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9 UNITED STATES OF AMERICA
10 BEFORE THE NATIONAL LABOR RELATIONS BOARD

11 WESTERN CAB COMPANY)

12 and)

13 UNITED STEEL, PAPER AND FORESTRY,)
14 RUBBER, MANUFACTURING, ENERGY,)
15 ALLIED-INDUSTRIAL AND SERVICE)
16 WORKERS INTERNATIONAL UNION, AFL-)
CIO/CLC)

Case Nos.: 28-CA-131426
28-CA-132767
28-CA-135801

17 WESTERN CAB COMPANY'S RESPONSE TO
18 CHARGING PARTY'S BRIEF IN SUPPORT OF
19 EXCEPTIONS TO THE DECISION AND RECOMMENDED
20 ORDER OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii, iii, iv, v
I. PRELIMINARY STATEMENT	1
II. EMPLOYEE DISCIPLINE ISSUES.....	7
A. SECTION 10(c) PROHIBITS REINSTATEMENT OR BACK PAY FOR EMPLOYEES DISCHARGED FOR CAUSE	14
B. THERE IS NO 8(a)(5) VIOLATION GIVEN THE UNION’S FAILURE TO BARGAIN	18
III. <i>ALAN RITCHEY</i> ISSUES.....	24
IV. CREDIBILITY ISSUES.....	27
V. THE 8(a)(1) ISSUES.....	31
A. CONVERSATIONS ABOUT THE UNION	31
B. THE <i>TRIP SHEET</i> MAGAZINE.....	34
C. DISPARAGEMENT OF THE UNION.....	36
VII. CONCLUSION	38

TABLE OF AUTHORITIES

Federal Cases:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
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20
21
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28

*Amalgamated Meat Cutters and Butcher Workmen of No. Am.,
Local No. 365 v. NLRB*, 435 F.2d 668 (9th Cir. 1970).....32

Derby Refining Co. v. NLRB,
1979 WL 4858 (10th Cir. 1979)34

Excavation-Construction, Inc. v. NLRB,
660 F.2d 1015 (4th Cir. 1981)33

Garcia v. High Flying Foods,
2015 WL 773054 (S.D. Cal. 2015).....32

Gossen Co. v. NLRB,
719 F.2d 1354 (7th Cir. 1983)32

H.K. Porter Co., Inc. v. NLRB,
397 U.S. 99 (1970)13

Hotel Employees and Restaurant Employees Union v. NLRB,
760 F.2d 1006 (9th Cir. 1985)32

Monmouth Care Center v. NLRB,
672 F.3d 1085 (D.C. Cir. 2012).....30

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___ F.3d ___, 2015 WL 5935187 (11th Cir. 2015).....31

NLRB v. Columbus Marble Works,
233 F.2d 406 (5th Cir. 1956)14

NLRB v. Eastern Massachusetts Street Railway Co.,
235 F.2d 700 (1st Cir. 1956)14

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969)37

NLRB v. Goya Foods of Fla.,
525 F.3d 1117 (11th Cir. 2008)31

NLRB v. Island Typographers, Inc.,
705 F.2d 44 (2^d Cir. 1983)22-23

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937)14

1
2
3
4
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8
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27
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NLRB v. Noel Canning,
— U.S. —, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014)..... 1, 29

NLRB v. Ralph Printing and Lithographing Co.,
379 F.2d 687 (8th Cir. 1967) 32

NLRB v. Sunnyland Packing Co.,
369 F.2d 787 (5th Cir. 1966) 31

Noel Canning v. NLRB,
705 F.3d 490 (D.C. Cir. 2013)..... 1, 4-5, 22, 25, 27, 29, 31

Stephens Media, LLC v. NLRB,
677 F.3d 1241 (D.C. Cir. 2012) 30

W. W. Grainger, Inc. v. NLRB,
860 F.2d 244 (7th Cir. 1988) 22-23

NLRB Cases:

Ace Cab, Inc.,
301 NLRB 18 (1992)..... 10

Adams & Associates,
JD-25-15, 2015 WL 3759560 (June 26, 2015)..... 6

Alan Ritchey, Inc.,
359 NLRB 40 (2012)..... 1, 4-7, 11-14, 17, 22-25, 27, 38

American Buslines,
164 NLRB 1055 (1967)..... 21-23

Anheuser-Busch, Inc.,
351 NLRB 40 (2007)..... 15-16, 27

Boston Cab Co.,
212 NLRB 92 (1974)..... 10

City Transportation Co.,
131 NLRB 105 (1961)..... 10

Cotter & Co.,
21-CA-27222-1, 1990 WL 279479 (Advice Memo, March 30, 1990) 23

Fresno Bee,
337 NLRB 1161 (2002)..... 1, 5-7, 9

1		
2	<i>Genessee County Association for Retarded Citizens,</i>	
	1994 WL 1865823 (May 3, 1994).....	19
3		
4	<i>Great Western Produce, Inc.,</i>	
	299 NLRB 1004 (1990).....	15
5		
6	<i>Hacienda Hotel, Inc.,</i>	
	363 NLRB 7 (2015).....	4
7		
8	<i>Hartmann Luggage Co.,</i>	
	173 NLRB 193 (1968).....	19
9		
10	<i>High Flying Foods,</i>	
	JD-29-15, 2015 WL 2395895 (May 19, 2015).....	6
11		
12	<i>J&J Snack Foods Handhelds Corp.,</i>	
	363 NLRB 21 (2015).....	29
13		
14	<i>Kenosha News Pub. Corp,</i>	
	264 NLRB 50 (1982).....	9
15		
16	<i>Kitsap Tenant Support Services, Inc.,</i>	
	JD-29-15, 2015 WL 4709436 (July 28, 2015).....	5, 10
17		
18	<i>Latino Express, Inc.,</i>	
	JD-09-15, 2015 WL 1205363 (March 17, 2015)	5
19		
20	<i>Lincoln Lutheran of Racine,</i>	
	362 NLRB 188 (2015).....	4
21		
22	<i>McDonald Land & Mining,</i>	
	301 NLRB 61 (1991).....	37
23		
24	<i>McKesson Corporation,</i>	
	JD-30-14, 2014 WL 5682510 (Nov. 4, 2014)	6
25		
26	<i>Ohio Edison Co.,</i>	
	362 NLRB 88 (2015).....	22
27		
28	<i>Pony Express Courier Corp.,</i>	
	283 NLRB 868 (1987).....	37
	<i>Ready Mix USA, LLC,</i>	
	JD-52-15, 2015 WL 5440337 (Sept. 15, 2015)	5
	<i>Security Walls, LLC,</i>	
	361 NLRB 29 (2014).....	14, 17

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SGS Control Services,
275 NLRB 137 (1985).....19

Shen Lincoln-Mercury-Mitsubishi, Inc.,
321 NLRB 82 (1996).....30

SMG Puerto Rico, II, LP,
JD-07-15, 2015 WL 1756217 (April 17, 2015)5

SNE Enterprises,
344 NLRB 673 (2005).....4

South Lexington Management Corp.,
JD-07015, 2015 WL 400624 (Jan. 29, 2015)5

Standard Dry Wall Products, Inc.,
91 NLRB 103 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).....29

Taracorp Industries,
273 NLRB 54 (1984).....14

TGF Management Group Holdco., Inc.,
JD-05-15, 2015 WL 194519 (January 15, 2015).....5

Tocco, Inc.,
323 NLRB 480 (1997).....15

Union-Tribune Publishing Co.,
353 NLRB 2 (2008).....16

Uniserv,
351 NLRB No. 86 (2007).....27

Vigor Industrial, LLC,
JD-35-15, 2015 WL 5159225 (Sept. 2, 2015).....22

Washington River Protection Solutions,
2014 WL 6603994 (Advice Memo. Oct. 14, 2014).....12

Whirlpool Corporation,
281 NLRB 7, 1986 WL 54315 (1986).....23

1 Western Cab Company (“Western Cab”) submits the following brief in response to the
2 Brief in Support of Exceptions filed by the Charging Party, United Steel, Paper and Forestry,
3 Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-
4 CIO/CLC (the “Union”) on October 14, 2015, with regard to the September 2, 2015, Decision of
5 Administrative Law Judge Ariel L. Sotolongo entered following trial in Las Vegas, Nevada, on
6 January 27-28, 2015.
7

8 **I. PRELIMINARY STATEMENT**

9 The initial charge in this case was filed by the Union on June 24, 2014, just two days
10 before the U.S. Supreme Court published its decision in *NLRB v. Noel Canning*, ___ U.S. ___, 134
11 S.Ct. 2550, 189 L.Ed.2d 538 (2014), voiding *Alan Ritchey*, 359 NLRB No. 40 (2012), as the
12 product of an unconstitutionally appointed Board without addressing the merits of its analysis or
13 holding.¹

14
15 The charges in this case were formulated on *Alan Ritchey*, the invalidation of which left
16 *Fresno Bee*, 337 NLRB No. 1161 (2002), the controlling law on the question of pre-bargaining
17 contract, pre-imposition discipline, holding that an employer had no duty to bargain over pre-
18 imposition discretionary discipline in the period before the employer’s first contract with the
19 union.

