 550, 561 (D.C. Cir. 1980). There can be no doubt that

⁵ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

“an employer’s disciplinary system constitutes ‘a term of employment that is a mandatory subject of bargaining.’” *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (quoting *Migali Indus., Inc.*, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining)); *Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), *enforced*, 570 F.2d 1327 (7th Cir. 1978).

On review, this Court affords “considerable deference to the Board’s expertise in applying the . . . Act to the labor controversies that come before it.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board’s factual findings if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998). Under this test, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; *see also Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985). As this Court has cautioned, “[o]nly in the most rare and unusual cases will

an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).

B. Substantial Evidence Supports Board’s Finding that the Company Unilaterally Changed the Disciplinary Policy

The Board determined (A3 p.118) that the Company did not have a policy in effect at the time of the discharges that mandated termination for the three guards as the appropriate disciplinary measure and that the discharges were a unilateral change to the Company’s discipline and discharge policy. In making this determination, the Board properly found (A3 pp.118, 119 n.8.) that the progressive disciplinary system, set forth in the Policy Statement, was the operative policy and that it did not obligate the Company to discharge the guards. The Board found further (A3 p.118) that the PWS did not compel the Company to discharge the employees. Accordingly, the Company’s treatment of the discharges as a mandatory penalty constituted an unlawful unilateral change in the terms and conditions of employment. The Board’s decision is fully supported by substantial evidence.

1. The Policy Statement governed and did not mandate discharge

The Board found that, at the time of the discharges, the Policy Statement was the relevant policy regarding the Company’s actions because it “governed the

[Company] and its employees.” (A3 p.119 n.8.) The Policy Statement listed “with great specificity, offenses that serve as grounds for immediate discharge.” (A3 p.119.) Unless included in that list, an offense was addressed under the policy’s progressive system. Here, the guards’ conduct (security breach) is *not* included within the “gross misconduct” category of offenses requiring immediate dismissal. Rather, the offense, according to the Policy Statement, warranted a two-day suspension for a first offense and discharge if an employee has prior offenses. None of the three guards had ever been disciplined previously.

Therefore, as the Board found, the record makes clear, and the Company does not contest, the offenses did not qualify for immediate termination under the progressive discipline system, and “the three guards would not have been discharged if the [Company] applied [the Policy Statement].” (A3 p.133.) Given these uncontested facts, the Board properly concluded that the Company violated the Act “by unilaterally changing its discipline policy by terminating three employees for a first offense not contemplated by its existing progressive discipline policy.” (A3 p.133.)

2. The PWS did not supersede the Policy Statement; nor does it mandate discharge

The Company argues (Br. 15-24) that the PWS superseded the Policy Statement and is the only relevant policy.⁶ The Company never presented this argument to the Board, and the Court is therefore precluded from considering it. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (court lacks jurisdiction to consider issue not raised before Board). In any event, the Board properly found that the Policy Statement supersedes the PWS and governed the Company’s discharge of the employees.⁷ In challenging this finding, the Company relies on

⁶ In making this argument, the Company repeats verbatim concerns articulated in the dissent without proper attribution. *Compare* Br. 15-16, with A3 pp.123-24; *compare* Br. 18-22, with A3 pp.124-26. Courts disfavor this practice. *See Prairie State Generating Co. v. Secretary of Labor*, 792 F.3d 82, 96 n.10 (D.C. Cir. 2015) (“We note that three pages of [the] opening brief appear to be taken, virtually verbatim and without adequate attribution, from [the] dissent. . . . This court strongly disapproves of copy-and-paste arguments. Extended quotation without quotation marks or appropriate citation amounts to misrepresentation to the court, *see* MODEL RULES OF PROF’L CONDUCT R. 8.4(c) and disserves the client.”). The Company’s cut-and-paste is not limited to the argument that the PWS superseded the discipline policy. *Compare* Br. 25-26, with A3 p.125; *compare* Br. 31-33, with A3 p.126 nn.7, 8.

⁷ Even though the Company failed to raise this claim to the Board, the Board considered the supremacy of the PWS in responding to an argument raised only by the dissent. An argument raised by the dissent does not otherwise save a party’s

irrelevant case law that does not support its claim that the PWS is the controlling document. Moreover, the Company's challenge itself is entirely academic inasmuch as the Board found that *neither* the PWS nor the Policy Statement mandated discharge.

