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**Nos. 20-1280, 20-1321**

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

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

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties, Intervenors, and Amici:** 800 River Road Operating Company, LLC d/b/a Care One at New Milford (“Care One”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. 1199 SEIU, United Healthcare Workers East (“the Union”), was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

**B. Ruling Under Review:** The ruling under review is a Decision and Order of the Board in *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (June 23, 2020).

**C. Related Cases:** This case has not previously been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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## **GLOSSARY**

Act	National Labor Relations Act
ALJ	Administrative Law Judge
Board	National Labor Relations Board
Br.	Opening brief filed by 800 River Road Operating Company, LLC d/b/a/ Care One at New Milford
Care One	800 River Road Operating Company, LLC d/b/a/ Care One at New Milford
D&O	Decision and Order (369 NLRB No. 109)
ERX	Employer Exhibit
GCX	General Counsel Exhibit
Tr.	Transcript
Union	1199 SEIU, United Healthcare Workers East

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of 800 River Road Operating Company, LLC d/b/a Care One at New Milford (“Care One”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order against Care One. The Board’s Decision and Order, which issued on June 23, 2020, is reported at 369 NLRB No. 109. (D&O 1-26.) The Board had

jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act. 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The petition and cross-application are timely, as the Act provides no time limit for those filings.

### **STATEMENT OF THE ISSUE**

Whether substantial evidence supports the Board's finding that Care One violated Section 8(a)(5) and (1) of the Act by unilaterally reducing employees' weekly hours.

### **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are contained in an addendum to this brief.

### **STATEMENT OF THE CASE**

Care One operates a facility in New Milford, New Jersey, where it provides rehabilitation and nursing care. (D&O 2, 10; GCX 4.) On February 7, 2012, a unit of Care One's nonprofessional employees voted for 1199 SEIU, United Healthcare Workers East ("the Union") to represent them in collective bargaining. (D&O 10; GCX 2.)<sup>1</sup> The Board rejected Care One's objections to the election and certified

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<sup>1</sup> Record references preceding a semicolon are to the Board's findings of fact; those following are to supporting evidence.

the Union as the employees' representative. (D&O 10; GCX 2.) The Court subsequently enforced the Board's order requiring Care One to recognize and bargain with the Union. *See 800 River Road Operating Co., LLC d/b/a Woodcrest Health Care Center*, 846 F.3d 378, 391 (D.C. Cir. 2017). This case involves changes Care One made to 20 employees' hours after the union election, without bargaining with the employees' chosen representative.

### **I. Statement of Facts and Procedural History**

Each of the employees at issue regularly received pay for approximately 40 hours a week, including for hours worked, vacation, and sick leave. (D&O 11-13, 17-26.)<sup>2</sup> They generally took vacation and sick leave in 8-hour increments. (D&O 12, 17-26.) Their hours then dropped and they began to receive pay for approximately 37.5 hours a week. (D&O 11-13, 17-26.) At the same time, they began to generally take vacation and sick leave in 7.5-hour increments. (D&O 12, 17-26.)

The pay period in which the reduction from 40 to 37.5 weekly hours occurred varied according to job classification. (D&O 10-11, 17-26.) For

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<sup>2</sup> Specific employees' hours are discussed below (pp. 10-14). The underlying payroll records upon which the Board relied are at GCX 10(a)-(h) and ERX 6. Care One corrects several transcription errors (Br. 9-10 nn.9-11), but does not otherwise challenge the Board's reliance on the charts contained in Appendix B to the administrative law judge's recommended decision as an accurate summary of the underlying records. Additional corrections are noted below (pp. 11-12 nn.5-7).

recreation assistants, weekly hours dropped in the pay period ending February 1, 2014. (D&O 10.) For dietary aides, housekeepers, laundry aides, and the porter, the reduction occurred in the period ending July 19, 2014. (D&O 10-11.) For the maintenance worker, it was the period ending September 16, 2014. (D&O 11.) And for the receptionist, it was the period ending March 28, 2015. (D&O 11.) Care One did not provide the Union with notice or an opportunity to bargain before reducing employees' hours. (D&O 11; GCX 4.)

