

**No. 09-73444**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**WAREHOUSE UNION LOCAL 6,  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**ALAN RITCHEY, INC.**

**Intervenor**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Warehouse Union Local 6, International Longshore and Warehouse Union (“the Union”), for review of an Order of the National Labor Relations Board (“the Board”) issued against Alan Ritchey, Inc. (“the Company”). The Board’s Decision and Order issued on September 25, 2009, and is reported at 354 NLRB No. 79. (ER 1-53.)<sup>1</sup> The Board’s Order is final under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) (“the Act”).<sup>2</sup>

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<sup>1</sup> Record references are to the Excerpts of Record filed by the Union (“ER”) or to the Supplemental Excerpts of Record filed by the Board (“SER”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

<sup>2</sup> The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). *See Alan Ritchey, Inc.*, 354 NLRB No. 79, slip op. at 1 n.3 (2009). The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (2009); *Teamsters Local Union No. 523 v. NLRB*, 509 F.3d 849 (10th Cir. 2009). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On November 2, 2009, the Supreme Court granted a writ of certiorari on the issue in *New Process Steel*, and argument is scheduled for March 23, 2010. The issue has been briefed to this

The Board had jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), because the events underlying the alleged unfair labor practices occurred in Richmond, California. The Union filed its petition for review on October 28, 2009. The Union's petition was timely; the Act places no time limit on the institution of proceedings to review Board orders. The Court granted the Company's motion to intervene on December 14, 2009.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board reasonably dismissed the complaint allegation that the Company violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and afford it an opportunity to bargain before each of dozens of individual disciplinary decisions.

### **STATEMENT OF THE CASE**

Based on unfair labor practice charges filed by the Union, the Board's General Counsel issued several related complaints alleging numerous violations of the Act ranging from an overall refusal to bargain in good faith, to unilateral changes in employment terms, to direct dealing with and discriminatory discipline

of employees. One complaint allegation—the only one at issue here—was that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to notify and bargain with the Union before disciplining unit employees for failing to meet efficiency and absenteeism standards, and for insubordination and threatening behavior. (ER 699-702.)

Following a hearing, an administrative law judge issued a decision finding merit to some of the complaint allegations while dismissing others. (ER 7-53.) The parties thereafter filed exceptions and cross-exceptions to the judge's findings. No exceptions were filed to many of the judge's dismissals, including allegations that the Company unilaterally changed work and safety rules and working times and days, and discriminatorily discharged certain employees. (ER 1.)

The Board (Chairman Liebman and Member Schaumber) adopted many of the judge's findings, including his findings that the Company violated Section 8(a)(5) and (1) of the Act by engaging in bad-faith bargaining, by dealing directly with employees, by promulgating an unlawful no-talking rule, and by unilaterally changing certain employees' work times and job duties, all in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(1) and (5)). (ER 2.) The Board, in agreement with the judge, dismissed other complaint allegations, including dismissals to which no exceptions were filed. (ER 1 n.6.) Additionally, the Board, in disagreement with the judge, dismissed other allegations, including that the

Company discriminatorily gave more onerous work assignments to an employee and unilaterally eliminated two non-working holidays. (ER 2.) None of those findings are before this Court.

Concerning the only complaint allegation at issue here, the Board, reversing the judge, dismissed it, finding that the Company did not violate Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union before disciplining employees pursuant to its established disciplinary process for failing to meet preexisting efficiency and absenteeism standards, and for insubordination and threatening behavior. (ER 2-4.) The Board, however, remanded to the judge the question of whether the Company enforced its efficiency standards more stringently after the Union's arrival, also in violation of Section 8(a)(5) and (1) of the Act. (ER 4-5.) That remanded issue is not before the Court.

## **STATEMENT OF THE FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

As noted previously, the Board found that the Company committed a number of violations of the Act and dismissed many other complaint allegations. None of those findings are before the Court. The factual findings described below relate solely to the one dismissed complaint allegation that the Union challenges on review.

**A. The Company Begins Operations as a Postal Service Contractor, Utilizing a Progressive Disciplinary System**

In August 1999, the Company began operations at its Richmond, California plant, where it inspects, repairs, and stores mail transport equipment for the United States Postal Service (“USPS”). The Company’s contract with the USPS controlled all aspects of the plant’s operations, including worker productivity, and gave the USPS the right to unilaterally change any contract terms. (ER 10; 455-56, SER 28-30, 126-27.) At the plant, the Company employed approximately 250 employees who worked in five separate departments on three shifts. (ER 10; 239-40.)