As the Board noted, the Policy Statement "states on its face that it supersedes all other policies concerning discipline." (A3 p.134.) Further, the PWS "reflects the agreement between [the Company] and the IRS, but not necessarily between [the Company] and its own employees." (A3 p.119 n.8.) The Board explained the significance of this distinction: "[T]he PWS expressly delegates to [the Company] the role of setting and enforcing a disciplinary policy consistent with its parameters." (A3 p.119 n.8.) According to the Board's findings, the Company may well have established the Policy Statement in an attempt "to conform its disciplinary policy to the PWS guidelines." (A3 p.119 n.8.) The Board also noted that neither the Policy Statement nor the collective-bargaining agreement even reference the PWS. In light of these considerations, the Board

failure to raise it to the Board. *See HealthBridge Mgmt. v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (explaining that the dissenting member's "explici[t] question[ing]" of an issue is sufficient to give "the majority notice" of that issue but is "insufficient to invoke our jurisdiction."); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 343 (3d Cir. 1984) ("[T]he Board responded to the dissenter's argument in a footnote, [but] this brief reference to the merits in the Board's decision does not excuse petitioner from its statutory obligation under § 10(e) to file exceptions presenting and preserving its argument to the Board.")

properly determined that the Policy Statement, in fact, “governed the [Company] and its employees.” (A3 p.119 n.8.)

In an attempt to show that the PWS was the operative document, the Company relies on (Br. 16-17) inapplicable precedent. The three cases it cites involve different areas of law in which the Board’s refusal to allow an employer to issue policy handbooks or make other changes that depart from provisions of collective-bargaining agreements in effect between the parties. *See, e.g., Arts Way Vessels, Inc.*, 355 NLRB 1142, 1146 (2010) (finding that the employer’s handbook containing a host of changes to the terms and conditions of employment during the life of a collective-bargaining agreement amounted to repudiation of the parties’ contract); *United Cerebral Palsy of New York*, 347 NLRB 603, 606 (2006) (same); *Memphis Furniture Mfg. Co.*, 252 NLRB 303, 306-07 (1980) (finding a violation where employer refused to pay bonuses consistent with an operative collective-bargaining agreement). These cases simply stand for the well-established propositions that an employer must adhere to the terms of collective-bargaining agreements and cannot make unilateral changes by issuing handbooks that deviate from established terms.

This is not a case of the Company promulgating a handbook policy that contravenes provisions of a collective-bargaining agreement. Indeed, at the time of the discharges, the parties had only begun bargaining for a first contract and did

not have an effective agreement in place. Nor is the PWS analogous to a collective-bargaining agreement such that that line of cases would apply. The Company therefore errantly invokes this precedent to argue that the Board should not have found that the Policy Statement superseded the PWS.

The Company likewise does not further its argument by relying on (Br. 23-24) non-Board cases that address whether an employment contract supersedes a city code provision, *see Gosnell v. City of Greenville*, 57 F.3d 1066 (4th Cir. 1995) (unpublished, per curiam decision), whether an employee handbook superseded an employment contract's mandatory arbitration clause such that an employer could compel arbitration, *see Hoffman v. Kamhi*, 927 F. Supp. 640, 643 (S.D.N.Y. 1996), and whether, under Arizona law, an employee handbook supersedes the rules and regulations of the Bureau of Indian affairs and federal law, *see Smith v. Lujan*, 780 F. Supp. 1275 (D. Ariz. 1991). None of these cases bears any relevance to whether, in this case, the Company's 2014 Policy Statement superseded the PWS.

In any event, the Board properly found (A3 p.118) that even assuming the supremacy of the PWS, it did not mandate discharge. Consequently, whether the Policy Statement later superseded the PWS is ultimately immaterial to the finding that the Company unlawfully made a unilateral change to its discipline policy. The PWS outlines two avenues for the discharge of a company employee: (1) the IRS may direct the Company to remove an employee from providing services under the

contract for specific reasons (A2 p.75), and (2) the CO and the COR can suspend or remove a company employee for failure to “meet and adhere to the Standards of Conduct as required in this contract.”⁸ (A2 p.75.) Neither circumstance occurred in this case.

