Nos. 18-2103 & 18-2217

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATAIONS BOARD

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STATEMENT OF ORAL ARGUMENT

This case involves the application of settled principles to straightforward facts established on credited testimony, and therefore does not require oral argument. However, because Petitioner, Ozburn-Hessey Logistics, LLC, has requested oral argument, the Board also requests the opportunity to argue. The Board believes that 15 minutes per side will be sufficient for the parties to present their views.

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Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on Ozburn-Hessey Logistics, LLC's ("the Company") petition to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order finding that the Company violated the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. ("the Act"). The Order issued on August 24, 2018, and is reported at 366 NLRB No. 173.[1] The Company's petition and the Board's cross-application were timely because the Act imposes no time limit on such filings. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("the Union"), which was the charging party before the Board, has intervened on the Board's behalf.

The Board had subject matter jurisdiction under Section 10(a) of the Act, which authorizes it to prevent unfair labor practices affecting commerce. 29 U.S.C. § 160(a)). The Board's Order is final. The Court has jurisdiction under Section 10(e) of the Act, and venue is proper because the unfair labor practices took place in Tennessee. 29 U.S.C. §160(e).

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[1] "A" references are to the appendix. "SA" references are to the supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's brief.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portion of its Order remedying the uncontested finding that the Company violated Section 8(a)(5) and (1) of the Act when, without providing the Union notice and an opportunity to bargain, it unilaterally implemented changes to its attendance policy in October 2013.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act when, without providing the Union notice and an opportunity to bargain, it made further changes to its attendance policy after October 2013.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by discharging employee Jermaine Brown pursuant to its unilaterally-implemented attendance policy change.

STATEMENT OF THE CASE

The Company asserts (Br. 4) that the history between the Union and the Company is "important background for this case," and the Board agrees because that history demonstrates the Company's flagrant disregard for its employees' rights under the Act and its steadfast refusal to recognize the Union after it won a July 2011 election. Previously, the Board, in two separate decisions, rejected the Company's objections and ballot challenges to that election, found that the

Company committed numerous unfair labor practices during the Union's campaign, certified the Union as the employees' collective-bargaining representative, and ordered the Company to bargain with the Union. *Ozburn-Hessey Logistics, LLC*, 362 NLRB 977 (2015); *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025 (2013), *affirmed* 361 NLRB 921 (2014). The Court of Appeals for the District of Columbia Circuit issued one decision enforcing both Board orders. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210 (2016).

While the Company was pursuing its ultimately unsuccessful challenge to the July 2011 election and the Union's certification, it unilaterally changed its attendance policy, without notifying the Union or giving it an opportunity to bargain. Later, it then unilaterally modified that new policy, and, relying on that subsequently changed policy, discharged an employee. Those unilateral changes and discharge are at issue in this case.

On March 30, 2016, following an investigation into a charge filed by the Union, the General Counsel issued a complaint and notice of hearing alleging that "about October 1, 2013" the Company violated Section 8(a)(5) and (1) of the Act by "chang[ing] the number of attendance points charged; and chang[ing] the circumstances under which attendance points are charged." (A 17.) The complaint also alleged that the Company violated Section 8(a)(5) and (1) of the Act by discharging Jermaine Brown pursuant to those unilaterally-implemented

attendance policy changes. (A 18.) On September 22, 2016, following a hearing, the Administrative Law Judge issued a decision and recommended order finding that the Company violated Section 8(a)(5) and (1) of the Act in October 2013 by unilaterally changing the attendance policy. The judge, however, dismissed the allegation concerning Brown's discharge. In doing so, the judge explained that he could not determine the legality of the Company's subsequent modification to its attendance policy because the complaint did not allege that change also violated the Act. In the judge's view, because the complaint did not allege a second unlawful change, any determination regarding Brown's discharge had to be based on "the policy before and after the mid-October 2013 change, not whether any later unilateral modifications of that change worked to [Brown's] detriment." (A 3, 12.) The General Counsel filed exceptions to the judge's decision and the Company filed a brief in opposition.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; the Employees Choose the Union as their Collective-Bargaining Representative

The Company is a nationwide provider of transportation, warehousing, and supply-chain management services, with its principal place of business in Memphis, Tennessee. (A 8; SA 76-80 stipulating to cases.) After a July 2011 election, the Company and the Union filed objections to the election which the Board ultimately resolved in the Union's favor. (A 8; SA 76-80.)

In November 2014, the Board certified the Union as the collective-bargaining representative of a unit of employees at the Company's Memphis warehouse. (A 8; SA 76-80.)