At all relevant times, Care One's wage and benefit summary stated that "[d]epending on [their] position and work schedule, hourly and salaried employees generally work either 7.5 hour[s]/day up to 37.5 hours/week or they may work 8 hours/day up to 40 hours/week." (D&O 11; ERX 1.) For purposes of eligibility for benefits, vacation, holiday pay, and sick time, the summary defined full-time employees as those who regularly work "37.5 hours or more per week," and defined part-time employees as those who regularly worked 24 to less than 37.5 hours per week. (D&O 11; ERX 1.) The summary stated that vacation hours and sick time may be used "based upon an employee's regularly scheduled work day." (D&O 11; ERX 1.) "For example," the summary explained, "an employee who is regularly scheduled to work a seven and one-half (7.5) hour day may use seven and one-half (7.5) sick time [or vacation] hours." (D&O 11; ERX 1.)

The Union filed unfair-labor-practice charges and the Board's General Counsel issued a complaint alleging, among other things, that Care One violated the Act by decreasing employees' hours without bargaining with the Union. (GCX 1(a), GCX 1(c), (GCX 1(e), GCX 1(l).) An administrative law judge held a hearing and issued a recommended decision and order finding that violation. (D&O 9-17.)

## **II. The Board's Conclusions and Order**

The Board (then-Chairman Ring and Members Kaplan and Emanuel) found, in agreement with the administrative law judge, that Care One violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' payroll hours from 40 to 37.5 hours per week. (D&O 1 n.1 & 12-15.)<sup>3</sup> The Board's Order requires Care One to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (D&O 8.) The Order also directs Care One to rescind the unlawful change, bargain with the Union on request before changing employees' terms and conditions of employment in the future, make employees

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<sup>3</sup> The Board also overruled precedent upon which the judge had relied in finding that Care One violated the Act by disciplining four employees without bargaining with the Union, and accordingly dismissed the corresponding complaint allegations. (D&O 1-9.) The Union has not petitioned for review of the partial dismissal, so only the Board's finding that Care One unlawfully reduced employees' hours without bargaining is at issue here.

whole for any losses they suffered as a result of the reduction in their payroll hours, and post a remedial notice. (D&O 8.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that Care One unlawfully reduced employees' hours without bargaining with their union. As the Board found, Care One's payroll records established that the employees at issue worked approximately 40 hours per week. The records show that Care One then reduced those hours to approximately 37.5 per week. The Board reasonably found that those records—on their face, without more—establish a material change in employees' weekly hours. Because it is well settled that an employer must bargain with its employees' representative before making material changes to their hours, and Care One concedes that it did not bargain with the Union before reducing employees' hours, that change was unlawful.

Care One attacks the Board's factual finding of a material change by cataloging routine variations in employees' hours, but it fails to demonstrate that no reasonable finder of fact could discern the distinct overall reduction in hours that the Board found. Care One also attempts to recharacterize the status quo preceding the reduction to privilege its unilateral action. In doing so, however, it ignores its burden of proof to establish an affirmative defense, distorts the

evidence, and misunderstands its bargaining obligation under settled law. All of its arguments are meritless.

## ARGUMENT

### **Substantial Evidence Supports the Board’s Finding that Care One Violated Section 8(a)(5) and (1) of the Act by Unilaterally Changing Employees’ Hours**

#### **A. An Employer Violates the Act by Changing Employees’ Hours Without Notifying and Bargaining with their Union**

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 [its] employees.” 29 U.S.C. § 158(a)(5). Section 8(d) of the Act, in turn, defines the employer’s collective-bargaining duty as the obligation “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). That obligation attaches at the time employees vote for union representation. *Fugazy Cont’l Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984) (per curiam). “[A]n employer’s violation of [S]ection 8(a)(5)’s duty to bargain also violates [S]ection 8(a)(1),” which “makes it an unfair labor practice for an employer to interfere with its employees’ exercise of their rights under the Act.” *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017).

An employer thus violates Section 8(a)(5) and (1) if, instead of bargaining, it makes unilateral changes to employees’ work hours. *NLRB v. Katz*, 369 U.S. 736,

743, 747 (1962); *Int'l Woodworkers of Am., AFL-CIO, Local 3-10 v. NLRB*, 380 F.2d 628, 629-30 (D.C. Cir. 1967). Such changes are “tantamount to an outright refusal to negotiate on that subject,” *id.* at 746, and they violate the Act regardless of the employer’s motivation, *id.* at 743, 747. An employer may, however, establish an affirmative defense to a unilateral-change violation by proving that it has a past practice of regularly making similar unilateral changes. *See Palm Beach Metro Transp., LLC*, 357 NLRB 180, 183 (2011), *enforced*, 459 F. App’x 874 (11th Cir. 2012); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999), *enforced*, 1 F. App’x 8 (2d Cir. 2001).