From the time that the plant opened, the Company maintained and utilized a five-step progressive disciplinary system consisting of counseling, verbal warning, written warning, suspension, and termination. (ER 3; 263, 431-32, 1162.) The Company’s employee handbook stated that “in certain circumstances, and at management’s sole discretion, it may be necessary to impose an action, up to and including termination of employment, without prior notice or counseling and without progressing through each stage of the disciplinary guidelines.” (ER 3; 1162.)

**B. Inspectors' Job Duties and the USPS Efficiency Standards; the Company Issues Discipline to Inspectors Who Fail To Meet the Standards; the Company Implements and Follows Its Absenteeism Guidelines**

At the plant, half of the employees worked as inspectors who examined, one product at a time, various types of mailbags for tears or rips, as well as mail trays, lids, and sleeves for holes or cracks. (ER 10; 253-55, SER 8-10, 12-20.) The rate at which inspectors worked was monitored by a database that recorded their raw daily numbers by scanning product bar codes. (ER 10; 254-56, 277, 447-51, 462-64, 823-927.) From day one of the plant's operations, inspectors' efficiency was measured against a standard set by the USPS. (ER 10; 259, 429, SER 125.)

Also from the time the plant opened, the Company issued performance-related discipline to inspectors with low efficiency ratings. (ER 3; 928-40, SER 31-124.) On January 18, 2000, Plant Manager Dave Williams announced that inspectors would be expected to achieve a minimum performance level of 80 percent of the USPS efficiency standard for each product being inspected. (ER 3, 10-11; 272, 429-31.) Inspectors had to meet the 80-percent standard as an average efficiency level over a 4-week period in order to avoid initial discipline for low efficiency. (ER 15; 262.) Pursuant to this standard, the Company, from the time the plant opened until mid-April 2000, issued efficiency-related discipline to approximately 50 inspectors. (ER 3, 13; 928-40, SER 31-124.) Those disciplinary

actions included 68 verbal warnings, 20 written warnings, 4 suspensions, and 1 discharge. (ER 3, 13; SER 31-124.)

The Company usually permitted inspectors who received verbal warnings for low efficiency to increase their efficiency levels gradually, sometimes to a level below 80 percent of the USPS standard. (ER 13; SER 115-16, 123.) Specifically, the Company granted leniency to three inspectors who failed to meet efficiency standards: Francis Young, whose husband died; Amelia Santos, who was unable to work consecutive days in a particular position; and Anita Benjamin, who worked in a low-volume area where it was difficult to maintain a rhythm. (ER 3; ER 263-64, 433.)

Also from the time the plant opened, the Company followed absenteeism guidelines that were set forth in the managers' manual. (ER 23; 295, 586.) Those guidelines established a system of progressive discipline based on the number of unexcused absences incurred during a 12-month period. Thus, for 2 to 4 absences, employees would receive counseling; for 5 to 6 absences, a verbal warning; for 7 to 8 absences, a written warning; for 9 to 10 absences, a suspension; and for 11 or more absences, termination. (ER 3, 22-23; 292, 592, SER 128-29.) Although the Company followed those guidelines, there were instances where, based on particular circumstances, they were applied with flexibility. For example, of two employees who each had nine unexcused absences, one received a verbal warning

and the other a written warning. (ER 3, 23; 1029, 1046.) On another occasion, an employee with 62 unexcused absences received a verbal warning, while another employee with 10 unexcused absences was discharged. (ER 3, 23; 1021, 1081.)

**C. The Union Becomes the Employees' Collective-Bargaining Representative, Requests Notification of Individual Disciplinary Actions, and Demands Pre-implementation Bargaining, as Well as Rescission of All Discipline**

On April 13, 2000, the Board conducted a representation election at the plant, resulting in the Union's certification as the collective-bargaining representative of all full-time and regular part-time employees in the warehouse, processing, container repair, and quality and data departments. (ER 10; 812-13.)

The unit included the inspectors whose work is described above at p. 7.

On May 26, the Union sent a letter to Plant Manager Williams protesting the Company's disciplining of unit employees pursuant to the efficiency standards and absenteeism guidelines described above. In its letter, the Union took the position that the Company was required to afford it "prior notice, and an opportunity to bargain, before taking disciplinary action against bargaining unit employees." (ER 3, 15; 817.) The Union also demanded immediate rescission of all disciplinary actions taken against unit employees since the April 13 election. (ER 15; 818.)

