

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TOTAL SECURITY MANAGEMENT ILLINOIS 1,
LLC

and

Case 13-CA-108215

INTERNATIONAL UNION SECURITY POLICE
FIRE PROFESSIONALS OF AMERICA (SPFPA)

Lisa Friedheim-Weis and Brigid Garrity, Esqs., for the General Counsel.
Eugene Boyle, Esq. (Neal, Gerber and Eisenberg)
Chicago, Illinois, for the Respondent.
Guy Thomas, SPFPA, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan Administrative Law Judge. This case was submitted to me on a stipulated record on April 2, 2014. The General Counsel and Respondent, Total Security Management Illinois 1, LLC, filed briefs upon this record on May 7, 2014.

The Charging Party Union, the International Union Security Police Fire Professionals of America (SPFPA), filed the charge on June 28, 2013. The General Counsel issued the complaint on August 19, 2013. The issue in this matter is whether Respondent violated Section 8(a)((5) and (1) in failing to provide the Union with prior notice and an opportunity to bargain prior to discharging bargaining unit employees Winston Jennings, Jason Mack and Nequan Smith.

FINDINGS OF FACT

I find as fact all the matters to which the parties stipulated on April 2, 2014. The essential facts are as follows. Respondent, which is based on Oakbrook Terrace, Illinois, provides security planning and security services. The company receives materials and services at its Oakbrook facility valued in excess of \$50,000 directly from locations outside of Illinois. Thus, Respondent admits to being an employer within the meaning of the Act.

The Union, SPFPA, was certified as the exclusive collective bargaining agent of a unit of Respondent's employees on August 21, 2012. The Union represents a bargaining unit consisting of all full time and regular part time armed and unarmed security officers performing guard duties at Marshfield Plaza, 1700 W. 119th St. in Chicago.

Since August 21, 2012, the Union and Respondent have been in negotiations over an initial collective bargaining agreement. So far as this record shows, as of April 2, 2014, the parties had not reached agreement on a collective bargaining agreement or other binding agreement regarding discipline.

On March 12, 2013, Respondent discharged three employees without giving prior notice and an opportunity to bargain to the Union. It discharged Winston Jennings for allegedly refusing to cooperate with Respondent's internal investigation of co-worker Jason Mack, making misrepresentations to a supervisor, being insubordinate and failing to report a violation of company policy.

Respondent discharged Jason Mack on March 12 for allegedly abandoning his post prior to completing his shift and falsifying company documents. That day Respondent also discharged Nequan Smith for allegedly using profane and indecent language towards a supervisor and causing a disturbance at a client site.

In discharging the three employees, Respondent exercised discretion in applying its Security Officer's Personnel Policy Manual, Guidelines and Rules, and/or any other written or verbal policies and practices. Respondent did not adhere to any uniform policy or practice with respect to issuing discipline regarding the alleged transgressions of the three employees.

With regard to Jennings, Mack and Smith, Respondent did not have a reasonable good faith belief that the presence of any one of them presented a serious, imminent danger to Respondent's business or personnel, or that any of them engaged in unlawful conduct, posed a significant risk of exposing Respondent to legal liability for his conduct, or threatened safety, health or security in or outside the workplace.

Analysis

The parties have stipulated that the issues presented in this matter include the validity of the Board's decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). That decision, if valid, leads to the conclusion that Respondent violated the Act as alleged. However, that decision was issued by three members, only one of whom, Chairman Pearce, had been confirmed by the Senate. Thus Respondent challenges the validity of the recess appointments of the other two, Richard Griffin and Sharon Block.

Respondent also challenges the validity of then Acting General Counsel Lafe Solomon's appointment and thus the authority of anyone at the Board to issue the complaint in this matter. Robert Griffin was sworn in as the General Counsel of the Board in November 2013, after the complaint in this matter issued.

Finally, Respondent challenges the validity of the Board's appointment of Regional Director Peter Ohr and thus Mr. Ohr's authority to issue the complaint in this matter. This challenge is based on the fact that Mr. Ohr was appointed to the position of Regional Director by a three member Board which had only two members whose appointments were allegedly valid. The Board that appointed Mr. Ohr to his current position consisted of two members confirmed by the Senate, Chairman Pearce and Brian Hayes, and Craig Becker, a recess appointment. Respondent argues that Mr. Becker's appointment to the Board was invalid; thus any actions by this three-member Board were also invalid.

