

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

REPLY 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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
GLOSSARY OF ABBREVIATIONS	iv
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Generalizations and Approximations are not Sufficient to Meet CGC’s Burden of Establishing a 40 Hour Per Week Status Quo	3
II. CGC and the Union Failed to Adequately Address the Fact that the Status Quo Was and Has Remained that Full-Time Employees Regularly Worked 37.5 Hours or More Per Week	10
III. CGC and the Union Misapprehend the Center’s Arguments and Improperly Try to Flip the Burden of Proof on to the Center.....	16
CONCLUSION	20
CERTIFICATE OF COMPLIANCE.....	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Beverly Health and Rehab. Services, Inc. v. NLRB</i> , 297 F.3d 468 (6th Cir. 2002)	19
<i>Bryant & Stratton Bus. Inst., Inc. v. NLRB</i> , 140 F.3d 169 (2d Cir. 1998)	5, 6
<i>Electrolux Home Products, Inc.</i> , 368 NLRB No. 34 (2019).	7
<i>Flambeau Airmold Corp.</i> , 334 NLRB 165 (2001)	14
<i>Fred Meyer Stores, Inc.</i> , 865 F.3d 630 (D.C. Cir. 2017).....	10
<i>Goya Foods of Florida</i> , 351 NLRB 94 (2007)	19
<i>Huron Valley-Sinai Hosp.</i> , 369 NLRB No. 64 (2020)	14
<i>NLRB v. Dynatron/Bondo Corp.</i> , 176 F.3d 1310 (11th Cir. 1999)	5, 7
<i>Pacific Diesel Parts Company</i> , 203 NLRB 820 (1973)	3
<i>Palm Beach Metro Transp., LLC</i> , 357 NLRB 180 (2011)	19
<i>Rhino NW., LLC</i> , 369 NLRB No. 25 (2020)	14
<i>Windsor Redding Care Center, LLC v. NLRB</i> , 944 F.3d 294 (D.C. Cir. 2019).....	10

Statutes

29 U.S.C. §158(a)(3).....7
29 U.S.C. §158(a)(5).....1, 3, 14, 19

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

SUMMARY OF ARGUMENT¹

In their Briefs, CGC and the Union advocate for this Court to set a very dangerous precedent. They both seek to lower the burden on CGC in establishing an unlawful unilateral change in violation of Section 8(a)(5) of the Act to a point where that burden would be nearly non-existent. Both CGC and the Union redouble their argument that CGC's burden of proof was met here based on mere generalizations, approximations, and hazy statistical patterns gleaned from the limited payroll records submitted into evidence (that even ALJ Green called "not entirely consistent," despite solely relying on those hazy statistical patterns for his reasoning). But a closer look at these statistical patterns ultimately leads to more questions than answers about what the evidence shows, especially since CGC and the Union provided no testimony or other evidence to explain or put into context the limited payroll records. And, significantly, neither CGC nor the Union cite to *any* case law finding a Section 8(a)(5) violation based on the mere generalizations, approximations, and hazy statistical patterns put forth here. In fact, the allegations and evidence lack such specificity that CGC and the Union do not even agree on when the alleged "change" occurred for several employees.

¹ The Brief of Petitioner is referred to as its "Opening Brief" or "Op. Br." The references used in the Center's Opening Brief are also used herein. The Brief of the National Labor Relations Board is referred to herein as "CGC's Brief" or "CGC Br.", and the Brief for Intervenor 1199SEIU United Healthcare Workers East is referred to herein as "Union's Brief" or "Un. Br."

Additionally, CGC and the Union fail to adequately address the fact that the Center's Wage & Benefit Summary – the significance of which was uncontroverted by any evidence presented by CGC or the Union during the hearing – set forth the operative status quo that Full-Time employees, such as the 20 at issue, regularly worked 37.5 hours *or more* per week. While CGC and the Union try to cast doubt on the significance of the Wage & Benefit Summary, their arguments are unavailing, and are not supported by common sense, the record evidence, or the case law to which they cite.

Lastly, CGC and the Union seek to not only lower the burden of proof on CGC but wrongly seek to flip the burden of proof on to the Center entirely. Try as they might, though, it is axiomatic that it is **CGC's** burden of proving that the Center actually reduced the hours of the employees at issue, and it is not the Center's burden to prove it did not act unlawfully. CGC and the Union's attempt to flip the burden of proof is best encapsulated by the fact that CGC is incredibly imprecise about what it is even claiming or trying to prove – a change in employee schedules, or simply that any change in hours constitutes an unfair labor practice. In either scenario, CGC does not do nearly enough by simply presenting limited payroll records with no other testimony or evidence to provide any context or explanation as to what occurred when the employees' hours allegedly were changed.