B. The Company's Disciplinary System and Pre-October 2013 Attendance Policy

Since at least February 2011, the Company has maintained a disciplinary system whereby it charges points to hourly employees for absenteeism and tardiness. (A 9; A 46-48.) The total number of points an employee accumulates over a given 52-week rolling basis determines the level of discipline he receives: four points for a written warning, eight points for a second written warning, twelve points for a final written warning, and thirteen points for termination. (A 9; A 46-48.) Points are excised one year after accrual, enabling employees the opportunity to reduce their point totals with the passage of time. (A 9; A 46-48.) The amount of points charged to an employee for a violation depends on the type of infraction. (A 9; A 46-48.) Under the policy in effect from February 2011 to October 2013 (the "3-point rule"), an employee who left work early without permission received three attendance points. (A 9; A 46-48.)

C. The Company Changes Its Attendance Policy So Employees Receive One Attendance Point, Instead of Three, for Leaving Work Early

In October 2013, at a time when the Company was refusing to bargain with the Union and challenging the Union's certification, the Company changed its

attendance policy. (A 9; SA 55-57, 65.) The October 2013 changes left the structure of the disciplinary points system intact, but, among other changes, reduced the number of attendance points that employees received for leaving work early, from three points to one ("new written policy" or "1-point policy"). (A 9; SA 55-57.)

In meetings called by the Company the week of October 14, 2013, to inform employees about the attendance policy changes, the Company announced the changes, distributed the new policy in writing, and obtained employees' signatures indicating that they had received the new policy. (A 9; SA 55-57, 71-72, 169-71.) The Company does not dispute that it failed to provide the Union with prior notice of the new written policy or an opportunity to bargain over it. (A 2, 9-10.)

D. The Company Unilaterally Modifies Its New Written Policy To Charge an Employee Two Points for Leaving Work Less than Two Hours into a Shift

Sometime after the October 2013 changes, again while the Company was challenging the Union's certification, the Company unilaterally modified its new written policy so that employees who left before they had worked two hours would receive two attendance points instead of one ("the 2-hour rule"). (A 9; SA 70.) The Company does not dispute that it made this change and that it did not provide the Union with notice of this change or the opportunity to bargain over it. The Company did not incorporate the 2-hour rule into its new written policy, and it did

not notify employees contemporaneously about this change. (A 2, 9-10.) In a September 2014 email to other managers, Regional Human Resources Manager Lisa Johnson confirmed that "[i]f an employee leaves before working a full 2 hours, then the employee will receive 2 points." (A 2, SA 70.)

E. The Company Charges Jermaine Brown with Attendance Points Pursuant to the 2-Hour Rule; the Company Discharges Brown after He Accumulates 13 Attendance Points

In April 2013, Jermaine Brown was hired by the Company as a full-time regular employee. He received the attendance policy then in effect. (A 9; SA 86-87.) He was assigned to work on the Company's Fiskar's account, one of the Company's four primary customer accounts serviced at the warehouse. (A 9; SA 82-85.) His supervisor was Verdia Jones. (A 9; SA 158.) In October 2013, Brown signed a document acknowledging his receipt of the Company's new written attendance policy. (A 9; SA 71.)

About a year later, on October 15, 2014, Jones informed Brown that he was being charged two points for leaving less than two hours into his shifts on both July 28 and October 10, 2014. (A 9; SA 88-92.) Unhappy with the point assessment, Brown spoke with Johnson, complaining that the new written policy provided that employees would be charged one attendance point, not two, for leaving early. (A 10; SA 94-100.) When Johnson could not provide a satisfactory answer, Brown spoke with Phil Smith, then Director of Operations, about his 2-

point penalty, explaining that nowhere in the new written policy did it say anything about two points for leaving early. (A 9-10; SA 100-06.) Smith responded that the policy did not say two points but that was what it meant. (A 9; SA 102.)

That same day, after Brown raised the issue with both Smith and Johnson, Jones presented him with a second written warning, which Brown refused to sign. (A 9-10; SA 108-10.) At that time, Brown had accumulated a 52-week rolling point-total of nine points, which included four points for leaving less than two hours into his shifts on July 28 and October 14. (A 10; SA 58.)

About 10 days later, Brown encountered new Director of Operations Christopher Brawley. (A 10; SA 111.) Brown explained to Brawley that he had received two points for leaving early and that it should have been one. (A 10; SA 115.) Brawley stated that he would look into it and get back to him. (A 10; SA 115.)

Thereafter, at a November 2014 meeting, Brawley announced to employees, including Brown, that any employee leaving less than two hours into their shift would receive two points, not one. (A 10; SA 137-43, 169-71.) Several employees at the meeting voiced their objection, noting that the new written policy stated that only one point would be charged for a leave-early. (A 10; SA 137-43.) Brawley did not respond. (A 10; SA 141-43.)

On December 12, 2014, Jones gave Brown a final written warning for having 13 combined points, including the four total points for leaving less than two hours into his shifts on July 28 and October 10. (A 10; SA 59, 117-18.) On April 27, 2015, he received another final written warning for having 12 combined points, again including the four points for the July 28 and October 10 leave-earlies. (A 10; SA 60, 120.) Brown refused to sign either warning. (A 10; SA 59-60.)

