

ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 20-1280, 20-1321

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

800 RIVER ROAD OPERATING COMPANY, LLC d/b/a
CARE ONE AT NEW MILFORD,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

On Petition For Review From a Decision And Order of
The National Labor Relations Board

BRIEF OF PETITIONER

Brian J. Gershengorn
Seth D. Kaufman
FISHER & PHILLIPS LLP
The New York Times Building
New York, NY 10018
(212) 899-9960

Stephen C. Mitchell
FISHER & PHILLIPS LLP
The New York Times Building
New York, NY 10018
(212) 255-0000

Attorneys for Petitioner

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
PARTIES AND AMICI**

Parties.

The parties to this appeal are 800 River Road Operating Company, LLC d/b/a Care One at New Milford (Respondent in the underlying agency matter and Petitioner and Cross-Respondent herein), the National Labor Relations Board (Respondent and Cross-Petitioner herein), and 1199 SEIU United Healthcare Workers East (Charging Party in the underlying agency matter and Intervenor herein).

Amici Curiae.

No persons or entities were *amici* in the underlying agency matter or are *amici* in this Court.

RULINGS UNDER REVIEW

Petitioner seeks review of the National Labor Relations Board's Decision and Order in the matter of "800 River Road Operating Company LLC, d/b/a Care One at New Milford *and* 1199 SEIU, United Healthcare Workers East," dated June 23, 2020 and reported at 369 NLRB No. 109, that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by reducing the work hours of 20 bargaining unit employees without notifying and offering to bargain with the Union.¹

¹ Petitioner is not seeking review of the ruling in the Decision and Order dismissing the allegations that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National

RELATED CASES

Counsel is aware of no related cases currently pending in this Court or in any other court.

Labor Relations Act by not providing the Union notice and an opportunity to bargain prior to taking certain discipline.

CORPORATE DISCLOSURE STATEMENT

800 River Road Operating Company LLC d/b/a Care One at New Milford declares that its sole member is THCI of New Jersey, LLC and that no publicly held company has a 10% or greater interest in any of the entities identified above.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vi
GLOSSARY OF ABBREVIATIONS	ix
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES	1
STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	4
I. Background	4
II. In its Case-In-Chief, CGC Merely Submitted Limited Payroll Records Without Context or Explanation	5
III. The Center Submitted Evidence that the “Status Quo” as of the Union’s March 2012 Election was That Full-Time Employees Accumulated 37.5 Hours or More per Week	12
SUMMARY OF ARGUMENT	16
STANDING	19
ARGUMENT	20
I. This Court Must Not Enforce a Board Decision that is Unsupported by Substantial Evidence or Where the Board Has Acted in an Arbitrary or Capricious Manner	20

II. The Board Incorrectly Determined that CGC Met its Burden of Proving that the Center Changed or Altered the “Status Quo”21

 A. A Necessary Component of a Section 8(a)(5) Violations is that the Employer Changed or Altered the “Status Quo”21

 B. The "Status Quo" at the Center was that Full-Time Employees Accumulated 37.5 Hours or More Per Week.....23

 C. The Board’s Decision and Order was not Supported by Substantial Evidence Because ALJ Green Impermissibly Discounted the Wage & Benefit Summary25

 D. ALJ Green and the Board Erred in their Legal Analysis by Failing to Consider the Issue of Properly Defining the “Status Quo”29

 i. ALJ Green Skipped Over the Issue of Defining the “Status Quo”29

 ii. ALJ Green Incorrectly Presumed the “Status Quo” was a 40-Hour Workweek32

 iii. The Board Failed to Properly Review ALJ Green’s Flawed Decision.....38

CONCLUSION40

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Acme Die Casting v. NLRB</i> , 93 F.3d 854 (D.C. Cir. 1996).....	34
<i>Columbia Memorial Hospital</i> , 362 NLRB 1256 (2015)	39
<i>Comau, Inc. v. NLRB</i> , 671 F.3d 1232 (D.C. Cir. 2012).....	19
<i>Daily News of Los Angeles</i> , 315 NLRB 1236 (1994)	22
<i>Daily News of Los Angeles v. NLRB</i> , 73 F.3d 406 (D.C. Cir. 1996).....	22, 23, 28
<i>E.I. Du Pont De Nemours</i> , 364 NLRB No. 113, slip op. (Aug. 26, 2016), <i>rev'd on other grounds</i> , <i>Raytheon Network Centric Systems</i> , 365 NLRB No. 161 (2017).....	22, 33
<i>Electronic Data Sys. Int'l Corp.</i> , 278 NLRB 125 (1986)	32
<i>Fred Meyer Stores, Inc. v. NLRB</i> , 865 F.3d 630 (D.C. Cir. 2017).....	20, 21, 27, 29, 39
<i>Jacoby v. NLRB</i> , 233 F.3d 611 (D.C. Cir. 2000).....	21, 33
<i>Mathews Readymix, Inc. v. NLRB</i> , 165 F.3d 74 (D.C. Cir. 1999).....	27
<i>Miller Waste Mills, Inc.</i> , Case No. 18-CA-16411, 2003 WL 22135398 (NLRB Div. of Judges Sept. 11, 2003)	23
<i>Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	20, 21

<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	21
<i>NLRB v. Noel Canning</i> , 134 S.Ct. 2550 (2014).....	5, 37
<i>Pacific Diesel Parts Company</i> , 203 NLRB 820 (1973)	23
<i>In re Post-Tribune Co.</i> , 337 NLRB 1279 (2002)	22, 28
<i>Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985).....	20, 33
<i>Raytheon Network Centric Systems</i> , 365 NLRB No. 161 (2017)	22, 30
<i>S&F Mkt. St. Healthcare LLC v. NLRB</i> , 570 F.3d 354 (D.C. Cir. 2009).....	21
<i>TruServ Corp. v. NLRB</i> , 254 F.3d 1105 (D.C. Cir. 2001).....	27
<i>Warshawsky v. NLRB</i> , 182 F.3d 948 (D.C. Cir. 1999).....	27
<i>Windsor Redding Care Center, LLC v. NLRB</i> , 944 F.3d 294 (D.C. Cir. 2019).....	20, 21, 29, 30

Statutes

28 U.S.C. § 2112.....	2
29 U.S.C. § 158(a)(1).....	1
29 U.S.C. § 158(a)(5).....	2
29 U.S.C. § 160(e)	1, 2
29 U.S.C. § 160(f).....	1, 2, 19

Rules

Fed. R. App. P. 32(a)(5).....41

Fed. R. App. P. 32(a)(6).....41

Fed. R. App. P. 32(a)(7)(B)41

Fed. R. App. P. 32(f).....41

GLOSSARY OF ABBREVIATIONS

Term	Abbreviation
National Labor Relations Act (29 U.S.C. §151 <i>et seq.</i>)	Act
National Labor Relations Board	Board
800 River Road Operating Company, LLC d/b/a Care One at New Milford	Petitioner or the Center
The Board's Counsel for the General Counsel	CGC
1199 SEIU, United Healthcare Workers East	Union
Administrative Law Judge Benjamin Green	ALJ Green
ALJ Green's November 20, 2018 Decision	Decision
The Board's June 23, 2020 Decision and Order, Reported at 369 NLRB No. 109	Decision and Order

STATEMENT OF JURISDICTION

The Board's June 23, 2020, Decision and Order, reported at 369 NLRB No. 109, is a final decision from which an appeal is appropriate because Petitioner is aggrieved by it. This Court has jurisdiction of this Petition for Review pursuant to 29 U.S.C. §§ 160(e) and (f). The Petition for Review was timely filed on July 24, 2020. The National Labor Relations Board filed a Cross-Application for Enforcement on August 19, 2020, pursuant to 29 U.S.C. §§ 160(e) and (f), which this Court directed be consolidated with Petitioner's Petition for Review and treated as a cross-appeal thereto.²

STATEMENT OF ISSUES

Did ALJ Green and the Board err in not properly analyzing or defining the "status quo" from which any alleged unilateral reduction of hours would be measured?