20
21 The Board’s November 26, 2014, Order Further Consolidating Cases, Second Consolidated
22 Complaint and Notice of Hearing directed Western Cab to respond to the Union’s charges that
23 after having recognized the Union since approximately March 26, 2012, although without having
24 reached a bargaining agreement, Western Cab had violated Secs. 8(a)(1) and 8(a)(5) of the Act by,

25
26 ¹ The Charge in Case 28-CA-131426 was filed June 24, 2014. The other charges were all
27 filed after *Noel Canning*’s publication: Case 28-CA-132767 was filed July 15, 2014, and in Case
28 28-CA-135801 was filed September 2, 2014. The Supreme Court’s Opinion concludes by
affirming the judgment of the D.C. Circuit Court of Appeals which vacated the Board’s order. 134
S.Ct. at 2578; *Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

1 among other things, (1) changing its health care plan for employees to comply with the Affordable
2 Care Act (“ACA”); (2) suspending or discharging employees without first bargaining about their
3 discipline; (3) disparaging the union and/or employees; and (4) removing from the employees’
4 breakroom copies of a magazine containing a union advertisement.

5
6 Following trial on January 27-28, 2015, ALJ Ariel Sotolongo entered his Decision on
7 September 2, 2015, rejecting all but two of the charges and concluding that Western Cab had
8 violated the Act as follows:

9 By failing to provide the Union with notice or an *opportunity to bargain*
10 *concerning the discretionary disciplinary action taken* with regard to all
11 employees discharged or suspended by Respondent between January 1, 2014 and
12 July 8, 2014, and by failing to provide the Union with notice or an opportunity to
13 bargain concerning *changes to the healthcare benefits* provided to bargaining unit
14 employees, which were mandatory subjects of bargaining, Respondent violated
15 Section 8(a)(1) and (5) of the Act. [Emphasis added.]

16 Decision, p. 17, ll. 17-23. As for the resulting remedy, the ALJ rejected reinstatement and back-
17 pay remedies:

18 The appropriate remedy for the Section 8(a)(1) and (5) violations I have
19 found is an order requiring Respondent to cease and desist from such conduct and
20 take certain affirmative action consistent with the policies and purposes of the Act.

21 Specifically, Respondent will be *required to bargain* with the Union with
22 respect to the disciplinary action taken with respect to all *employees discharged or*
23 *suspended* by Respondent between January 1, 2014 and July 8, 2014, and will
24 further be required to bargain with the Union with respect *to changes to the*
25 *healthcare benefits* provided to bargaining unit employees. For the reasons
26 discussed above, I decline the General Counsel[‘s] request to recommend any
27 additional remedies (such as reinstatement and/or backpay) with regard to the
28 disciplined employees. Additionally, Respondent will be ordered to post a notice to
employees assuring them that it will not violate their rights in this or any other
related matter in the future. Finally, to the extent that Respondent communicates
with its employees by email, it shall also be required to distribute the notice to
employees in that manner, as well as any other electronic means it customarily uses
to communicate with employees. [Emphasis added.]

Decision, p. 17, ll. 32-45. The Decision then directed Western Cab to cease and desist from “(a)
Failing to bargain with [the Union] regarding the disciplinary action taken regarding all employees
discharged or suspended between January 1, 2014 and July 8, 2014, or prior to imposing such

1 discipline to any other employees in the future” and (b) Failing to bargain with [the Union]
2 regarding changes to healthcare benefits provided to bargaining unit employees.”

3 The Union’s “Statement of the Case” fashions this dispute as arising from facts other than
4 those actually presented at trial and appearing in the record, *e.g.*, arguing as if Western Cab had
5 terminated employees, its most important asset in its high-turnover service industry, absent cause
6 and on irrational whim and caprice; as if Western Cab had not immediately responded to the
7 Union’s request for a list of employees terminated or suspended with an offer to bargain, only to
8 then not hear back from the Union other than through its charges; as if the *Trip Sheet* magazine,
9 routinely discarded by Western Cab, was actually a piece of “union literature,” as opposed to a
10 monthly magazine featuring ads and other enticements attempting to lure cab drivers to break the
11 governing laws of Nevada and Las Vegas by taking passengers to destinations other than those
12 requested; and as if Western Cab management even knew there was a union advertisement in a
13 single *Trip Sheet* magazine, the August 2014 issue. The Union attacks the ALJ’s assessment of
14 credibility of the witnesses, but that effort must fail because the Board and the Courts uniformly
15 defer to the ALJ, who has heard the live testimony of the witnesses, questioned the witnesses
16 where appropriate, and heard responses to the questions of others, to determine the credibility of
17 the testifying witnesses absent some gross error or abuse, which has not been demonstrated here.

18 The Union paints the ALJ’s Decision as a humiliation of the Union in the eyes of Western
19 Cab’s employees, but the Decision in fact penalizes Western Cab by demanding its promotion of
20 and cooperation with the Union through posting of the Notice to Employees in various forums, all
21 designed to repeatedly reach Western Cab’s employees. The Union asserts that no punishment of
22 Western Cab could suffice other than back-pay and reinstatement to employees who were
23 indisputably terminated or suspended for such wrongs as “... being arrested while working;
24 leaving the scene of an at-fault accident; ... assault and battery; customer abuse; reckless or unsafe
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1 driving; failure to turn in book; failure to report an accident; substance abuse violations; [and]
2 fighting.” Reinstating and back-paying such employees would hardly send an appropriate message
3 about the parties or about the enforcement mechanisms designed in the Act. Moreover, as the
4 Decision notes, in direct contrast to the action of the employer in *Alan Ritchey*, who **affirmatively**
5 **refused** the Union’s request to bargain, the record here shows that Western Cab **affirmatively**
6 **offered** to bargain with the Union on July 8, less than one month from the Union’s June 11, 2014
7 request for information. Although the offer is still open, the Union has never responded to it.
8 Decision, p. 8, ll. 34-35.

10 Contrary to the Union’s argument, ALJ Sotolongo’s discussion of remedies in his Decision
11 comports with *Alan Ritchey* and *Noel Canning*. With *Alan Ritchey*’s invalidation by the Supreme
12 Court in *Noel Canning*, the ALJ was reasonably and understandably uncomfortable with imposing
13 sanctions other than those imposed in *Alan Ritchey*, such as back-pay and reinstatement, especially
14 on the facts of this dispute. *Alan Ritchey* acknowledged that it was extending the law, reversing
15 precedent and thus applied its holding prospectively only. *Alan Ritchey*, at p. 10 (“we apply new
16 rules and other changes prospectively where retroactive application would cause ‘manifest
17 injustice’”); see also, *Lincoln Lutheran of Racine*, 382 NLRB No. 188, p. 7 (2015), quoting *SNE*
18 *Enterprises*, 344 NLRB 673, 673 (2005) (dismissing charges in a case which created new rules as
19 to do otherwise would be an unfair retroactive application of new law and would work a “manifest
20 injustice,” continuing: “In determining whether retroactive application would result in ‘manifest
21 injustice,’ the Board considers ‘the reliance of the parties on preexisting law, the effect of
22 retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising
23 from retroactive applications.’ Today’s ruling definitively changes longstanding substantive
24 Board law..., rather than merely changing a remedial matter.”); *Hacienda Hotel*, 353 NLRB 7
25 (2015) (make-whole relief refused where its imposition would have been unfair in light of the fact
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1 that the law had just changed as the result of recently decided protracted litigation overturning 50
2 years of precedent).