On July 1, 2015, Brown arrived late to work. (A 10; SA 121, 126, 171-72.) After verifying that Brown's cumulative 13-point total warranted termination, Johnson made the decision to discharge Brown. (A 10; SA 189-91.) She called Brown to her office, where she, Brawley, and Manager Jim Windisch explained to Brown that they were discharging him because of his total accumulated attendance points. (A 10; SA 122-25, 173-76.) Brown objected, noting that his point total included the two points each he had received for leaving less than two hours into his shifts on July 28 and October 10. (A 10; SA 122-25.) Brown told them that he had thought about taking the issue to the Union, but that he had hoped the Company was going to reconsider. (A 10; SA 124.) Windisch responded that they were not going to discuss Brown's complaint, and Johnson handed Brown his separation papers. (A 10; SA 61-62, 124.) Brown called Union representative Ben Brandon to tell him that he was terminated because the Company changed the attendance policy. (A 10; SA 150-53.) The Union was not aware of the attendance

policy changes until that time, and did not see the actual new written policy until the hearing. (A 10; SA 150-51, 156.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 24, 2018, the Board (Members Pearce, Kaplan, and Emanuel), in the absence of exceptions, agreed with the judge that the Company violated Section 8(a)(5) and (1) of the Act by changing its attendance policy in October 2013 without affording the Union an opportunity to bargain. The Board, however, in disagreement with the judge, found two additional violations. Specifically, the Board also found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the 2-hour rule and by discharging Jermaine Brown pursuant to that unlawfully-implemented policy. In so doing, the Board disagreed with the judge's conclusion that it could not determine the legality of the unilaterally implemented 2-hour rule because it was not specifically alleged in the complaint. Citing the well-established principle that the Board can find and remedy a violation even in the absence of a specific complaint allegation, the Board found that because the 2-hour rule was closely connected to the subject matter of the complaint and fully litigated at the hearing, it could find that the Company's implementation of the 2-hour rule and its application of it to Brown were unlawful. Noting that the Company did not dispute its unilateral implementation of the rule and that it admitted that it discharged Brown pursuant

to that rule, the Board then found that the Company violated Section 8(a)(5) and (1) by unilaterally implementing the 2-hour rule and by discharging Brown in reliance on that unlawful rule. (A 3-4.)

The Board's Order requires that the Company cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). It also requires that the Company rescind the unlawful changes to its attendance policy, and, upon the Union's request, bargain over terms and conditions of employment. In addition, the Order specifies that the Company offer Brown reinstatement to his former job, or, if it no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings. Finally, the Order requires that the Company remove from its files any reference to Brown's discharge, notify Brown of such and that his discharge will not be used against him in any way, and post a remedial notice. (A 4.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's findings that the Company committed three violations of Section 8(a)(5) and (1) when, prior to the Union's certification and during the pendency of its election objections, it (1) unilaterally altered its attendance policy to reduce the number of attendance points that

employees received for leaving work from three to one, (2) subsequently modified that policy to create a 2-hour rule that assessed employees two points if they left work less than two hours into their shift, and (3) discharged an employee pursuant to the 2-hour rule.

The Company does not dispute that it engaged in this conduct. It raises no challenge to the Board's finding as to the first violation, and the Board is therefore entitled to summary enforcement of that portion of its Order. As to the second violation, the Company argues that the Board should not have found that the 2-hour rule violated the Act because the complaint did not contain an allegation specific to that rule. The Board, however, applying the well settled principle that it can find and remedy a violation even in the absence of a specified complaint allegation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated," properly found that the Company's unilateral implementation of the 2-hour rule violated the Act. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990). The complaint allegation and the 2-hour rule were closely connected; both involved the same facts and the same issue, namely whether the Company's unilateral modifications to its attendance policy violated Section 8(a)(5) and (1) of the Act. The Company also had the notice necessary to fully and fairly litigate the validity of the 2-hour rule. Prior to the hearing, the General Counsel informed the Company that the 2-hour

rule's legality would be at issue, and the Company acted in accord with that knowledge at the hearing, directly examining its witnesses and cross-examining the General Counsel's witnesses about the rule's implementation.

Substantial evidence also supports the Board's finding that Brown's discharge pursuant to the unlawful 2-hour rule violated the Act. At the hearing, the Company admitted that it discharged Brown pursuant to the that rule. Nonetheless, the Company claims that its 2-hour rule did not cause Brown's termination because under its previous policy, where employees received three attendance points instead of one for leaving work early, Brown would have been discharged earlier. But the Board properly found the Company acted at its peril in creating its new written attendance policy. Having created that new status quo upon which Brown had reasonably relied, the Company could not therefore rely on its former rule to claim that Brown would have been discharged even in the absence of its unlawful 2-hour rule. Moreover, the Company's argument failed to address the significant harm its unilateral changes caused to the Union's representative status.