STATUTES AND REGULATIONS

29 U.S.C. § 158(a)(1):

² References herein to the Complaint dated March 30, 2018, the transcript of the record of the hearing held before ALJ Green on July 10, 2018, exhibits introduced at the hearing by Petitioner and Counsel for the General Counsel, CGC's Post-Hearing Brief, ALJ Green's Decision dated November 20, 2018, and the Board's Decision and Order dated June 23, 2020 and reported at 369 NLRB No. 109, shall be made, respectively, as follows: "Compl. __," "Tr. __," "PX __," "GCX __," "CGC P-H Br. __," "ALJ __," and "Bd. __."

It shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]....

29 U.S.C. § 158(a)(5):

It shall be an unfair labor practice for an employer...to refuse to bargain collectively with the representatives of his employees....

29 U.S.C. § 160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]...[The court] shall have the power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. ...The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....

29 U.S.C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside....Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

STATEMENT OF THE CASE

On August 16, 2017, the Union filed a Charge in the instant case, which concerned actions allegedly taken by the Center while it was challenging the Union's certification as the collective bargaining representative of a unit of employees. (GCX 1(a).) On February 1, 2018, the Union filed its First Amended Charge (GCX 1(c)), and on March 30, 2018, Region 22 of the Board issued a Complaint and Notice of Hearing (GCX 1(e)). On April 26, 2018, the hearing was rescheduled, and on June 29, 2018 the Charge and Complaint were amended and certain allegations in the Complaint were withdrawn. (GX 1(j), 1(l).) Among other allegations in the Complaint (the rest of which were either withdrawn by CGC both prior to or after the hearing, dismissed by the Board in its Decision and Order, or settled), the Complaint alleged that “[s]ince about February of 2013, [the Center] has unilaterally decreased bargaining-unit employees’ hours” without “providing notice to the Union and without affording the Union an opportunity to bargain...” (Compl. ¶¶ 19-20.)

A hearing on the Complaint was conducted by ALJ Green on July 10, 2018. During the hearing, CGC submitted a chart into evidence listing 20 bargaining unit employees who CGC was specifically alleging had their hours reduced from 40

hours per week to 37.5 hours per week, which is the subject of the instant appeal. (GCX 10(a); Tr. 16-17.) On August 14, 2018, the parties filed their Post-Hearing Briefs with ALJ Green. On November 20, 2018, ALJ Green issued his Decision in which he sustained the allegation that the Center unilaterally decreased the hours of 20 bargaining unit employees identified by CGC without providing notice to and bargaining with the Union. On January 17, 2019, the Center timely filed exceptions and a supporting brief to ALJ Green's Decision, on March 14, 2019, CGC and the Union filed answering briefs, and on March 28, 2019, the Center filed a reply brief.³ On June 23, 2020, the Board issued its Decision and Order affirming the allegation that the Center unilaterally decreased the hours of 20 bargaining unit employees (and dismissing certain other allegations which are not the subject of the instant appeal). (Bd. 1 n.1.)

STATEMENT OF THE FACTS

I. Background

The Center is a rehabilitation and nursing facility located in New Milford, New Jersey, with over 200 beds available for residents. (GCX 4; Tr. 82.) On March 9, 2012, the Union won a representation election in Case 22-RC-073078 to represent

³ On July 1, 2019, the Union filed a Motion for Partial Withdrawal of the Charge, seeking to withdraw certain allegations regarding alleged unlawful discipline. On August 29, 2019, the Board denied the Union's Motion (*see* 368 NLRB No. 60). The allegations the Union sought to withdraw were ultimately denied by the Board in its Decision and Order and are not the subject of the instant appeal.

a defined bargaining unit of employees at the Center. (GCX 1(d), (g); GCX 2.) In order to challenge the Board's decision overruling the Center's objections, the Center refused to recognize or bargain with the Union, and several years of legal challenges followed.⁴ Following this Court's decision upholding the Union's certification on January 24, 2017, the Union requested, and the Center provided, information related to bargaining (going back to the period before the Union's March 2012 election), and the parties met for their first bargaining session on May 11, 2017.

II. In its Case-In-Chief, CGC Merely Submitted Limited Payroll Records Without Context or Explanation

In its case in chief, CGC and the Union called did not call any witnesses. As substantive evidence in support of the allegation at issue herein that the Center unlawfully reduced the hours of 20 bargaining unit employees, who were purportedly full-time employees, from 40 hours per week to 37.5 hours per week, CGC submitted two (2) pieces of evidence: (i) a limited subset of payroll records for the 20 bargaining unit employees (GCX 10(b)-(h)); and (ii) a chart purportedly

⁴ After the Center refused to bargain, the Union filed a Charge in Case 22-CA-097938, and the Board issued a summary judgment decision finding that the Center unlawfully refused to bargain. (GCX 2(m) *reported at* 361 NLRB No. 117 (2014).) The Center filed a petition for review in this Court, but, in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the case was delayed while the Board set aside its decisions in Cases 22-CA-097938 and 22-RC-073078. The decisions were later reaffirmed by the Board on June 15, 2015. (GCX 2(n) *reported at* 362 NLRB No. 114 (2015).) The Center again filed a petition for review in the D.C. Circuit on July 7, 2015, and this Court issued its decision upholding the Union's certification on January 24, 2017. (GCX 2(o).)

summarizing information from the payroll records (the “Chart”) (GCX 10(a)).⁵ CGC claimed the information in the Chart was supported by selected payroll records, and both showed “employees whose hours were decreased and the pay period in which their hours were decreased” and that the employees “hours were reduced from 40 to 37 and a half or for one employee 38.” (Tr. 16-17.)

The Chart’s heading stated: “Employees Whose Hours Were Decreased” and listed seven columns: “Year”, “Period Ending in Which Hrs Were Decreased”, “Ee Number”, “Full Name”, “Title”, “Hourly Rate”, and “Std Hours”. (GCX 10(a).) The rows were different years, with the earliest possible year being 2011, and the latest possible year being 2017. (*Id.*) The “Std Hours” column had 40 hours listed in the rows prior to the period in which each employee’s hours was allegedly decreased, and 37.5 hours (or, in one case, 38 hours) in the rows after each employee’s hours were allegedly decreased. (*Id.*) For 13 of the 20 bargaining unit employees, the alleged date of the hours reduction in the Chart was July 19, 2014, for five (5) of the employees the alleged date of the hours reduction was February 1, 2014, for one (1) of the employees, the alleged date of the hours reduction was

⁵ CGC also submitted additional exhibits, such as four (4) charts in support of its theory that the Center changed its hiring practices to hire Full-Time employees at less hours after the Union’s March 2012 election. (GCX 9(a)-(h).) CGC withdrew this theory of wrongdoing after the hearing in its Post-Hearing Brief. (CGC P-H Br. 1 n.3.) In addition, the parties stipulated as to the facts relevant to determine whether the Center violated Section 8(a)(5) by issuing certain discipline, which was eventually dismissed by the Board in its Decision and Order. (GCX 4.)

August 16, 2014, and for the last employee, the alleged date of the reduction was March 28, 2015. (*Id.*)

The payroll records submitted into evidence consisted of approximately 10 to 13 (depending on the individual)⁶ bi-weekly pay stubs for each employee, covering the period just before and just after the date demarcated in the Chart as the date each employee's hours were allegedly reduced. (GCX 10(b)-(h); Tr. 16-18.) Although CGC alleged that the Center reduced the hours of the 20 bargaining unit employees from 40 hours per week to 37.5 hours per week, the payroll records CGC submitted into evidence showed the employees accumulating⁷ hours as follows:

- Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Vicente Ricarze (“Ricarze”) *never* accumulated 40 hours. In those 11 weeks, he accumulated 36, 37.5, 38, 39, 39, 39.25, 39.25, 39.25, 39.5, 39.5, and 39.75 hours. (GCX 10(b); ALJ Appendix B.)
- Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Allan Tolentino (“Tolentino”) accumulated less than 40 hours in *three-quarters (12) of those weeks* (15.75, 31.25, 31.5, 38.25, 38.25, 39.25, 39.25, 39.5, 39.5, 39.5, 39.75, and 39.75 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Tolentino accumulated more than 37.5 hours in four (4) of those weeks (37.75, 38.75, 38.75, and 39 hours). (GCX 10(b); ALJ Appendix B.)
- Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours

⁶ For most of the 20 bargaining unit employees, CGC submitted 11 payroll records. CGC never explained why it submitted a different number of payroll records for different employees.