**B. The Board’s Finding of an Unlawful Unilateral Change Is Entitled to Great Deference**

The Board’s construction of the Act is “entitled to considerable deference” and must be upheld if reasonable and consistent with the policies of the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979). In Section 8(a)(5) and (d) of the Act, Congress delegated to the Board “the primary responsibility for marking out the scope of the statutory language and of the statutory duty to bargain.” *Id.* at 496. “The unilateral change doctrine . . . represent[s] the Board’s interpretation of the [Act’s] requirement that parties bargain in good faith.” *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 200 (1991).

The Board’s factual findings are “conclusive” when supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). In reviewing the Board’s

factual findings, the Court may not “displace the Board’s choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Court also applies the substantial evidence test to the Board’s “application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted).

**C. Care One Unlawfully Reduced Employees’ Payroll Hours From 40 to 37.5 Hours Per Week Without Bargaining**

Care One stipulated that it did not bargain with the Union about employees’ hours. (D&O 11; GCX 4.) As we now show, substantial evidence supports the Board’s finding that Care One materially reduced them. Neither the facts nor the law support Care One’s efforts to recharacterize the status quo as privileging that unilateral reduction, and Care One’s remaining arguments are also meritless. Accordingly, Care One violated the Act.

**1. Employees’ payroll records show a material reduction in their weekly hours**

The Board found that “the employees in question largely accrued 40 hours per week before and 37.5 hours per week during or after” a specific pay period for

each job classification. (D&O 13.) Before the reduction occurred, the employees' hours fluctuated to a limited degree around a norm of 40 pay hours, including sick and vacation time.<sup>4</sup> Specifically, the Board found that the employees "generally accrued 40 hours per week and rarely if ever accrued less than 39 hours per week." (D&O 13.) Then abruptly—during a particular pay period for each job classification—the employees "experienced a reduction in hours to 37.5-hour weeks and rarely if ever accrued more than 38.75 hours per week after the change." (D&O 13.) As a result, the Board found, "a change occurred which was different than the prior changes." (D&O 13.) That is, the employees experienced a material diminution in hours that was markedly unlike the routine variation they had previously known.

The payroll records in evidence fully support the Board's findings. (D&O 17-26; GCX 10, ERX 6.) Taking the employees by job classification, the five recreation assistants all saw their hours drop in the pay period ending February 1, 2014. (D&O 10.) Rosilin Bobby accumulated 40 hours every single week for 3 months before her hours dropped to 37.5 for each of the next 10 weeks, save 2 in which her hours were 38 and 37.25. (D&O 18-19.) Sara Jiminez had 40 hours for 10 weeks straight (except for 2 weeks at 39.5 hours) before she, like Bobby, saw a

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<sup>4</sup> In totaling employees' weekly hours, the Board did not count holiday pay. (D&O 14.) Care One does not contest that approach. (Br. 7 n.6.)

drop to 37.5 for 10 weeks, save 2 weeks at 38 and 37.25 hours. (D&O 23.) Donna Timms accumulated 40 hours or more for 10 out of 12 weeks, then accumulated 37.5 hours for every one of the next 10 weeks. (D&O 25.) Mariamma Abraham accumulated 40 hours in 8 out of 14 weeks preceding the change, then accumulated 37.5 or fewer hours for each of the next 8 weeks. (D&O 14 n.10, 17-18.) Finally, Shiril Tom consistently worked 40 hours, or in 2 cases 39.75 hours, for 12 weeks. He then accumulated 37.5 or 38 hours for the next 8 weeks. (D&O 26.)

