

NOT YET SCHEDULED FOR ORAL ARGUMENT

**United States Court of Appeals
for the District of Columbia Circuit**

No. 20-1280

(Consolidated with 20-1321)

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.

1199SEIU UNITED HEALTHCARE WORKERS EAST,

Intervenor for Respondent.

*On Petition for Review and Cross-Application for Enforcement of an Order of the
National Labor Relations Board in No. NLRB-22CA204545.*

**BRIEF FOR INTERVENOR
1199SEIU UNITED HEALTHCARE WORKERS EAST**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenor 1199SEIU United Healthcare Workers East certifies as follows:

A. Parties and Amici

Petitioner/Cross-Respondent is 800 River Road Operating Company, LLC d/b/a CareOne at New Milford (“CareOne” or “Company”). Respondent/Cross-Petitioner is the National Labor Relations Board (“Board”). Intervenor for Respondent/Cross-Petitioner is 1199SEIU United Healthcare Workers East (“the Union”) and was the charging party in the underlying Board proceeding. No person or entity has sought to participate as *amicus curiae*.

B. Ruling Under Review

This case involves the Company’s petition for review, and the Board’s cross-application for enforcement, of the Decision and Order of the Board, issued on June 23, 2020, and published at 369 NLRB No. 109, finding that the Company committed an unfair labor practice by unilaterally reducing the work hours of 20 bargaining unit employees. The Union intervened on the side of the Board.

C. Related Cases

This matter has not previously been before this Court or any other court. Counsel is not aware of any other related cases currently pending.

DISCLOSURE STATEMENT

1199SEIU United Healthcare Workers East is not a corporation. It is a labor organization affiliated with the Service Employees International Union.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Briefs for the Company and the Board.

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GLOSSARY

1. Act	The National Labor Relations Act
2. Board	The National Labor Relations Board
3. CareOne's Br.	Opening Brief of Petitioner/Cross-Respondent 800 River Road Operating Company, LLC d/b/a CareOne at New Milford
4. Board's Br.	Brief of Respondent/Cross-Petitioner National Labor Relations Board
5. CareOne or Company	800 River Road Operating Company, LLC d/b/a CareOne at New Milford
6. Union or Intervenor	1199SEIU United HealthCare Workers East
7. ALJ	Administrative Law Judge
8. D&O	Board's Decision and Order of June 23, 2020, reported at 369 NLRB No. 109
9. Tr.	Transcript of the hearing before the ALJ on July 10, 2018
10. Gen. Counsel Ex.	Exhibits introduced by the General Counsel at the hearing before the ALJ on July 10, 2018
11. CareOne Ex.	Exhibits introduced by CareOne at and after the hearing before the ALJ on July 10, 2018

PRELIMINARY STATEMENT

Intervenor 1199SEIU United Healthcare Workers East, the charging party in the underlying unfair labor practice proceeding, submits this brief in support of the National Labor Relations Board's cross-application for enforcement of the Board's Decision and Order ("D&O"). The Union adopts and relies upon the statement of issues presented, statement of the case, statement of the facts, and arguments contained in the Board's brief. The arguments raised herein are not repetitive of but, rather, expand upon the arguments made in the Board's brief.

SUMMARY OF ARGUMENT

In March 2012, employees of CareOne selected the Union as their exclusive bargaining representative. But for the next five years, the Company refused to bargain with the Union. Instead, during that period, CareOne unilaterally, and without notice to the Union, reduced the regular hours of 20 bargaining unit employees from 40 hours per week to 37.5, unlawfully depriving each of them of 2.5 hours of paid work every week thereafter. In so doing, as the Board held, the Company violated § 8(a)(5) of the Act.¹ 29 U.S.C. § 158(a)(5). Because the Board's factual findings are supported by substantial evidence, and its decision is well-reasoned and free from error, the Board's order should be enforced.

¹ Section 8(a)(5) prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).