**D. The Company Continues To Discipline Employees for Efficiency and Absenteeism Problems After the Election; the Company Discharges Employees Pontiflet and Miller Pursuant to Its Disciplinary Policies**

After the election, the Company continued to follow its established five-step progressive disciplinary system, and to discipline employees pursuant to that system for breaches of its preexisting efficiency standards and absenteeism guidelines. Thus, from April 13 through the end of September, the Company issued performance-related discipline based on efficiency standards to 41 inspectors, consisting of 22 verbal warnings, 29 written warnings, 22 suspensions, and 14 discharges. (ER 3; 941-1013.) The Company also continued to follow its absenteeism guidelines, issuing discipline for absenteeism in approximately 40 instances in the 5 months after the election. (ER 23; 295, 586, 1015-1063.)

From the time that the plant opened, the Company also consistently maintained a policy under which employees could be terminated for insubordination. (ER 22; 293, 295, 1161.) On May 31, pursuant to this policy, the Company discharged employee LaTachianna Pontiflet, an inspector, for insubordination. (ER 22; 182, 222.) Specifically, the Company discharged her for engaging in a confrontation with her shift manager, June Rivera, regarding her job assignment. (ER 22; 183-85, 216-21.) Pontiflet, who had just returned to work following a suspension for ongoing low efficiency, refused her job assignment. (ER 22; 185, 216-21.) Accordingly, Rivera told her that she was being

insubordinate, and ordered her to clock out and leave the plant. (ER 22; 185, 216-21.) Later that day, Pontiflet spoke to Plant Manager Williams, who said that she had been terminated for insubordination. (ER 22; 222.)

From the time it began operations, the Company also maintained a policy that generally treated threats by employees against coworkers or supervisors as grounds for immediate discharge. (ER 24; 1154.) On October 13, the Company discharged employee Mandrell Miller, an inspector, for an episode of threatening and improper behavior toward a coworker. (ER 23; 521.) Afterwards, Plant Manager Williams spoke with the Union about Miller's discharge. (ER 24; 507-8, 521.) His discharge, like Pontiflet's, occurred after the Union made its May 26 demand that the Company afford it notice and an opportunity to bargain before disciplining unit employees. (ER 22, 24; 817.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in relevant part, contrary to the administrative law judge, that the Company did not violate Section 8(a)(5) and (1) of the Act by failing to notify the Union and bargain with it before issuing discipline for efficiency-related performance problems, absenteeism, insubordination, or threatening behavior to employees specifically named in the complaint. The Board accordingly dismissed the relevant complaint allegations. (ER 3.) The Board, however, remanded to the

judge the question of whether the Company more stringently enforced its unchanged efficiency standards after the election, in violation of Section 8(a)(5) and (1) of the Act. (ER 4.)

### **SUMMARY OF ARGUMENT**

The key facts on which the Board relied in dismissing the relevant complaint allegations are largely undisputed. From the time that the plant opened, the Company adhered to a five-step disciplinary system that remained in effect after the Union's election victory. Pursuant to that preexisting system, the Company took disciplinary actions for the same reasons before and after the election against employees whose efficiency levels fell below the extant 80 percent standard; employees who violated the extant absenteeism guidelines; and employees who violated extant policies governing insubordination and threatening behavior. Throughout this period, company managers acted within the parameters of this system, with their discretion thus circumscribed.

Presented with this scenario, the Board reasonably applied Board law to dismiss complaint allegations that the Company violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain over dozens of individual disciplinary actions that the Company took in accordance with a disciplinary system that predated the Union's arrival. As the Board found, its prior decision in *The Fresno Bee*, 337 NLRB 1161 (2002), is dispositive and

dictates the result here. The Board's application of the law to the factual findings of the administrative law judge is reasonable, and the Union's petition for review should be dismissed on that basis.

The Union attempts to undermine the Board's findings by misreading cases that predate *Fresno Bee*, and by mistakenly relying on factually distinguishable cases. In particular, the Union misreads dicta in *Washoe Medical Center*, 337 NLRB 202 (2001). The Board explicitly recognizes *Washoe Medical Center* and *Fresno Bee* as harmonious decisions, despite the Union's assertion to the contrary. The Union also erroneously depends on cases in which an employer made a unilateral change from past practice to argue that the Company was required to bargain to impasse over every individual disciplinary decision. Those cases are inapposite because they involve employers that failed to follow a consistent past practice. By contrast, substantial evidence supports the Board's finding that the Company was maintaining the status quo when it disciplined individual employees pursuant to a progressive disciplinary system that predated the Union and circumscribed managerial discretion.