STANDARD OF REVIEW

On review, the Board's findings of fact will be upheld if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Squier Distrib. Co. v. Local 7, Int'l Bhd. of Teamsters*, 801 F.2d 238, 241 (6th Cir. 1986). The Board's

application of the law to particular facts is also reviewed under the substantial-evidence standard. *Exum v. NLRB*, 546 F.3d 719, 724 (6th Cir. 2008). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. *Accord Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2018). Accordingly, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. *Accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000).[2]

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTION OF ITS ORDER REMEDYING THE UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN, WITHOUT PROVIDING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN, IT UNILATERALLY IMPLEMENTED CHANGES TO ITS ATTENDANCE POLICY IN OCTOBER 2013

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[2] The Company claims (Br. 9) the primary issue here is a legal one and therefore warrants *de novo* review. The issue of a unilateral change, however, requires the application of law to the facts and is therefore reviewed under the substantial evidence standard, as discussed above. To the extent the Company advocates *de novo* review of the Board's finding that it can determine and remedy a violation not alleged in the complaint, such a standard is contrary to the principle that "[w]hether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make every case unique; a determination of whether there has been full and fair litigation must therefore be made on the record in each case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990).

In the absence of exceptions, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5)(1)) when, without giving the Union notice and an opportunity to bargain, it unilaterally changed its attendance policy in October 2013, reducing the number of attendance points that an employee receives for leaving work early from three points to one. *See Loral Defense Sys.-Akron v. NLRB*, 200 F.3d 436, 448-49 (6th Cir. 1999) (explaining that an employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes to employees' terms and conditions of employment without giving the union notice and opportunity to bargain). In its opening brief, the Company does not challenge that finding. Under this Court's practice, "[t]he failure of a party to challenge the merits of any portion of a Board decision and order constitutes an abandonment of any issues that may arise thereunder and entitles the Board to summary enforcement of that portion of its decision and order." *NLRB v. Pinnacle Metal Prod. Co.*, 69 F. App'x 206, 207 (6th Cir. 2003); *see also NLRB v. Autodie Int'l, Inc. v. NLRB*, 169 F.3d 378, 381 (6th Cir. 1999) (Board entitled to summary enforcement of violations not contested in opening brief); Fed. R. App. 28(a)(8)(A) (brief must contain party's contentions with citations to authorities and record). Moreover, this Court is jurisdictionally barred from considering any challenges to this violation under Section 10(e) of the Act, 29 U.S.C. §160(e), because the Company failed to except to this finding before the Board. *See* 29 U.S.C. §160 (e)

(providing that "[n]o 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, 665-66 (1982); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 843 (6th Cir. 2003) (granting summary enforcement for failure to timely challenge issue before the Board). Given the Company's failure to raise the issue before the Board and this Court, the Board is entitled to summary enforcement of the portion of its Order remedying the Company's unlawful unilateral implementation of its 1-point policy.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN, WITHOUT PROVIDING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN, IT MADE CHANGES TO ITS ATTENDANCE POLICY AFTER OCTOBER 2013

A. An Employer Violates the Act When it Unilaterally Changes Employees' Terms and Conditions of Employment

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" as required by Section 8(d). 29 U.S.C. § 158(a)(5). Section 8(d) of the Act sets forth the parameters of this obligation, requiring that the parties "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).

An employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes to mandatory subjects of bargaining without first affording the collective-bargaining representative of its employees notice and the opportunity to bargain.[3] *NLRB v. Katz*, 369 U.S. 736, 737 (1962). *Accord Loral Defense Sys.*, 200 F.3d at 449. Unilateral action with respect to any mandatory subject of bargaining is prohibited "for it is a circumvention of the duty to negotiate which frustrates the objective of [S]ection 8(a)(5) much as does a flat refusal [to bargain]." *Katz*, 369 U.S. at 743. As this Court has stated, affording the union notice and opportunity to bargain are essential to the collective-bargaining process because without it, an employer's changes to terms and conditions of employment serve to "minimize[] the influence of organized bargaining and emphasize[] to the employees that there is no necessity for a collective bargaining agent." *Loral Defense Sys.*, 200 F.3d at 449 (citing *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)) (internal quotations omitted).

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[3] Conduct that violates Section 8(a)(5) also derivatively violates Section 8(a)(1), *NLRB v. Galicks*, 671 F.3d 602, 608 n.2 (6th Cir. 2012), which prohibits employer actions that "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" under the Act, 29 U.S.C. § 158(a)(1).

Mandatory subjects of bargaining are those encompassed in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981). *Accord NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112, 1115 (6th Cir. 1989). The Board and this court have held that attendance policies are mandatory bargaining subjects. *Dorsey Trailers*, 327 NLRB 835, 852 n. 26 (1999), *enforced in relevant part*, 233 F.3d 831, 838-39 (4th Cir. 2000); *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863 (6th Cir. 1990) (employer's unilateral change to tardiness policy involved term or condition of employment over which employer had duty to bargain).