⁷ Hours accumulated includes work time, paid vacation time, and paid sick time. ALJ Green provided a summary of the hours accumulated by, as well as holiday pay paid to, the 20 bargaining unit employees in Appendix B to his Decision.

- per week, Dawn-Marie Sormani (“Sormani”) accumulated less than 40 hours in *over half (6) of those weeks* (34.75, 37.5, 37.75, 37.75, 38, and 38.25 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Sormani accumulated more than 37.5 hours in *nearly half (5) of those weeks* (37.75, 37.75, 37.83, 38, and 38.25 hours). (GCX 10(h); ALJ Appendix B.)
- Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Mariamma Abraham (“Abraham”) accumulated less than 40 hours in *nearly half (7) of those weeks* (12, 24, 31.75, 35.5, 36, 38.5, and 38.75 hours). (GCX 10(g); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Enrique Fontanez (“Fontanez”) accumulated less than 40 hours in four (4) of those weeks (39.25, 39.5, 39.5, and 39.5 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Fontanez accumulated more than 37.5 hours in one (1) of those weeks (37.75 hours). (GCX 10(b); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Desinette Bazile accumulated less than 40 hours in three (3) of those weeks (39.25, 39.5, and 39.5 hours). (GCX 10(c); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 38 hours per week,⁸ Benjamin Bustos (“Bustos”) accumulated less than 40 hours in three (3) of those weeks (39.5, 39.75, and 39.75 hours). Out of the 13 weeks after the supposed reduction from 40 to 38 hours per week, Bustos accumulated more than 38 hours in three (3) of those weeks (38.25, 38.5, and 38.75 hours). (GCX 10(b); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Sara Jimenez (“Jimenez”) accumulated less than 40 hours in three (3) of those weeks (38, 39.5, and 39.5 hours). (GCX 10(g); ALJ Appendix B.)
 - Out of the 13 weeks prior to the supposed reduction from 40 to 37.5 hours

⁸ Bustos was the sole employee for which CGC’s Chart alleged a reduction from 40 to 38 hours per week. (GCX 10(a).)

- per week, Shiril Tom (“Tom”) accumulated less than 40 hours in three (3) of those weeks (38, 39.75, and 39.75 hours). Out of the nine (9) weeks after the supposed reduction from 40 to 37.5 hours per week, Tom accumulated more than 37.5 hours in one (1) of those weeks (38 hours). (GCX 10(g); ALJ Appendix B.)
- Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Julienne Benoit (“Benoit”) accumulated less than 40 hours in two (2) of those weeks (32 and 39.5 hours). (GCX 10(c); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Edgardo Irabon (“Irabon”) accumulated less than 40 hours in two (2) of those weeks (39.5 and 39.75 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Irabon accumulated more than 37.5 hours in *nearly all (9) of those weeks* (37.75,⁹ 37.75, 38.25, 38.25, 38.25, 38.25, 38.5, 38.5, and 38.75 hours). (GCX 10(e); ALJ Appendix B.)
 - Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Paulette Murray (“Murray”) accumulated less than 40 hours in two (2) of those weeks (32 and 32 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Murray accumulated more than 37.5 hours in one (1) of those weeks (38 hours). (GCX 10(c); ALJ Appendix B.)
 - Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Jean Ramkhalawan (“Ramkhalawan”) accumulated less than 40 hours in two (2) of those weeks (39.5 and 39.75 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Ramkhalawan accumulated more than 37.5 hours in two (2) of those weeks (38 and 45 hours). (GCX 10(d); ALJ Appendix B.)
 - Out of the 13 weeks prior to the supposed reduction from 40 to 37.5 hours

⁹ In Appendix B, ALJ Green incorrectly marked the “Regular” hours in “Week 2” of the payroll period ending July 19, 2014 as 37.5. (ALJ Appendix B.) The “Regular” hours were actually 37.75 in this week. (GCX 10(e).) In addition, ALJ Green incorrectly included 7.5 “Sick” hours in the following week, when none were on the payroll records. (GCX 10(e); ALJ Appendix B.)

per week, Donna Timms accumulated less than 40 hours in two (2) of those weeks (38 and 38 hours). (GCX 10(g); ALJ Appendix B.)

- Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, George Varghese (“Varghese”) accumulated less than 40 hours in two (2) weeks (35.5 and 39.5 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Varghese accumulated more than 37.5 hours in two (2) of those weeks (38¹⁰ and 38 hours). (GCX 10(b); ALJ Appendix B.)
- Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours, Hegarty accumulated less than 40 hours in two (2) of those weeks (37.75 and 32 hours). Out of the nine (9) weeks after the supposed reduction from 40 to 37.5 hours, Hegarty accumulated more than 37.5 hours in *over half* (5) of those weeks (37.75, 38, 38, 38.25, and 41.75 hours). (GCX 10(h); ALJ Appendix B.) As discussed below, the Center submitted additional payroll records into evidence for Hegarty.
- Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Evelyn Coronado (“Coronado”) accumulated less than 40 hours in one (1) of those weeks (39 hours). Out of the 13 weeks after the supposed reduction from 40 to 37.5 hours per week, Coronado accumulated more than 37.5 hours in two (2) of those weeks (37.75 and 43.5 hours). (GCX 10(b); ALJ Appendix B.)
- Out of the 11 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Elaine Farr (“Farr”) accumulated less than 40 hours in one (1) of those weeks (39.75 hours). Out of the 11 weeks after the supposed reduction from 40 to 37.5 hours per week, Farr accumulated more than 37.5 hours in *nearly half* (5) of those weeks (37.75,¹¹ 38, 38, 38, 38, and 38.25 hours). (GCX 10(b); ALJ Appendix B.)

¹⁰ In Appendix B, ALJ Green incorrectly marked Varghese as having accumulated 37.5 “Sick” hours only in “Week 2” of the payroll period ending August 16, 2014. (ALJ Appendix B.) In that week, Varghese actually accumulated 30 “Regular” hours and eight (8) “Sick” hours for a total of 38 hours. (GCX 10(b).)

¹¹ In Appendix B, ALJ Green incorrectly marked the “Regular” hours in “Week 1” of the payroll period ending August 16, 2014 as 37.5. (ALJ Appendix B.) The “Regular” hours were actually 37.75 in this week. (GCX 10(b).)

- Out of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, Rosilin Boby accumulated less than 40 hours in one (1) of those weeks (38 hours). (GCX 10(g); ALJ Appendix B.)

So, despite CGC and the Union arguing that the limited payroll records for the 20 bargaining unit employees would demonstrate a “status quo” of a 40-hour workweek prior to the supposed change, only *one (1) of the 20* employees – Charles Abouzeid – accumulated 40 or more hours in each week prior to his or her supposed reduction. (GCX 10(a), (d); ALJ Appendix B.) Indeed, Ricarze *never* accumulated 40 hours when the “status quo” was supposedly a 40-hour workweek, Tolentino accumulated less than 40 hours in nearly all those weeks, and Sormani and Abraham accumulated less than 40 hours in nearly half those weeks. Moreover, after the supposed reduction to a 37.5-hour workweek, most employees continued to accumulate *more* than 37.5 hours, with Irabon doing so in nearly all the weeks for which CGC submitted payroll records, Hegarty doing so in more than half of those weeks, and Sormani doing so in nearly half those weeks.

Neither CGC nor the Union submitted any other evidence of the “status quo” as of the Union’s March 2012 election – through witness testimony or otherwise (since they declined to call any witnesses) – or how these selected payroll records could have demonstrated that the Center changed or altered the “status quo.”