### **STANDARD OF REVIEW**

"Congress made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S.

488, 496 (1979); *see also NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1368 (9th Cir. 1981) (recognizing that it is the primary responsibility of the Board “to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy”) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)). Accordingly, the Board’s determination as to whether or not the parties have a statutory duty to bargain must be affirmed if it “is reasonably defensible.” *Ford Motor Co.*, 441 U.S. at 497. *Accord Retlaw Broadcasting Co. v. NLRB*, 172 F.3d 660, 664 (9th Cir. 1999).

As to factual matters, the Board’s findings are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). This requirement is satisfied if “it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). This Court will not reverse the Board’s decision simply because there is evidence to the contrary, or because it would have decided the case differently on a de novo review. *See Universal Camera Corp*, 340 U.S. at 488; *SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 984, 988 (9th Cir. 1991).

The standard of review does not change where the Board has disagreed with the administrative law judge. *Northern Montana Health Care Center v. NLRB*,

178 F.3d 1089, 1093 (9th Cir. 1999) (citing *Universal Camera Corp.*, 340 U.S. at 496); *SKS Die Casting & Machining, Inc.*, 941 F.2d at 988-89. The Court gives no special weight to the judge's decision where, as here, the Board merely disagrees with the ultimate conclusions drawn by the judge from the underlying facts.

*Kallmann v. NLRB*, 640 F.2d 1094, 1098 & n.7 (9th Cir. 1981) ("the Board is to be accorded special deference in drawing derivative inferences from the evidence").

*Accord NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982) (with respect to derivative inferences, the Court's "deference is to the Board," not the judge).

## ARGUMENT

### **THE BOARD REASONABLY FOUND THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO NOTIFY THE UNION AND AFFORD IT AN OPPORTUNITY TO BARGAIN BEFORE EACH OF DOZENS OF INDIVIDUAL DISCIPLINARY DECISIONS THAT COMPORTED WITH ITS PAST PRACTICE AND MANAGEMENT’S LIMITED DISCRETION**

#### **A. Overview of Uncontested and Contested Issues**

To begin, the issue before the Court is quite limited in scope: the Union petitions for review of just one of many findings that the Board made. For its part, the Board is not seeking judicial enforcement of its Decision and Order as to the unfair labor practices it found. Thus, the Board’s findings that the Company, following the Union’s arrival, committed a range of violations of Section 8(a)(5) and (1) of the Act<sup>3</sup> by engaging in overall bad-faith bargaining, by dealing directly with employees, and by making numerous unilateral changes to wages, hours, and other employment terms, are not before the Court. (ER 2-3.)

Also not before the Court are the portions of the Board’s Order remedying those unfair labor practices by directing the Company to bargain with the Union on

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<sup>3</sup> Section 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) make it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees” with respect to “wages, hours, and other terms and conditions of employment.” *See Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

request concerning terms and conditions of employment, and to embody any understanding reached in a signed agreement. (ER 6.) Such bargaining typically includes negotiations for contractual grievance and arbitration procedures that can resolve disputes over employee discipline. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). Thus, portions of the Board's Order not at issue here will provide the parties with a path for resolving these and other subjects; through collective bargaining, the parties can reach agreement on a contract that includes grievance and arbitration procedures governing employee discipline, unless they reach an overall impasse. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988); *Walnut Creek Honda Assocs. 2 v. NLRB*, 89 F.3d 645, 648-49 (9th Cir. 1996).

Instead, the sole issue raised by the Union's petition concerns a situation that arises in the interim, before an initial contract with grievance and arbitration procedures is in place. The Union contends that the Board erred in dismissing a complaint allegation that the Company violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and afford it an opportunity to bargain before disciplining individual employees pursuant to a preexisting disciplinary system. The Board found, and the evidence is uncontroverted, that the disciplinary system

in question was in place before the Union came on the scene, as were the Company's efficiency standards, absenteeism guidelines, and policies on insubordination and threats. (ER 3.) An employer does not violate Section 8(a)(5) and (1) of the Act where, as here, it maintains the status quo after a union enters the picture. This principle is a corollary to the rule that an employer cannot, without bargaining to impasse, effect a unilateral change in an existing term or condition of employment after a union's arrival. *See Litton Financial Printing Div., Inc. v. NLRB*, 501 U.S. 190, 198 (1991).