Similar patterns are clear in each of the other employees' records. Among the 7 dietary aides, whose hours dropped in the pay period ending July 19, 2014, Benjamin Bustos had 40 hours in 8 out of 11 weeks, during which his hours were never below 39. Then for 14 weeks he never had 40 hours, and only once accumulated as many as 39.25. (D&O 19.) Evelyn Coronado had 40 hours for 10 out of 11 weeks before dropping to between 37 and 37.75 in 12 of the next 13 weeks. (D&O 19-20.)<sup>5</sup> Elaine Farr similarly had 40 hours for 10 out of 11 weeks, followed by 38.25 or fewer hours for the next 11 straight weeks. (D&O 20.)<sup>6</sup>

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<sup>5</sup> Appendix B contains an erroneous entry of 8 sick hours for Coronado in the pay period ending September 13, 2014 (D&O 19), which should be holiday time according to her pay records (GCX 10(b)).

<sup>6</sup> Appendix B erroneously reflects 22.5 hours of sick time in the pay period ending August 30, 2014 (D&O 20), which do not appear in Farr's pay records (GCX 10(b)).

Enrique Fontanez had 40 hours for 7 out of 11 weeks, and at least 39.25 in the other 4. (D&O 20.) Then he had 37.5 hours for 11 weeks, except for 1 week at 37 and 1 week at 37.75. (D&O 20.) Vicente Ricarze had 39 hours or more in 8 out of 11 weeks, then had 37.5 hours or fewer every single week for 15 weeks. (D&O 14 n.10, 24-25.) Allan Tolentino similarly had 39 hours or more for 11 out of 15 weeks, and then fell below 38.75 hours for 10 of the next 11. (D&O 25-26.) And George Varghese had exactly 40 hours for 13 out of 15 weeks, followed by exactly 37.5 hours for 8 of the next 11 (and never more than 38). (D&O 26.)

The housekeepers, laundry aides, and porter also saw their hours drop in July 2014. (D&O 11.) Desinette Bazile had 40 hours for 8 out of 11 weeks, then 37.5 or fewer hours in each of the next 11 weeks. (D&O 18.)<sup>7</sup> Julienne Benoit had 40 hours for 9 out of 11 weeks, then 37.5 or fewer hours for 11 straight weeks. (D&O 18.) Paulette Murray accumulated 40 hours or more for 13 out of 15 weeks, then 38 hours or fewer for 10 out of 11 weeks. (D&O 23-24.) Charles Abouzeid had 40 hours or more for 11 weeks running, then 37.75 or fewer hours for the next 11. (D&O 17.) Jean Ramkhalawan was at 39.5 hours or more for 11 weeks, then 38 or fewer for 10 of the next 11. (D&O 24.) And Edgardo Irabon accumulated

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<sup>7</sup> Appendix B erroneously reflects 7.5 hours of sick time in the pay period ending August 2, 2014 (D&O 18), which do not appear on Bazile's records (GCX 10(c)).

39.5 hours or more for 11 weeks before dropping to 38.5 or fewer hours in 10 of the 11 weeks that followed. (D&O 23.)

Finally, maintenance worker Andrew Hegarty and receptionist Dawn-Marie Sormani experienced reductions in the pay periods ending August 16, 2014, and March 28, 2015, respectively. (D&O 11.) Hegarty regularly accumulated at least 40 hours prior to the change, reaching that amount in 18 of 22 weeks. His regular hours then dropped, as he accumulated fewer than 39 hours in 18 out of the next 22 weeks. (D&O 14, 21-22.)<sup>8</sup> Sormani also saw a change as she initially accumulated 40 hours or more in 5 out of 10 weeks, then never accumulated more than 38.25 hours in any of the following 12 weeks. (D&O 13-14, 25.)

Across the payroll records, as the Board found (D&O 12), entries reflecting employees' sick and vacation hours confirm that Care One systematically reduced employees' hours. With only rare exceptions, the records show that employees

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<sup>8</sup> In addition to the smaller set of payroll records the General Counsel introduced, Care One provided records for Hegarty covering the period from January 5, 2013, to December 17, 2016. (ERX 6.) As the Board found, the additional records show that Hegarty often accumulated 40 hours during the 84 weeks preceding the change, with 39 hours or more in 82% of those weeks. (D&O 14, 20-23.) The Board further noted that the records suggest that Care One restored Hegarty's 40-hour schedule in 2015. (D&O 14.) That further change may limit Care One's liability for Hegarty's backpay in a future compliance proceeding. (D&O 14.)