When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences not on the date of certification, but as of the date of the election. *Alta Vista Regional Hosp.*, 357 NLRB 326, 326-27 (2011), *enforced sub nom., San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012). Thus, an employer acts at its peril in making changes to terms and conditions of employment during the period that objections to an election are pending and a final certification determination has yet to be made. *Id; Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974),

enforcement denied on other grounds, 512 F.2d 684 (5th Cir. 1975); *King Radio Corp., Inc.*, 166 NLRB 649, 652 (1966), *enforced*, 398 F.2d 14 (10th Cir. 1968).

Where the Board's final determination on objections to an election results in the certification of a representative, the Board holds the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes during the interim period. *Alta Vista*, 357 NLRB at 327. This is because such interim unilateral changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. *Id.* The rule prevents an employer from "box[ing] the union in on future bargaining positions" and serves to discourage the employer from postponing bargaining obligations by filing spurious challenges to an election. *Id*; *NLRB v. Sandpiper Convalescent Ctr.*, 824 F.2d 318, 320 (4th Cir. 1987) (citing *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984)).

B. The Company Violated the Act by Implementing the 2-Hour Rule Without Affording the Union Notice and Opportunity to Bargain

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally modifying its new written attendance policy. (A 3.) Specifically, under the new written policy announced in October 2013, employees who left work early would receive one attendance point. The Company does not dispute that sometime after October 2013, it unilaterally

modified that new policy so that employees who left work before they had worked two hours would receive two attendance points. (A 3.) The Company also does not dispute that it changed this rule without affording the Union notice and opportunity to bargain. (A 3.) The Company made this change while its objections to the election were pending, and in doing so, it acted "at its peril," risking a violation should, as happened here, the final determination of its election challenge results in the Union's certification. (A 4 n.8, 8; SA 76-80.) Thus, because the Company does not contest it made the change, and that it did so without consulting the Union, the Board properly found a violation.[4] (A 3.)

Although the Company does not dispute the merits of the Board's finding that it implemented the 2-hour rule without consulting with the Union, it argues that the Board should never have considered the issue because the complaint failed to allege that the Company had unlawfully made a second change to the policy. The Board, however, "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296

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[4] The Company claims that "exactly when and how" the 2-hour rule was communicated to employees is a disputed fact. (Br. 6 n.2.) But this claim ignores that the Board specifically found that the rule was implemented "some time after October 2013," and that finding was sufficient to support a violation, particularly when the Company does not dispute it implemented the rule and did so without notifying the Union. (A 2 n.5.)

NLRB at 334. Applying this established legal standard, the Board properly concluded that "both criteria are met here" and found that the Company's implementation of the 2-hour rule was unlawful. (A 3-4.)

1. Closely connected

A close connection exists between the complaint allegation and the violation found where, *inter alia*: the complaint indicates the section of the Act that was allegedly violated and who allegedly engaged in unlawful activity; the kind of behavior that is alleged to be unlawful in the complaint is similar to the behavior found unlawful; and the particular found violation is relevant to the general complaint allegation. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003) (citing *Pergament*, 296 NLRB at 334). As discussed below, the Board's finding that the Company unlawfully implemented the 2-hour rule is closely connected to the subject matter of the complaint because both the finding and the allegation address the same facts and the same issue. And pre-trial communications further establish that the Company had notice that 2-hour rule was at issue.

The Board's finding that the Company unlawfully implemented the 2-hour rule is closely connected to the subject matter of the complaint because both the finding and the allegation address the same facts and the same issue. (A 3.) The complaint alleged in relevant part that "[a]bout October 1, 2013, Respondent, for

attendance violations [] changed the number of attendance points charged; and [] changed the circumstances under which attendance points are charged," and that "[a]s a result of Respondent's conduct described above . . . , Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act."[5] (A 17-18.) The complaint also stated that "[a]s a result of the Respondent's conduct described above . . . , Respondent discharged its employee Jermaine Brown." (A 18.) Given that language, the Board correctly found that, "it is apparent" that the 2-hour rule is "closely connected" to subject matter of the complaint and "arises from the same set of facts as the October 2013 written policy change." (A 3.) Both involve the Company's changes to its attendance policy and the points that employees would receive for leaving work early. Indeed, the Company all but admits (Br. 6) the close factual connection, explaining that "the Two-Hour Rule was an interpretation of the New Attendance Policy." Given this claim, the Company's argument (Br. 14) that there is a "logical incoherence" to the Board's finding of a "close connection" rings hollow.