It is this principle—that an employer must maintain the status quo after a union's election victory until the parties bargain to an overall agreement or impasse—which informs the Board's finding that the Company did not violate the Act by failing to bargain with the Union before taking individual disciplinary actions pursuant to a policy that was in place before the Union arrived. We show below that the Board, consistent with settled law, including *Fresno Bee*, a lead case that is directly on point, reasonably found that the Company was not required to notify and bargain with the Union before making individual disciplinary decisions pursuant to its preexisting disciplinary system.

**B. The Board, Relying on *Fresno Bee*, Reasonably Found that the Company Did Not Violate the Act by Failing To Bargain with the Union Before Disciplining Individual Employees Pursuant to a Preexisting Policy that Circumscribed Its Managers' Discretion**

The Board reasonably dismissed (ER 3) the complaint allegations that the Company violated the Act by failing to notify the Union and afford it an opportunity to bargain before deciding to discipline employees pursuant to a preexisting disciplinary system and standards that circumscribed its managers' discretion. In so ruling, the Board relied on evidence that the Company, throughout its operations, predicated its disciplinary actions on a five-step system that predated the Union's selection as the employees' bargaining representative. (ER 4 n.10, 19.) As the Board also found (ER 4 n.10), the system did not materially change after the election. Moreover, the efficiency, absenteeism and work conduct standards governed by the disciplinary system also remained unaltered. Thus, the Company's efficiency standards operated in the same way before and after the election, with the same consequences for failure to adhere to the same expected efficiency level. (ER 4; 430-39.) Likewise, the Company's attendance guidelines did not change after the election, nor did the sanctions for insubordination and threatening behavior. (ER 4; 585-86, 602-08, 610-14, RX 3.) In short, the evidence shows that there was no unilateral change with regard to disciplinary procedures and work policies in this case, and thus there was no

requirement that the Company bargain with the Union before carrying on with business as usual.

In reaching its conclusion that the Company did not violate the Act as alleged, the Board appropriately relied (ER 3) on *The Fresno Bee*, 337 NLRB 1161 (2002), a case that is on all fours with the instant one. As the Board succinctly stated (ER 3), *Fresno Bee* “is dispositive” of the outcome here. In *Fresno Bee*, as in this case, the General Counsel alleged that the employer was obligated to notify and bargain with the union before imposing discipline on employees. 337 NLRB at 1186. Likewise, in *Fresno Bee*, as in the instant case, the Board rejected that allegation, finding that because the employer’s progressive disciplinary system predated the union election and sufficiently circumscribed managerial discretion, it could not be said that the employer, by following the same system post-election, made unilateral changes that required pre-implementation bargaining. *Id.*

The facts here are no different from those in *Fresno Bee*, and thus the outcome is no different either.<sup>4</sup> Simply put, here, as in *Fresno Bee*, the employer applied its preexisting disciplinary system in meting out discipline; accordingly, here, as in *Fresno Bee*, the Board reasonably concluded that the employer did not change employment terms when it applied its disciplinary system after the election.

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<sup>4</sup> As here, the employer in *Fresno Bee* admittedly did not notify the union before disciplining several employees. *Id.* Furthermore, as here, the union in *Fresno Bee* protested the employer’s action and demanded pre-implementation bargaining over the disciplinary actions. *Id.* at 1187.

*See Fresno Bee*, 337 NLRB at 1186-87. Similarly, here, as in *Fresno Bee*, while management did retain some discretion in meting out discipline, the “fact that the procedures reserve to [the Company] a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.” *Id.* at 1186.

The Board’s holding in *Fresno Bee*, that an employer is not required to bargain before the fact about day-to-day disciplinary actions taken pursuant to a preexisting system, is fully consistent with prior Board decisions. Thus, in *Wabash Transformer Corp.*, 215 NLRB 546, 546-47 (1974), *enforced*, 509 F.2d 647 (8th Cir. 1975), the Board found no violation of Section 8(a)(5) and (1) of the Act where an employer, without giving the union notice or an opportunity to bargain, discharged an employee for failing to meet an efficiency standard that was in place prior to the union’s arrival. Similarly, in *Trading Port, Inc.*, 224 NLRB 980, 982-83 (1976), the Board found no violation of Section 8(a)(5) and (1) of the Act where an employer, without giving the union notice or opportunity to bargain, continued to impose the same penalties on employees for failing to meet preexisting efficiency standards, and only changed its methods for tracking efficiency.