The Board found, and the Company does not contest, that COR Sears never directed the Company to take any disciplinary action against any of the three guards. As the Board stated, “in addressing his concerns with the [Company] about the guards’ misconduct here, Sears did not instruct the [Company] to discharge them.” (A3 p.118.) Indeed, the Board noted that Sears “was even unwilling to characterize [the guards’] behavior as ‘careless’ in his April 23 email to Carpenter.” (A3 p.134.) Likewise, the Board found that Sears never informed the Company “that its contract with the IRS was in jeopardy because of the guards’ infractions.” (A3 p.118.) The Board determined further that its finding was consistent with the Company’s answer to the complaint, wherein the Company admitted that “discharging the guards was within its discretion.” (A3 p.118.)

⁸ The Company reads Section 6.4.4 too broadly by asserting (Br. 15, 22) that this section provides cause for immediate removal *of an employee*. As the Board found, Section 6.4.4 “provides that the contractor (i.e., the [Company]) can be immediately removed from the performance of the contract for one of the listed infractions, including its employees’ neglect of duty.” (A3 p.118 n.7 (citing A2 p.75.) Nevertheless, like the other provisions of the PWS, the language is not compulsory. Rather, listed infractions give the IRS cause to terminate the contract with the Company, but do not compel it.

Given these uncontested factual findings, the Board's determination that "even under the PWS, the [Company] was not required to discharge the guards" (A3 p.118) is reasonable and fully supported by substantial evidence.

Further, the Board properly found that the record established that COR Sears was the only identified IRS official with the authority to discharge the guards. The Board relied on the fact that Carpenter "identified Sears as the COR multiple times without contradiction" (A3 p.117 n.5) and described Sears' job as "involv[ing] reporting to the Contracting Officer on [the Company's] performance, on [its] adherence to the [PWS], and on [its] management and oversight of [the] contract." (A3 p.117 n.5.) As further support, the Board noted (A3 p.118) that Sears had previously ordered the predecessor contractor to discharge an employee. In short, the record only refers to Sears and contains no reference to any other IRS representative with the authority to discipline. (A3 p.117 n.5; *see also* A3 p.118 n.6: "Nothing in the hearing testimony, exhibits, or even the [Company's] motion to reopen the record identifies a CO or other higher-ranking individual charged with enforcing the [Company's] contract with the IRS."). Given that Sears is the sole identified IRS official who, under the PWS, could have directed the Company to remove the guards or removed the guards himself and he did not do so, the Board's finding that the Company did not act under any obligation to discharge the guards is amply supported by substantial evidence.

In sum, according to the Board, the PWS could not have been the basis for the discharges because the IRS did not request the discharges and the PWS itself did not compel them. Once the PWS is removed from the calculus, the relevant inquiry became whether the Company could identify a disciplinary policy that justified immediate discharge of the three guards. As the Board found, the Company failed to make any such showing: “[R]egardless of whether or not [the Company] could disregard its progressive disciplinary policy, it did not have a policy mandating the termination of its guards for a first offense similar to those of Schneider, Klabunde, and Marinez prior to April 2015.” (A3 p.134.) Accordingly, the Board properly determined that the Company’s decision to discharge the three guards was an unlawful unilateral change in discipline policy, and substantial evidence amply supports this determination.

II. THE BOARD REASONABLY DETERMINED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO BARGAIN WITH THE UNION POST-DISCHARGE

As shown, an employer must bargain collectively with a union, upon request, over terms and conditions of employment, which include an employer’s disciplinary system. *See City Cab Co.*, 787 F.2d at 1478, and cases cited at pp. 16-18. It is equally well established that “[n]egotiations over termination of employment constitute a mandatory subject of bargaining.” *Ryder Dist. Resources, Inc.*, 302 NLRB 76, 90 (1991); *see also Manchester Health Ctr.*, 287 NLRB 328

(1987) (“A grievance about a discharge is clearly a mandatory subject of bargaining.”), *enforcement denied on other grounds*, 861 F.2d 50 (2d Cir. 1988).

Here, the Board determined that the Union’s May 3 demand for reinstatement and a make-whole remedy sufficiently “invoke[d the Company’s] obligation to bargain.” (A3 p.133.) The Board found further that the Company “refused to bargain after imposing discipline and thus did not live up to its obligations under existing caselaw.” (A3 p.133.) Before the Court, the Company abandons its challenge raised to the Board that it engaged in bargaining over the discharges. Indeed, the Company does not contest any of the underlying merits of the Board’s finding that the Company violated the Act by failing and refusing to bargain with the Union post-discharge.