ARGUMENT

I. STANDARD OF REVIEW

“[T]he scope of the court’s review of the Board’s decision is limited.” *Pac. Mar. Ass’n v. NLRB*, 967 F.3d 878, 884 (D.C. Cir. 2020). Because “the Board has ‘the primary responsibility of marking out the scope . . . of the statutory duty to bargain,’” reviewing courts accord the Board’s determination regarding whether a party has violated this statutory duty “great deference.” *Id.* (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)). “Consequently, this court must sustain the Board’s decision unless, reviewing the record as a whole, it appears that the Board’s factual findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue.” *Id.* (internal quotation marks omitted). This standard of review “‘gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree which could satisfy a reasonable factfinder.’” *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998)). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Id.* (internal quotation marks omitted).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT THE COMPANY UNILATERALLY REDUCED THE REGULAR HOURS OF 20 BARGAINING UNIT EMPLOYEES

The Board found that CareOne unilaterally decreased the regular hours of 20 bargaining unit employees from 40 hours per week to 37.5 hours per week on various dates in 2014 and 2015. D&O at 10, 12–13. Specifically, the Board held that during the payroll periods ending:

- July 19, 2014, CareOne decreased the regular hours of every dietary aide, housekeeper, laundry aide, and porter who was working 40 hours per week at that time,² *compare* Gen. Counsel Ex. 10a with Gen. Counsel Ex. 9c (all 40-hour per week employees in the above titles still employed as of July 19, 2014, per Gen. Counsel Ex. 9c, appear in Gen. Counsel Ex. 10a);
- February 1, 2014, CareOne decreased the regular work hours of five (out of eight) recreation assistants³;
- August 16, 2014, CareOne decreased the regular work hours of a maintenance worker (Andrew Hegarty); and

² Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Vicente Ricarze, George Varghese, Desinette Bazille, Julianne Benoit, Paulette Murray, Charles Abouzeid, Jean Ramkhalawan, and Edgardo Irabon. *See* Gen. Counsel Ex. 10a.

³ Mariamma Abraham, Rosilin Boby, Sara Jimenez, Donna Timms, and Shiril Tom. *See* Gen. Counsel Ex. 10a.

- March 28, 2015, CareOne decreased the regular work hours of a unit secretary/receptionist (Dawn-Marie Sormani).

D&O at 10, 12–13; *see* Gen. Counsel Ex. 10a. These findings were supported by substantial evidence.

A. A Reasonable Factfinder Could Conclude that Prior to the Company’s Unilateral Changes, the Employees at Issue Regularly Worked 40 Hours Per Week

A reasonable factfinder could easily conclude that the status quo ante was that the employees at issue regularly worked 40 hours per week. In hopes of persuading this Court to the contrary, the Company contends that (1) the Board “skipped over the issue of defining the status quo” and “incorrectly presumed the ‘status quo’ was a 40-hour work week,” CareOne’s Br. at 29, 32; (2) the status quo ante was in fact that the employees worked 37.5 hours or more per week, *id.* at 12–15, 23–36; and (3) the status quo ante is defined as the period immediately after certification, not the period immediately preceding the unilateral changes, *id.* at 33. None of these arguments has merit.

1. The Board Explicitly Found, on the Basis of Substantial Evidence, that the Employees Worked 40 Hours Per Week Prior to the Unilateral Changes

As an initial matter, the Board did not “skip[] over the issue of defining the status quo.” CareOne’s Br. at 29. Rather, the Board explicitly held, on the basis of the payroll records submitted by the General Counsel, that the employees at issue

“generally accrued 40 hours per week and rarely if ever accrued less than 39 hours per week” prior to the Company’s unilateral reduction of those hours. D&O at 12; *see also* D&O at 11, 13, 17–29. This conclusion is supported by substantial evidence.