3 Thus, in *Kitsap Tenant Support Services, Inc.*, JD-(SF)-29-15, 2015 WL 4709436, *11
4 (July 28, 2015), ALJ Sotolongo explained that *Noel Canning* left *Fresno Bee*, 337 NLRB 1161
5 (2002), controlling Board precedent that there was no duty to bargain pre-imposition discipline
6 during the period before the employer's first contract with the union:
7

8 ***[W]hether this conduct by Respondent violated the Act depends entirely on***
9 ***whether the Board re-affirms the principles it announced in Alan Ritchey, which***
10 ***was invalidated by the Supreme Court in Noel Canning on constitutional***
11 ***grounds. Prior to Alan Ritchey, the Board had never held that employers had to***
12 ***bargain with unions prior to imposing discretionary discipline during the 'interim***
13 ***period' after certification but before a first contract. Indeed, the Board had***
14 ***adopted a decision of an administrative law judge holding that there was no such***
15 ***pre-imposition duty to bargain over discretionary discipline during this period.***
16 See *Fresno Bee*, 337 NLRB 1161 (2002). In *Alan Ritchey*, the Board rejected the
17 *Fresno Bee* rationale, explaining that its longstanding doctrine that employees must
18 bargain with the collective-bargaining representative of its employees prior to
19 discretionary changes in the status quo regarding terms and conditions of
20 employment, a mandatory subject of bargaining. [Emphasis added.]²

21 *Ready Mix USA, LLC*, JD-52-15, 2015 WL 5440337, *22-23 (Sept. 15, 2015), also explains
22 the problems that have arisen in the wake of *Alan Ritchey*'s invalidation and declines to anticipate
23

24 ² *Kitsap* did not involve terminations in response to exigent circumstances as here. *Id.*, at
25 p. 13, n. 23. However, given the similarity of ALJ Sotolongo's decisions in *Kitsap* and *Western*
26 *Cab*, it is worth noting that fn. 4 of the Union's Brief classifies *Kitsap* as upholding *Alan Ritchey*
27 and yet takes exception in this similarly-reasoned case. The other cases cited by the Union in its
28 fn. 4 as upholding *Alan Ritchey*, are equally unsupportive of the Union's position. For example,
TGF Management Group Holdco, Inc., JD-05-15, 2015 WL 194519, *6 (January 15, 2015),
discloses that both General Counsel and the company did "not dispute that *Alan Ritchey, Inc.* is
pertinent." Then, *Latino Express, Inc.*, JD-09-15, 2015 WL 1205363, *10 (March 17, 2015),
South Lexington Management Corp., JD-07-15, 2015 WL 400624, *7 (January 29, 2015), and
SMG Puerto Rico, II, JD-07-15, 2015 WL 1756217, *7 (April 17, 2015), the first decided by ALJ
Etchingham and the other two by ALJ Cates, uniformly pronounce that "*Alan Ritchey* has no
precedential value..." but then proceed to apply its reasoning anyway, discrediting *Fresno Bee*,
337 NLRB No. 1161 (2002), and adopting the rationale of *Alan Ritchey*. The Board's records
show that *South Lexington* settled, but that exceptions have been filed and await resolution in
Latino Express and *SMG Puerto Rico II, LP*. Those decisions really lack any precedential value in
this proceeding.

1 what another Board will do with the issue:

2 The Board's decision in *Alan Ritchey* forms the basis for the instant
3 allegation that the Respondent violated Section 8(a)(5) by failing to provide the
4 Union notice and an opportunity to bargain before terminating Thomas. It also
5 poses an obstacle. The panel that decided *Alan Ritchey*, it turns out, was not
6 properly constituted.....

7 The General Counsel concedes... that in the light of *Noel Canning*, ... *Alan*
8 *Ritchey* 'is no longer considered binding precedent.' He contends, nonetheless that
9 its rationale should apply because *Alan Ritchey* was 'an application of longstanding
10 Board precedent requiring employers to bargain over discretionary aspects of
11 changes it intends to make after a bargaining representative has been selected.'

12 Of course there is a problem with that. Even were I to proclaim agreement
13 with the *Alan Ritchey* panel that the rationale of *Fresno Bee* was 'demonstrably
14 incorrect,' ***it remains the case that before Alan Ritchey there was Fresno Bee, and***
15 ***under Fresno Bee and its rationale – which was adopted by the Board – the***
16 ***instant allegation of the complaint must be dismissed. Alan Ritchey overruled***
17 ***Fresno Bee, but Alan Ritchey is not precedent. That leaves Fresno Bee, wrong as***
18 ***it may be, in place. In any event, even were one to ignore Fresno Bee, as the***
19 ***Board made clear in Alan Ritchey, the general application of its principles was***
20 ***not so clear that the Board was willing to apply the decision in Alan Ritchey***
21 ***retroactively.*** That was also a part of *Alan Ritchey*'s rationale, but not a part that
22 General Counsel wants me to apply here.

23 ***Some believe that the Board will reaffirm Alan Ritchey's principles. It***
24 ***may or it may not. And if it does, it may or may not once more decline to apply***
25 ***the principles retroactively.*** I agree with the Respondent's position on this: 'The
26 Administrative Law Judge must apply Board precedent as it finds it.' ... ***It is not***
27 ***my position to guess or anticipate what the Board will do in the future, but rather***
28 ***to apply the Board precedents....*** I will dismiss this allegation. [Emphasis added.]

29 *See also, Adams & Associates*, JD-25-15, 2015 WL 3759560, *16 (June 26, 2015), declining to
30 apply *Alan Ritchey* as "[i]t is unclear whether the current Board will adhere to [it] and "until it is
31 reaffirmed or adopted by the Board, it is not controlling...;" *McKesson Corporation*, JD-30-14,
32 2014 WL 5682510, *25 (Nov. 4, 2014), also refusing to extend *Alan Ritchey*, reasoning that he had
33 "a duty to follow Board precedent as it exists" and would not accept "General Counsel's invitation
34 to boldly go where few, if any, judges have gone before;" and *High Flying Foods*, JD-29-15, 2015
35 WL 2395895, *19 (May 19, 2015), also refusing General Counsel's invitation to adhere to *Alan*
36 *Ritchey*, reasoning that it "is for the Board, not me, to determine whether Board precedent should
37 be altered" and that under the circumstances, "*Fresno Bee*, even if incorrectly decided, has been
38

1 reinstated as valid precedent and employers do not have an obligation to bargain in situations like
2 the one presented here [involving discharges due to union activities],” then concluding that
3 “employers... should not be expected to bargain with a union in these circumstances, at a time
4 when no valid Board decision imposes such an obligation upon them.”

5
6 Finally, the serious “for cause” employee misconduct presented here was even expressly
7 acknowledged by *Alan Ritchey* as amounting to “exigent circumstances” -- exposing the employer
8 to possible legal liability for the employee’s misconduct, threatening the safety, health or security
9 of those in or outside the workplace -- and therefore justifying the quick removal of the employee
10 from the workplace with bargaining to follow *after* the workplace has been made safe. *Alan*
11 *Ritchey.*, at p. 8. Moreover, upon invalidation of *Alan Ritchey*, *Fresno Bee* became controlling law
12 and under *Fresno Bee* the claims based on pre-imposition discretionary discipline against Western
13 Cab would have to be dismissed. As will be demonstrated in further detail below, the Union has
14 presented no good grounds for ordering remedies beyond those in the invalidated *Alan Ritchey*
15 decision.
16

17 **II. EMPLOYEE DISCIPLINE ISSUES**

18 Western Cab is a family owned company operating in metropolitan Las Vegas with around
19 430 drivers, 6 office employees, 6 dispatchers, and 15-20 mechanics and lot attendants. TR, p. 31,
20 ll. 6-12;³ Decision, p. 2:38- p. 3:1. It has no written handbook, policies or rules, except for
21 occasional instructions posted on bulletin boards in the main hallway, by the drivers’ room and by
22 the time clock. TR. p. 85, ll. 19-21. For example, employees must sign a document agreeing that
23 they read and will obey pertinent portions of the Nevada Statutes, Nevada Administrative Code
24
25 ///
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27
28 ³ Transcript page and line references will be TR, p. __, l. __. General Counsel’s and Respondent Western Cab’s Exhibits will be GCX __ and RX __, respectively.

1 and Las Vegas Municipal Code, each of which prohibits cab drivers from diverting customers to
2 destinations other than directed by the customer. RX 4.

3 Union efforts to organize Western Cab drivers began in February 2012. TR, p. 145, ll. 17-
4 22. On March 26, 2012, Western Cab voluntarily recognized the Union. GCX 1(s), ¶6(b);
5 Decision, p. 3:2-4. From then through January 2014, the parties met and reached tentative
6 agreements on several issues, but not as to the Union's review of employee discipline,
7 terminations, suspensions or as to modifications to healthcare. TR, p. 146, l. 9 – p. 147, l. 4;
8 Decision, p. 3:2-6.