At the hearing, Care One's counsel repeatedly represented that Care One would introduce "full payroll records" for all of the employees at issue. (Tr. 18, 47.) Ultimately, however, Care One declined to do so. (D&O 11-12 n.1, 13.)

took sick and vacation leave in 8-hour increments before the change and in 7.5-hour increments thereafter. (D&O 12, 17-26.) That leave usage accords with a shift from a 40-hour workweek to a 37.5-hour workweek. (D&O 12 & n.3.)

Taken together, the foregoing records are substantial evidence of the reduction the Board found.

## **2. Care One's challenges to the Board's finding of a material reduction in hours are meritless**

In attacking the Board's finding of a material change, Care One laboriously demonstrates that the payroll records do not uniformly reflect employees accumulating precisely 40 hours each and every week before, and 37.5 hours each and every week after, the change. (Br. 7-11, 34-36.) But that fact is obvious and undisputed—and in no way inconsistent with the Board's findings. As shown above, the records constitute substantial evidence that employees were generally accumulating approximately 40 hours—sometimes a little more, sometimes a little less—but then, in a specific pay period for each job classification, their hours were reduced to approximately 37.5. (*See above*, pp. 3-4, 9-14.) To the extent Care One highlights examples of weeks outside that general pattern, those “exceptions may disprove a firm rule, but they do not undermine evidence of a broad and general policy.” *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1314 (11th Cir. 1999). “The exception does not eradicate the norm.” *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 181 (2d Cir. 1998).

Given the deference the Court grants the Board's findings of fact, it is not enough for Care One to argue that the records could be interpreted differently. Substantial evidence review "does not allow a court to 'supplant the [Board]'s findings merely by identifying alternative findings that could be supported by substantial evidence.'" *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)). *Accord Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). Thus, even if one assumes for the sake of argument that the payroll records could be interpreted differently, that fact would not warrant overturning the Board's amply supported finding of a distinct change.

Before the Court, Care One asserts that the change was "as little as 15 minutes" between certain individual weeks (Br. 34 n.19), but it never specifically challenges the Board's materiality finding. It has therefore waived any such argument. *See New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004).

In any event, even accepting Care One's characterization of the scale of the change, precedent uniformly supports the Board's conclusion. The Board, with court approval, has repeatedly found comparable changes to employees' work hours or schedules material. For instance, in *Atlas Microfilming*, 267 NLRB 682,

695-96 (1983), *enforced*, 753 F.2d 313 (3d Cir. 1985), the Board found a unilateral, 15-minute change in weekly hours unlawful. Similarly, it has found unilateral changes to the timing of 15-minute breaks unlawful. *See, e.g., Parsons Elec., LLC v. NLRB.*, 812 F.3d 716, 722 (8th Cir. 2016) (upholding the Board’s finding that employer made material change to policy allowing employees to go home 15 minutes early instead of taking 15 minute afternoon break); *El Paso Elec. Co. v. NLRB.*, 681 F.3d 651, 659 (5th Cir. 2012) (employer made material change by prohibiting employees from aggregating 15-minute breaks). Indeed, it has found even an *annual* change of that volume—the unilateral discontinuation of a 15-minute Thanksgiving break—to be a “material, substantial, and significant change.” *Rangaire Co.*, 309 NLRB 1043, 1043 (1992), *aff’d mem.*, 9 F.3d 104 (5th Cir. 1993).

### **3. Care One’s attempt to recharacterize the status quo is unsupported by the facts or the law**

Having failed to undermine the Board’s finding that it materially reduced employees’ payroll hours, Care One attempts to obfuscate that change by recharacterizing the status quo in a manner unsupported by the facts or the law. To do so, it first wrongly claims that the Board “skipped” defining the status quo from which Care One’s change departed. (Br. 29-31.) Plainly, the Board found that the status quo was that the employees at issue “generally accrued 40 hours per week,” with minor variations around that norm. (D&O 13.) As shown above, months of

payroll records for all of the employees constitute substantial evidence in support of that finding. *See, e.g., Mission Foods*, 350 NLRB 336, 344 (2007) (finding that employer violated the Act by unilaterally transferring employee to a job where her average hours were lower in the pay periods immediately following the transfer than in the preceding ones).<sup>9</sup>