For example, in every week from the payroll period ending May 10, 2014 through the first week of the period ending July 19, 2014, dietary aide Elaine Farr worked between 39.75 and 40 hours per week.⁴ *See* Gen. Counsel Ex. 10b. During this eleven-week period, the median of Ms. Farr’s weekly hours was 40. *See id.* Further, when Ms. Farr took sick or vacation time during this period (as she did in the payroll periods ending May 10, May 24, June 21, and July 5, 2014), she took it in 8-hour increments, *see* Gen. Counsel Ex. 10b, pursuant to the Company’s policy that vacation and sick time be taken “based upon an employee’s regularly scheduled work day,” such that “an employee who is regularly scheduled to work a seven and one-half (7.5) hour day may take seven and one-half (7.5) hours of

⁴ Ms. Farr worked 40 hours per week in each of these pay periods, with the exception of the first week of the payroll period ending June 7, 2014, when she worked 39.75 hours. *See* Gen. Counsel Ex. 10b. These numbers include sick and vacation pay, denoted on the payroll records “STT” and “VTT,” respectively. *See* Gen. Counsel Ex. 11 at 13.

Consistent with the approach utilized by the Board, *see* D&O at 17; Board’s Br. at 10 n.4, and the Company, *see* CareOne’s Br. at 7–11, holiday pay is not included in the totals of employees’ hours discussed herein.

vacation time,” CareOne Ex. 1 at 6 ¶ 13 & 7 ¶ 11. Finally, Ms. Farr received weekend differential pay in every week of this period for 8 hours of work.⁵ *See id.*

The same 40-hour week is evidenced by dietary aide Evelyn Coronado’s payroll records. Every week from the payroll period ending May 10, 2014 through the first week of the period ending July 19, 2014, Ms. Coronado worked 40 hours, with the exception of one week, when she worked 38.5 hours. *See id.* During that time, the median of her weekly hours was 40. Correspondingly, when Ms. Coronado took sick and vacation time during this period (as she did in the payroll periods ending May 10, May 24, and July 5, 2014), she took it in 8-hour increments. *See id.* Likewise, Ms. Coronado received weekend differential pay in every week of this period for 8 hours of work. *See id.*

To take another example, laundry aide Charles Abouzeid worked 40 to 40.25 hours every week from payroll period 20 through the first week of payroll period 30 of 2014 (ending July 14, 2014).⁶ *See Gen. Counsel Ex. 10d.* During this time,

⁵ Weekend day differential pay is denoted “DWD” on paystubs. The DWD code is defined in General Counsel Ex. 11 at page 12 (last code on bottom right-hand corner).

⁶ Mr. Abouzeid worked 40 hours every week of this period with the exception of the first week of the payroll period ending June 21, 2014, when he worked 40.25 hours. *See Gen. Counsel Ex. 10d.*

the median of his weekly hours was 40, and he was paid a weekend differential every week for 8 hours of work.⁷ *See id.*

The payroll records of recreation aide Rosilin Bobby reflect the same pattern. Ms. Bobby worked 40 hours every week from the payroll period ending November 9, 2013 through the end of the payroll period ending January 18, 2014. *See* General Counsel Ex. 10g. During this period, when Ms. Bobby took sick and vacation time (as she did in the payroll period ending January 4, 2014), she did so in 8-hour increments. *Id.*

The same status quo ante of 40 hours per week is evident with respect to Andrew Hegarty, whom the Company singles out for special scrutiny. Although, as the Company notes, Mr. Hegarty “accumulated less than 40 hours in 15 of th[e]” 84 weeks from January 5, 2013 to August 2, 2014, CareOne’s Br. at 35, this represents, as the Board found, “a relatively small percentage” of the total weeks in this period, D&O at 17. Notably, the median of Mr. Hegarty’s hours from January 2013 through the pay period ending August 2, 2014 was 40 hours. *See* CareOne Ex. 6. Further, like the other employees, and consistent with the Wage & Benefit Summary, prior to the unilateral reduction of his hours, Mr. Hegarty was