Rather than attacking the merits of the Board’s finding, the Company argues that the Board should have granted its motions to reopen the record so that it could adduce additional evidence (Br. 25-34) and, based on that evidence, withdraw and amend its answer to the complaint (Br. 19-21). Therefore, if the Court upholds the Board’s denial of the motions, as argued below, the Company has presented no other basis to disturb this Board finding, and the finding should be summarily upheld.

III. THE BOARD ACTED WITHIN ITS DISCRETION IN DENYING THE COMPANY'S MOTION TO REOPEN THE RECORD TO ADDUCE ADDITION EVIDENCE AND TO AMEND ITS ANSWER

The Company attempts to evade liability for both unfair-labor-practice violations by claiming (Br. 25-34) that the Board erred in denying its motions to reopen the record to submit new evidence, which the Company claims supports its related request to withdraw the admission in its answer that the discharges were discretionary. Specifically, the Company seeks to supplement the record with an affidavit from Chief Manager Walls stating that, following the Company's offer of reinstatement to the discharged guards, IRS Senior Contract Specialist Bernadette Briggs emailed Walls on March 9, 2016, informing her that the IRS would not permit the guards to perform services under the contract. (A3 pp.58-61.) Walls' affidavit also sets forth Walls' "belie[f] that if Ms. Briggs or the COR were aware of the circumstances surrounding the three officers in April 2015, they would have taken the same position as when they became aware of the incidents recently." (A3 p.58.) The Company claims that this new evidence precludes a finding that the 2015 discharges were discretionary, eliminates any bargaining obligation, and renders the employees discharged for cause, thereby eliminating its duty to reinstate the guards and provide back pay.

The Board did not abuse its discretion in rejecting these motions. As explained below, the Board properly found (A3 pp.121-22) that the evidence that

the Company sought to include in the record did not compel a different result, concerned post-hearing events, and was entirely speculative. Moreover, the Company's campaign to amend its answer based on this evidence misunderstands the Board's actual findings, which would not change regardless of whether the discharges were discretionary.

A. Applicable Principles and Standard of Review

Under Board regulation, “[a] party to a Board proceeding may, because of extraordinary circumstances, move for . . . reopening the record after the Board decision or order.” 29 C.F.R. § 102.48(d)(1). The regulation provides further that the motion “shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.” *Id.* Lastly, the regulation only allows for “newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence with the Board believes should have been taken at the hearing” to be taken at any further hearing. *Id.*

For nearly four decades, the Board has consistently defined newly discovered evidence as “evidence which was in existence at the time of the hearing and of which the movant was excusably ignorant.” *Owen Lee Floor Svc., Inc.*, 250 NLRB 651, 651 n.2 (1980), *enforced*, 659 F.2d 1082 (6th Cir. 1981); *see also Labor Ready, Inc.*, 330 NLRB 1024, 1024 (2000); *Fitel/Lucent Techs.*,

Inc., 326 NLRB 46, 46 n.1 (1998); *Winchell Co.*, 305 NLRB 903, 903 n.1 (1991), *enforced*, 977 F.2d 570 (3d Cir. 1992); *Seder Foods Corp.*, 286 NLRB 215, 216 (1987); *Nabco Corp.*, 266 NLRB 687, 687 (1983). A party seeking to reopen the record to introduce evidence as “newly discovered” must also show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence. *Owen Lee Floor*, 250 NLRB at 651 n.2.

A decision to reopen the record and receive additional evidence rests in the sound equitable discretion of the Board and will be overturned by a reviewing court only where the challenging party demonstrates an abuse of discretion. *U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1254 (11th Cir. 1991); *Seattle-First Nat'l Bank v. NLRB*, 892 F.2d 792, 797 (9th Cir. 1989); *NLRB v. Seafarers Int'l Union*, 496 F.2d 1363 (5th Cir. 1974). As shown below, the Board did not abuse its discretion in finding that the Company failed to meet the requirements of Section 102.48(d)(1), namely, that the evidence would require a different result and concerned pre-hearing events.