III. The Center Submitted Evidence that the “Status Quo” as of the Union’s March 2012 Election was That Full-Time Employees Accumulated 37.5 Hours or More per Week

The Center called Maureen Montegari (“Montegari”) as its witness. Montegari was hired in January 2010 as a Regional Vice President of Human Resources. (Tr. 20.) In this role, Montegari provided day-to-day human resources services to a region of nursing facilities, including the Center. (Tr. 20-23.) In 2012, Montegari was promoted to Vice President for Human Resources (the position she held at the time of the hearing), where she supervised the Regional Vice Presidents of Human Resources (including the individual responsible for the Center). (Tr. 21-22.) As both the individual responsible for day-to-day human resources for the Center, and then as the individual supervising the Regional Director responsible for day-to-day human resources for the Center, it was Montegari’s responsibility to be familiar with all aspects of the Center’s payroll, scheduling, and human resources policies and practices. (Tr. 20-23.)

Montegari further testified that she had a comprehensive understanding of the Center’s scheduling policies and practices, as well as the staffing and scheduling at the Center through her interaction with the Center’s management team and her observations of and knowledge of the Center. (Tr. 24-31; 64-65, 73-74, 86-87.) As Montegari unequivocally testified, “It’s [her] job to be familiar with the scheduling and the HR operations of the facility.” (Tr. 29.) In addition, as Vice President of

Human Resources, Montegari was responsible for approving and/or updating human resources policies, such as policies governing payroll, scheduling, and hiring policies. (Tr. 89-90.)

Montegari testified that every new hire receives a copy of the Center's Wage & Benefit Summary at the beginning of their employment, which contains information on wages, work hours, paid vacation and sick benefits, health insurance, retirement benefits, and leave benefits, among other information. (PX 1; Tr. 25.) Montegari testified that the Wage & Benefit Summary went into effect on May 1, 2009, replacing a previous version. (PX 1; Tr. 25, 65-66.) Per the Wage & Benefit Summary, the Center has four (4) categories of employees, which are based on the hours they regularly work: (1) Full-Time Benefits Eligible ("Full-Time") employees, who "[r]egularly wor[k] 37.5 hours or more per week;" (2) Part-Time Benefits Eligible employees, who "[r]egularly wor[k] 24 hours to less than 37.5 hours per week;" (3) Part-Time Not Benefits Eligible employees, who "[r]egularly work less than 24 hours per week;" and (4) Per Diem employees, who do not have a regular schedule and work on an as-needed basis. (PX 1; Tr. 25-29.) The Center designates the appropriate category for employees so they understand the number of hours they are expected to regularly work, or otherwise accumulate including a combination of paid vacation time and paid sick time, if applicable.¹²

¹² Although the Wage & Benefit Summary refers to hours regularly "worked," for

The Wage & Benefit Summary remained substantively in effect as of the date of the hearing, except for minor formatting changes and updates to comply with the law. (Tr. 25-26.) Nothing in the Wage & Benefit Summary regarding hours worked or scheduling changed after May 1, 2009, or after the Union’s March 2012 election. (Tr. 30-31.) Neither CGC nor the Union presented any testimony – since they called no witnesses – disputing or impeaching Montegari’s testimony regarding the Wage & Benefit Summary. Accordingly, the terms of the Wage & Benefit Summary represented the “status quo” as of the date of the Union’s March 2012 election that the Center was required to maintain afterwards.

Notably, the Wage & Benefit Summary does not guarantee any minimum number of weekly hours for an employee. Rather, it only provides that employees *regularly* accumulate (through work time, paid vacation time, and paid sick time) a certain number of hours based on their category. (PX 1.) Moreover, Montegari testified that although an employee’s schedule should drive the actual hours employees worked, employees could work more than or less than their scheduled hours. (Tr. 26-27, 66-67, 72-76). Similarly, because payroll records show the hours

the purpose of its analysis herein, the Center refers to hours accumulated through paid vacation time and paid sick time, in addition to hours actually worked. Logically, it follows that the Wage & Benefit Summary’s reference to hours “regularly worked” includes hours accumulated through paid time off benefits as provided for therein for the purposes of determining an employee’s “regular” hours. This was noted by ALJ Green, who also based his analysis on hours accumulated. (ALJ 4, 7, 8, Appendix B.)

an employee works, they will not necessarily reflect what an employee is scheduled to work, and an employee's actual hours as reflected on their payroll records could be more than or less than their original scheduled hours. (*Id.*) Here, the selected payroll records CGC submitted into evidence were consistent with the Wage & Benefit Summary in that they demonstrated that the 20 bargaining unit employees, who were Full-Time employees, all regularly accumulated 37.5 hours or more during the period reflected in those payroll records.

To provide some context surrounding the limited payroll records CGC submitted into evidence, the Center also submitted into evidence the payroll records of one of the 20 bargaining unit employees, Andrew Hegarty, from the beginning of his employment in December 2012 through June 2018 (just before the hearing). (PX 6.) In its Chart, CGC claimed that Hegarty's hours were reduced from 40 hours to 37.5 hours per week in the payroll period ending August 16, 2014. (GCX 10(a).) However, in the 89 weeks from the beginning of his employment to the alleged change, Hegarty accumulated less than 40 hours in 15 weeks. (PX 6.) As the ALJ admitted, the supplemental payroll records CGC submitted into evidence showed that after the alleged change in August 2014, Hegarty always regularly accumulated 37.5 or more hours per week, including often regularly accumulating 40 or more hours per week. (ALJ 8; *see also* PX 6.) And, again, this was consistent with his status as a Full-Time employee pursuant to the Wage & Benefit Summary, which

represented the “status quo” as of the Union’s March 2012 election and Hegarty’s January 2013 hire.

SUMMARY OF ARGUMENT

The Center’s Wage & Benefit Summary represented the “status quo,” from which any alleged change would be measured, as of the date of the Union’s March 2012 election (which was the operative date for determining the “status quo”). The uncontroverted evidence was that the Center’s Wage & Benefit Summary went into effect in 2009, it continued to remain in effect as of the Union’s March 2012 election, and it was never changed and remained in effect as of the hearing. While CGC alleged that the “status quo” was a 40-hour workweek, the Wage & Benefit Summary made clear that the “status quo” for Full-Time employees was to *regularly accumulate 37.5 hours or more* per week.

However, CGC and the Union did next to nothing to meet their burden of proving that the “status quo” was a 40-hour workweek and that the Center changed the “status quo” by reducing the 20 bargaining unit employees’ hours. Neither CGC nor the Union presented any testimony from any of the 20 bargaining unit employees whose hours were allegedly reduced to explain what their hours or schedules were and if they ever differed from the “status quo” as of the Union’s March 2012 election. In fact, CGC and the Union *called no witnesses at all*. CGC’s sole evidence that the “status quo” was a 40-hour workweek that changed to a 37.5-hour

workweek was a limited and cherry-picked subset of 10 to 13 payroll records for each employee from several years after the Union's March 2012 election. But those selected payroll records simply showed the 20 bargaining unit employees regularly accumulating 37.5 hours or more per week – *i.e.* that the Center was maintaining the “status quo.”

For his part, ALJ Green first mischaracterized and then failed to appreciate the significance of the Wage & Benefit Summary as representing the “status quo” as of the Union's March 2012 election. ALJ Green misquoted the Wage & Benefit Summary as supposedly indicating that employees were generally scheduled to work 37.5 hours per week, when, in fact, the Wage & Benefit Summary explicitly required that Full-Time employees regularly accumulate 37.5 hours *or more* per week. By misquoting the Wage & Benefit Summary, ALJ Green created an illusion that the limited and cherry-picked payroll records and Wage & Benefit Summary were inconsistent with each other, when they were, in fact, completely consistent with each other. By doing so, ALJ Green failed to properly engage with the record evidence, as this Court requires, and, accordingly, his Decision was unsupported by substantial evidence.