⁷ This 8 hours is the sum of the hours for which Mr. Abouzeid was paid a weekend day differential (“DWD”) and a weekend evening differential (“DDE”) for a tour spanning the day and evening shifts. *See* Gen. Counsel Ex. 10d; Gen. Counsel Ex. 11 at 12 (defining “DDE” code –second code from the bottom in the far left column).

compensated for sick and vacation time in 8-hour increments (as can be seen in the payroll periods ending May 11, 2013, June 22, 2013, July 6, 2013, August 31, 2013, September 14, 2013, October 12, 2013, November 23, 2013, December 7, 2013, December 21, 2013, January 3, 2014, January 18, 2014, June 7, 2014, and June 21, 2014). *See* CareOne Ex. 6.

As shown in the following chart, all of the payroll records in evidence, Gen. Counsel Exs. 10b to 10h, show the same status quo ante of 40 hours per week:⁸

⁸ Although the Company purports to list every week in which an employee worked fewer than 40 hours prior to the unilateral changes (*see* CareOne's Br. at 7–9), its list is rife with errors. For example, many of the weeks that the Company treats as pre-reduction weeks actually reflect the employees' hours *after* they were unilaterally reduced. Thus, while the Company claims that recreation aides Sara Jimenez, Shiril Tom, Donna Timms, and Rosilin Bobby each worked 38 hours in one week prior to the reduction and that Mariamma Abraham worked 35.5 hours, in fact, in each instance, the week the Company cites is the week in which the recreation aides' hours were first reduced. *See* Gen. Counsel Ex. 10(g) (payroll period ending February 1, 2014).

Employee	Title	Pre-Reduction Median Hours
Bustos, Benjamin	Dietary Aide	40
Coronado, Evelyn	Dietary Aide	40
Farr, Elaine	Dietary Aide	40
Fontanez, Enrique	Dietary Aide	40
Ricarze, Vicente	Dietary Aide	39.25
Tolentino, Allan	Dietary Aide	39.5 ⁹
Varghese, George	Dietary Aide	40
Abraham, Mariamma	Recreation Aide	40
Boby, Rosilin	Recreation Aide	40
Jimenez, Sara	Recreation Aide	40
Timms, Donna	Recreation Aide	40
Tom, Shiril	Recreation Aide	40
Hegarty, Andrew	Maintenance	40
Bazile, Desinette	Housekeeper	40
Benoit, Julianne	Housekeeper	40
Murray, Paulette	Housekeeper	40
Abouzeid, Charles	Laundry Aide	40
Ramkhalawan, Jean	Laundry Aide	40
Sormani, Dawn-Marie	Receptionist	39.1
Irabon, Edgardo	Porter	40

⁹ The Company incorrectly states that Mr. Tolentino worked 31.25 hours in one week prior to the unilateral reduction. *See* CareOne's Br. at 7. In fact, Mr. Tolentino's hours in the referenced week were 39.25 (including 8 hours of vacation time). *See* Gen. Counsel Ex. 10b (payroll period ending July 5, 2014). Notably, Mr. Tolentino was compensated for 8, not 7.5 hours of vacation time in that week, and he was likewise compensated for sick and vacation time in 8-hour increments in the payroll periods ending April 26 and May 24, 2014, prior to the unilateral change.

Significantly, the Company admitted that when it implemented a decision to hire new employees at 37.5 instead of 40 hours per week, it “grandfathered in the 40-hour employees who worked prior to” the change. Gen. Counsel Ex. 6 at 1.

There is ample evidence to support the Board’s conclusion that the status quo ante for the employees at issue was a 40-hour week.

2. The Board Did Not Err in Rejecting the Company’s Unfounded Assertion that Employees Had No Regular Schedules Prior to the Unilateral Changes

The Company appears to assert, on the basis of the Wage & Benefit Summary, that the status quo ante was that employees had no regular schedules; rather, they worked 37.5 hours or more week, and apparently, their schedules randomly fluctuated between 37.5 and 40 hours. *See* CareOne’s Br. at 22–33. This argument is contrary to both governing law and the factual record.