B. The Board Properly Determined that the Company Failed To Meet the Requirements Necessary To Reopen the Record

The Company made the strategic decision that it would defend against the unfair-labor-practice charges by relying solely on Carpenter’s investigation and the Company’s view of its obligations under the PWS. The Company’s motion to

reopen and supplemental motion are simply attempts to re-litigate the case under a different theory, having failed to avoid liability under its first defense strategy. The Board did not abuse its discretion in denying the Company an opportunity to offer alternative defenses to the charges, the facts of which, if true, would not change the Board's findings and existed at the time of the hearing before the judge.

1. The evidence would not require a different result regarding either violation found by the Board

With respect to the unilateral change to the discipline policy, the Company claims that the new evidence shows that it had no choice but to discharge the guards and, therefore, it should be allowed to amend its answer to “deny the allegations that the discharges of the guards were discretionary.” (Br. 19.) The Board properly rejected this claim, explaining “that a different IRS representative assertedly determined – some 10 months after the discharges and after the judge found that the [Company] acted unlawfully – that the guards’ offenses prevented reinstatement would not affect the finding here that the [Company] exercised discretion in discharging the guards.” (A3 p.122.)

Further, the Board properly rejected (A3 p.122 n.19) the newly proffered evidence because its alleged effect on the Board's unlawful unilateral-change finding was purely speculative. Pointing to Walls' affidavit, the Company surmises (Br. 33-34) that this new evidence shows that an unnamed IRS decision-maker would have ordered the guards to be discharged once that person was made

aware of the guards' conduct. As the Board explained, however, "Walls' speculation does not demonstrate that the IRS was unaware of the discharges in 2015 or that it would have acted differently than it actually did." (A3 p.122 n.19.) Moreover, the Board noted (A3 p.122 n.19) that Briggs' email to Walls fails to confirm that the IRS would have taken a different action if other officials had been aware. The Board therefore properly determined that the Company failed to show that either Walls' affidavit or an admission that its discharges were mandatory would require the Board to reach a different determination regarding the Company's unlawful unilateral change.

It also bears noting that, contrary to the Company's claim (Br. 20), its admission that the discharges were discretionary was not essential to the Board's finding of an unlawful unilateral change. Rather, as discussed above (p. 25), this finding does not rely on the Company's answer to the complaint. The Board determined, based on the express language of the Policy Statement and the PWS, that neither document mandated the discharges; the Company's answer to the complaint merely bolstered that determination. Accordingly, even if the Company were permitted to withdraw its admission, the Board's finding that the Company unilaterally changed its discipline policy, premised on the documents' language, would remain undisturbed.

The Board also properly found (A3 p.122 n.19) that the Company's proffered evidence set forth in Walls' affidavit would not have changed the Board's finding that the Company failed to bargain post-discharge. As shown, under Board precedent, the Company had a clear obligation, upon request, to engage in post-discharge bargaining. It did not do so, choosing instead to ignore the Union's bargaining request. As the Board emphasized, when explaining the non-determinative nature of Walls' affidavit, "even if the IRS were shown to have *subsequently* disagreed with Sears' conduct, this would not alter the [Company's] duty to bargain with the Union at the time of the discharges." (A3 n.122 n.19.)

The Company likewise gains no ground with its campaign to amend its answer to deny discretion concerning the discharges. Any amendment to its answer would not change the finding that the Company failed to bargain post-discharge, and the Company's argument suffers from a fundamental misunderstanding of the Board's decision and of applicable law. *See* A3 p.122 n.18. The Company believes (Br. 21) that when it answered the complaint, whether the discharges were discretionary was irrelevant because then-extant Board law, which provided that an employer was not required to engage in pre-discharge bargaining regardless of any discretion in its discharge decision, compelled the administrative law judge to dismiss the complaint. *See Fresno Bee*, 337 NLRB 1161 (2002). In other words, pre-discharge bargaining was not