However, the case law to which CGC and the Union cite in their Briefs

provide a roadmap of what CGC should have done to prove their case – such as submitting employee schedules, notices of schedule or hours changes, or testimony from any of the 20 employees at issue that their schedule or hours were, in fact, reduced. CGC and the Union did none of that, and this Court should not enforce a Board decision based on such scant evidence.

ARGUMENT

I. Generalizations and Approximations are not Sufficient to Meet CGC’s Burden of Establishing a 40 Hour Per Week Status Quo

In its Opening Brief, the Center explained how ALJ Green did not require CGC to meet its burden of establishing a 40 hour per week status quo that was changed in violation of the Act. ALJ Green impermissibly presumed a 40 hour per week status quo by hazily relying on limited and seemingly random payroll records as “best evidence” of some sort of general pattern of approximate hours worked – a pattern that ALJ Green admitted “was not entirely consistent.” (Op. Br. 32-38; *quoting* ALJ 4.) Neither CGC’s Brief nor the Union’s Brief effectively counters this point. Instead, CGC (CGC Br. 9-16) and the Union (Un. Br. 4-10, 15-21) redouble their defective argument that generalizations and approximations are sufficient to meet CGC’s burden of proof.²

² The burden of proving a Section 8(a)(5) violation is squarely on CGC. *See Pacific Diesel Parts Company*, 203 NLRB 820, 824 (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.”).

CGC, after first rehashing the Center’s analysis of the employees’ hours worked (CGC Br. 9-14), summarizes this alleged pattern as employees “*generally* accumulating *approximately* 40 hours” per week prior to the alleged change, with their hours reduced to “*approximately* 37.5” per week after the alleged change. (CGC Br. 14 (emphasis added).) The Union takes a slightly different approach but likewise focuses on supposed statistical patterns from the payroll records. After also first rehashing the Center’s analysis of the employees’ hours worked (Un. Br. 4-9), the Union’s analysis culminates in listing employees’ median hours before and after the alleged change (Un. Br. 9, 15). It is noteworthy that, despite a supposed statistical pattern showing a unilateral change from 40 to 37.5 hours per week, several of the employees’ median weekly hours were either below 40 prior to the alleged change or greater than 37.5 after the alleged change.³ (*Id.*)

In addition, CGC and the Union both claim there was a “near universal” shift in leave increments from 8 hours to 7.5 hours after employees’ alleged change,

³ CGC’s focus on “materiality” (CGC Br. 15-16), arguing that a 15-minute change is material and that the Center waived such an argument by not raising it before the Board is a complete non-sequitur. The Center is not arguing (and, indeed, did not argue before the Board) that a 15-minute change would be immaterial. The Center is arguing that it was impermissible for ALJ Green to solely rely on supposed statistical patterns in the payroll records to find a 40-hour workweek status quo and a change from that status quo to a 37.5-hour workweek. Among other reasons this reliance on statistical patterns was impermissible is that, in some instances, the difference in hours accumulated before the alleged “change” from 40 to 37.5 hours per week was as little as 15 minutes – not close to the 2.5 hours alleged.

demonstrating a change in weekly hours worked. (CGC Br. 13-14, 21; Un. Br. 4-8.). However, CGC and the Union both gloss over the fact that *nearly every* employee at issue, at least once and sometimes more, was paid leave in less than 8-hour increments before his or her alleged change and was paid leave in 8-hour or more increments after his or her alleged change, or both.⁴

However, neither CGC nor the Union cite to *any* case law finding an unlawful unilateral change – or *any* unfair labor practice – based on generalizations, approximations, or a hazy statistical analysis of median hours. In fact, the Union does not cite to *a single case* to support this part of its Brief. For its part, CGC primarily relies on *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169 (2d Cir. 1998) and *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310 (11th Cir. 1999) to