Care One also incorrectly insists (Br. 16, 24-25, 32 n.18, 33) that the Board was required to determine what the status quo was as of the date of the 2012 union election—years before the disputed unilateral action occurred. To be sure, employees’ wages, hours, and other terms and conditions of employment at the time of the election define the initial status quo for bargaining purposes. (*See* above, p. 7.) But an employer’s unilateral changes after that time—whether lawful or not—can create a new status quo that the employer cannot unilaterally change without again violating the Act. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 939 F.3d 777, 781 (6th Cir. 2019) (upholding Board’s finding that employer “made two independent changes to [attendance] policy, causing new harm to the union each

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<sup>9</sup> Care One asserts that “[t]he Board has been clear” that a difference in hours between two weeks would not establish an unlawful unilateral change. (Br. 28.) But Care One cites no authority for that claim and we are aware of none. *Cf. Fla. Steel Corp. v. NLRB*, 601 F.2d 125, 130 (4th Cir. 1979) (upholding the Board’s finding that employer violated the Act by unilaterally instituting a schedule change for the duration of a single week). And even if such a rule existed, it would not be contrary to the Board’s findings here that months of payroll records on either side of the change established a meaningful drop in weekly hours.

time by refusing to notify or bargain with it”); *Roemer Indus., Inc.*, 367 NLRB No. 133, 2019 WL 2252371, at \*1 n.4 (May 23, 2019) (unilateral pay increase and unilateral rescission of the increase two months later were both unlawful changes), *enforced*, 824 F. App’x 396 (6th Cir. 2020). Here, whether employees’ 40-hour schedules dated back to the pre-election period or resulted from a more recent change, the Board reasonably found the multi-month period immediately preceding the change sufficient to establish a status quo that Care One was required to maintain.

Finally, Care One again asks the Court to disregard employees’ actual working hours by redefining the status quo with reference to a wage and benefit summary. Care One argues that the terms of that document created a status quo of employees accumulating “37.5 hours or more” weekly, and thus gave Care One the right to reduce employees’ weekly hours as long as they regularly reached at least 37.5. (*E.g.*, Br. 26 & n.15, 28, 32 n.18.) Measured against that interpretation of the wage and benefit summary, Care One contends that its reduction in employees’ hours was not a change at all, but merely the maintenance of the 37.5-plus status quo. (Br. 14, 16-17, 23-24, 28-29.) In making that argument, Care One ignores its burden of proof, mischaracterizes the wage and benefit summary, and distorts governing law.

First of all, in arguing that the status quo privileged its unilateral action, Care One misunderstands what the law requires it to prove. Once the Board found a unilateral reduction in employees' hours, it was Care One's burden—if it wished to show that its actions were consistent with a broader status quo—to establish as an affirmative defense that it had a past practice of making similar unilateral changes. *Eugene Iovine*, 328 NLRB at 294-95 n.2. “As the party asserting a past practice, the [employer] must prove that the employees would reasonably consider the action at issue to be consistent with what the [employer] has done in the past.” *ABF Freight Sys., Inc.*, 369 NLRB No. 107, 2020 WL 3439941, at \*2 (June 19, 2020). See also *Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 385 (1st Cir. 2017) (employer “may benefit from a safe harbor for an established past practice” by proving that it took similar unilateral actions “on a consistent basis prior to the election of the [u]nion” (quoting *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 166 (1st Cir. 2005) (internal quotation marks and alterations omitted))). Thus, for example, it was Care One's burden—not the General Counsel's—to introduce “evidence to explain what occurred” when it reduced employees' hours. (Br. 37.) See *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (“By failing to specify when the prior changes occurred, the number of such changes or their frequency, the [employer] necessarily failed to meet its burden of showing regularity and frequency.”); *Eugene Iovine*, 328 NLRB

at 294 (employer did not establish a past-practice defense where it failed to show “both the specific circumstances surrounding the reduction of hours” that the Board found unlawful “and those surrounding reductions in hours in prior years”).