Further, the ultimate issue is the same in both instances—whether the Company implemented a change to its attendance policy without giving the Union notice and an opportunity to bargain—and requires the Company to mount similar,

[5] Record references to "Respondent" are to the Company.

if not identical, defenses. *See Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 233 (4th Cir. 2015) (close connection between complaint alleging disparate enforcement of rule and found violation of unlawful rule change where "core issue" was how the employer handled union literature in an employee breakroom); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993) (finding no prejudice to employer where alleged theory and pled theory involve same defenses). Thus, both the pled and unpled allegation concern similar violations of the same section of the Act, Section 8(a)(5) and (1). *See Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1137 n.3 (4th Cir. 1982) (Board did not err in finding unalleged 8(a)(1) violation where employer had "ample notice" because of a similar 8(a)(1) violation alleged); *Casino Ready Mix*, 321 F.3d at 1199-2000 (close connection between alleged 8(a)(1) violation and unalleged 8(a)(1) violation found). Moreover, the complaint establishes the connection between Brown's discharge and the 2-hour rule, specifically alleging that the Company's attendance policy changes resulted in Brown's discharge, and notably, the Company admitted that it discharged Brown pursuant to its 2-hour rule. (A 3; A 17-18, SA 175-76, 189-91.)

Furthermore, any doubt about the subject matter of the complaint was resolved three months before the hearing when the General Counsel, in response to Company counsel's inquiry asking "[w]hat specifically is the alleged unilateral

change to the attendance policy," explained that the unilateral change "includ[ed] the later decision to assess two attendance points to employees who leave work early within the first two hours of the employees' shift." (A 3; SA 73-75.) The General Counsel further expounded that it "would argue that all employees who were disciplined or discharged pursuant to the unilaterally-implemented attendance policy, most specifically those employees who were assessed two points for leaving early within the first two hours of a shift," would be entitled to have such discipline or discharge rescinded. (A 3; SA 73-75.) Given this exchange, the Company cannot now claim that it was in the dark that the 2-hour rule would be an issue at the hearing; rather, the Company "knew from the outset that the thing complained of" was the validity of that rule. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349-50 (1938) (affirming Board finding that employer unlawfully failed to rehire employees because of union activities, though complaint alleged unlawful discharge).

The purpose of the "closely connected" inquiry is to ensure that the employer had notice of the acts forming the basis of the complaint. *See Serv. Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 447 (2d Cir. 2011) (citing *NLRB v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 87 (2d Cir. 1987)). Given the circumstances set forth above, the Board reasonably found "apparent" the close connection between the 2-hour rule and the subject matter of

the complaint, and that the Company was afforded sufficient notice that the legality of the 2-hour rule would be at issue during the hearing. (A 3.)

2. Fully and fairly litigated

In determining whether an unalleged issue was fully and fairly litigated, the Board and courts consider, among other things, whether the employer had an opportunity to cross-examine the General Counsel's witnesses about the alleged violation and put its own witnesses on the stand to rebut those witnesses, and whether the employer would have altered its litigation strategy had the issue been specifically alleged in the complaint. *See Intertape Polymer*, 801 F.3d at 232-33; *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122 (D.C. Cir. 2001); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136-37 (2d Cir. 1990). Here, the Board reasonably found that the 2-hour rule and its application to Brown were fully and fairly litigated because the Company had the opportunity to cross-examine the General Counsel's witness and to question its own witnesses about the rule and Brown's discharge. (A 3.)

The Company's behavior at the hearing undermines any claim that it lacked notice that the lawfulness of the 2-hour rule was at issue. As the Board noted (A 3), the Company had the opportunity to cross-examine the General Counsel's witnesses, Jermaine Brown and co-worker Troy Hughlett, about the roll-out of the 2-hour rule. (SA 116, 127, 134, 137-41, 144.) Indeed, on cross-examination, the

Company's counsel questioned Brown specifically about his violations of the 2-hour rule (SA 128-31), and asked Hughlett about whether and when he learned from management about the 2-hour rule (SA 145-48). *See Casino Ready Mix*, 321 F.3d at 1200 (finding unalleged coercive statement fully litigated where respondent had opportunity to cross-examine witness).

The Company also questioned its own witnesses about the 2-hour rule. (A 3; SA 159-64, 167-71, 179-88, 204-05.) For instance, the Company questioned Regional Human Resources Manager Johnson about implementation of the 2-hour rule, and specifically discussed her statement in an email—offered as an exhibit by the General Counsel—where she had stated that "[i]f the employee leaves before working a full 2 hours, then the employee will receive 2 points." (A 2-3; SA 70, 179-88.) Johnson also testified that Brown was discharged pursuant to that rule. (SA 189-91.) The Company also questioned Human Resources Director Shannon Miles about the implementation of the 2-hour rule, and she testified that it was her decision to implement that rule. (A 3; SA 204-05.) Brown's Supervisor, Verdia Jones, and Director of Operations Chris Brawley similarly testified for the Company about the implementation of the 2-hour rule, with Brawley discussing Brown's discharge pursuant to that rule. (A 3; SA 159-64, 167-71, 175-76.) Given its cross-examination of the General Counsel's witnesses about the 2-hour rule, as well as its exploration of the issue with its own witnesses, the Company

cannot now claim that the validity of that rule was not fully and fairly litigated. *See Tasty Baking*, 254 F.3d at 122 (conduct implicated in the found violation fully and fairly litigated where employer had full opportunity to cross-examine General Counsel's witnesses about the alleged violation and to put its own witnesses on the stand to rebut those witnesses); *Williams Pipeline Co.*, 315 NLRB 630, 630 (1994) (opportunity to explore unalleged violation at hearing renders issue fully and fairly litigated).