⁴ Abouzeid received 8 hours of holiday pay after his alleged change; Abraham received 7, 7.07, and 7.5 hours of holiday pay prior to her alleged change; Bazile received 7.5 hours of sick pay and 7.83 hours of holiday pay prior to her alleged change, Benoit received 8 hours of holiday pay after her alleged change, Bobby received 7.5 hours of holiday pay four (4) times prior to his alleged change; Bustos received 8 hours of sick pay twice after his alleged change; Coronado received 8 hours of sick pay after her alleged change; Fontanez received 8 hours of holiday pay after his alleged change; Hegarty received 5.08 hours of holiday pay three (3) times prior to his change and received 8 hours and 16 hours of vacation pay after his alleged change; Jiminez received 8 hours of holiday pay after her alleged change; Murray received 7.92 hours of holiday pay and 8 hours of sick pay after her alleged change; Sormani received 7.5 hours of holiday pay prior to her alleged change; Timms received 8 hours of holiday pay after her alleged change; Tom received 8 hours of vacation pay after his alleged change; and Varghese received 7.5 hours of vacation pay prior to his alleged change, and received 7.98 hours of holiday pay and 8 hours of sick pay after his alleged change. (Decision Appendix B.)

support its reliance on general and approximate evidence. CGC claims that it is entitled to rely on generalizations and approximations, arguing that, in analyzing allegations of a unilateral change, a limited number of exceptions will not “disprove” the existence of a “broad and general policy” or “eradicate the norm.” (CGC Br. 14.) However, these cases are distinguishable, and the evidence presented by the general counsel in those cases to prove the “general policy” or “norm” in the first place (from which a unilateral change was then shown), far exceeded that presented by CGC and the Union here.

In *Bryant & Stratton*, the Board held that a wage increase given in 10 out of the previous 11 years was not discretionary but a term and condition of employment which the employer could not unilaterally change. *See* 140 F.3d at 180-82. The Board rejected the employer’s argument that the wage increases were not a term and condition of employment because of the one (1) year where the increase was not given. *Id.* at 181. But in *Bryant & Stratton*, the general counsel met its burden of establishing the status quo, from which there was an unlawful unilateral change, by presenting *specific* evidence of the employer’s decision-making in granting the increase in 10 of those years and the employer’s decision-making in not granting it in the other. *See id.* Here, on the other hand, CGC simply provided a small sample of payroll records devoid of any context or testimony that, as CGC readily admits, only show *generalizations* and *approximations*. CGC presented no testimony or

other evidence of the Center’s decision-making regarding employees’ hours around the time of the alleged change – or that the Center even made a decision to take some affirmative action.

Similarly, in *Dynatron/Bondo*, the “broad and general policy” at issue was a near-decade long merit pay increase that the employer unlawfully stopped, with the employer only pointing to six (6) employees over that period whose increases did not conform to the general practice. *See* 176 F.3d at 1313-14. The Court reasonably held that the “cherry-picked examples of six employees whose merit pay increases did not follow” the policy did not dissuade the Court from finding that the merit pay increase was an established term and condition of employment that the employer could not unilaterally change. *Id.* at 1314. Here, to the contrary, it was CGC who cherry picked a limited subset of payroll records – weeks’ worth not years’ worth – to try to show a deviation from the Center’s Wage & Benefit Summary, which set forth that Full-Time employees regularly worked 37.5 hours or more per week.⁵

⁵ In the recent *Electrolux Home Products, Inc.* case, the Board, properly analyzing the facts in a manner it failed to do here, found that the general counsel did not meet its burden of proving that the discharge of an employee was unlawfully motivated by union activity. *See* 368 NLRB No. 34 (2019). Although that case arose in the Section 8(a)(3) context and involved determining whether the general counsel met its ultimate burden of proof under the *Wright Line* standard, the Board’s analysis is instructive of what it should have done, but failed to do, in this case. In *Electrolux*, while the general counsel presented evidence that the employer’s stated reason for the employee’s discharge was pretextual, the general counsel did not meet its burden of proof by presenting evidence that the reason for the discharge was the employee’s union activity. *See id.* at *3-4. There, unlike here, the Board required the general

In fact, the Union's unfounded criticism⁶ of the Center's description of hours worked (Un. Br. 8 n.8) demonstrates just how poorly CGC defined the unfair labor practice alleged here. The Union claims the Center's description of the payroll records was "rife with errors" because the Center noted that Jiminez, Tom, Timms, Bobby, and Abraham worked less than 40 hours during the first week of the bi-weekly payroll period ending February 1, 2014. The Union claims that the first week of this bi-weekly payroll period was actually the first week *after*, rather than the last week *before*, the alleged reduction in hours took place, so the reduced hours were not evidence of a weakness in CGC and the Union's position. (*Id.*) But this makes no sense and is inconsistent with the other employees.