The only evidence Care One points to in support of its characterization of the status quo—the 2009 wage and benefit summary—cannot satisfy its burden of proof. As an initial matter, the plain language of the summary does not even support Care One’s position. The summary categorizes employees who regularly work 37.5 hours or more per week as “Full-Time Benefits Eligible.” (Br. 23 (citing ERX 1).) Specifically, the document provides that “[e]mployees actively employed on a full-time basis (regularly work 37.5 hours or more per week) are eligible for vacation, holiday pay, and sick time.” (ERX 1.) But that statement of eligibility for certain benefits and leave does not answer the question at hand. Even assuming the summary accurately describes Care One’s benefits and leave policies, it does not establish the status quo of employees’ actual work hours at the time of the unilateral reduction. And it certainly does not establish that Care One had a longstanding practice of reducing employees’ hours in the way the payroll records show it did here. In the absence of such evidence, the fact that employees continued to accrue enough hours to be eligible for full-time benefits does not undermine the Board’s finding of a material change in hours.

Moreover, the summary itself undermines Care One’s central claim that the status quo can be defined only as employees regularly accumulating 37.5 hours a week or more. In language the Board quoted, but which Care One omits from its brief, the summary specifies that “[d]epending on [thei]r position and work schedule, hourly and salaried employees generally work *either* 7.5 hour[s]/day up to 37.5 hours/week *or* they may work 8 hours/day up to 40 hours/week.” (D&O 11 (quoting ERX 1) (internal quotation marks omitted and emphasis added).) Thus, the document indicates that full-time employees ordinarily will work one schedule or the other—not a random number of hours above 37.5. As the Board also noted (and as Care One also neglects to mention), the summary provides for the use of vacation and sick time in increments based on an employee’s “regularly scheduled work day.” (D&O 11 (quoting ERX 1) (internal quotation marks omitted).) In conjunction with the nearly universal shift from 8-hour increments of leave to 7.5-hour increments that the payroll records reflect, that language supports the Board’s finding of a change in employee’s hours. (*See* above, pp. 3-4, 13-14.)

In any event, even leaving aside Care One’s misreading of the wage and benefit summary, its argument fails because it is founded on a basic misunderstanding of an employer’s bargaining obligations under the Act. Care One notes that the wage and benefit summary “contained no guarantee of hours” for any employee. (Br. 24.) But that simply describes the default employment

arrangement for employees who are not represented by a union. As explained above (pp. 7-8), once employees choose a collective-bargaining representative, the Act requires their employer to maintain their wages, hours, and other terms and conditions of employment until it has bargained over any proposed changes. *Katz*, 369 U.S. at 743. The absence of guaranteed terms and conditions of employment before the collective-bargaining relationship begins has never absolved employers of that responsibility.

Care One attempts to arrogate to itself the right to “snap [employees] back” (Br. 29) to a minimum level of hours—at any time, within its sole discretion—simply by characterizing that prerogative as the status quo under the wage and benefit summary. In advancing that argument, Care One “relie[s] on an asserted historic right to act unilaterally” by dropping employees to 37.5 hours, “as distinct from an established past practice of doing so.” *Goya Foods of Fla.*, 351 NLRB 94, 97 (2007) (quoting *Goya Food of Fla.*, 347 NLRB 1118, 1120 (2006), *enforced*, 525 F.3d 1117 (11th Cir. 2008)) (internal quotation marks omitted), *enforced mem.* 309 F. App’x 422 (D.C. Cir. 2009) (per curiam). But again, “[t]hat right to exercise sole discretion changed once the Union became the [employees’] representative.” *Id.* (quoting *Goya Foods*, 347 NLRB at 1120 (internal quotation marks omitted)).

Once its employees chose union representation, and absent proof of a past practice of regularly making similar changes, Care One could “no longer unilaterally exercise its discretion with respect to hours and days of work, mandatory subjects of bargaining, for its employees, because of the intervention of the bargaining representative.” *Palm Beach Metro Transp.*, 357 NLRB at 184. And as a matter of law, the purported *policy* of employer discretion on which Care One relies is not equivalent to evidence of a *past practice*. Proving such a past practice requires record evidence that specific unilateral actions are “similar in kind and degree,” *Raytheon Network Centric Sys.*, 365 NLRB No. 161, 2017 WL 6507215, at \*21 (Dec. 15, 2017), to others the employer took “with such regularity and frequency [that] employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis,” *Palm Beach Metro Transp.*, 357 NLRB at 184. *Cf. Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002) (reservation of discretion under management-rights clause in expired contract did not establish a past practice defense in the absence of “evidence of a pattern of unilateral change to work schedules”); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977) (upholding the Board’s rejection of employer’s claim that its policy justified a unilateral wage increase where employer failed to show the policy was “firmly established” and a “longstanding

practice”).<sup>10</sup> Because Care One did not make any such past-practice argument, much less meet its burden of showing such an established practice, its unilateral reduction in employees’ hours was unlawful.