The Board’s rejection (ER 4) of the contention that company managers exercised effectively unlimited discretion is based on substantial evidence in the record as a whole. Specifically, the Board relied on the Company’s written five-

step progressive disciplinary system, under which various types of warnings preceded suspension and discharge. There is no dispute (ER 11) that this system was in place and utilized before and after the election. As the Board determined (ER 4), “[n]otwithstanding evidence of some flexibility or leniency, the framework of the progressive discipline system circumscribed the [Company’s] exercise of discretion as it disciplined employees.” The Board’s conclusion (ER 4) that the explicit disciplinary steps contained in the company handbook sufficiently curtailed management discretion is a factual finding that is accorded deference on review.<sup>5</sup> See cases cited above at p. 14.

Consider the alternative to the Board’s holding here—“[i]f every challenge to an act of discipline were to qualify as rooted in an existing term and condition of employment, routine enforcement of duly promulgated rules of conduct would be encumbered by the need to either *first* bargain to impasse or to obtain the union’s assent.” *Mulay Plastics, Inc.*, 291 NLRB 708, 711 (1988). For example, at the beginning of each shift, supervisors receive efficiency numbers for each employee from the previous day, and then go onto the plant floor to speak with them

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<sup>5</sup> The Union appears to regard (Br 34 n.9) as evidence of “discretion” the Company’s discharge of several employees who were members of the union bargaining committee. The Board, however, dismissed the complaint allegations that the Company discriminatorily discharged those employees in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (ER 3 n.9, 18.) The Union does not seek review of those dismissals here. Thus, the Union’s attempt to portray those discharges as discriminatory is irrelevant and obfuscatory.

individually about their ratings. (ER 11.) If those numbers are below the expected threshold, supervisors may, in line with the Company's preexisting system, verbally counsel the employees. If the Company had to give the Union notice and an opportunity to bargain over every such verbal counseling, the efficiency system would itself be rendered highly inefficient. Indeed, such a regime would unduly impede the long-recognized right of employers to maintain efficiency and conduct business by taking disciplinary action against employees who violate established rules or fail to meet job requirements. *See, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960).

In any event, as the Board concluded (ER 4), based on the judge's factual findings, *Fresno Bee* is factually indistinguishable from the instant case, and as "extant Board law . . . prescribes dismissal of the alleged violation here." Thus, the Company had no obligation to notify and bargain to impasse with the Union before imposing discipline pursuant to its preexisting system and standards.

**C. The Board's Decision To Dismiss the Complaint Allegations Is Consistent with Prior Board Decisions**

In challenging the Board's dismissal of the complaint allegations, the Union makes two primary arguments. First, it misreads (Br 36-38) dicta in *Washoe Medical Center*, 337 NLRB 202, 202 n.1 (2001), to contend that the 2001 ruling cannot be reconciled with *Fresno Bee* and the instant case. As shown below, however, the Board itself wholly rejected this misreading of *Washoe* and explained

why the cases are not at odds. The Union also relies (Br 23-29) on various cases, including *NLRB v. Katz*, 369 U.S. 736, 737 (1962), involving the principle that an employer may not unilaterally change an existing term or condition of employment without first providing a collective-bargaining representative with notice and opportunity to bargain. While there is no dispute that employers are barred from unilaterally changing terms and conditions of employment, we show below that this principle is inapplicable because, as the Board found, the Company did not change its disciplinary system after the Union's arrival.

**i. The Board's decision is consistent with *Washoe Medical Center***

The Union's mistaken reliance on *Washoe Medical Center*, 337 NLRB 202, 202 n.1 (2001), ignores the Board's own reading of that case. Indeed, the Board rejected (ER 4) the judge's misreading of *Washoe*, noting that *Fresno Bee*, 337 NLRB at 1161, 1186-87, which issued after the judge's recommended decision here, clarified the Board's holding in *Washoe*. The judge, of course, did not have the benefit of *Fresno Bee* when he issued his recommended decision here. Without the benefit of the Board's later decision, the judge misread the Board's intent in *Washoe*. The Union (Br 36) repeats that error on review by contending that *Washoe* and *Fresno Bee* are inconsistent. The Board, however, reasonably concluded (ER 4 n.11) that *Washoe* and *Fresno Bee* "are not irreconcilable."

To appreciate the Union's misreading of *Washoe*, it is important to understand the limited nature of the Board's holding in that case. In *Washoe*, 337 NLRB at 202 n.1, the Board affirmed the judge's recommended dismissal of a complaint allegation that the employer had violated Section 8(a)(5) and (1) of the Act by failing to bargain before the planned imposition of specific discipline on particular employees. The Board did so, however, on quite narrow grounds: it simply noted (*id.* at n.1) that the record did "not establish that the Union at any time" requested bargaining—a point that the judge in *Washoe* had overlooked. It is important to recognize that this factual observation, standing alone, does not support an inverse inference that the Board would have found a violation if the union had requested bargaining in *Washoe*.