The first column of CGC Exhibit 10(a) is titled "Period Ending in Which [Hours] Were Decreased," listing February 1, 2014 for these five employees and

counsel to introduce evidence specifically demonstrating that the employer violated the law, and explicitly rejected the idea that it was required to infer that the employer acted unlawfully simply because the general counsel produced evidence that the employer acted pretextually. *See id.*

⁶ The Center acknowledges that, as the Union points out in its Brief (Un. Br. 9 n. 9), the Center mistakenly did not include 8 hours of vacation pay for Tolentino in the first week of the bi-weekly payroll period ending July 5, 2014 (the last week prior to his alleged change) and that the reference to 31.25 hours on page 7 of its Brief should be 39.25. However, the fact remains that Tolentino did not work 40 hours in this week, and thus the Center accurately stated that "[o]ut of the 15 weeks prior to the supposed reduction from 40 to 37.5 hours per week, [Tolentino] accumulated less than 40 hours in *three-quarters (12) of those weeks.*" (Op. Br. 7 (emphasis in original).) The Center reiterates that Tolentino accumulated as little as 15.75 hours in a week while he supposedly was working 40 hours per week. (*See id.*)

other dates for the rest, most commonly, July 19, 2014. Based on the briefing throughout and the wording of CGC Exhibit 10(a), the Center's understanding is that the date of the alleged change for each employee occurred between the two (2) weeks of the bi-weekly payroll period listed in CGC Exhibit 10(a). The Union does not claim that this understanding is incorrect for any of the other employees, apparently acknowledging that for the other employees, the date of the alleged change was in between the weeks of the bi-weekly payroll period listed. Indeed, there is no indication on the face of CGC Exhibit 10(a) (or anywhere else, since CGC presented the Exhibit without explanation or context) that the date listed in CGC Exhibit 10(a) would have a different meaning for different employees.

Moreover, in its Brief, CGC does not challenge the Center's understanding. It thus appears that CGC and the Union, the charging party in this case, are not in agreement as to the allegations or what the evidence purports to show. The fact that this case has reached this Court with it *still* being unclear as to what CGC is alleging demonstrates exactly why the scant record evidence here is insufficient to meet CGC's burden of proof.

Lastly, although CGC and the Union point out that this Court must provide deference to the Board's decisions, this Court has also been clear that Board decisions must be supported by "substantial evidence." By its very definition, generalizations and approximations are not substantial evidence of an unfair labor

practice. *See Windsor Redding Care Center, LLC v. NLRB*, 944 F.3d 294, 299, 301 (D.C. Cir.) (Court will not enforce Board decision unsupported by substantial evidence, including where Board “failed to engage with record evidence”); *Fred Meyer Stores, Inc.*, 865 F.3d 630, 638 (D.C. Cir. 2017) (Court will not uphold Board decision that does not have “a rational connection between the facts found and the choice made” or where Board has “behaved in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking.”) If this Court were to accept generalizations and approximations as sufficient to prove an unfair labor practice, CGC’s burden would be lowered so far as to be nearly non-existent. It should go without saying that an agency of the United States government should be tasked with more than putting forth generalizations and approximations to hold a charged party in violation of the law.

II. CGC and the Union Failed to Adequately Address the Fact that the Status Quo Was and Has Remained that Full-Time Employees Regularly Worked 37.5 Hours or More Per Week

It must be reiterated, since CGC and the Union failed to adequately address this fact in their Briefs: the Center’s Wage & Benefit Summary indisputably represented the Center’s policy in place regarding hours worked and scheduling, both before and after the Union’s March 2012 election. In other words, the Wage & Benefit Summary set forth the status quo that Full-Time employees, such as the 20 at issue, regularly worked 37.5 hours or more per week, from which CGC had the

burden of proving a change occurred. Montegari's testimony regarding the Wage & Benefit Summary and the Wage & Benefit Summary, itself, were *uncontroverted* by any other record evidence since CGC and the Union elected not to present any witnesses or evidence besides limited payroll records and summary charts. Accordingly, CGC and the Union's attempts to cast doubt on the significance of the Wage & Benefit Summary (CGC Br. 18-22, Un. Br. 10-11) are unavailing.

