

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: April 26, 2018

TO: Timothy Watson, Regional Director  
Region 16

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Cott Beverages Inc.  
Case 16-CA-206068

530-6067-4055-3900  
530-6067-4055-5000

This case was submitted for advice as to whether the Employer unilaterally implemented a stricter tardiness and absentee policy after the Union's successful election, thereby violating Section 8(a)(5).<sup>1</sup> We conclude that the Employer decided to implement this policy and to strictly enforce it before the Union election, and therefore did not violate the Act.

FACTS

Cott Beverages Inc. (the Employer) operates a production and warehouse facility in Grand Prairie, Texas and employs approximately 77 production, maintenance, quality assurance, and warehouse employees.

On October 1, 2016, the Employer issued employees the current handbook which contained an attendance policy providing that employees would be assessed attendance points for certain attendance "occurrences." The "tardiness" provision stated:

***Tardiness***

- Tardiness is defined as reporting to work later than the associate's scheduled start time.
- If an associate reports to work 1 - 120 minutes after his/her scheduled start time, it will be recorded as one-half (1/2) of an occurrence.

---

<sup>1</sup> The Region has determined that the Employer did not violate Section 8(a)(3), based on an absence of evidence of Employer anti-union animus.

- If an associate reports to work from 2 hours late to the end of the day, it will be recorded as one full occurrence.

The policy provided that employees would be issued discipline once they reached six attendance points as set out below:

- A. After six full occurrences in a rolling twelve-month period, a Verbal Documented Counseling Session (Step 1) will be issued. Once an associate has accumulated 6 or more attendance points, if the associate has another occurrence, the associate typically will move to the next step in the corrective counseling procedure unless their current corrective action has expired.
- B. After seven full occurrences in a rolling twelve-month period, a Written Documented Counseling Session (Step 2) will be issued. Once an associate has accumulated 7 or more attendance points, if the associate has another occurrence, the associate typically will move to the next step in the corrective counseling procedure unless their current corrective action has expired.
- C. After eight full occurrences in a rolling twelve-month period, the associate will be issued a Decision Making Session (Step 3) and be required to make a Total Performance Commitment to the Company.

Since the issuance of this policy, the Employer asserts that it has sought to strictly and uniformly apply the policy—including charging employees with one-half attendance point for being only a minute late. However, aggressive enforcement of the policy did not begin immediately. While at least one employee was actually charged one-half point for being as little as a minute late in January of 2017, the Employer concedes that enforcement of the policy was lax and sporadic initially because supervisors had difficulty enforcing the policy due to their other daily responsibilities and were failing to catch all the instances of tardiness. At least one supervisor—Supervisor A—had a practice of giving tardy employees a seven-minute grace period.

In an effort to achieve more uniform compliance with its new absentee and tardiness policy, the Employer held trainings for employees in late February and early March 2017. The trainings—which were entitled the “one point lesson”—conveyed, inter alia, that being 1-120 minutes late would count as one-half attendance point. Employees were required to sign an acknowledgement indicating that if they did not follow these policies they would be coached.

Following the training, enforcement remained somewhat inconsistent. Thus, in mid or late March, several employees were disciplined for being only one minute or a few minutes late, but in early April, Supervisor A told Employee B that a seven-minute grace period still applied.<sup>2</sup>

On April 11, 2017, the International Brotherhood of Teamsters, Local 997 (the Union) filed a petition to represent the Employer's employees. Subsequently, the exact date being unknown, the Employer tasked one manager with regularly reviewing all employee attendance records to identify and report all instances of tardiness in all departments so that violations would not be missed.

The Union won the election held on May 3, 2017, and was certified on May 11, 2017. The Union asserts that the Employer began more strictly enforcing the attendance policy in June 2017, after the election, including assessing one-half attendance point when employees were only a couple of minutes late. Employee B states that, after the election, Supervisor A told him that the seven-minute grace period no longer applied. Also, another employee, Employee C, states that a different supervisor, Supervisor D, told him after the election that, while the Employer may have been lenient in the past, it would now be enforcing the absentee and tardiness policy as written in the handbook.

The Employer asserts that the parties have reached tentative agreements on all non-economic provisions for a collective-bargaining agreement—including the attendance policy at issue.

### ACTION

We conclude that the Employer did not violate the Act by strictly enforcing its tardiness policy after the election because it decided to do this before the election. Accordingly, the charge should be dismissed, absent withdrawal.

It is well established that an employer is prohibited from making unilateral changes in its employees' terms and conditions of employment without first affording the employees' bargaining representative notice and opportunity to bargain over the proposed changes.<sup>3</sup> After a union wins an election, in the interim period between the

---

<sup>2</sup> The Employer denies that such a grace period existed after the training.

<sup>3</sup> *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

election and certification, “an employer acts at its peril in making changes in terms and conditions of employment” if the union is ultimately certified.<sup>4</sup>

Stricter enforcement of an otherwise dormant or nearly dormant rule following a successful union election generally constitutes an unlawful unilateral change in terms and conditions of employment.<sup>5</sup> However, a “firm decision” to change a term and condition of employment made before an election will not be found unlawful simply because it is implemented after the union wins the election.<sup>6</sup> Also, an employer’s mere “particularizations of, or delineations of means for carrying out, an established rule or practice,”<sup>7</sup> or its use of a new internal system to more effectively enforce an existing policy,<sup>8</sup> are lawful because they are not “material, substantial, and significant” changes.<sup>9</sup>

---

<sup>4</sup> *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). *See also Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001).