9
10 On June 11, 2014, the Union requested information as to “any and all discipline that has
11 been given to bargaining unit employees for the past 6 months.” GCX 9(a). On June 27, 2014,
12 Western Cab first responded by email with a list of disciplinary measures short of termination
13 (GCX 10(b)), and on July 7, 2014, a list of terminations, voluntary and involuntary, for the last six
14 months (GCX 10(b); GCX 10(d)-(n). The next day, July 8, 2014, Western Cab sent a modified
15 list, redacting social security numbers, showing employees terminated or suspended for what the
16 Union has described in its Brief, at p. 3:-4, as:

17
18 being tardy; absences (also known as ‘no-call/no show’ or ‘N/C N/S’); being
19 arrested while working; leaving the scene of an at-fault accident, long-hauling; not
20 having a valid Taxi Authority card; failure to turn items into the lost and found;
21 unsatisfactory probation; use of the cab for personal business; assault and battery;
22 customer abuse; reckless or unsafe driving; failure to turn in book; failure to report
23 an accident; substance abuse violations; fighting; and high-flagging. (GC Exh. 10 at
24 *d-n*). Employees were also suspended for allegedly having extreme low book;
25 needing additional training, failing to properly fill out a trip sheet; attendance
26 problems; driving a cab in the wrong service area because it had the wrong
27 medallion; reckless driving; hostility towards other drivers; failure to drop money
28 with book; low productivity; ‘lost and found’ issues; insubordination; and at-fault
accidents. (CG Ex. 11 at *e-h*).⁴

The Union protests the list of serious employee misconduct committed by Western Cab's

⁴ See also, GCX 10(d)-(n), the handwritten notes for reasons for the voluntary or involuntary termination.

1 former employees as amounting to less than shocking employee misconduct, taking the position
2 that “The Union maintains that the reasons for the unilaterally-imposed discipline are *irrelevant* to
3 Western’s obligation to bargain over the discipline and, therefore, give the Union notice before its
4 imposition.” Union Brief, p. 4, fn. 1 (emphasis added). The Union’s trivialization of the serious
5 infractions at issue ignores not only plain common sense,⁵ but the actual substance of Western
6 Cab’s July 8, 2014, response to the Union, which stated in part:
7

8 Attached please find a list of terminated employees.... In addition, *if the*
9 *union needs or wants to discuss any of these discharges, please let me know and*
10 *we can set a meeting if necessary to talk about them.*

11 Also, in the future, Western Cab will send notice to the union of any
12 contemplated discipline that would cause a financial impact on an employee (such
13 as disciplinary suspensions and discharges) and offer to discuss such contemplated
14 discipline or discharge with the union before the actual event. *In circumstances of*
15 *serious misconduct, such as fighting, theft or other matters that require*

16 ⁵ For example, NLRA §2(11) defines the duties of a “supervisor,” such as Ms. Sarver, as
17 including the application of “independent judgment” in directing employees, stating:

18 The term ‘supervisor’ means any individual having authority, in the interest of the
19 employer, to hire, transfer, suspend, law off, recall, promote, discharge, assign,
20 reward, or discipline other employees, or responsibly to direct them, or to adjust
21 their grievances, or effectively to recommend such action, if in connection with the
22 foregoing the exercise of such authority is not merely of a routine or clerical nature,
23 but requires the use of independent judgment.

24 But, some dangers, including those exigencies raised by drunk or combative cabdrivers, whose
25 actions threaten the safety of passengers, other employees and the general public, are simply so
26 obvious as to not even implicate supervisory discretion, but plain common sense. *Fresno Bee*, 337
27 NLRB 1161, 30 (2002), observes that “[e]mployee discipline, regardless of how exhaustively
28 codified or systematized, requires some managerial discretion. The variables in workplace
situations and employee behaviors are too great to obviate all discretion in discipline.” To the
same effect, the dissent of Board Member Zimmerman in *Kenosha News Pub. Corp.*, 264 NLRB
50, 16 (1982), explains that some workplace emergencies obviously give rise to only one
reasonable solution -- immediate termination:

29 *Willis Shaw Frozen Food Express* [173 NLRB 487 (1968)] presents a situation
30 which clearly is distinguishable from this one.... There, 2 of approximately 80 head
31 drivers had to fire their assistant drivers mid-journey because of drunkenness which
32 rendered the assistants incapable of continuing their driving duties.... Surely, to
33 fire a truck driver because he is too drunk to keep driving cannot reasonably be
34 termed an exclusive exercise of supervisory judgment. It is, rather, *an unavoidable*
35 *solution to an obvious operational problem, when, in the circumstances, any*
36 *driver would be forced to take.* [Emphasis added.]

1 *immediate exclusion from the property, the company will suspend the employee*
2 *without pay, pending investigation and notify the union immediately.* Also, with
3 respect to the Work History Report I emailed to you on June 27, 2014, *my client*
4 *stands ready to discuss and review any discipline contained in that report. In the*
future, the company will send to the union, on a monthly basis, another such
report and offer to discuss any of the entries contained therein. [Emphasis added.]

5 GCX10(a).

6 It was established at the trial, and is also obvious, that the taxicab industry has a very high
7 employee turnover rate which makes it “very competitive as far as getting drivers to work for you,
8 very competitive.” TR, 172 (testimony of union agent William Locke); TR, p. 99 (testimony of
9 Martha Sarver, Western Cab’s General Manager). Of Western Cab’s approximately 430 drivers it
10 terminated 175 in the first six months of 2014. GCX 10(a). That is a rate of nearly 30
11 terminations per month, nearly one each day. High employee turnover is costly to an employer
12 and Ms. Sarver explained that terminating drivers was “the last thing I want to do.” TR, p. 99 (“It
13 doesn’t make any sense first off. This business has become very competitive as to getting drivers
14 to work for you, very competitive.”).⁶

15
16 ALJ Sotolongo recognized that cab companies, including Western Cab, are subject to “high
17 turnover ‘revolving-door’” employment, giving rise to specific bargaining concerns discussed by
18 him not only in *Western Cab*, but also in *Kitsap Tenant Support Services*, JD-29-15, 2015 WL
19 4709436 (July 28, 2015) (involving residential support service workers for disabled clients). At
20 fn. 16, the Decision discusses the difficulty of pre-imposition bargaining in high-turnover
21 businesses where post-imposition bargaining may be more effective and fair to the employer, other
22 employees, customers and the general public:
23
24

25 ⁶ This fact is well known in the industry. See, e.g., *Boston Cab Co.*, 212 NLRB 92, 2
26 (1974) (noting large turnover of drivers “is an industry characteristic”); *City Transportation Co.*,
27 131 NLRB 105, 5 (1961) (“To establish the perspective to analyze the discharges it must be borne
28 in mind that Respondent’s officers testified that it was always short of drivers (taxicabs had to stay
on the lot unused); it was difficult to get qualified drivers; and there was a high percentage of
turnover among the drivers”); *Ace Cab, Inc.*, 301 NLRB 16, 4 (1992) (noting a high turnover of
drivers is the “nature of the business” in Las Vegas).

1 I am aware that in the absence of a make-whole remedy, a simple order to
2 bargain after the discipline has been imposed is of little, if any value, rendering
3 *Alan Ritchey* virtually meaningless. Yet the clear, explicit language of Section
4 10(c) as it related to make-whole remedies for disciplinary actions constrains the
5 Board in a manner it does not face regarding any other remedial orders to restore
6 the status quo ante. *Alan Ritchey*, as I discussed in my decision in *Kitsap Tenant*
7 *Support Services*, raises a host of questions and issues unanswered, and this issue is
8 certainly at the very core. ***Perhaps the solution may lie in reexamining the need***
9 ***for pre-imposition bargaining in these disciplinary situations.*** As I posed in
10 *Kitsap*, ***if as the Board argues, the intent of the (Alan Ritchey) policy is to prevent***
11 ***the specter of impotency from being cast on a newly-certificated union, it can be***
12 ***argued that the same goal may be achieved as effectively, but without the***
13 ***underlying cost and uncertainty, by requiring the employer to bargain after the***
14 ***imposition of discipline, with a required notice about such bargaining being sent***
15 ***to the entire bargaining unit.*** Indeed, this case illustrates some of the concerns I
16 raised in my *Kitsap* decision with regard to the burdens imposed on employers by
17 *Alan Ritchey*, including difficulties in scheduling bargaining meetings and their
18 obligation to maintain employees in the payroll while they complied with their
19 bargaining obligation. It is a stretch to describe discipline as a ‘discreet’ event
20 when it happens 121 times in a short period, as happened in this case, and will
21 happen in *high-turnover ‘revolving-door,’ types of businesses.* [Emphasis added.]

22 With respect to discharges arising from exigent circumstances posing immediate risk of
23 harm to customers, other employees and the public together with the threat of lawsuit against the
24 employer, *Alan Ritchey*, p. 8, confirms an employer’s reasonable right to act unilaterally and
25 discharge an employee, with post-discharge notice to the union, and at p. 10 explains that even if
26 the circumstances pose a pre-imposition duty to bargain, the employer has no duty to bargain
27 where the discipline is consistent with past practice or the misconduct poses an immediate risk of
28 harm:

29 Moreover, the employer has *no duty to bargain over those aspects of its*
30 *disciplinary decision that are consistent with past practice or policy.* Third, *an*
31 *employer may act unilaterally and impose discipline without providing the union*
32 *with notice and an opportunity to bargain in any situation that presents exigent*
33 *circumstances: that is, where an employer has a reasonable, good-faith belief that*
34 *an employee’s continued presence on the job presents a serious, imminent danger*
35 *to the employer’s business or personnel.* The scope of such exigent circumstances
36 is best defined going forward, case-by-case, but *it would surely encompass*
37 *situations where (for example) the employer reasonably and in good faith believes*
38 *that an employee has engaged in unlawful conduct, poses a significant risk of*
39 *exposing the employer to legal liability for his conduct, or threatens safety,*
40 *health, or security in or outside the workplace. Thus, our holding today does not*

1 *prevent an employer from quickly removing an employee from the workplace,*
2 limiting the employee’s access to coworkers (consistent with its legal obligations)
3 or equipment, or taking other necessary actions to address exigent circumstances
 when they exist. [Emphasis added; fns. omitted.]