First, CGC argues that the text of the Wage & Benefit Summary does not "answer the question at hand" because the Wage & Benefit Summary does not address schedules and regular work hours, it only addresses eligibility for certain benefits. (CGC Br. 20.) However, a more than cursory reading of the Wage & Benefit Summary, combined with Montegari's uncontroverted testimony, demonstrates this to be false. Montegari testified: (1) that the Center provided the Wage & Benefit Summary to the Center's employees to make it clear what the expectations were for, among other things, their work hours; and (2) that the Wage & Benefit Summary reflects the Center's policy for scheduling and hours worked. (Tr. 25-26.) Moreover, page two (2) of the Wage & Benefit Summary, which has been the focus of the Parties' attention, is not primarily about eligibility for benefits, but also about expectations for regular work hours. (PX 1 p. 2.) For instance, not only does page two (2) of the Wage & Benefit Summary distinguish between expectations of regular hours worked for Full-Time and certain Part-Time

employees (both of whom are eligible for benefits), but it distinguishes between expectations of regular hours worked for Per Diem employees and other Part-Time employees (neither of whom are eligible for benefits). (*Id.*) Additionally, Section “2)” on page three (3) of the Wage & Benefit Summary leaves space to fill in employees’ regular hours worked. CGC is simply wrong to claim these categories and the Wage & Benefit Summary have nothing to do with schedules or regular hours worked. (PX 1 p. 3.)

Second, CGC and the Union focus on one line from the Wage & Benefit Summary to try to argue that the employees at issue must have been working either 40 hours per week or 37.5 hours per week, *ipso facto* any week in which an employee’s weekly hours was reduced to less than 40 demonstrated that a change occurred. (CGC Br. 21; Un. Br. 11.) This one line, on page four (4) of the Wage & Benefit Summary in the “Vacation/Holiday/Sick Time,” “General Provisions/Eligibility and Waiting Periods” section states: “Depending on your position and work schedule, hourly and salaried employees generally work 7.5 hour/day up to 37.5 hours/week or they may work 8 hours/day up to 40 hours/week.” (PX 1 p. 4.) But this sentence is a complete red herring, and CGC and the Union put far too much weight on it.

Rather, this sentence refers to *daily* schedules of 7.5 hours per day or 8 hours per day. But this sentence does not state that employees would work exclusively

7.5-hour per day shifts or exclusively 8-hour per day shifts in any given week. This sentence clearly contemplates employees working some 7.5 hour per day shifts and some 8 hour per day shifts. In fact, the Center’s Opening Brief (and Appendix B in ALJ Green’s Decision) lists the *numerous* instances where the employees at issue worked between 37.5 hours and 40 hours per week (consistent with the status quo of Full-Time employees working 37.5 hours or more per week), both before and after the employees’ alleged change.⁷ (See Op. Br. 7-11.) If an employee worked between 37.5 and 40 hours in a week, by definition, he or she must have worked some 7.5-hour and some 8-hour shifts. Moreover, CGC alleges that Bustos’ hours were reduced to 38 per week (GCX 10(a)), again, necessitating some combination of 7.5-hour and 8-hour shifts. Thus, to accept CGC and the Union’s tortuous reading of this sentence would require the Court to ignore the payroll records – *i.e.* the only evidence CGC and the Union presented – as well as CGC’s own allegations.⁸

Third, both CGC and the Union cite to case law for the supposedly meaningful proposition that “the status quo is defined by an employer’s actual practice, and to

⁷ Montegari’s testimony is consistent with this point. She testified that it was generally standard for employees to be scheduled for 7.5 hours in a day (which, if worked five (5) days in a week, would be 37.5 hours), but that there could be exceptions where employees could work 8 hours in a day. (Tr. 28-29.)

⁸ The Center also notes that this sentence from the Wage & Benefit Summary refers to *general* scheduling and hours worked practices. CGC and the Union are, again, solely relying on generalizations to try to prove specific unfair labor practices.

the extent that practice differs from a written policy, it is the practice that is dispositive, not the policy.” (Un. Br. 10; *see also* CGC Br. 24 n.10.) However, the point the Center made in its Opening Brief is that the Wage & Benefit Summary, which sets forth that Full-Time employees regularly work 37.5 hours *or more* per week, was consistent with the payroll records, which indisputably showed all the employees at issue regularly working 37.5 hours or more per week. There was simply no need for ALJ Green, or for this Court now, to find the Wage & Benefit Summary (and Montegari’s testimony about it) and the payroll records in conflict when they were not. Regardless, the cases to which CGC and the Union cite are distinguishable in that they all involve an unlawful change by the employer to more strictly enforce its already existing written policy, which has nothing to do with the issue here.⁹