Finally, as the Board noted, there is no indication that had a second, independent policy change been specified in the complaint, the Company would have altered its litigation strategy, nor does the Company make any such claim to the Court. (A 3.) *See Pergament*, 920 F.2d at 137 (refuting claim that employer would have altered litigation strategy where employer had notice of the unalleged issue and actively litigated that issue during the hearing). Rather, as demonstrated above, from the beginning, the Company had notice of the issue through a pre-hearing email exchange with the General Counsel. Moreover, its conduct during the hearing, including its questioning of its own witnesses, demonstrates that it knew the validity of the 2-hour rule was at issue.

3. The Company's challenges lack merit

The Company challenges (Br. 11-14) the Board's *Pergament* analysis, claiming that it departs from precedent and improperly relies on an unpled

allegation of fact. But the Company fails to show how its cases require a different result, rendering its challenges wholly without merit.

The Company (Br.12) cites to *Champion International Corporation* for the agreed-upon principle that "a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is," but it does not show how the Board acted contrary to that principle here. 339 NLRB 672, 673 (2003). In that case, the Board refused to find a separate violation of direct dealing where the complaint alleged an unlawful unilateral change, explaining that the two violations are "two different things, and the allegations and defenses are different." *Id.* Here, as discussed above, the complaint allegation and the 2-hour rule involve similar facts, issues, and defenses.

The Company likewise gains no ground with its other cases (Br. 12-13). In *Lamar Advertising*, the Board refused to find a Section 8(a)(4) violation based on an unpled theory where there was "no exploration on either direct or cross-examination" of that theory and whether neither party sought to develop any evidence on that issue at the hearing. 343 NLRB 261, 266 (2004). These facts stand in stark contrast to the instant case, where both parties fully explored the Company's 2-hour rule's implementation and application at the hearing. The Company's reliance on *Independent Electrical Contractors of Houston v. NLRB* is inapplicable for similar reasons. 720 F.3d 543 (5th Cir. 2013). There the court

refused to find a Section 8(a)(1) violation based on a "novel" theory not alleged in the complaint or pursued at the hearing and which required "different proof" than the pled Section 8(a)(3) allegation. *Id.* at 552-54. Here, the underlying theory of both violations and the required proof are similar, if not identical.

The Company (Br. 13) misses the mark with its claim that the violation relies on an "unpled allegation of fact," namely that the 2-hour rule was implemented after October 2013. In making this argument, the Company relies on *GPS Terminal Services*, 333 NLRB 968 (2001). This case, however, is not like *GPS Terminal*, where the Board found that the judge improperly amended the complaint over the General Counsel's objection to include a purely factual allegation that a picket line included union members. *Id.* at 968-69. Rather, the issue here is whether the Board can find a violation when "an unalleged unfair labor practice [is] claimed to have been fairly litigated"—the very type of situation the Board identified in *GPS Terminal* as appropriate for the application of *Pergament*. *Id.* at 969 n.9.

In any event, the Company has failed to show how the absence of this factual allegation failed to provide notice that the 2-hour rule was at issue. Indeed, the timing of the rule's implementation is irrelevant to the violation, which required the General Counsel to show that the Company unilaterally modified its

attendance policy without giving the Union an opportunity to bargain—facts that the Company does not dispute and facts which were alleged in the complaint.

Finally, the Company's claim that the Board deprived it of due process lacks merit. As an initial matter, the Board addressed the Company's due process concerns by applying the *Pergament* standard, and properly found "no infringement of the [Company's] due process rights." (A 3.) *See Pergament*, 920 F.2d at 134 ("In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated.").

The Company offers no support for this claim other than its general assertion (Br. 16) that the Board "violated [its] due process rights" by finding an unalleged unfair labor practice. And the cases it cites serve only to support the Board's finding. Thus, in *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (Br. 15), this Court stated that "[t]he fundamental elements of procedural due process are notice and an opportunity to be heard." As detailed above (pp. 23-29), however, these requirements were met here. The Company was on notice that the 2-hour rule was an issue and it had every opportunity to defend the legality of that rule at the hearing.

For the same reasons, *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 542 (6th Cir. 1984) (Br. 14-15), also does not support the Company's due process claim. There, the court determined that the Board could not find a violation that was not alleged in the complaint because the General Counsel had explicitly assured the employer that no unalleged charge was sought, only one witness testified to the unalleged issue, and the unalleged allegation was "remedially more severe" than the alleged violation. *Id.* at 542. Here, the General Counsel explicitly informed the Company that the complaint included the 2-hour rule within its scope, the Company took advantage of the opportunity to be heard by presenting its own witnesses with questions about the 2-hour rule, and the remedy for both Section 8(a)(5) charges is the same: an order to rescind the unlawful change and bargain at the Union's request. Given these facts, the Court should reject the Company's ill-supported attempt to mount a due process challenge..