It is well established that the status quo is defined by an employer’s actual practice, and to the extent that practice differs from a written policy, it is the practice that is dispositive, not the policy.¹⁰ *See, e.g., Huron Valley-Sinai Hosp. & Michigan Nurses Ass’n*, 369 NLRB No. 64, slip op. at 7 (2020); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001). As the Board found, and as demonstrated

¹⁰ If this were not the case, an employer could make a mockery of its duty to bargain simply by stating a policy that employees work 0 hours or more and are paid \$0 or more. The employer could then make as many unilateral changes as it desired to wages and hours without violating the law because all of the changes would be consistent with the status quo ante.

above, CareOne's actual practice prior to the unilateral reductions, as shown by its payroll records, was to have the employees at issue regularly work 40 hours per week.

Moreover, CareOne's assertion that employees had no regular hours is belied by its own summary chart (CareOne Ex. 2), the testimony of its own witness¹¹ (see Tr. at 27–30, 44, 86), and the language of the Wage & Benefit Summary itself (see D&O at 13–14; Board's Br. at 4), all of which show that the status quo prior to the Company's 2014 and 2015 unilateral reductions was that employees worked *either* 40 hours per week *or* 37.5 hours per week. The Wage & Benefit Summary thus does not undercut the Board's conclusion that the status quo ante was that the employees regularly worked 40 hours per week.

3. The Company Waived the Argument that the Board Erred in Defining the Status Quo Ante by the Period Immediately Preceding the Unilateral Changes; In Any Event, this Argument is Completely Meritless

Even more groundless is the Company's argument, made for the first time, that the Board erred by defining the status quo ante as the period immediately prior

¹¹ Maureen Montegari, the Company's only witness, testified, for example, that "the standard schedule for full time employment at Woodcrest" is "five shifts seven and a half hours per week" for a total of "37 and a half hours per week," but that some employees worked 40 hours per week. Tr. at 27–28. Per Ms. Montegari, "hourly and salaried employees generally work either seven and a half hours per day up to 37 and a half hours per week, or they may work eight hours a day up to 40 hours a week." *Id.* at 30.

to the unilateral reductions rather than the period immediately after the election.

Although the Company raised exceptions to the ALJ's findings, it did not raise this argument before the Board. *See generally* CareOne's Exceptions to ALJ's Decision & CareOne's Br. in Support of Exceptions. As a result, it has waived the argument. Section 10(e) of the Act is unequivocal on this point: "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." 29 U.S.C. § 160(e); *see Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1349 (D.C. Cir. 2004) ("[U]nder section 10(e) this court is without jurisdiction to consider the argument which the company never made before the Board." (footnote omitted)).

In any event, the Company's argument is preposterous. The Union was elected as the exclusive representative of CareOne's employees in March 2012. D&O at 10. More than two years later, the Company unilaterally reduced employees' regular work week from 40 to 37.5 hours. *Id.* at 10–13; Gen. Counsel Ex. 10a. By definition, the status quo ante is determined by reference to the employees' regular hours in the time immediately preceding the change. *See Associated Truck Lines*, 239 NLRB 917, 922 n.3 (1978) ("'Status quo' has been judicially defined as 'the last uncontested status which preceded the pending controversy.'" (quoting *Minn. Mining and Mfg. Co. v. Meter*, 385 F.2d 265, 273

(8th Cir. 1967). Whatever the employees' regular hours might have been two years earlier, immediately after the election, they have nothing to do with determining the status quo at the time of the unilateral change addressed in this case.