Lastly, CGC and the Union take issue with the Center’s point that the Wage & Benefit Summary operated as the status quo as of the Union’s election in March 2012. (CGC Br. 17; Un. Br. 12-13.) According to the Union, it is irrelevant what

⁹ *See, e.g. Huron Valley-Sinai Hosp.*, 369 NLRB No. 64, slip op. at 7 (2020) (“Respondent’s strict enforcement of its rule against combining meal and rest breaks was a clear departure from the status quo and therefore violates Section 8(a)(5) and (1) of the Act.”); *Rhino NW., LLC*, 369 NLRB No. 25 (2020) (strict enforcement after unionization of policy that was previously sporadically enforced was a Section 8(a)(5) violation); *Flambeau Airmold Corp.*, 334 NLRB 165, 165-66 (2001) (employer committed unfair labor practice by clarifying that policy requiring “as much notice as possible” before taking sick day required at least one hour’s notice).

occurred as of the date of the Union election, and all that matters is what was occurring just before the alleged change. But the Union makes too much of this distinction. The Center is not arguing that it would have been free to make multiple changes to the status quo after the Union's election, or even that the status quo in 2014 (when the alleged changes took place) was different than the status quo in March 2012. The Center's point is that ALJ Green skipped over properly defining the status quo and considering the evidence – in the form of the Wage & Benefit Summary and Montegari's testimony – as to the terms and conditions as of March 2012 and continuing.¹⁰ Indeed, CGC posits that any 40-hour workweek in 2014 might have resulted from a separate unfair labor practice occurring between March 2012 and 2014. (CGC Br. 18.) But CGC's assertion, once again, perfectly illustrates its failure to prove its case and provide any specifics or context about the hours worked of the employees at issue. To the extent CGC chalks up any piece of its case to some second unfair labor practice that might have occurred prior to the one alleged here, the Center would have expected CGC to put that allegation in the complaint, which it decidedly did not.¹¹

¹⁰ Montegari unequivocally testified that the Wage & Benefit Summary, in relevant part, remained in effect through the date of the hearing. (Tr. 25-26.)

¹¹ The Union claims that the Center waived its argument that the Wage & Benefit Summary represented the status quo by not raising the argument in its exceptions to the Board. (Un. Br. 12.) This is incorrect. The Center's Exceptions clearly raised to the Board that ALJ Green did not place proper significance on the Wage & Benefit

III. CGC and the Union Misapprehend the Center's Arguments and Improperly Try to Flip the Burden of Proof on to the Center

In their Briefs, CGC and the Union do not hide where they (wrongly) believe the burden of proof lies in this case. In response to the Center's argument that the status quo was defined by the Wage & Benefit Summary as Full-Time employees regularly working 37.5 hours or more per week, and thus that the Center did not reduce the hours of the employees at issue, CGC criticizes the Center's argument because it "ignores [the Center's] burden of proof" on this point. (CGC Br. 18.) CGC later continues that "it was [the Center's] burden—not the General Counsel's—to introduce evidence to explain what occurred when it reduced employees' hours." (CGC Br. 19 (quotation omitted).) But it is axiomatic that it is *CGC's* burden of proving that the Center actually reduced the hours of the employees at issue. It is not incumbent upon the Center to prove that it did not act unlawfully, and CGC's attempt to flip that burden in its Brief echoes the manner in which ALJ Green largely presumed the Center committed an unfair labor practice and acted accordingly.

Summary as representing the status quo and that ALJ Green did not properly analyze the legal issue of determining the status quo. Moreover, the Center argued to the Board in its supporting Brief that "Montegari testified—without any controverting evidence presented by the General Counsel—that the 2009 Wage & Benefit Summary, which went into effect in May 2009, represented the status quo as of March 2012 when the Union was certified as the employees' bargaining representative." (Exceptions Br. p. 31.)