required irrespective of discretion. After the judge's decision and while the case was pending before the Board, the Board issued *Total Security Management*, which overruled *Fresno Bee* and held that discretionary discipline is a mandatory subject of bargaining and an employer must provide notice to and an opportunity to bargain with a union prior to discharging an employee. *See Total Sec. Mgmt. Ill 1, LLC*, 364 NLRB No. 106 (2016). The change in Board law concerning discretion, therefore, affected only those allegations that an employer failed to bargain *before* imposing discipline. Here, the Company was found to have failed to bargain *after* discharging the guards, so it cannot claim that the change makes relevant its admission that the discharges were discretionary. Further, as the Board stated, "we perceive no reason why a party should be relieved of its admission to a *factual matter*. That the [Company] exercised discretion in discharging the three guards should not change based on the General Counsel's theory of a violation." (A3 p.122 n.18.) In short, the change in law does not affect the Board's finding in this case that the employer failed to bargain post-discharge, and the Board properly rejected the Company's motion to reopen the record to amend its answer.

In sum, the Board did not abuse its discretion in denying the Company's requests to reopen the record inasmuch as the requests failed to show that the "new" evidence would "require a different result" under 29 C.F.R. § 102.48(d)(1). *See Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 504 (5th Cir. 2002) (upholding

Board’s denial of motion to reopen, in part, because” the motion failed to explain why the evidence [the employer] sought to introduce would be outcome determinative”).

2. The Company failed to show that its evidence existed at the time of the hearing and that it acted with diligence in uncovering it

The Board found that the Company had failed to show that its proffered evidence “existed at the time of the hearing, much less that it acted with diligence in uncovering the evidence.” (A3 p.121.) The Company discharged the guards in May 2015, and the parties conducted the hearing in December 2015. As the Board explained, at the time of the discharges, COR Sears did not demand the discharge of the three guards, and “the [Company did not] argue during the proceeding before the judge that any other IRS representative demanded the discharge of the guards.” (A3 p.122.) Indeed, the Company readily acknowledged during the discharge process that it relied solely on Carpenter’s investigative report in discharging the guards. The Board therefore properly concluded that, in light of the foregoing undisputed facts, the Company’s reliance on the March 9, 2016 communication sought “to introduce evidence that occurred after the violations alleged in this case – evidence, which, by definition, is not ‘newly discovered’ or ‘previously unavailable’ under the Board’s rules.” (A3 p.122.)

The Company wrongly argues that grounds for reopening the record include “evidence regarding post hearing events.” (Br. 31.) Notably, the Company cites no precedent for this claim.⁹ The Board expressly rejected this notion, explaining that “Board precedent is clear: evidence pertaining to events that occurred after the close of the hearing is not considered by the Board in a motion to reopen the record.” (A3 p.122 n.17.)

Accordingly, the Company’s proffered evidence did not exist at the time of the hearing, and the Board therefore did not abuse its discretion in determining that the Company did not provide a valid basis for reopening the record. *See Rush Univ. Med. Ctr.*, 362 NLRB No. 23, 2015 WL 867098, at *1 n.2 (2015) (denying request to reopen record for election petitions that did not exist at the time of the hearing), *enforced on other grounds*, 833 F.3d 202 (D.C. Cir. 2016); *Allis-Chalmers Corp.*, 286 NLRB 219, 219 n.1 (1987) (denying the motion to reopen because “it proffers evidence concerning an alleged event that occurred after the close of the hearing”).

The Board also properly determined (A3 p.122) that the Company failed to show that it acted with diligence in uncovering the evidence. The Company provides no credible explanation for why it failed to present evidence during the hearing that the IRS insisted on the discharges. The Company asserts (Br. 32), as

⁹ In lieu of relying on case law to support its claim, the Company once again quotes the dissent (A3 p.126 n.7) without proper attribution.

it did in its motion before the Board, that COR Sears lacked the final authority to direct the Company to discharge guards and that such authority rested with Briggs or the Contracting Officer.¹⁰ The Board properly rejected these assertions as insufficient bases to reopen the record, noting the Company's failure "to explain why it could not have pursued the issue of Sears' authority during the hearing." (A3 p.122 n.19.) Indeed, the Company certainly had the opportunity to explore that issue. At the hearing, company and union witnesses testified without contradiction that COR Sears was the only individual charged with ensuring proper adherence to the Company's contract with the IRS. (A3 p 118 n.6, A3 p.122 n.19.) The Company did not elicit any testimony from Carpenter, its own witness, concerning the identification of any other IRS official who was responsible for ensuring the Company's compliance with the contract, nor did the Company make any attempt to identify other IRS officials who had authority to direct the Company to act under the PWS. Moreover, Union representative Martinez also testified that COR Sears had, in fact, previously directed the predecessor company to discharge a guard who slept on duty, and the Company offered no rebuttal evidence or testimony. (A3 p.118 n.6.) Given this evidence, the Board properly rejected the

¹⁰ Before the Court, the Company argues (Br. 32-33) that the PWS permits the Company's view that COR Sears was not the final decision-maker. The Company never made this argument in its motion to the Board (*see* A3 pp.41-61), and the Court is therefore precluded from considering it here. *See* 29 U.S.C. § 160(e); *Woelke*, 456 U.S. at 665.