So obvious and undisputable is this logical fact that it literally goes without saying. For example, in *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), this Court enforced a Board decision and order finding, among other things, that the company had unlawfully added fifteen minutes to employees' shifts without bargaining with the union. *Id.* at 731; see *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301, 304-05 (1999). The election in which the union was selected as bargaining representative had taken place more than a year and a half before the unlawful schedule change. 328 NLRB at 304. Neither the Court nor the Board addressed what the employees' schedules were at the time of the election, and they saw no need to state the obvious, that the employees' terms and conditions of employment at the time of the election were irrelevant to an unlawful unilateral change that was effectuated many months later.¹²

¹² Consistent with this uniform approach, the Board's standard remedy in unilateral change cases is to order the restoration of the status quo ante that existed immediately prior to the implementation of the unilateral changes, not the status quo that existed at the time of the election. See, e.g., *Gunderson Rail Servs.*, 364 NLRB No. 30, slip op. at 4 (2016) (ordering employer to "[r]estore the status quo ante by reestablishing and resuming operations at the Tucson, Arizona facility as they existed prior to the date of the facility's closure in October 2012"); *Caribbean Int'l News Corp.*, 357 NLRB 1585, 1586 (2011) (ordering employer to "restore the status quo ante as it existed prior to the elimination of the circulation department

Naturally, the Company can cite no authority for its outlandish proposition. Its only citation is to a footnote yanked out of context from *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 4 n.14 (2016), *overruled by Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017)). See CareOne's Br. at 33. The footnote supplemented the Board's explanation that in bargaining following the expiration of a collective bargaining agreement, the status quo is established by the expired agreement. As background to this explanation, the footnote stated that where the starting point is the recognition or certification of a new bargaining representative, and therefore there is no expired agreement, the status quo is established by the employees' terms and conditions of employment at the time of the election or recognition. The union in *Du Pont* was a longtime incumbent, and neither the footnote nor the broader discussion purported to address unilateral changes that occurred months or years after the election of a new representative. 364 NLRB No. 113, slip op. at 4. Even if this frivolous argument could properly be considered on the merits, it would have to be rejected out of hand.

on or about July 5, 2009"); *Ric's Best Auto Painting*, 248 NLRB 1028, 1028 (1980) (ordering employer to "[r]estore the status quo ante which existed prior to the implementation of the unilateral changes made by Respondent").

B. A Reasonable Factfinder Could Conclude that the Company Unilaterally Reduced the Employees' Regular Hours to 37.5 Hours Per Week

The Board's conclusion that the Company unilaterally reduced the 20 employees' regular hours to 37.5 hours per week is supported by substantial evidence. Returning to the employee examples referenced in Section A.1, *supra*, although dietary aide Elaine Farr always worked between 39.75 and 40 hours per week prior to the unilateral change, *see supra* at 5, mid-way through the payroll period ending July 19, 2014, the Company unilaterally decreased her hours to 37.5 hours per week. *See* Gen. Counsel Ex. 10b. Thus, beginning in the second week of the payroll period ending July 19, 2014, and for at least 10 weeks thereafter, Ms. Farr never worked more than 38 hours in any week, with a median of 37.5 hours per week. *Id.* The same change can be seen in Ms. Farr's sick and vacation pay. Whereas she had previously been compensated in 8-hour increments, *see supra* at 5, after the unilateral reduction, she received sick and vacation time in 7.5-hour increments, *see* Gen. Counsel Ex. 10b (payroll periods ending July 19, August 2, and September 13, 2014). Likewise, whereas Ms. Farr had previously always received 8 hours of weekend differential pay, *see supra* at 6, starting in the second week of the payroll period ending July 19, 2014, and continuing every week thereafter, Ms. Farr received only 7.5 or 7.75 hours of differential pay, *see* Gen. Counsel Ex. 10b.