Ultimately, CGC mischaracterizes the Center's argument, incorrectly asserting that the Center claimed it was *privileged* to reduce employees' hours (not the argument that the Center did make – that CGC did not prove the Center reduced employees' hours, in the first place). In so doing, CGC criticizes the Center's Opening Brief for noting that the status quo may be that employees work a regular minimum of set hours or more. (CGC Br. 22 *citing* Op. Br. 31; *see also* Un. Br. 10.) But the Center's point was that if employees, like the ones at issue here, all regularly work 37.5 hours or more per week in accordance with the Center's stated policy, the employer should not be trapped into a reset status quo simply because CGC found a limited subset of weeks where employees tended to work higher hours than the minimum provided for by the status quo. Placing the burden on the employer to prove that it could snap back employee hours in a manner consistent with the status quo misplaces the burden of proof on the accused party.¹²

Furthermore, CGC (seemingly intentionally) is incredibly imprecise about what exactly it set out to prove (or what it would have the Center disprove) regarding hours worked, as opposed to schedules. It is undisputed that the status quo was not

¹² The Union argues that an employer could make a mockery of this point by implementing a policy that employees work zero hours or more or get paid zero dollars or more, and then the employer would have free reign to make adjustments while still maintaining the status quo. (Un. Br. 10 n.10.) The Center agrees that such a bad faith policy designed to circumvent the requirements of the Act would not be lawful. However, the Union's *reductio ad absurdum* argument has no bearing on the actual factual situation here, which is far different.

a guaranteed set of hours. But CGC never explains whether it is alleging that the Center changed the *schedules* of the employees at issue, or it is simply alleging that because employees' hours were different in certain weeks, the Center committed an unfair labor practice. In fact, CGC's summary chart in CGC Exhibit 10(a) uses the term "Std Hours" presumably meaning "standard hours." But the term "standard hours" is not found in the Wage & Benefit Summary or in the payroll records submitted into evidence. It appears to be a term made up by CGC out of whole cloth to avoid providing specifics to meet its burden of proof.

But this gets to the fundamental point underpinning the issues with CGC and the Union's case. CGC and the Union entered into evidence payroll records from an undefined and seemingly random period, which were not entirely clear and did not evince a consistent pattern of schedules or hours worked – and *nothing more*. CGC provided no context, no explanation, and no indication of whether the Center actually took any action to change employees' schedules, hours worked, or some ill-defined "standard hours."¹³ And CGC and the Union (and then ALJ Green and the

¹³ In its Opening Brief, the Center noted that CGC never squared this theory of the case with its Complaint allegation that the Center unilaterally decreased bargaining-unit employees' hours since February of 2013. (Op. Br. 37-38.) CGC devotes an entire section of its Brief (CGC Br. 24-25) to argue that the Center's "grousing" that the ultimate unfair labor practice found was completely divorced from the underlying complaint allegation did not mean that the Center was deprived of due process. But CGC completely misses the point. The Center does not claim it was deprived of due process, only that the lack of specificity in the Complaint is indicative of CGC's "throw anything against the wall" approach and ALJ Green's

Board) put the burden on the Center to fill in the blanks and disprove the violation that was presumed to have occurred.

What CGC and the Union should have done, since CGC undeniably has the burden of proof, is submit evidence similar to what occurred in many of the cases to which they cite, such as submitting employee schedules, notices of schedule or hours changes, or testimony from any of the 20 employees at issue that their scheduled hours were, in fact, reduced on the date alleged.¹⁴ *See, e.g. Palm Beach Metro Transp., LLC*, 357 NLRB 180, 183 (2011) (unlawful reduction of hours found where “[e]mployees Turton, Brown, Siverain, and Jarrell testified they worked in excess of 40 hours per week” and were then “informed by management, orally and in writing” of schedule reductions); *Goya Foods of Florida*, 351 NLRB 94, 95-98 (2007) (Section 8(a)(5) violation where employer introduced new inspection procedures and changing drivers’ routes, wages, and working conditions by implementing a new software routing program based on extensive employee testimony of effects of new software); *Beverly Health and Rehab. Services, Inc. v. NLRB*, 297 F.3d 468, 472, 474, 479-80 (6th Cir. 2002) (Section 8(a)(5) violation for unilateral implementation of revised disciplinary rules, reduction of work schedules, and revised job

credulousness in the face of CGC’s vague allegations. (*See Op. Br. 37.*)

¹⁴ As discussed in Section I of the Argument, *supra*, neither CGC nor the Union can point to **any** cases finding a Section 8(a)(5) violation on the scant evidence presented here.

descriptions based on testimony regarding employer's announcement and notification to union of changes).

Instead, CGC and the Union provided almost nothing to ALJ Green and turned to the Center to prove it did not violate the law. This Court should not uphold this unlawful reversal of the burden of proof.

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: March 12, 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 5,577 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: March 12, 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 March 12, 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*