ALJ Green also legally erred by skipping over the fundamental issue of defining the “status quo” and by not properly analyzing the record evidence with an eye towards defining the “status quo.” CGC and the Union expected ALJ Green to

presume that the “status quo” was a 40-hour workweek and that the Center reduced the hours of the 20 bargaining unit employees to 37.5 hours per week, despite presenting scant and cherry-picked evidence devoid of any witness testimony to provide context. ALJ Green obliged and presumed the “status quo” to be a 40-hour workweek despite acknowledging that the 20 bargaining unit employees accumulated less than 40 hours in several weeks prior to the alleged reduction in hours – with one employee *never* accumulating 40 hours. Moreover, after employees’ hours were supposedly changed to a 37.5-hour workweek, the employees continued to accumulate more than 37.5 hours per week, within one employee doing so in nearly *all* of those weeks. ALJ Green even glossed over the fact the dates CGC demarcated for each employee’s supposed change in 2014 and 2015 were seemingly picked at random with no connection to the Complaint, which originally alleged that a change occurred since February 2013. ALJ Green’s failure to analyze an issue necessary to a Section 8(a)(5) violation evinced a reversible lack of reasoned decision-making.

Finally, the Board completely abdicated its responsibility to properly review ALJ Green’s Decision. Despite the dearth of evidence presented by CGC and the Union, and despite ALJ Green’s faulty analysis on a fundamental legal issue, the Board merely rubber stamped ALJ Green’s Decision in a footnote and failed to even address the arguments presented by the Center. In doing so, the Board acted with

an erroneous view of the law, failed to engage in reasoned decision-making as this Court requires, and committed legal error. As a result, and because CGC failed to prove a Section 8(a)(5) violation, this Court must decline enforcement of the Board's June 23, 2020 Decision and Order.¹³

STANDING

Petitioner, as an employer engaged in interstate commerce, was subject to the Board's jurisdiction to determine whether it committed an unfair labor practice. Here, the Board concluded that Petitioner violated the Act and directed Petitioner to cease and desist from changing the terms and conditions of employment of its unit employees, including reducing payroll hours, without first notifying the Union and giving it an opportunity to bargain, rescind the change of payroll hours that were unilaterally implemented, post a notice regarding the unilateral reduction of hours, and pay monetary damages (such as making affected employees whole and compensating affected employees from adverse tax consequences). Petitioner is therefore an aggrieved party within the meaning of Section 10(f) of the Act, 29 U.S.C. §160(f), and accordingly has standing to seek review of the Board's final

¹³ Denial of enforcement without remand is appropriate here, as the record evidence could not possibly support a Section 8(a)(5) violation. *See, e.g. Comau, Inc. v. NLRB*, 671 F.3d 1232 (D.C. Cir. 2012) (denying enforcement of Section 8(a)(5) violation without remand where Board's finding was "arbitrary and capricious"). Alternatively, Petitioner requests that this Court deny enforcement and remand the case to the Board for the sole purpose of analyzing the legal issue raised herein – *i.e.* defining the "status quo" – consistent with the Court's opinion.

order in this Court.

ARGUMENT

I. This Court Must Not Enforce a Board Decision that is Unsupported by Substantial Evidence or Where the Board Has Acted in an Arbitrary and Capricious Manner

Although Board decisions are generally entitled to deference, this Court will not enforce a Board decision unsupported by substantial evidence. *See Windsor Redding Care Center, LLC v. NLRB*, 944 F.3d 294, 299 (D.C. Cir. 2019). While this Court will ordinarily defer to the Board’s factual inferences, this Court will not defer where the Board “[o]ffers an explanation for its decision that runs counter to the evidence” before it. *Fred Meyer Stores, Inc.*, 865 F.3d at 638 quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court’s lack of deference includes cases where the Board “failed to engage with record evidence that was favorable to the Company and that undercut the Board’s decision....” *Windsor Redding Care Center, LLC*, 944 F.3d at 301. This Court must ensure that the Board has “examine[d] the relevant data and articulate[d] a satisfactory explanation for [the Board’s] action including a rational connection between the facts found and the choice made.” *Fred Meyer Stores, Inc.*, 865 F.3d at 638 quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

Moreover, “judicial deference is not accorded a decision of the [Board] when the Board acts pursuant to an erroneous view of law....” *Prill v. NLRB*, 755 F.2d

941, 942 (D.C. Cir. 1985); *see also Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000) (Board decision “cannot be sustained where it is based not on the agency’s own judgment but on an erroneous view of the law.”); *S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 358 (D.C. Cir. 2009) (Court should not uphold Board decision that “failed to apply the proper legal standard”) (citations omitted). This Court’s lack of deference includes cases where the Board has “behaved in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking.” *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630 638 (D.C. Cir. 2017). A Board decision is arbitrary and capricious and evinces a lack of reasoned decision-making “if it ‘entirely fail[s] to consider an important aspect of the problem’....” *Windsor Redding Care Center, LLC*, 944 F.3d at 299 *quoting Motor Vehicle Mfrs. Ass’n of U.S.* 463 U.S. at 43.

Accordingly, this Court must fulfill its duty to determine whether the Board properly considered all the reasonable inferences compelled by the evidence and examined all of the relevant legal issues. Here, ALJ Green, affirmed in perfunctory fashion by the Board, did neither.

II. The Board Incorrectly Determined that CGC Met its Burden of Proving that the Center Changed or Altered the “Status Quo”

A. A Necessary Component of a Section 8(a)(5) Violations is that the Employer Changed or Altered the “Status Quo”

It is axiomatic, as established by the Supreme Court in *NLRB v. Katz*, 369

U.S. 736 (1962), that an employer violates Section 8(a)(5) of the Act if it makes a unilateral change to bargaining unit employees' existing terms and conditions of employment – *i.e.* the “status quo” – without first providing notice and the opportunity to bargain with their bargaining representative. *See Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). In a first contract scenario, like the instant case, the “status quo” is “the terms and conditions existing on the date of the union’s” election. *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at 5 n.14 (Aug. 26, 2016), *rev'd on other grounds, Raytheon*, 365 NLRB No. 161.

As the Board has explained, “the vice involved...is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of” a Section 8(a)(5) violation. *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994)) (emphasis in original) *enfd. Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996). It thus follows that a necessary component to any Section 8(a)(5) violation is that the employer *changed* or *altered* the “status quo” for bargaining unit employees. *See In re Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (“Therefore, where an employer’s action does not change existing conditions – that is, where it does not alter the status quo – the employer does not violate Section 8(a)(5) and (1).”). As this Court has aptly stated, “the relevant inquiry here is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed” by the employer. *Daily News*

of *Los Angeles*, 73 F.3d at 411.

Furthermore, it is CGC's burden of proof to establish that an employer violated Section 8(a)(5) of the Act, which requires that CGC meet its burden to demonstrate that the Center changed or altered the "status quo." See *Pacific Diesel Parts Company*, 203 NLRB 820, 822 (1973) (concluding that "General Counsel has failed to sustain the burden of proof in establishing...a violation of Section 8(a)(5) and (1) of the Act," because General Counsel failed to show an unlawful change to the terms and conditions of employment); *Miller Waste Mills, Inc.*, Case No. 18-CA-16411, 2003 WL 22135398 (NLRB Div. of Judges Sept. 11, 2003) ("Because counsel for the general counsel has not established any change that is inconsistent with the expired agreement's terms, the burden of proof as to a Section 8(a)(5) violation has not been met.").

Therefore, unless CGC can prove that the Center altered the "status quo" by changing existing conditions, CGC cannot meet its burden to prove a Section 8(a)(5) violation. As discussed, herein, CGC did not meet its burden of proof.

B. The "Status Quo" at the Center was that Full-Time Employees Accumulated 37.5 Hours or More Per Week

The uncontroverted evidence entered into the record before ALJ Green was that the "status quo," as of the Union's March 2012 election, was that Full-Time employees "regularly wor[k] 37.5 hours or more per week." (PX 1; Tr. 25-26.) This was set forth in the Center's Wage & Benefit Summary, which Montegari

uncontrovertibly testified went into effect at the Center in May 2009 (three years prior to the Union March 2012 election) and remained in effect at the Center as of the hearing. (*Id.*)

Notably, the Wage & Benefit summary contained no guarantee of hours for Full-Time employees (or any employees), and neither CGC nor the Union submitted any evidence that the “status quo” as of the Union’s March 2012 election included a guarantee of any weekly hours. In fact, the wording of the Wage & Benefit Summary is clear that a Full-Time employee was only required to *regularly* accumulate (through work time, paid vacation time, or paid sick time) 37.5 hours or more during a week. (PX 1.) Moreover, Montegari testified that Full-Time employees would pick up extra work and accumulate more than 37.5 hours per week (and that the Center would hire part-time employees who regularly accumulated less than 37.5 hours per week and per diem employees who had no regular schedule). (PX 1; Tr. 26-27.)