The same reduction is evidenced by dietary aide Evelyn Coronado's payroll records. Despite working 40 hours in nearly every week prior to the second week of the payroll period ending July 19, 2014, *see supra* at 6, from that time through at least the payroll period ending September 27, 2014, Ms. Coronado worked only 37.5 hours per week (with the exception of one week), and the median of her weekly hours thus dropped to 37.5/hours week. *See id.* Correspondingly, after the reduction during the payroll period ending July 19, 2014, Ms. Coronado received sick and vacation pay in 7.5-hour increments (down from 8-hour increments), as can be seen in the payroll periods ending August 2, August 16, September 13, and October 11, 2014. *See id.* Likewise, Ms. Coronado's weekend differential pay dropped to 7.5 hours (from 8 hours), in nearly every week from the second week of the payroll period ending July 19, 2014 through at least the payroll period ending October 11, 2014.¹³ *See id.*

Laundry aide Charles Abouzeid saw the same drop in hours. Despite previously always working at least 40 hours per week, *see supra* at 6, from the second week of the payroll period ending July 19, 2014 through the end of the payroll period ending September 27, 2014, Mr. Abouzeid only worked between 37.25 and 37.5 hours per week, with a median of 37.5 hours per week, *see Gen.*

¹³ With one exception in the first week of the payroll period ending August 2, 2014.

Counsel Ex. 10d. His sick and vacation time after the reduction was correspondingly paid in 7.5-hour increments. *See id.* (see payroll periods ending August 2, August 16, and August 30, 2014). And, while Mr. Abouzeid was paid a weekend differential for 8 hours of work every week prior to the reduction, every week after the reduction, he was paid for 7.5 hours of work.¹⁴ *See id.*

Similarly, while recreation aide Rosilin Bobby worked 40 hours per week every week from the payroll period ending November 9, 2013 through the end of the payroll ending January 18, 2014, in the ten weeks that followed, Ms. Bobby only worked between 37.5 hours and 38 hours per week,¹⁵ with a median of 37.5 hours per week. *See* Gen. Counsel Ex. 10g. Correspondingly, Ms. Bobby's sick and vacation pay was reduced to 7.5-hour increments from 8-hour increments. *See id.* (payroll period ending February 15, 2014).

The same holds true for Andrew Hegarty, with whom, as previously noted, the Company takes particular issue. The Company asserts that Mr. Hegarty "accumulated more than 37.5 hours in five" of the nine weeks after the unilateral reduction as well as "in many instances after this nine (9) week period." CareOne's

¹⁴ As noted *supra* at 5, n.7, these figures include the total number of hours for which Mr. Abouzeid received weekend differential pay (summing the weekend day and evening hours), denoted "DWD" and "DDE" on the payroll records.

¹⁵ Ms. Bobby worked 37.5 hours every week except for the first week of the payroll period ending February 1, 2014, when she worked 38 hours, and the first week of the payroll period ending February 15, 2014, when she worked 37.25 hours.

Br. at 36. However, as the Board noted, “from the payroll period ending August 16, 2014 (when the change allegedly occurred) to the end of the year, Hegarty accumulated less than 39 hours [in] 18 of 22 weeks. By contrast, Hegarty accrued at least 40 hours [in] 18 of 22 weeks immediately prior to the payroll period ending August 16, 2014.” D&O at 17. The same decrease is evident in Mr. Hegarty’s sick and vacation time compensation. Despite previously compensating Mr. Hegarty for sick and vacation time in 8-hour increments, *see supra* at 7, after the Company unilaterally reduced his regular hours, it began to compensate Mr. Hegarty for sick and vacation time exclusively in 7.5-hour increments. *See* CareOne Ex. 6.