The Board has held that until the issue of the recess appointments is definitively resolved, it will continue to fulfill its responsibilities under the Act, *Belgrove Post Acute Care Center*, 359 NLRB No. 77 fn. 1 (2013). Therefore, I am bound by existing Board precedent, *Waco, Inc.*, 273 NLRB 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F. 2d 176 (8th Cir. 1964). As to the alleged infirmity of the complaint based on the alleged lack of authority of the Acting General Counsel, I am also bound by the Board's rejection of this defense in *Belgrove*. Pursuant to *Belgrove* I further conclude that the Board had authority to appoint Peter Ohr as Regional Director and that Mr. Ohr had authority to issue the complaint in this matter. Thus, the only issue before me is whether Respondent violated the Act as alleged, applying the Board's *Alan Ritchey* decision.

The *Alan Ritchey* decision concerns an employer's statutory obligations between the time unit employees have selected an exclusive bargaining representative and that when the union and employer have effectuated a first contract. The Board held that with regard to more serious forms of discipline: suspensions, demotions and discharges, such an employer must generally provide its employees' representative notice and an opportunity to bargain before disciplining a unit employee. An exception to this rule is a situation in which the employer is not exercising discretion. I take the absence of discretion to mean that the employer is automatically executing an established policy. For example, suppose an employer which has an established, uniformly enforced policy of automatically discharging an employee for three consecutive no call/no shows. This employer would not have to provide a union notice and an opportunity to bargain over the discharge of an employee who violated that policy.

Also, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel, the employer may impose discipline immediately and unilaterally. Such a situation might be where the employee assaults another employee or supervisor. However, even in this case, the employer would be required to bargain after the discipline was imposed.¹

The employer's obligation to bargain over serious types of discipline does not require the employer to bargain to impasse prior to imposing discipline. However, after imposing discipline the employer must continue to bargain until reaching agreement or impasse.

¹ The Board noted, at footnote 19 of the *Allen Ritchey* decision, that in such circumstances, the employer could suspend an employee pending investigation, notify the Union and bargain over the suspension after the fact, as well as any discipline imposed resulting from the employer's investigation.

Conclusion of Law

In the instant case Respondent has admitted to facts which constitute a violation of Section 8(a)(5) and (1) of the Act pursuant to the *Alan Ritchey* decision. The disciplines were serious, i.e., discharges; Respondent exercised discretion in discharging the three employees; it did not provide prior notice and opportunity to bargain before doing so and concedes that none of the employees' continued presence at work presented an imminent danger to its business or employees.

Remedy

The Respondent, having discharged employees in violation of the Act, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Total Security Management Illinois 1, LLC, Oakbrook Terrace, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Imposing serious discipline (e.g., suspension, discharge, demotion) upon bargaining unit employees without first notifying the employees' collective bargaining representative and providing the bargaining representative with the opportunity to bargain over the discipline to be imposed.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (a) Rescind the discharges of Winston Jennings, Jason Mack and Nequan Smith.
- (b) Notify the Union and provide it with an opportunity to bargain over any discipline that may be imposed for the alleged misconduct that led to the discharge of the three employees on March 12, 2013.
- (c) Within 14 days from the date of the Board's Order, offer Winston Jennings, Jason Mack and Nequan Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (d) Make Winston Jennings, Jason Mack and Nequan Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- (e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way. This does not prevent Respondent from disciplining or discharging these employees after providing the Union notice and opportunity to bargain over any discipline that may be imposed, after complying with Section 8(a)(5) and (1) of the Act.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its Oakbrook Terrace and Marshfield Plaza facilities, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employee are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 12, 2013.

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(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10 Dated, Washington, D.C., May 9, 2014.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend or demote you without providing your union, International Union Security Police Fire Professionals of America (SPFPA) notice and an opportunity to bargain about the discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the discharges of Winston Jennings, Jason Mack and Nequan Smith and will reinstate them to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Winston Jennings, Jason Mack and Nequan Smith whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL within 14 days of this the date of this Order remove from our files any reference to the unlawful discharges of Winston Jennings, Jason Mack and Nequan Smith. However, this does not prevent us from imposing discipline after notifying the Union and providing it with an opportunity to bargain over that discipline.

WE WILL, within 3 days thereafter, notify Winston Jennings, Jason Mack and Nequan Smith in writing that this has been done and that the discharges previously imposed will not be used against them in any way—except that if discipline is lawfully imposed after giving notice and an opportunity to bargain over the discipline to the Union, records of such discipline may be contained in our files.

TOTAL SECURITY MANAGEMENT
ILLINOIS 1, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-1443
(312) 353-7570, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/13-CA-108215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.