Company's unsupported assertion that an IRS official other than COR Sears was, in fact, vested with the authority to discharge the guards and properly determined that this unsubstantiated claim was insufficient to provide a basis to reopen the record. *See APL Logistics, Inc.*, 341 NLRB 994, 994 (2004) (denying a request to reopen the record because the movant "offered nothing beyond its bare assertion to establish that the proffered evidence is newly discovered," and failed to show it could not have developed the facts during the hearing), *enforced*, 142 F. App'x 869 (6th Cir. 2005).

The Company further speculates that Sears did not tell Briggs or the CO about the incidents involving the guards, "or at least the record should be reopened for that determination."¹¹ (Br. 34.) Again, the Board properly rejected (A3 p.122 n.19) this bald assertion as grounds for reopening the record, because, in addition to being entirely speculative, the Company does not explain why it could not have earlier discovered information about COR Sears' communications, if any, among IRS officials. *See Local 911, AFL-CIO*, 275 NLRB 980, 981 (1985) ("No evidence has been presented that the [movant] attempted to secure the 'newly discovered' evidence prior to or even during the hearing and was unsuccessful in doing so."), *enforced*, 794 F.2d 682 (9th Cir. 1986). The Company provides no

¹¹ While Walls asserts, without any discernible basis beyond the Company's own interests, that COR Sears told no one about the incidents involving the guards, Briggs' email does not indicate whether others at the IRS were aware of the security breaches. (A3 p.122 n.19)

reason for its failure to call COR Sears as a witness – who would have been an obvious source for providing testimony regarding whether he had any conversations with other IRS representatives about the security breaches. *See NLRB v. R & H Masonry Supply, Inc.*, 627 F.2d 1013, 1014 (9th Cir. 1980) (finding that the Board did not err in refusing to reopen record to allow testimony from a witness where the movant failed to explain why the witness could not have been present at the original hearing).

In sum, the Company cannot show that the Board abused its discretion in denying the motions to reopen the record. The Company here failed for the same reasons as the movant in *Seattle First National*, wherein the Ninth Circuit affirmed the Board’s denial of a motion to reopen the record because “[the] hearing offered ample opportunity to [the movant] to make its case . . . [the movant] made no effort to develop a record, through either its own or [the union’s] witnesses.” 892 F.2d at 797. Therefore, “[a]ny paucity in the record inheres in the facts themselves, or in [the Company’s] failure to elicit them.” *Id.*

C. The Company’s Remaining Arguments Are Meritless

Contrary to the Company’s claims (Br. 26-31), the Board acted consistent with its rules and regulations and properly effectuated the purposes of the Act in denying the motions to reopen the record. The Board has not “urged narrow, restrictive interpretations of its regulations.” (Br. 27.) Rather, as shown (pp. 32-

40), the Board followed the clear provisions of the regulation and adhered to well-established precedent concerning what constitutes newly discovered evidence and under what circumstances it is appropriate to reopen a record to take additional evidence. Quite simply, the Board determined, and did not abuse its discretion in doing so, that the Company failed in all respects concerning its obligations under 29 C.F.R. § 102.48(d)(1) – namely, the proffered evidence would not require a different result, the evidence was not in existence at the time of the hearing, and, even assuming the evidence was available during the hearing, the Company offered no valid basis for its failure to uncover it then. Given its multiple, fatal failures to meet the plain requirements of 29 C.F.R. § 102.48(d)(1), the Company can hardly fault the Board for an inflexible interpretation of its rules.