In the instant case, however, the administrative law judge (ER 20-21) mistakenly adopted such an inference. He misread *Washoe*, 337 NLRB at 202 n.1, as requiring an employer to engage in pre-implementation bargaining if the union requests it, regardless of whether the disciplinary system circumscribes managerial discretion. Thus, the judge here erroneously opined that "the crux of the Board's holding in *Washoe*" is that if a union makes a before-the-fact demand for bargaining, the employer must afford it an opportunity to bargain before subjecting employees to discipline, regardless of the degree of discretion involved. (ER 21.)

As discussed above pp. 20-21, about two months after the judge issued his recommended decision here, the Board decided *Fresno Bee*, a case in which the union *did* request pre-implementation bargaining over individual disciplinary decisions. Nevertheless, the Board dismissed the Section 8(a)(5) and (1) complaint allegation on the ground that the employer's disciplinary policies predated the union's arrival and circumscribed its discretion to such an extent that it could not be said that each post-election application of those policies constituted a change in the status quo. 337 NLRB at 1186. Thus, *Fresno Bee* stands for the proposition that—contrary to the judge's recommended finding here, which the Board rejected (ER 4 n.11)—the Act does *not* impose a pre-implementation obligation to bargain over individual disciplinary decisions solely because a union requests it.

In the instant case, the Board clarified its view, not clearly articulated in *Washoe* and *Fresno Bee*, that a violation of the Act should not automatically be found simply because a union requests pre-disciplinary bargaining. As the Board stated here (ER 4 n.11), while there was no request for pre-disciplinary bargaining in *Washoe*, the *Washoe* Board's footnote addressing that point identified the bargaining demand as “a necessary, but not sufficient, condition for finding the alleged violation . . . .”

The Union (Br 36) does not help itself by pointing to the Board's rejection in *Washoe* of the judge's statement there that the General Counsel had to show that

“imposition of discipline constituted a change in [the employer’s] policies and procedures.” 337 NLRB at 202 n.1, 206. The Board’s decision here is not inconsistent with the Board’s rejection of the judge’s statement in *Washoe*. The Board here did not conclude that the Company lawfully disciplined employees without notice and an opportunity to bargain *only* because the Company did not change its disciplinary system after the election. Rather, the Board considered (ER 4) that the Company did not change its disciplinary system *and* that the system itself sufficiently circumscribed managerial discretion.

Finally, contrary to the Union’s further claim (Br 36-37), the *Washoe* Board left undisturbed dicta in the *Washoe* judge’s recommended decision where she explained (as did the same judge in *Fresno Bee*, 337 NLRB at 1186):

Employee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behavior are too great to permit otherwise . . . . The fact that the procedures reserve to [the employer] a degree of discretion or that every conceivable scenario leading to discipline is not specified does not alone vitiate the system as a past practice and policy.

*Washoe*, 337 NLRB at 206. Because the *Washoe* Board did not disturb that dicta, the Union errs in suggesting (Br 37-38 & n.11) that the Board’s acceptance of the judge’s same reasoning in *Fresno Bee*, 337 NLRB at 1186-87, is somehow problematic.

**ii. Because the Company did not unilaterally change its disciplinary system, the Union errs in relying on *Katz* and other unilateral change cases**

The Union’s heavy reliance (Br 15-16, 23-35, 40-42) on *NLRB v. Katz*, 369 U.S. 736, 743 (1962), is an error that pervades its brief. As the evidence shows, after the Union came on the scene, the Company did not change its disciplinary system, its efficiency standards, its absenteeism guidelines, or its policies on insubordination and threats. In a parallel situation, the Board, in *Fresno Bee*, cited and acknowledged the precedence of cases such as *Katz*. See *Fresno Bee*, 337 NLRB at 1161, 1186. While recognizing that *Katz* has been applied “to bar unilateral conduct by employers in a wide variety of situations,” it nonetheless found that because no unilateral change had occurred, *Katz* was inapplicable there. *Id.* The *Katz* decision likewise does not govern the instant case, because the Company also made no post-election unilateral change to its disciplinary system.<sup>6</sup>