#### 4. Care One’s remaining arguments fail

It is unclear what argument Care One is trying to make by grouching about the content of the complaint and the manner in which the General Counsel and Union presented their arguments to the administrative law judge. (Br. 37-38.) If Care One means to suggest that it was somehow deprived of due process, the Court is “without jurisdiction to consider that question,” as Care One did not raise any such argument before the Board. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996) (Court barred from considering due-process argument employer failed

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<sup>10</sup> Indeed, even actions consistent with an employer’s preexisting, written policy may constitute a unilateral change under certain circumstances. *See, e.g., Rhino Nw., LLC*, 369 NLRB No. 25, 2020 WL 614935, at \*1 n.3 (Feb. 6, 2020) (where employer’s policy was “only enforced sporadically” before unionization, its change to strict enforcement could not be justified based on a past practice defense); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (employer’s enforcement of written policy requiring employees to give three days’ notice before taking a vacation only after unionization was unlawful unilateral change).

to raise adequately before the Board). And Care One has also waived any potential due process argument by failing to clearly argue it with supporting legal authority before the Court. (*See* above, p. 15.)

In any event, Care One cannot dispute that it fully litigated the violation the Board found. *See Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003) (“[T]he Board 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.” (quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990) (internal quotation marks omitted)). In particular, Care One availed itself of the opportunity to introduce any payroll records it thought would advance its position. (D&O 11-12 n.1, 13.) And Care One cannot seriously claim to have been caught unawares at any point in the proceeding. In Care One’s opening statement, its counsel stated “we understand and the Board has confirmed that it really boils down again to two particular issues,” one of which was “that [Care One] unilaterally reduced 20 employees’ work schedules from 40 to 37.5.” (Tr. 10.) Because “it is plain that [Care One] knew what was going on, that is where the matter ends.” *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1162 (5th Cir. 1977).

Finally, Care One adds nothing with its makeweight argument that the Board improperly “rubber stamped” the administrative law judge’s decision. (Br. 38-40.)

“Where the Board generally adopts the ALJ’s findings, as the Board did here, the Board need not repeat and explicate every piece of evidence supporting the ALJ’s findings.” *NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 88 n.1 (3d Cir. 2002). *Accord McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 3 n.1 (1st Cir. 1997) (“The Board need not make independent findings or conduct a separate analysis of the factors prompting the order if it specifically adopts the findings and reasoning of the ALJ.”). It is enough that the path of the Board’s rationale “may reasonably be discerned.” *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1281 (D.C. Cir. 1990) (citation and internal quotation marks omitted). Here, the Board explained that it considered the record and the parties’ exceptions and briefs, and it expressly adopted the judge’s relevant findings while clarifying the evidentiary standard it applied. (D&O 1 n.1.) Nothing more was required.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Care One's petition, grant the Board's cross-application, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

February 2021

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

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800 RIVER ROAD OPERATING COMPANY, LLC	)	
d/b/a CARE ONE AT NEW MILFORD	)	
Petitioner/Cross-Respondent	)	Nos. 20-1280,
	)	20-1321
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

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**STATUTORY ADDENDUM**

**National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.**

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	ii
Section 8(d) (29 U.S.C. § 158(d)).....	ii
Section 10(a) (29 U.S.C. § 160(a)) .....	ii
Section 10(e) (29 U.S.C. § 160(e)).....	ii
Section 10(f) (29 U.S.C. § 160(f)).....	iii

## NATIONAL LABOR RELATIONS ACT

### **Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.**

#### (a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

#### (d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to 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, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

### **Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.**

#### (a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce . . . .

#### (e) Petition to court for enforcement of order; proceedings; review of judgment

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

proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have 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. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

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 a court a written petition praying that the order of the Board be modified or set aside . . . .

**UNITED STATES COURT OF APPEALS  
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	)	Nos. 20-1280,
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	)	
v.	)	Board Case No.
	)	22-CA-204545
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 6,317 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word for Office 365. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/David Habenstreit  
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Dated at Washington, DC  
this 12th day of February 2021

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

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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit  
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Dated at Washington, DC  
this 12th day of February 2021