However, while CGC alleged, and ALJ ultimately found, that the “status quo” was a 40-hour workweek, CGC failed to rebut or even address the Center’s evidence of the “status quo” relevant to this matter – the Wage & Benefit Summary. Tellingly, despite holding the burden of proof, CGC (and the Union) neglected to call *even one of the 20 bargaining unit employees* to testify about his or her alleged hours

reduction (even though 11¹⁴ were current employees as of the date of the hearing and could be expected to offer supporting testimony). The record is devoid of any witness testimony that the “status quo” as of the Union’s March 2012 election was anything different than what was reflected in the Wage & Benefit Summary. Moreover, neither CGC nor the Union presented any testimony whatsoever as to the number of hours the 20 bargaining unit employees ever expected to work, the number of hours they worked at the time of the Union’s March 2012 election, or anything else related to this alleged reduction of hours. Therefore, Montegari’s testimony that the Wage & Benefits Summary represented the scheduling policy and practice in place at the time of the Union’s March 2012 election – *i.e.* the “status quo” that Full-Time employees regularly accumulated 37.5 hours or more per week – was *uncontroverted*.

C. The Board’s Decision and Order was not Supported by Substantial Evidence Because ALJ Green Impermissibly Discounted the Wage & Benefit Summary

In his Decision, ALJ Green erroneously mischaracterized and dismissed the significance of the Center’s Wage & Benefit Summary. ALJ Green stated that he placed “no significance on Montegari’s testimony or the Wage & Benefit Summary to the extent they indicate that employees were generally scheduled to work 37.5

¹⁴ Sormani, Jimenez, Abraham, Hegarty, Irabon, Abouzeid, Murray, Benoit, Varghese, Ricarze and Coronado.

hours per week.” (ALJ 7.) But this characterization of the Wage & Benefit Summary is not accurate. The Wage & Benefit Summary does not “indicate that employees were generally scheduled to work 37.5 hours per week,” as ALJ Green stated. (*Id.*; PX 1.) Instead, the Wage & Benefit Summary states that Full-Time employees regularly accumulated 37.5 hours *or more* per week. (PX 1.) By mischaracterizing the Wage & Benefit Summary and omitting the language that the “status quo” involved regularly accumulating 37.5 hours *or more* per week, ALJ Green realigned the “status quo” as a 40-hour workweek (from which weekly hours were reduced to 37.5) where the Wage & Benefit Summary differed from the limited payroll records CGC submitted into evidence.

ALJ Green’s mischaracterization of the Wage & Benefit Summary thus created an illusion that the payroll records and Wage & Benefit Summary were inconsistent with each other when, in fact, they were perfectly consistent. In fact, the payroll records submitted by CGC (and by the Center) demonstrate that at all times, both before and after the date of the alleged change, the 20 bargaining unit employees regularly accumulated 37.5 hours or more per week – whether 37.5 hours, 40 hours, or somewhere in between.¹⁵ (GCX 10(b)-(h); ALJ Appendix B.) ALJ

¹⁵ Under no view of the evidence, could it be argued that any of the 20 employees did not regularly accumulate 37.5 hours or more throughout the entirety of the payroll periods CGC (or the Center) submitted into evidence. Indeed, CGC and the Union do not argue, and ALJ Green did not find, that the alleged Section 8(a)(5) violation stems from these limited weeks where employees accumulated less than

Green’s analysis was not a suitable “examin[ation of] the relevant data” and did not create “a rational connection” between the facts and his ultimate reasoning, as this Court requires.¹⁶ *Fred Meyer Stores, Inc.*, 865 F.3d at 638.¹⁷ Simply put, ALJ Green erred by deeming the uncontroverted Wage & Benefit Summary insignificant solely because it conflicted with a presumed narrative surrounding the payroll records and ALJ Green’s mischaracterization of the Wage & Benefit Summary. *See TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116 (D.C. Cir. 2001) (Board’s decision was not “based on the record evidence; rather, the Board relied on its intuitive belief”).

Furthermore, CGC and the Union’s sole argument to ALJ Green was that upon certain dates chosen by CGC within the limited payroll records, the 20 bargaining unit employees had their hours reduced from 40 hours per week to 37.5 hours per

37.5 hours per week.

¹⁶ It is important to note that the Center is not arguing that ALJ erred in finding certain evidence credible and certain evidence not credible. That would not be possible based on the record here, since neither CGC nor the Union entered testimony into the record that casted doubt on the credibility of the Wage & Benefit Summary and Montegari’s testimony. To the contrary, the Center is arguing that ALJ Green created a conflict between CGC and the Union’s evidence and the Center’s evidence where none existed, and thereby impermissibly dismissed the significance of the Wage & Benefit Summary as properly evincing the “status quo.”

¹⁷ *See also Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 79 (D.C. Cir. 1999) (declining enforcement and criticizing Board for “ignoring evidence” favorable to employer that “contradict[ed] the limited evidence upon which the Board relied in reaching its conclusion”); *Warshawsky v. NLRB*, 182 F.3d 948, 956 (D.C. Cir. 1999) (the Board cannot “focus on evidentiary fragments...to ignore the aggregate weight of the evidence”).

week. (ALJ 2-4; GCX 10(a).) But CGC submitting payroll records showing that the 20 bargaining unit employees accumulated 40 hours in certain weeks before the supposed “change” and less in certain weeks after the supposed “change,” is not sufficient to demonstrate a change to the “status quo” here and a Section 8(a)(5) violation. The Board has been clear that a Section 8(a)(5) violation requires CGC to show more than just the fact that a bargaining unit employee’s hours in one week were different than in another. A Section 8(a)(5) violation requires CGC to prove a change or alteration to the “*status quo*.” See *Daily News of Los Angeles, Post-Tribune Co.*, 337 NLRB at 1280 (where “an employer’s action does not change existing conditions – that is, where it does not alter the status quo – the employer does not violate Section 8(a)(5)”). This Court has reiterated this point and emphasized that a Section 8(a)(5) violation requires that an “established employment term” be “unilaterally changed” by the employer. *Daily News of Los Angeles*, 73 F.3d at 411.

Here, the established employment term – *i.e.* the “status quo” – as of the Union’s March 2012 election was that Full-Time employees regularly accumulated 37.5 hours or more. Neither CGC nor the Union presented any evidence demonstrating that the Center *changed* this established employment term. To the contrary, CGC only submitted evidence affirming that the Center maintained the existing conditions of employment – *i.e.* the “status quo” – in that the 20 bargaining

unit employees all regularly – if not almost exclusively – accumulated 37.5 hours or more during the selected payroll periods CGC submitted into evidence. ALJ Green’s strained analysis both “failed to engage with the record evidence” that undercut his reasoning, and offered an “explanation for [his] decision that [ran] counter to the evidence” before him. *Windsor Redding Care Center, LLC*, 944 F.3d at 300; *Fred Meyer Stores, Inc.*, 865 F.3d at 638. As such, this Court should not defer to or uphold the Board’s Decision and Order rubber stamping ALJ Green’s Decision.

D. ALJ Green and the Board Erred in their Legal Analysis by Failing to Consider the Issue of Properly Defining the “Status Quo”

i. *ALJ Green Skipped Over the Issue of Defining the “Status Quo”*

According to ALJ Green’s Decision, the “status quo” (from which any alleged change would be measured) for the 20 bargaining unit employees was not that they regularly accumulated 37.5 hours or more per week, but that the “status quo” was a 40-hour workweek. (ALJ 6-7.) However, ALJ Green erred in his legal analysis by skipping the question of defining the “status quo,” in the first place. Instead, ALJ Green, without properly considering the evidence, created this 40-hour workweek “status quo” almost entirely out of whole cloth based on guesswork. As discussed above, neither CGC nor the Union submitted any evidence to define the “status quo” as 40 hours per week for the 20 bargaining unit employees. Instead, they relied on a limited selection of payroll periods during which the employees’ hours fluctuated, but that showed the employees always regularly accumulating 37.5 hours or more.