4 *See also, id.*, at fn. 19 to this passage, stating: “In the circumstances described, *an employer could*
5 *suspend an employee pending investigation, as many employers already do.* An employer who
6 takes such action should promptly notify the union of its action and the basis for it and *bargain*
7 *over the suspension after the fact*, as well as bargain with the union regarding any subsequent
8 disciplinary decisions resulting from the employer’s investigation.” [Emphasis added.]⁷

9 Although Western Cab did not notify or bargain with the Union prior to imposing the
10 discipline at issue, the unrefuted testimony is that most of the terminations were for the very
11 serious reasons conceded by the Union in its Brief, posing immediate danger to other employees
12 and the public in general as well as exposing Western Cab to lawsuits and liability. Western Cab
13 made its offer to bargain regarding the discharges and suspensions on July 8, 2014, and the Union
14 has yet to respond. *Id.*, p. 3:35 – p. 4, l. 5; GCX 10(b). In conformity with the vacated and void
15 *Alan Ritchey* decision, Western Cab acted reasonably in immediately terminating employees who
16 posed serious imminent dangers and risks to others in the workplace, customers and the public and
17 responded immediately to the Union’s inquiry with an invitation to bargain. The Union ignored
18 Western Cab’s invitation to bargain. Western Cab’s response to the employee misconduct was
19 reasonable and did not contravene the nearly contemporaneously invalidated *Alan Ritchey* decision
20 or plain common sense.
21
22

23
24 ⁷ Following *Alan Ritchey*, the General Counsel submitted an Advise Memorandum in
25 *Washington River Protection Solutions*, 2014 WL 6603994, *3 (Advice Memo. 2014), explaining:
26 “[W]hen a union has not yet attained an initial bargaining agreement or an interim grievance
27 procedure that addresses discipline, an employer that previously exercised unlimited discretion
28 when imposing employee discipline must, *absent exigent circumstances*, give the union notice
 and an opportunity to bargain over the discretionary aspects of that decision before implementing a
 disciplinary action....” [Emphasis added.]

1 One of the main problems with the Union's position is that the reinstatement and backpay
2 remedy is based on alleged misconduct by the employer in bargaining with the union. But, there is
3 a fundamental difference between claims, on one hand, that an employee was terminated for his
4 activities which were protected by the Act itself, or even from some misconduct under a new rule
5 that was unilaterally implemented by the employer and which made the employee's conduct a
6 violation of the rule and, on the other hand, claims by an employee who commits misconduct so
7 serious that it does not even need a rule, as where he endangers others in the workplace or the
8 public and exposes the employer to liability.

9
10 Thus, the backpay and reinstatement remedies under *Alan Ritchey* are subject to a myriad
11 of exceptions: (1) it is not applicable if the discharge is within past practice; (2) it is not applicable
12 when the discharge is for exigent circumstances; (3) implementation of the discharge does not
13 require negotiating to an impasse on the entire contract, but only on the individual discharge itself;
14 and (4) it purports to exempt "non-discretionary discharges," but that is illusory because almost all
15 discharges require the exercise of some discretion. It is easy to say the employee who beats up a
16 supervisor can be fired, but what if some witnesses claim the supervisor provoked the employee or
17 even started the fight? What if a casino's cage employee walked out with cash from her till, but
18 investigations suggest she was escorted at gun point?

19
20 Congress, in enacting Section 10(e) recognized some of these problems and perhaps others,
21 but *it is* the law and obviously for good reason. The NLRB has no jurisdiction over contract terms.
22 It cannot order an employer to agree to any contract term. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S.
23 99, 102 (1970) ("[W]hile the Board does have power under the [NLRA] ... to require employers
24 and employees to negotiate, it is without power to compel a company or a union to agree to any
25 substantive contractual provision of a collective-bargaining agreement"). Yet, negotiating contract
26 terms is exactly what *Alan Ritchey* would do. It would give employees and unions a much
27
28

1 stronger benefit than almost any union contract in the United States which, almost universally
2 permits unilateral discipline which can be challenged after the fact, through a grievance and
3 arbitration procedure.

4 **A. SECTION 10(c) PROHIBITS REINSTATEMENT OR BACK PAY FOR**
5 **EMPLOYEES DISCHARGED FOR CAUSE**

6 The Union would simply have the Board read Section 10(c) out of existence. Section 10(c)
7 of the Act prohibits reinstatement and back pay if the employees were disciplined for cause: “No
8 order of the Board shall require the reinstatement of any individual as an employee who has been
9 suspended or discharged, or the payment to him of any back pay, *if such individual was*
10 *suspended or discharged for cause.*” [Emphasis added.] There is no modifying language to
11 exempt or create an exception for discretionary discharge or to require such termination to be
12 under exigent circumstances.
13

14 This section is not only clear and direct in its wording, but Board decisions and court cases
15 interpreting the section make “it abundantly clear that the Board is not to interfere with the
16 exercise by employers of their traditional right to discharge employees for adequate cause.” *NLRB*
17 *v. Eastern Massachusetts Street Railway Co.*, 235 F.2d 700 (1st Cir. 1956), *citing NLRB v. Jones &*
18 *Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).⁸ Thus, reinstatement has been denied to employees
19 discharged for “rank insubordination, willful disobedience or disloyalty, such as, for instance,
20 disparaging their employer’s services to the public at a critical time in the development of the
21 business,... or, no doubt, beating a plant manager, ..., and this even though the employee’s offense
22 was committed in connection with protective [protected] activity.” *Id. Taracorp Industries*, 273
23 NLRB No. 54, n. 8 (1984), *quoting NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir.
24

25
26 ⁸ See also, *Security Walls, LLC*, 361 NLRB No. 29 (August 29, 2014), in which the Board
27 considered Sec. 10(c) in the context of pre-imposition bargaining under *Alan Ritchey* conditions.
28 The Board did not dismiss the argument that 10(c) authorized the termination at issue for cause,
ruling only that neither party had met the standards for summary judgment relief.

1 1956), which further explains §10(c)'s breadth and purpose:

2 It is important to distinguish between the term 'cause' at it appears in Sec.
3 10(c) and the term 'just cause,' which is a term of art traditionally applied by
4 arbitrators in interpreting collective-bargaining agreements. Just cause
5 encompasses principles such as the law of the shop, fundamental fairness, and
6 related arbitral doctrines. ***Cause, in the contest of Sec. 10(c), effectively means the
7 absence of a prohibited reason.*** For under our Act:

8 ***Management can discharge for good cause, or bad cause,
9 or no cause at all. It has, as the master of its own business affairs,
10 complete freedom with but one specific, definite qualification: it
11 may not discharge when the real motivating purpose is to do that
12 which [the Act] forbids.*** [Emphasis added.]

13 The Board attempted to create exceptions in past cases, e.g., *Tocco, Inc.*, 323 NLRB 480
14 (1997) and *Great Western Produce, Inc.*, 299 NLRB 1004 (1990), but those cases were reversed
15 by *Anheuser-Busch, Inc.*, 351 NLRB No. 40 (2007).⁹ There, the Board confirmed on remand from
16 the U.S. Supreme Court that make-whole relief is denied to employees terminated for cause under
17 Section 10(c), even though that cause was discovered by illegal means (surveillance cameras
18 installed without bargaining in violation of Section 8(a)(5)). By the hidden cameras installed
19 without bargaining, Anheuser-Busch learned that certain employees were engaged in misconduct
20 (unauthorized breaks and using illegal drugs on company property) and Anheuser disciplined or
21 discharged 16 of them. The Board initially found the use of the cameras unlawful and issued a
22 case-and-desist order. It nevertheless concluded it lacked authority to award reinstatement or
23 backpay because the employees had been terminated for cause, regardless of the fact that the
24 employer had learned of their misconduct only through its own misconduct. The D.C. Circuit
25 affirmed and the Supreme Court affirmed the Board's unfair labor practice finding, but remanded
26 for further consideration of the law concerning terminations and suspensions. On remand, the
27 Board reviewed the NLRA and its legislative history, concluding that Section 10(c) and
28

⁹ In *Tocco*, the Board had ordered make-whole relief for employees discharged for drug use after the employer unlawfully changed its drug-testing policy. In *Great Western*, the Board approved a make-whole remedy where the employer unlawfully changed its method for recording misconduct and then relied on misconduct documented through the new system in terminating employees.