None of the cases cited (Br. 27-29, 33) by the Company furthers its cause. Those cases involve separate and distinct Board regulations, with different standards allowing for deviation.¹² Similarly, the Company cites (Br. 33)

¹² For example, *Livingstone Powered Metal, Inc. v. NLRB*, 669 F.2d 133 (3d Cir. 1982), and *NLRB v. Zeno Table Co.*, 610 F.2d 567 (9th Cir. 1979), involve whether a late-filed answer to a complaint requires good cause or extraordinary circumstances. *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138 (3d Cir. 1982), involves a regulation governing extensions of time to file certain responses for pleadings served by mail. None of these cases sheds light on the present case. The Company also cites (Br. 26) *NLRB v. Dane County Dairy*, 795 F.2d 1313 (7th Cir. 1986), but that case does not contain the attributed quotation. Indeed, *Dane County* has nothing to do with liberal construction of Board rules and regulations, and the court there rejected all challenges to the Board's finding that an answer was untimely.

inapposite cases where administrative law judges have remanded cases to complete the record, none of which involve a situation similar to the instant case.¹³

Nor can the Company show that any “rigid interpretation” made the Board unable to reach the merits of the case or deprived the Company of a fair hearing. (Br. 29.) To the contrary, the Board gave the Company a full opportunity to present its case; in hindsight, and having been found liable, the Company appears simply to regret its litigation choices. Indeed, it is this regret and second-guessing that have led the Company to expend further resources (Br. 30), not any action by the Board. Further, the Company’s bare assertion (Br. 30) that the Board’s reasonable application of its rules, which is also consistent with long-standing precedent, overburdens the courts is pure hyperbole. Efficiency would have been

¹³ None of the cases cited by the Company supports the notion that the Board abused its discretion here. Rather, those cases generally involve instances where the Board determined that additional evidence was necessary under circumstances decidedly distinct from those presented here or where the Board was remanding consistent with an order from a reviewing court. *See, e.g., Woodlawn Hosp.*, 274 NLRB 796 (1985) (remanding for additional evidence consistent with a reviewing court order); *Dr. Phillip Megdal*, 267 NLRB 82, 82 (1983) (remanding for a specific credibility determination); *Camay Drilling Co.*, 239 NLRB 997 (1978) (remanding to allow intervenors to participate after the Board granted a motion to intervene); *Raley’s & Indep. Drug Clerk Ass’n*, 357 NLRB 880 (2011) (remanding to determine amounts owed after the Board determined an applicant was entitled to an award under the Equal Access to Justice Act); *Sage Dev. Co.*, 301 NLRB 1173 (1991) (remanding due to intervening decision affecting case); *Bay Harbour Elec., Inc.*, 348 NLRB 963 (2006) (remanding due to intervening decision affecting case).

best served by the Company fully presenting all theories of its case at the appropriate time.

Lastly, the Company wrongly asserts (Br. 31-32) that its proffered evidence shows that the guards were, in fact, discharged for cause and claims that, under Section 10(c), the Board cannot order reinstatement and back pay.¹⁴ It is well-established that “[c]ause, in the context of Section 10(c) effectively means the absence of a prohibited reason.” *Anheuser-Busch, Inc.*, 351 NLRB 644, 647-48 (2007). Here, the Company discharged the guards for a prohibited reason, namely, pursuant to an unlawful change to its disciplinary policy. The Board’s denial of the Company’s motions to reopen the record does not foreclose the Company from introducing Briggs’ email during a subsequent compliance hearing to demonstrate a cut-off date for any back pay calculation. As the Board explicitly informed the parties, they are free to “present evidence during the compliance stage of this proceeding regarding the [Company’s] ability to reinstate the discharged employees and its corresponding backpay obligation.” (A3 p.116 n.1); *see, e.g., F.W. Woolworth Co. v. NLRB*, No. 88-3150, 1989 WL 156897, at *10 (4th Cir. Dec. 27, 1989) (noting that evidence proffered in connection with denied motion to reopen was “a matter for the compliance stage of [the] proceeding”).

¹⁴ Section 10(c) of the Act provides that “[n]o order of the Board shall require reinstatement of any individual as an employee . . . or the payment to him of any back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c).

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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MARCH 2018

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

SECURITY WALLS, INC.)	
)	
Petitioner/Cross-Respondent)	
)	No. 17-13154-K
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	16-CA-152423
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 10,380 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 15th day of March, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 15th day of March, 2018