For similar reasons, the Union errs (Br 28-29) in relying on *Eugene Iovine, Inc.*, 328 NLRB 294 (1999) (“*Iovine I*”), *enforced mem.*, 2001 WL 10366 (2d Cir. 2001), a case that, unlike the instant one, involved a unilateral change. See *Fresno Bee*, 337 NLRB at 1186 (distinguishing *Iovine I* on that basis). In *Iovine I*, the

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<sup>6</sup> To the extent that the Union’s brief can be read as arguing that the Company changed its disciplinary system by enforcing its standards more stringently after the election, that issue is not before the Court. The Board remanded (ER 4-5) to the judge the question of whether the Company’s *enforcement* of its preexisting efficiency standards was more stringent after the election.

employer unilaterally reduced employees' work hours after the election. The employer, however, "failed to establish a past practice and further failed to establish that its . . . reduction of hours was consistent with its conduct in prior years." *Fresno Bee*, 337 NLRB at 1186 (quoting *Iovine I*, 328 NLRB at 294). Indeed, in *Iovine I*, the employer did not even identify the specific circumstances surrounding its post-election reduction in work hours, and thus failed to show that the reduction comported with its previous conduct. *Iovine I*, 328 NLRB at 294. Thus, in *Iovine I*, unlike here, "there was a demonstrable change from preceding practices," *Fresno Bee*, 337 NLRB at 1186, a key factual distinction that the Union fails to mention in its brief.

In *Iovine I*, the Board also found that the employer, by reducing employees' hours, had made a discretionary management move that was not guided by any "reasonable certainty" as to the timing and criteria for its decision. *Iovine I*, 328 NLRB at 294. In contrast, the five-step written disciplinary system that the Company adhered to both before and after the election set forth the timing and criteria for discipline of unit employees.

The Union likewise errs (Br 28) in relying on the Board's more recent decision in *Eugene Iovine, Inc.*, 353 NLRB No. 36, 2008 WL 4492588 (2008) ("*Iovine II*"), *application for enforcement pending*, No. 09-0217-ag (2d. Cir.). *Iovine II* rests on the same reasoning as *Iovine I* and is similarly distinguishable

from the instant case on the same basis. In *Iovine II*, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by laying off employees without giving the union notice and an opportunity to bargain over the layoffs before implementing them. 353 NLRB No. 36, slip op. at 1, 2008 WL 4492588 at \*1. The employer failed to show evidence that it had a past practice governing employee layoffs; to the contrary, it had no preexisting policy regarding layoffs. *Id.* By contrast, here the Company gave employees the actual reason for each disciplinary action, and disciplined them for the same reasons and in the same ways before and after the Union's arrival.

Finally, *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986), relied on by the Union (Br 27-29), does not require a different result. In *Local 512*, the employer unilaterally implemented economic layoffs. *Id.* at 711. The Court noted that, even if such layoffs could constitute a long-standing practice, that showing had not been made because there was no evidence that "work was 'slow' at seasonally predictable times." *Id.* The Court also noted that the layoff procedure was "*ad hoc* and highly discretionary" because the employer would consider several different alternatives to layoff each time there was an economic slowdown. *Id.* The situation presented here is quite different: disciplinary actions occurred at a similar rate before and after the election; they followed an established procedure set forth in the employee handbook; and, far

from being “highly discretionary,” *id.*, they were circumscribed by the extant disciplinary system.

In sum, the record shows that rather than unilaterally changing its established disciplinary system after the Union’s arrival, the Company continued to follow its system and to maintain the status quo. Moreover, the extant system circumscribed managerial discretion to an extent that defeats the Union’s apparent suggestion that each individual disciplinary action constituted a unilateral change. In these circumstances, the Board reasonably applied the rationale of *Fresno Bee* to find that the Company did not violate the Act by failing to give the Union notice and an opportunity to bargain over dozens of individual disciplinary decisions. The Board’s decision here is in harmony with *Fresno Bee* and *Washoe Medical Center*, and is not undermined by wholly distinguishable cases involving unilateral changes.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying the Union's petition for review.

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National Labor Relations Board

March 2010

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

WAREHOUSE UNION LOCAL 6,	:
INTERNATIONAL LONGSHORE AND	:
WAREHOUSE UNION	:
	:
Petitioner	:
	:
	: No. 09-73444
v.	:
	:
NATAIONAL LABOR RELATIONS BOARD	: Board Case No.
	: 32-CA-18149
Respondent	:
	:
and	:
	:
ALAN RITCHEY, INC.	:
	:
Intervenor	:

**CERTIFICATE OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, the Board represents that there are no related cases pending in this court.

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Dated at Washington, DC  
this 4th day of March, 2010

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