In sum, this is not a case where the Company was blindsided by a last-minute factual allegation. The language of the complaint itself, as well as the pre-hearing email from the General Counsel, provided the Company more than adequate notice that the unlawfulness of the unilaterally-implemented 2-hour rule leading to Brown's discharge would be litigated.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE JERMAINE BROWN PURSUANT TO ITS UNILATERALLY-IMPLEMENTED ATTENDANCE POLICY CHANGE

If an employer's unlawful, unilaterally-imposed rule was a factor in the discipline or discharge of an employee, the discipline or discharge violates Section 8(a)(5) and (1) of the Act. *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994), *enforced*, 67 F.3d 299, (6th Cir. Oct. 3, 1995); *Equitable Gas Co.*, 303 NLRB 925, 931 fn. 29 (1991), *enforcement denied on other grounds*, 966 F.2d 861, 867 (4th Cir. 1992); *Great Western Produce*, 299 NLRB 1004, 1005 (1990), *overruled on other grounds*, *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007). Substantial evidence supports the Board's finding that the Company violated Section 8(5) and (1) when it discharged Brown.

As the Board noted (A 3), the Company "admits" that it discharged Brown pursuant to the unilaterally implemented 2-hour rule. Indeed, Company officials admitted that it fired Brown because his point total reached the termination threshold—a threshold that was calculated by applying the unlawfully implemented 2-hour rule so that Brown received four points for leaving early on July 28 and October 10. (SA 61-62, 173-76, 189-91.) Under the previous 1-point policy, Brown would not have accumulated enough attendance points to reach the termination threshold on July 1, 2015. Thus, absent unlawful imposition of the 2-

hour rule, Brown would not have been discharged.

The Company disputes that its unilateral changes to the attendance policy caused Brown's discharge. (Br. 10-11.) At the outset, this argument ignores the Board's findings, discussed above, that the Company admitted it applied the 2-hour rule in determining whether Brown met the threshold limit for discharge. Moreover, the Company further argues (Br. 10) that it does not owe Brown reinstatement or backpay because it would have discharged Brown even absent its unilaterally implemented 2-hour rule. The Company seems to contend that its modifications benefited Brown and did not cause his discharge because he would have been discharged earlier pursuant to the Company's pre-October 2013 policy, where employees received three points for leaving work early. This argument, however, applies the wrong attendance policies. It also misunderstands the gravamen of the violation as well as the role the Company played in creating the circumstances in which it finds itself.

The Board properly found that the Company cannot rely on its former attendance policy to establish the parameters by which to determine the legality of Brown's discharge; rather, it must rely on the rule in effect at the time of the discharge. As the Board explained (A 4 n.8), the Company created the new written policy whereby employees who left work early would receive one attendance point "at its peril." Having created that policy, the Company "cannot rely on the pre-

October 2013 attendance policy to assert that Brown would have been discharged even in the absence of [its] unlawful implementation of the 2-hour rule." (A 4 n.8.) This is because the Company's unlawful implementation of its 1-point policy "created a new status quo, upon which Brown understandably relied" and used to guide his conduct. (A 4 n.8.) Relying on that new status quo, as set forth in the policy that he signed, Brown expected to receive one point, not two, for each day that he left early. Had the Company applied the 1-point policy, Brown would not have accumulated enough points for discharge, and had Brown known of the 2-hour rule, he could have adjusted his conduct accordingly. The Board (A 4 n.8) recognized the "seeming inconsistency" of finding that Brown was discharged because he relied on one unlawful change (the new written policy) that benefitted him but was discharged pursuant to a later unlawful change (the 2-hour rule) that did not. But as the Board explained, "that is a dilemma of the [Company's] own making" and one that it created by repeatedly bypassing the Union in favor of making unlawful unilateral changes. (A 4 n.8.)

In addition, by focusing on Brown and the remedy he is owed, the Company's argument ignores the gravamen of the violation—which is the Company's undeniable harm to the Union and the collective-bargaining process. As the Board explained, the focus of an unlawful discharge under Section 8(a)(5) "must be on the injury to the union's status as bargaining representative." (A 4

n.8, citing *Great Western Produce*, 299 NLRB at 1005.) That status "is harmed each time an unlawfully changed term or condition of employment is applied." *Id.* Having unlawfully shunned its bargaining obligation to unlawfully create a new status quo, the Company cannot now seek refuge from liability by relying on its former policy.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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March 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Nos. 18-2103
Respondent/Cross-Petitioner	)	18-2217
	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its proof brief contains 8,368 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 11th day of March, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
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	)	Nos. 18-2103
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	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth 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.

/s/David Habenstreit
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Dated at Washington, DC
this 11th day of March, 2019