1 compelling policy considerations barred it from granting a remedy to employees who were
2 disciplined or discharged for cause. The majority determined that while the employer could be
3 punished for its conduct in unilaterally installing the cameras, the employees should not benefit
4 from their misconduct by a windfall award of reinstatement and backpay. The Board's
5 Supplemental Decision explains its reliance on the legislative history of §10(c):
6

7 [T]he legislative history of Section 10(c) shows that Congress' purpose in
8 enacting Section 10(c) was to **insure that an employee who engaged in misconduct**
9 **was subject to discipline for that misconduct.** See *Fibreboard Paper Products*
10 *Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ('[t]he legislative history of [Section

11 10(c)] indicates that **it was designed to preclude the Board from reinstating the**
12 **individual who had been discharged because of misconduct**'). The Supreme
13 Court in *Fibreboard* quoted at length from that legislative history (id. at 217 fn. 11):
14 The House Report states that [Section 10(c)] was 'intended to put an
15 end to the belief, now widely held and certainly justified by the
16 Board's decisions, that engaging in union activities carries with it a
17 license to loaf, wander about the plants, refuse to work, waste time,
18 break rules, and engage in incivilities and other disorders and
19 misconduct.' H.R. Rep. No. 245, 80th Congress., 1st Sess. 42 (1947).
20 The Conference Report notes that under §10(c) 'employees who are
21 discharged or suspended for interfering with other employees at
22 work, whether or not in order to transact union business, or for
23 engaging in activities, whether or not union activities, contrary to
24 shop rules, or for Communist activities, or for other cause
25 [interfering with war production] ... will not be entitled to
26 reinstatement.' H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55
27 (1947).

28 The legislative history quoted above affirmatively
shows that the impetus for Section 10(c)'s prohibition on making
whole employees disciplined for cause was Congress' belief that
the Board had overstepped its authority and interfered with
legitimate management disciplinary prerogatives. If the Board in
the instant case were to grant a make-whole remedy to the 16
disciplined employees, the Board would be overturning discipline
for serious, admitted violations of lawfully established work rules.
[Emphasis added.]

22 See also, *Union-Tribune Publishing Co.*, 353 NLRB No. 2 (2008) (citing *Anheuser-Busch* and
23 enforcing its holding that, despite the employer's wrongful unilateral changes, "there is no dispute
24 that [the two employees] were discharged for violating Respondent's applicable drug and alcohol
25 policy" and "inasmuch as **both individuals apparently were discharged for cause, there can be no**
26 **violation of the Act in either instance....**" (emphasis added)).
27

28 Thus, *Anheuser-Busch* reversed prior Board cases and makes it unclear whether §10(c)

1 would prohibit reinstatement and backpay even if the discharge were for union activity, but that is
2 *not* an issue presented in this case. Here, Western Cab employees were disciplined for infractions
3 having absolutely nothing whatsoever to do with union activity or with any illegally created rule.
4 Contrary to the Union’s argument at p. 19, that the discipline imposed results “solely” from
5 “unlawfully promulgated work rules,” it actually results from the employees’ serious misconduct
6 which gave rise to circumstances justifying immediate termination as recognized in *Alan Ritchey*,
7 at p. 8, which did not discredit employer rights under §10(c), but acknowledged that they survived:

9 [T]he employer has no duty to bargain over those aspects of its disciplinary
10 decision that are consistent with past practice or policy.... Thus, our holding today
11 does not prevent an employer from quickly removing an employee from the
12 workplace, limiting the employee’s access to coworkers (consistent with its legal
13 obligations) or equipment, or taking other necessary actions to address exigent
14 circumstances when they exist.

15 Finally, an employer need not await an *overall* impasse in bargaining before
16 imposing discipline, so long as it exercises its discretion within existing standards.
17 [Emphasis supplied.]

18 Neither the Union nor the General Counsel challenged Western Cab’s “for cause”
19 terminations, which the Union has described in its Brief as including customer abuse, assault and
20 battery, unsafe driving, substance abuse violations, fighting, and failing to report an accident. The
21 record is clear that the Union did not request in advance to bargain with regard to terminations
22 when it knew it was dealing with a high-turnover business or even accept Western Cab’s July 8,
23 2014 offer to bargain. GCX 10(a). Under these circumstances, Western Cab did all it could do to
24 protect its other employees, its customers, the general public and itself from the discharged
25 employees’ misconduct and the claim against Western Cab for refusal to negotiate the terminations
26 should have been dismissed. *See, Security Walls, LLC*, 361 NLRB No. 29 (2014), where the
27 General Counsel and Respondent filed cross motions for summary judgment in an *Alan Ritchey*-
28 type issue case, the Board granted summary judgment to the union and General Counsel on the
Respondent’s obligation to supply the requested information about the discharges, but denied
summary judgment to both sides on the scope of the *Alan Ritchey* obligation to bargain. Here,

1 Western Cab acted under exigent circumstances, within its past practice, or other exception and
2 there was no demand for information by the Union until June 11, 2014 (RX 13) to which Western
3 Cab responded promptly and offered to bargain on July 8.

4
5 **B. THERE IS NO 8(a)(5) VIOLATION GIVEN**
6 **THE UNION'S FAILURE TO BARGAIN**

7 It is inconceivable that by February 2014, the Union was unaware of the high turnover of
8 employees in Las Vegas cab companies, including Western Cab, and that this high turnover
9 necessarily meant that Western Cab was regularly terminating some of its employees. *See*, fn. 6.
10 In fact, one of the employees on the bargaining committee, Gezahegne Teffera, who was
11 "designated as essential to the presentation" of the Board's case (TR, p. 17, ll. 19-20, p. 19, l. 9),
12 and therefore authorized to remain in the trial room despite a sequestration order, testified that he
13 had reported discharges to the Union, specifically to Mr. Sullivan, "three or four times." TR, p.
14 197, ll. 7-20. Note that Sullivan's last negotiating session was October 16, 2013 after which he
15 passed the negotiations over to Mr. Youngmark and then to Mr. Locke. Mr. Teffera's testimony
16 was consistent with his affidavit presented to the Board on June 18, 2014 (TR, p. 193, ll. 22-23), in
17 which he conceded he was collecting names of disciplined drivers and communicating them to the
18 Union:
19

20 As far as I could tell the drivers were becoming aware of this policy only after
21 being disciplined for low book. So, as soon as I received these calls from the
22 drivers in mid-January 2014, I called Steve Sullivan and told him about it...
23 Sullivan asked me to collect the names of the drivers who had been affected by this
24 policy.

25 TR, p. 200, ll. 10-20. This sworn statement is corroborated by the fact that the union filed a charge
26 with the Board on June 10, 2014, *before* the Union's request for all disciplinary action in the
27 preceding six months, objecting to an alleged change in "low book policy." GCX 1(c). This
28 charge, while later withdrawn on September 24, 2014, shows the Union knew of terminations in
January 2014 for violation of that allegedly new policy.

1 Mr. Teffera's testimony was uncontradicted and unchallenged and further, as a member of
2 the Union's negotiating team, Teffera was not just an employee. His knowledge of the
3 terminations is chargeable to the Union through its agency relationship with Teffera. *Hartmann*
4 *Luggage Co.*, 173 NLRB 193, *4 (1968) (company's notice to employee members of the union's
5 bargaining committee constituted actual notice to the union and where the union failed to "exercise
6 diligently its right to demand discussion or bargaining," it could not claim a failure to bargain on
7 the company's part); *SGS Control Services*, 275 NLRB 137, fn. 10 (1985), *citing Hartmann*
8 (notice to member of union's negotiating team constituted notice to union); *Genesee County*
9 *Association for Retarded Citizens*, 1994 WL 1865823, *6 (May 3, 1994) (management's
10 conversation with union bargaining team member, even if in private, was sufficient to put the
11 union on notice of a revised schedule, and as such, it was "incumbent on the Union to request
12 bargaining").

13
14
15 As noted above, on July 8, 2014, Western Cab, at the Union's request (GCX 9(a)), e-
16 mailed the Union a list of employees terminated for cause during the preceding 6 months. GCX
17 10(a). The e-mail attachment listed approximately 175 names of individuals terminated for any
18 reason in the 6-month period. General Counsel excluded probationary employees, those who quit
19 or abandoned their job, lost or failed to obtain Taxi Cab Authority approval to work, who were
20 rejected by the insurance company and perhaps other categories. TR, pp. 111-112. As the ALJ
21 pointed out the GC had reduced that list to approximately 27 for whom reinstatement and backpay
22 was being sought. TR, p. 24.