(GCX 10(a)-(h).) CGC then chose certain dates during the period covered by the payroll records and pointed to them as the dates the “status quo” supposedly changed and the employees’ hours were reduced. (ALJ 2-3; GCX 10(a).)

ALJ Green, in analyzing these payroll records and the weekly hours therein, framed the issue as “whether [the fluctuation in weekly hours] was a material change in employees’ hours or the mere continuation of minor deviations in hours insufficient to establish a ‘change.’” (ALJ 6.) But the framing of this question and the resulting analysis is legally flawed. ALJ Green skipped directly to evaluating whether any fluctuation in hours accumulated represented a “material change” or “minor deviations” in the “status quo” without first requiring CGC to prove the actual “status quo” from which a change or alteration could be measured. ALJ Green’s failure to address this aspect of a Section 8(a)(5) violation was legal error and his analysis should not be enforced by this Court. *See Windsor Redding Care Center, LLC*, 944 F.3d at 299 (Board decision is arbitrary and capricious, and thus should not be enforced, if the Board “entirely fail[s] to consider an important aspect of the problem”).

In fact, ALJ Green’s analysis began by citing to the recently decided Board decision, *Raytheon Network Centric Systems* to address “what constitutes a ‘change’ requiring notice to the union and the opportunity for bargaining prior to implementation.” (ALJ 6 *quoting* 365 NLRB No. 161.) While this is the correct

legal standard for determining whether a change to the “status quo” occurred, ALJ Green cited to no case law as to how to legally define the “status quo,” and gave no thought to this fundamental legal question.

Indeed, failing to properly consider the fundamental legal question of defining the “status quo,” in the first place, can result in work practices that are illogical and practically unworkable, and demonstrates the necessity of addressing this issue. Where the “status quo” is established as a bargaining unit employee regularly working a minimum number of hours with the possibility of more (as was the case here), the employer could maintain that “status quo” by having the bargaining unit employee work more than the minimum. However, under ALJ Green’s flawed reasoning, the employer would be required to maintain those greater hours in perpetuity or bargain with the union again to go back to the “status quo” (or the schedule agreed to by the parties where the parties have a contract). The bargaining unit employee’s hours could never just snap back to the minimum level allowed by the “status quo.” This is simply not the Board’s intention in requiring that an employer maintain the “status quo” while bargaining with the Union. And here, neither CGC nor the Union presented any evidence that any of the 20 bargaining unit employees was guaranteed to accumulate any weekly hours other than to regularly accumulate 37.5 hours or more per week, which was indisputably maintained throughout all the payroll records CGC (and the Center) submitted into evidence.

ii. *ALJ Green Incorrectly Presumed the “Status Quo” was a 40-Hour Workweek*

ALJ Green nebulously described the selected payroll records CGC submitted as the “best evidence,” which allowed him to render the Wage & Benefit Summary (or, at least, his mischaracterization of it) as insignificant or not probative of the legal issues. (ALJ 7.) However, ALJ Green incorrectly identified what legal issue the payroll records were the “best evidence” of. ALJ Green stated only that the payroll records were the “best evidence” (to the exclusion of the Wage & Benefits Summary) of the fact that a change to the “status quo” occurred. (*Id.*) But the Center’s argument is that the Wage & Benefits Summary provided the best evidence of what the “status quo” was, in the first place, which, as discussed above, is an issue ALJ Green skipped over.¹⁸ Significantly, the payroll records CGC submitted were

¹⁸ The legal authority relied on by ALJ Green in relying on payroll records as supposedly the “best evidence,” *Electronic Data Systems International Corporation*, 278 NLRB 125 (1986), is off-point and distinguishable, further demonstrating the deficiencies in ALJ Green’s legal analysis. In *Electronic Data Systems*, the ALJ sustained a party’s objection to an individual testifying about what she was paid because the “best evidence of what she was paid was the Company’s payroll” records. 278 NLRB at 132. Here, the Center is not disputing that the payroll records were accurate as to the hours accumulated by the 20 bargaining unit employees. The Center is instead arguing that the Wage & Benefits Summary, and Montegari’s testimony that this was the “status quo” as of the Union’s March 2012 election, was evidence the “status quo” was, indeed, that Full-Time employees regularly accumulated 37.5 hours or more per week. The selected payroll records CGC submitted for a limited period in 2014, devoid of any context or explanatory testimony, did not represent the best, or any, evidence of what the “status quo” was as of the Union’s March 2012 election.

all from 2014 and 2015, and not from the period around the Union's March 2012 election. (GCX 10(b)-(h).) ALJ Green thus incorrectly determined that these payroll records – and not the Wage & Benefit Summary – were the “best evidence” of the “status quo” as of the Union's March 2012 election, which is the operative date for determining the “status quo.” *See E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at 5 n.14.

Instead, CGC and the Union in their Post-Hearing Briefs (after not providing any explanation regarding this allegation during the hearing) simply expected ALJ Green to presume a 40 hour per week “status quo” based on scant evidence. ALJ Green took them up on that offer instead of requiring that CGC meet its burden to prove a Section 8(a)(5) violation. Judicial deference cannot be afforded where ALJ Green erroneously presumed an unfair labor practice without CGC meeting its burden of proof. *See Jacoby*, 233 F.3d at 611. *Prill*, 755 F.2d at 942. ALJ Green based his 40-hour workweek “status quo” on the concept that employees “largely accumulated (including time worked, paid vacation time, and paid sick time) 40 hours per week before the payroll period in which their hours were allegedly reduced and 37.50 hours per week during and after the payroll period in which their hours were allegedly reduced.” (ALJ 4.) But ALJ Green immediately admitted, that “this pattern was not entirely consistent” and noted that “it was not uncommon for employees to accumulate 39 to 39.75 hours per week before the alleged change and

it was not uncommon for employees to accumulate up to 38.75 hours after the alleged change.”¹⁹ (*Id.*)

In fact, the vast majority of the 20 bargaining unit employees did not accumulate 40 hours in multiple weeks prior to their supposed change, with Ricarze *never* accumulating 40 hours in those weeks, Sormani accumulating less than 40 hours in over half those weeks, and Abraham accumulating less than 40 hours in nearly half those weeks.²⁰ (GCX 10(b), (h); ALJ Appendix B.) Moreover, several employees accumulated more than 37.5 hours per week after their hours were supposedly changed to 37.5 hours per week, with Irabon accumulating more than 37.5 hours per week in nearly *all* of those weeks, Hegarty accumulating more than 37.5 hours in more than half the weeks for which CGC submitted payroll records, and Sormani accumulating more than 37.5 hours in nearly half those weeks.²¹ (GCX

¹⁹ The limited statistical pattern ALJ Green created, to the extent it is even representative, showed a difference in hours accumulated of as little as 15 minutes, which falls woefully short of establishing a “status quo” that was changed or altered. *See Acme Die Casting v. NLRB*, 93 F.3d 854, 857-58 (D.C. Cir. 1996) (declining enforcement of Section 8(a)(5) violation where Board’s statistical analysis of wage increases to determine whether unilateral change occurred was incomplete).

²⁰ Importantly, though, the above pattern *is* consistent with the “status quo” as reflected by the Wage & Benefit Summary that Full-Time employees regularly accumulated 37.5 hours or more per week.

²¹ ALJ Green also demonstrated that he replaced analysis with presumption by generalizing the hours worked by the 20 bargaining unit employees without considering each employee’s hours on its own terms. CGC provided no explanation as to why the hours worked of the 20 bargaining unit employees at issue should all

10(b)-(h); ALJ Appendix B.) ALJ Green thus gives away the fact that he presumed an unfair labor practice.

Furthermore, to present context, the Center submitted additional payroll records for Hegarty, one of the bargaining unit employees whose hours were allegedly reduced (who, again, neither CGC nor the Union called as a witness). (PX 6.) These payroll records spanned from the beginning of his employment in December 2012 through June 2018. (*Id.*) The hours Hegarty worked during this period were entirely in line with the Center's "status quo" of Full-Time employees regularly accumulating 37.5 hours or more per week – both before and after any supposed change. (*Id.*; ALJ Appendix B.) As ALJ Green admitted, from the beginning of Hegarty's employment until the alleged change in 2014 (before which the "status quo" was supposedly a 40-hour workweek), Hegarty accumulated less than 40 hours in 15 of those weeks. (PX 1; ALJ 8.)