The same the reduction from 40 hours to approximately 37.5 is clear for all of the employees at issue, as summarized below, based on Gen. Counsel Exs. 10b to 10h:

Employee	Title	Pre-Reductions Median Hours	Post-Reduction Median Hours
Bustos, Benjamin	Dietary Aide	40	37.5
Coronado, Evelyn	Dietary Aide	40	37.5
Farr, Elaine	Dietary Aide	40	37.5
Fontanez, Enrique	Dietary Aide	40	37.5
Ricarze, Vicente	Dietary Aide	39.25	37.5
Tolentino, Allan	Dietary Aide	39.5	37.5
Varghese, George	Dietary Aide	40	37.5
Abraham, Mariamma	Recreation Aide	40	37.5
Boby, Rosilin	Recreation Aide	40	37.5
Jimenez, Sara	Recreation Aide	40	37.5
Timms, Donna	Recreation Aide	40	37.5
Tom, Shiril	Recreation Aide	40	37.5
Hegarty, Andrew	Maintenance	40	37.6
Bazile, Desinette	Housekeeper	40	37.5
Benoit, Julianne	Housekeeper	40	37.5
Murray, Paulette	Housekeeper	40	37.5
Abouzeid, Charles	Laundry Aide	40	37.5
Ramkhalawan, Jean	Laundry Aide	40	37.5
Sormani, Dawn-Marie	Receptionist	39.1	37.75
Irabon, Edgardo	Porter	40	38.25

Critically, and contrary to the Company's apparent assertion that employees' hours always randomly fluctuated between 37.5 and 40 hours, the reductions occurred on the *same dates for the same titles*, and the hours of every dietary aide, housekeeper, laundry aide, and porter who had previously worked 40 hours per week were reduced.

In the face of this overwhelming body of authoritative evidence of its reduction of its employees' regular work hours, the Company argues that the 20 to 28 weeks of payroll records introduced by the General Counsel and relied on by

the Board were insufficient to establish that the Company reduced employees' hours. See CareOne's Br. at 28. However, it cites no authority for its dubious assertion that some longer period of time must be analyzed to establish a change, and it does not state how long a period would suffice. In fact, there is no such authority and no such requirement. Nor does the Company state how many weeks of payroll records would have sufficed in its view to prove a unilateral change. The Board's analysis of the many weeks of records described above provided all the support it needed to reach the conclusion that the employees' daily and weekly hours of work had indeed been reduced.

Significantly, the Company, which possessed the payroll records for all periods that might arguably have been material to the issue, told the ALJ during the hearing that it would be offering four full years of payroll records for all of the 20 employees, covering the period 2011 through 2015, Tr. at 18, "so that it's a complete and accurate picture." *Id.* at 92; *see also id.* at 47. However, the Company ultimately offered no records for any additional period, except with respect to one employee, Andrew Hegarty. There is only one conclusion that can be drawn from the Company's about-face: its review of the records showed that consideration of a longer period of time would not change the finding that the employees' regular work weeks had been reduced from 40 to 37.5 hours, and would only reinforce that finding.

The evidence before the Board was more than adequate to support its conclusion that the Company unilaterally reduced the regular work hours of 20 bargaining unit employees.¹⁶

¹⁶ This conclusion is consistent with this Court's decision in *Acme Die Casting v. NLRB*, 93 F.3d 854, 857-58 (D.C. Cir. 1996), upon which CareOne relies in arguing that the Board's analysis was somehow flawed. See CareOne's Br. at 34 n.19. *Acme Die Casting* concerned whether wage increases that varied in timing and amount over a period of years were sufficiently regular to constitute an established practice that the employer was required to continue. Here, by contrast, the Company maintained a consistent practice of having the employees at issue work 40 hours per week in all or most of the weeks prior to the Company's unilateral reduction of those hours.

Nor is the Board obligated to explain "what exactly happened" that caused the Company to reduce the employees' hours. CareOne's Br. at 37. The reason or motive behind the Company's unilateral changes is not relevant to a § 8(a)(5) violation. See *NLRB v. Katz*, 369 U.S. 736, 742 (1962).

CONCLUSION

For the forgoing reasons, and for all of the reasons cited in the Board's brief, the Union respectfully requests that this Court grant the Board's cross-application for enforcement in its entirety.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,119 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and complies with Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

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