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1 Western Cab's July 8 e-mail also included an *offer to bargain about any or all of those on*
2 *that list, as well as on an earlier list given for suspensions, warning notices or other discipline.*¹⁰

3 In addition, if the union needs or wants to discuss any of these
4 discharges, please let me know and we can set a meeting if
5 necessary to talk about them. Also, in the future, Western Cab will
6 send notice to the union of any contemplated discipline that would
7 cause a financial impact on an employee (such as disciplinary
8 suspension and discharges) and offer to discuss such contemplated
9 discipline or discharge with the union before the actual event.
10 G.C.X 1(e).

11 Notwithstanding this offer to bargain over suspensions and terminations, the Union filed,
12 seven days later on July 15, its charge, alleging exactly the opposite: that Western Cab "failed to
13 bargain with the Union over suspensions and terminations." GCX 1(g). The Union did not request
14 more information, did not request bargaining and did not challenge any of the "for cause"
15 terminations.¹¹ It simply filed the charge leading to the pending Complaint¹² and, thereafter, still

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20
21 ¹⁰ Western Cab and the Union never reached a TA as to terminations or discipline. Sarver
22 Testimony, TR p. 35, ll. 12-15; TR p. 38, l. 24 – p. 39, l. 1. The Union confirmed this point.
23 Sullivan Testimony, TR p. 146, l. 20 – p. 147, l. 1. In mid-June 2014, the Union requested
24 information on disciplines that had been issued. Sarver Testimony, TR p. 51, l. 25 – p. 52, l. 4.

25 ¹¹ Throughout the negotiations, Western Cab had been supplying the union with whatever it
26 asked for, including termination list, summary of drivers, shifts driven, trips done, payroll
27 information. Sarver Testimony, TR p. 107, ll. 12-18 ("Anything they asked for we gave to them").

28 Western Cab never refused to talk with the Union and when a driver asked about fuel
prices, Western Cab told them it was an issue that would have to be handled by the Union's
negotiating team on the drivers' behalf. Sarver Testimony, TR p. 110: l. 9 – p. 111, l. 8 (the
company never refused to discuss a termination or suspension with the union if asked).

¹² Sarver testimony, TR p. 106, ll. 8-12.

1 to this day, has not requested bargaining on any of those disciplinary actions.¹³

2 There can be no 8(a)(5) violation given the Union's failure to request to bargain. *American*
3 *Buslines*, 164 NLRB No. 136, 2 (1967), thus holds that a union's letter stating its disagreement
4 with a change that was to take place in less than a week was not a request to bargain, where the
5 union took no other action until filing a charge, dismissing charges against the employer and
6 explaining:
7

8 [W]e find that the record compels dismissal of the complaint. When the
9 Union was first apprised of Respondent's plan to promote all of the porters to
10 utility-baggage men with the concomitant disappearance of the Union's bargaining
11 unit, it became incumbent upon the Union to enforce its bargaining rights diligently
12 by attempting to persuade the Respondent to alter its decision if it found the
13 decision unacceptable. In this context, we note that the Respondent in its notifying
letter invited the Union to communicate with Respondent 'if there is any phase of
this situation which you desire to discuss.' However, the Union's immediate
reaction was merely to protest the proposal in a letter by characterizing it as an

14 ¹³ During this timeframe, bargaining on other issues was proceeding. For example, there is
15 evidence of six bargaining sessions in addition to 20 or more stated by General Counsel from late
2013 forward:

16 October 16, 2013	RX 12 (p. 2, 2 nd ¶) (see also 17 third page [November 7, 2013 Sullivan e-mail to Smith])	Union Negotiator Steve Sullivan
18 February 4, 2014	RX 10; TR, p. 153, ll. 15-16	Union Negotiator Chris Youngmark
20 April 24, 2014	RX 12 (p. 1, last ¶) regarding "we 21 have had three negotiation meetings 22 since August 2013: October [16], 2013, February 4, 2014, and April 24, 2014."	Union Negotiator William Locke
23 June 24, 2014	RX 14, line 1	Union Negotiator William Locke
25 July 22, 2014	RX 18 (date calendared) and RX 22 26 (referring to meeting "last Thursday" which the calendar shows to be 27 July 22, 2014.	Union Negotiator William Locke
28 September 24, 2014	RX 27	Union Negotiator William Locke

1 invasion of its statutory rights. Its next and final course of action was to file an
2 unfair labor practice charge. In *N.L.R.B. v. Columbian Enameling & Stamping Co.*,
3 306 U.S. 292, 297, the Supreme Court, in discussing the duty of labor organizations
4 to initiate collective bargaining, held ‘that the statute does not compel him [the
5 Employer] to seek out his employees or request their participation in negotiations
6 for purposes of collective bargaining To put the employer in default here the
7 employees must at least have signified to respondent their desire to negotiate.’

8 *See also, Vigor Industrial, LLC*, 2015 WL 515225, 10 (NLRB Div. Judges, September 2, 2015),
9 noting that “Waiver may occur even where a union has received no formal, written notice of the
10 proposed change if the union in fact received sufficient notice of the proposal to give it the
11 opportunity to make a meaningful response.” By contrast, *Ohio Edison Co.*, 362 NLRB No. 88
12 (May 21, 2015), *citing American Buslines*, found a sufficient request to bargain where the Union
13 responded to the employer’s unilateral change of the length of time employees must serve to be
14 eligible for reward with the Union President’s protest and desire to travel to the company’s
15 headquarters to meet with the decision maker. Here, the Union responded to Western Cab’s
16 request to bargain with protest and a charge.

17 Despite all of the contacts between Western Cab and the Union, the Union’s knowledge of
18 the nature of Western Cab’s business as resulting in high employee turnover, Mr. Teffera’s
19 multiple reports of employee terminations to the Union, and Western Cab’s July 8, 2014, offer to
20 bargain, the Union never requested to bargain or agreed to Western Cab’s offer to bargain, but
21 instead filed its charges in reliance on *Alan Ritchey*, and even in the aftermath of *Noel Canning*,
22 persisted in them. There is no question but that if a union has notice of a change affecting a
23 subject of mandatory bargaining, it must engage itself in the effort to bargain, or otherwise be
24 deemed to have waived it. In this process, “formal notice is not necessary as long as the union
25 have actual notice” of the change. *W. W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 248-49 (7th Cir.
26 1988). The Union’s “failure to assert its bargaining rights will result in a waiver of these rights”
27 and no violations of §§8(a)(5) or 8(a)(1) of the Act. *Id.*, *citing NLRB v. Island Typographers, Inc.*,
28

1 705 F.2d 44, 51 (2d Cir. 1983). In *Grainger*, the Court found that the union had waived its right to
2 bargain where it had opportunity to intervene in a process that resulted in the company's
3 termination of a business contract, left the matter up to its employees to act for themselves,
4 concluding: "We agree with the Second Circuit Court of Appeals that, 'a union cannot simply
5 ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the
6 employer of violating its statutory duty to bargain.'" *Id.*, quoting *Island Typographers, supra*. See
7 also, *Whirlpool Corporation*, 281 NLRB No. 7, 1986 WL 54315, *9 (August 8, 1986), citing
8 *American Buslines* (where union was on notice about a change in conditions of employment, but
9 did not request bargaining, it was deemed to have waived its right to engage in bargaining: "It is
10 not enough... that the union contents itself with simply protesting the modification in practice or
11 with filing an unfair labor practice charge; the union must 'prosecute its right to engage in
12 [bargaining]' or be deemed to have forgone that right."); *Cotter & Co.*, CA02722201, 1990 WL
13 279479, *3 (Advice Memo, March 30, 1990) (by failing to engage in bargaining after being
14 informed by company that it was contemplating closing and selling the facility, "the Union waived
15 such rights as it might have had").