However, in disregarding Hegarty's additional payroll records, ALJ Green solely focused on a limited subset of weeks immediately following Hegarty's supposed "change" to reason CGC still demonstrated a change occurred. (ALJ 8.)

be considered in one generalized analysis. In fact, CGC alleged that the 20 bargaining unit employees had their hours reduced on different dates. Yet, at CGC's invitation, ALJ Green, without second thought, analyzed all the employees' hours together to try to create some pattern, even though no such pattern could be discerned. In essence, ALJ Green seemed to take a generalized view of the 20 bargaining unit employees' hours as cover to presume that CGC's allegations were meritorious.

However, during this nine (9) week period Hegarty still accumulated more than 37.5 hours in *five (5)* of those weeks. (GCX 10(e).) And the ALJ admitted that throughout his employment, Hegarty was accumulating 37.5 hours or more per week, and in many instances after this nine (9) week period, Hegarty accumulated 40 hours or more per week. (ALJ 8.) The thread underpinning ALJ Green’s analysis of Hegarty’s additional payroll records, though, is still the impermissible presumption of a certain “status quo,” from which a change could then be found, regardless of what the actual data showed.²² In fact, ALJ Green even that Hegarty’s hours bordered on “ambiguous” as to any change (*id.*), but still presumed that the ambiguous evidence would show a Section 8(a)(5) violation.

Additionally, the Center acknowledges ALJ Green’s missive that an employer acts at its peril in making changes to the “status quo” while challenging an election. (ALJ 6 n.5.) But the Section 8(a)(5) allegation at issue herein, the evidence for which is a limited subset of approximately 10 to 13 payroll records per employee during the five (5) year period when the Center’s legal challenges were pending,

²² In his Decision, ALJ Green seemed to fault the Center for not submitting additional payroll records for more employees. (ALJ 4 n.1.) However, it is important to note that it was not the Center’s burden to prove that it did not commit an unfair labor practice. It was squarely CGC’s burden to prove that the Center committed an unfair labor practice. Moreover, as discussed herein, even when the Center submitted additional evidence in the form of Hegarty’s payroll records, ALJ Green found that evidence to be “ambiguous” yet still found a Section 8(a)(5) violation. (ALJ 8.)

seem almost reverse engineered to justify the finding of any unfair labor practice during this period.²³ Because neither CGC nor the Union presented any evidence to explain what occurred on the dates the alleged changes to the “status quo” took place (which were seemingly picked at random with no explanation), the parties, ALJ Green, the Board, and this Court are left to guess as to what exactly happened in 2014 or 2015 while the Center was challenging the Union’s March 2012 election. It is difficult to comprehend how CGC could have met its burden of proving a Section 8(a)(5) violation without providing this explanatory evidence.

The perfect encapsulation of CGC’s approach of throwing anything against the wall and hoping ALJ Green would presume a Section 8(a)(5) violation is that CGC never even squared its theory of the case with its original Complaint allegation that the Center unilaterally decreased bargaining-unit employees’ hours “since about February of 2013” – not February, July, or September of 2014, or March of 2015 as it now posits. ALJ Green never questioned CGC or the Union about this conspicuous change in legal theory, or at least mention it in his analysis. ALJ Green’s acceptance of CGC and the Union’s post-hoc theory of wrongdoing without question, and without any explanation of why that theory so differed from the Complaint

²³ Which, through no fault of its own, took an inordinate amount of time. The Center’s legal challenges were delayed by the issues surrounding the Supreme Court’s *Noel Canning* decision, which required the Board to reissue its underlying decisions, and the Center to re-file its appeal.

allegations, is suspect.

Lastly, ALJ Green's impermissible presumption of an unfair labor practice is further supported by the notable fact that CGC made no mention of the theory of wrongdoing at issue herein during the actual hearing. CGC's sole focus during the hearing was on the separate legal theory that the Center changed its hiring practices in violation of Section 8(a)(5) (Tr. 8-9), a theory which CGC unilaterally withdrew in its Post-Hearing Brief (and other allegations that have been dismissed by the Board). (CGC P-H Br. 1 n.3.) Only in their Post-Hearing Briefs did CGC and the Union begin to flesh out the legal theory that ALJ Green eventually adopted as a Section 8(a)(5) violation and is the subject of this appeal. And neither CGC nor the Union ever provided a reason for the discrepancy between what was articulated at the hearing, and what they ultimately argued in their Post-Hearing Briefs (that ALJ Green ended up accepting). The fact that CGC's case (and ALJ Green's adoption of it) is based on pure speculation thus becomes more apparent, and it becomes more apparent that ALJ Green should not have accepted it.

iii. *The Board Failed to Properly Review ALJ Green's Flawed Decision*

Despite the dearth of evidence CGC and the Union submitted, despite the curious manner in which CGC changed its theory of the case after issuing the Complaint, and despite ALJ Green's faulty analysis on a fundamental legal issue, the Board merely rubber stamped ALJ Green's Decision in a footnote. (Bd. 1 n.1.)

The only analysis the Board provided was to simply reaffirm that the “correct evidentiary standard is whether the General Counsel has shown by a preponderance of the evidence that the [Center] made a material change to the employees’ terms and conditions of employment,” citing to *Columbia Memorial Hospital*, 362 NLRB 1256, 1270 (2015). But the case law on which the Board relied demonstrates that the Board erred in the same manner that ALJ Green erred. *Columbia Memorial Hospital* simply stands for the proposition that the General Counsel “has the burden of showing by a preponderance of the evidence that the Respondent made a unilateral change that was material and substantial.” *Id.*

Neither the Board or its cited case law, though, begins to address the fundamental question that ALJ Green skipped over – how is the “status quo” as of the Union’s March 2012 election defined. This Court cannot allow the Board to simply rubber stamp ALJ Green’s incomplete analysis. This Court has unequivocally held that it “cannot defer to a Board that has not adequately considered the issues raised by the parties” and has thus acted in an arbitrary and capricious manner. *Fred Meyers Stores, Inc.*, 865 F. 3d at 639. Deference by this Court would only be appropriate “where ‘the process by which [the Board] reaches [a] result’ is ‘logical and rational – in other words, the [Board] has engaged in ‘reasoned decisionmaking.’” *Id.* at 639 quoting *Allentown Mack*, 522 U.S. at 374. The Board’s truncated analysis to approve ALJ Green’s flawed Decision was

arbitrary and capricious, clearly did not evince logical and rational decision-making, and, therefore, cannot stand.

CONCLUSION

Based on the foregoing facts, arguments and authorities, Petitioner respectfully request that this Honorable Court deny enforcement and set aside the Board's Decision and Order, reported at 369 NLRB No. 109.

Dated: December 14, 2020

Respectfully submitted,

BRIAN J. GERSHENGORN
SETH D. KAUFMAN
STEPHEN C. MITCHELL
FISHER & PHILLIPS LLP

By: /s/ Brian J. Gershengorn

*ATTORNEYS FOR PETITIONER,
800 RIVER ROAD OPERATING COMPANY,
LLC D/B/A CARE ONE AT NEW MILFORD*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,826 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point type using Microsoft Word.

Dated: December 14, 2020

Respectfully submitted,

BRIAN J. GERSHENGORN
SETH D. KAUFMAN
STEPHEN C. MITCHELL
FISHER & PHILLIPS LLP

By: /s/ Brian J. Gershengorn

*ATTORNEYS FOR PETITIONER,
800 RIVER ROAD OPERATING COMPANY,
LLC D/B/A CARE ONE AT NEW MILFORD*

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system.

I certify that counsel of record, as addressed below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brian J. Gershengorn _____

*ATTORNEYS FOR PETITIONER,
800 RIVER ROAD OPERATING COMPANY,
LLC D/B/A CARE ONE AT NEW MILFORD*