<sup>5</sup> *Id.* at 165-66 (finding unlawful employer’s unilateral postelection change effectively requiring employees to decide an hour in advance whether to report to work or use sick leave, where they previously could wait until the time they normally departed for work before making that choice). *See also Hyatt Regency Memphis*, 296 NLRB 259, 263-64 (1989) (unilateral move to more stringent enforcement of sign-in and sign-out policy postelection unlawful), *enforced in relevant part sub nom. Hyatt Corp. v. NLRB*, 939 F.2d 361, 372-73 (6th Cir. 1991); *Celotex Corp.*, 259 NLRB 1186, 1194 (1982) (highly increased frequency of warnings postelection).

<sup>6</sup> *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1230 (2006) (finding no violation where employer unilaterally implemented decision to lay off employees after election because decision was made before election).

<sup>7</sup> *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991).

<sup>8</sup> *Trading Port, Inc.*, 224 NLRB 980, 981-84 (1976) (concluding that the employer’s installation of a time clock to measure more accurately employees’ productivity against previously established productivity/efficiency standards, and the related increase in discipline imposed, did not require bargaining with the union).

<sup>9</sup> *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327, 327 (1976) (finding that employer did not violate 8(a)(5) by unilaterally introducing time clocks as a more dependable method of enforcing its longstanding rule that employees record their time in and out).

Here, the Employer asserts that it decided to strictly enforce its tardiness policy before the Union election, and the Employer's managers presumably would testify to that fact.<sup>10</sup> Also, the "one point lesson" trainings, held before the election, support the Employer's assertion. The training materials specifically stated that employees would be assessed one-half point for arriving between one minute and 120 minutes late, and employees were required to sign an acknowledgement that the policy would now be enforced.

We recognize that Supervisor B told Employee A in April 2017—after the training but before the election—that a seven-minute grace period for tardy employees remained in effect. But one supervisor's failure to strictly apply the tardiness policy after the training does not undercut the Employer's contentions that it had decided to strictly enforce the policy and that the training materials reflected that change. Indeed, one of the reasons the Employer ultimately decided to centralize review of all employee attendance records with one manager was to identify all instances of tardiness in all departments so that violations would not be missed by particular supervisors.

We also recognize that supervisors made statements after the election to the effect that the policy was now being strictly enforced. However, those statements did not suggest that the strict enforcement was in any way related to the election, and may have merely demonstrated that the earlier decision to strictly enforce the policy was finally being understood by all of the Employer's supervisors.

This case is distinguishable from *Hyatt Regency Memphis* and other similar cases that the Region would rely on in support of a complaint. In *Hyatt Regency Memphis*, the employer effectively suspended enforcement of its sign-in and sign-out policy pre-election, told employees that things would change after the election, and then increased disciplines after the election.<sup>11</sup> In the instant matter, the Employer never suspended enforcement of its tardiness policy, it notified employees (via the "one point

---

<sup>10</sup> *Starcraft Aerospace, Inc.*, 346 NLRB at 1230-32 (postelection unilateral layoff of employees lawful, where owner and managers testified that layoff decision was made before election). Cf. *Flambeau Airmold Corp.*, 334 NLRB at 165-66 (unlawful unilateral change concerning more stringent attendance policy; no contention that decision made pre-election); *Celotex Corp.*, 259 NLRB at 1193-94 (same).

<sup>11</sup> 296 NLRB at 261 ("supervisors made it plain to employees that they enjoyed lax enforcement of company rules because there was no union, and that things would change if they voted the [u]nion in").

lesson” trainings) before the election that it was now strictly enforcing the tardiness policy, and any pre-election leniency in enforcement was due to inconsistent enforcement by individual supervisors.

Finally, we conclude that the Employer did not violate Section 8(a)(5) by unilaterally centralizing review of all employee attendance records with one manager. It is unclear whether this decision was made or implemented before or after the election—the Employer only contends that centralization was accomplished after the petition was filed—but, regardless, this was not an unlawful unilateral change. The Employer merely instituted a new means of carrying out its lawful, pre-election decision to strictly enforce the tardiness policy, i.e., it created a more effective means of carrying out the already-established policy, similar to a decision to implement a time clock in place of a written sign-in/sign-out system.<sup>12</sup>

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
J.L.S.

ADV.16 -CA-206068.Response.Cott<sup>(b) (6), (b) (7)</sup>

---

<sup>12</sup> See *Bath Iron Works*, 302 NLRB at 901; *Trading Port, Inc.*, 224 NLRB at 981-84; *Rust Craft Broadcasting*, 225 NLRB at 327; see also *Wabash Transformer Corp.*, 215 NLRB 546, 546-47 (1974) (employer lawfully imposed discharge penalty for failure to meet efficiency standard that predated union election; penalty “was implicit in the existence of any such standard”), *enforced*, 509 F.2d 647 (8th Cir. 1975).