16
17
18 By turning a blind eye to the "revolving door" nature of Western Cab's business, to the
19 reports of terminations given to it by Mr. Teffera and by refusing Western Cab's offer to bargain,
20 the Union waived its right to bargain and as a matter of law, there can be no Section 8(a)(5)
21 violation under these circumstances. Given the well-known nature of the cab business as being
22 high-turnover and the reports to the Union of ongoing employee termination and discipline, it is far
23 more effective to require that the union upon undertaking representation of a group of employees
24 in such circumstances openly and plainly request to the employer to bargain with it over
25 disciplinary actions before their implementation. Such a rule would amount to only one more
26 simple adjustment to the exceptions already created by the Board's analysis in *Alan Ritchey* and
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28

1 such a rule would comport with Section 10(c) as well as other cases in which the union is
2 recognized to have an obligation to request bargaining and not just sit on the sidelines while the
3 employer continues to violate the rule in *Alan Ritchey* (at least as to non-exigent terminations), and
4 then sustain liabilities beyond anything it can afford, especially in high turnover environments.¹⁴

5 6 III. ALAN RITCHEY ISSUES

7 Exception 5 takes issue with the Decision's purported disregard of *Alan Ritchey* through its
8 purported rejection of the duty to bargain over suspensions and terminations. But, *Alan Ritchey*,
9 determined by the Supreme Court to be void *ab initio* for want of a constitutionally-valid Board,
10 did not consider or address the merits of the case and if the Board intends to penalize employers
11 for failure to bargain pre-imposition where there is no first agreement in place, the new law must
12 be again announced by the Board, but not accompanied by make-whole punishment in anticipation
13 of what the Board may or may not do.
14

15 As the Decision notes, between January and July 2014, Western Cab either terminated or
16 suspended 121 cab drivers without notifying or bargaining with the Union prior to doing so.
17 Decision, p. 7:20-24. General Counsel argued that *Alan Ritchey* imposed a pre-imposition
18 obligation to bargain with the Union, although no first agreement was in place. ALJ Sotolongo
19 concurred with General Counsel's view that Western Cab had violated *Alan Ritchey*, but
20 determined that in light of (1) *Alan Ritchey's* imposition of the obligation to bargain as being a
21

22 ///

23 ///

24
25 _____
26 ¹⁴ Not even the Board in *Alan Ritchey* could find a way to order reinstatement and backpay
27 to employees terminated for violation of categories of misconduct having nothing to do with a rule
28 promulgated by the employer. To the contrary, the Board had to come up with some exceptions
based on (1) exigent circumstances, and (2) whether supervisors had exercise discretion in the
discharge decision.

1 matter of first impression, (2) *Alan Ritchey*'s subsequent invalidation by *Noel Canning*,¹⁵ and (3)
2 the impracticality of the requirement on "revolving-door" business, such as Western Cab's
3 business, make-whole sanctions would not be imposed against Western Cab.¹⁶

4 Before *Alan Ritchey*, the Board had never required employers to bargain pre-imposition of
5 disciplinary actions pending negotiations of a first contract. As *Alan Ritchey* was held void *ab*
6 *initio* for lack of a constitutionally composed Board, it cannot be used as the authority to impose
7 make-whole penalties against Western Cab. Moreover, as pointed out above, completely contrary
8 to the Union's reasoning, ALJ Sotolongo actually considered and recognized *Alan Ritchey*'s
9 treatment of terminations or suspensions for cause under Section 10(c), and concluded that *Alan*
10 *Ritchey* did not in fact undertake to invalidate an employer's ability to terminate for cause or
11 exigent circumstances, noting in particular that there was no evidence that the Western Cab
12 termination had anything whatsoever to do with any new rules or the terminated employees' union
13 activities, if any:

14
15
16 There are multiple other scenarios where employer violations of Sec. 8(a)(5) & (1)
17 for unilateral changes that result in terminations warrant make-whole remedies. For

18 ¹⁵ The Supreme Court in *Noel Canning* never discusses the merits of *Alan Ritchey*. The
19 Supreme Court's decision, discussing recess-appointments from President George Washington
20 forward, never mentions the NLRB's decision and there is no reason to infer that any portion of it,
21 or its intent, was intended to be preserved as good law.

22 ¹⁶ To the extent the ALJ's Decision infers that the U.S. Supreme Court even considered the
23 merits of *Alan Ritchey*, it is wrong. See, e.g., *Western Cab* at fn. 1, stating:

24 In my recent decision in *Kitsap*..., I discussed the dilemma faced by Board
25 administrative law judges when confronted with *Alan Ritchey* issues, which is
26 occurring with high frequency, in light of ***the fact that in Noel Canning the***
27 ***Supreme Court did not find that the Board had misconstrued the Act***, but rather
28 held that board members who formed the majority in *Alan Ritchey* had been
unconstitutionally appointed. This is an unprecedented scenario, which as discussed
in my prior decision, calls on judges to decide whether to mechanically apply
precedent that appears to be on its way out or read the proverbial 'handwriting on
the wall.' [Emphasis added]

The Supreme Court's invalidation of *Alan Ritchey* implies no inherent approval of the
merits of anything the unconstitutionally-composed Board did. *Alan Ritchey* is a nullity.

1 example, when an employer unilaterally changes a work rule, and the violation by
2 an employee of that new rule is the direct and proximate cause of the employee's
3 discharge, that conduct is a violation of Sec. 8(a)(5) & (1) that warrants a make-
4 whole remedy, because the new rule came into existence unlawfully, and thus the
5 employee had not engaged in 'misconduct' under the status quo. [Citation omitted.

6 Such is not the scenario in the present case. In the present case, there are no
7 allegations, let alone a scintilla of evidence, that employees were disciplined for
8 discriminatory reasons proscribed by the Act, that is, engaging in union or protected
9 activity. Nor is there any evidence that Respondent unilaterally created new rules
10 that were the direct and proximate cause of the employees' discipline. The
11 undisputed testimony of Respondent's General Manager, Sarver, as well as
12 documentary evidence (GC Exhs. 10; 11), shows the reasons for the terminations
13 and suspensions were all related to conduct that the employees engaged (or failed to
14 engage) in. This conduct, for example, included leaving the scene of an accident or
15 failing to report one, unexcused absences, improperly filling out daily logs
16 (intentionally or otherwise), failing to report fares, getting arrested (while on the
17 job), tardiness, etc. The undisputed testimony of Sarver establishes that Respondent
18 has been imposing identical discipline for similar reasons for years, long before the
19 Union came into the picture. There is nothing unusual about such practice—such
20 conduct is typical of the kind of conduct that triggers discipline by most employers.
21 Contrary to what the General Counsel and Union appear to imply in their briefs,
22 Respondent's lack of hard-and-fast written rules—and its adherence to an "at-will"
23 philosophy of employment—does *not* mean that Respondent had no established
24 rules or past practice. Indeed, it is its very exercise of *discretion* in the application
25 of these rules that make the *Alan Ritchey* doctrine applicable in this case. Yet, it is
26 precisely this novel application of employers' duty to bargain over discretionary
27 discipline under *Alan Ritchey* that, in my view, creates an inevitable head-on
28 conflict with explicit provisions of Sec. 10(c) of the Act as it applies to make-whole
remedies for employees discharged or suspended for cause.

It is true, as the Union points out in its post-trial brief, that in *Anheuser-
Busch* the Board stated "*termination of employment* that is accomplished without
bargaining with the representative union is unlawful under Section 8(a)(5) and is
not 'for cause,'" *Id.* at 648 (Emphasis supplied). Yet, it is notable than in giving an
example of such violation, the Board uses the lay-off scenario described above,
where employees did not engage in any conduct that was the *cause*—or trigger—for
their discharge, but were rather passive victims of the employer's unlawful
unilateral action. To hold that the discipline imposed in this case was not 'for
cause' because of Respondent's unlawful failure to bargain prior to imposing such
discipline would, at best, define 'cause' in an unnatural, even tortured, manner. At
worst, such definition could be seen as an artifice devised to facilitate an obvious
'end run' around the plain meaning of Sec. 10(c). In short, the term 'for cause'
should not be interpreted other than as properly defined by the Board in *Taracorp*,
as described above, a definition that the Board itself correctly borrowed from the
court of appeals in *Columbus Marble Works*. Applying such definition in this case
leads to the inevitable conclusion that employees at issue here were disciplined as a
result of their *conduct*, and thus 'for cause' within the meaning of Sec. 10(c).
[Emphasis supplied.]

1 Decision, p. 11.¹⁷

2 Contrary to the Union's arguments, the ALJ did not disavow or diminish the reasoning of
3 *Alan Ritchey* and recognizing that the ruling is void and unenforceable based on the *Noel Canning*,
4 the ALJ crafted a remedy in accord with *Alan Ritchey* objectives, but, because they are not the
5 decision of the Board, applied them prospectively only and refused make-whole relief. While
6 Western Cab believes that the ALJ should not have applied *Alan Ritchey* at all, the ALJ's decision
7 was far more fair and appropriate than that urged by the Union in its Exceptions and supporting
8 Brief.
9

10 IV. CREDIBILITY ISSUES

11 Much of the Union's Brief and Exceptions is directed to the ALJ's credibility
12 determinations, e.g.: crediting Martha Sarver's testimony about why she barred *Trip Sheet*
13 magazines from Western Cab's premises beginning in 2009 (Exceptions 1-3, Brief §IV.B); and
14 finding Joan Young's earlier testimony about her conversation with Mr. Grigorov more credible
15 than her later testimony in response to the ALJ's own questioning (Exception 4, Brief §4.C). In
16 the Decision, the ALJ made some credibility determinations, each time explaining in detail the
17 basis for the determination he made.
18

19 For example, in crediting Ms. Sarver's testimony with regard to barring the *Trip Sheet*
20 magazines, the Decision, at p. 5:19-35, explains the testimony in light of the questions asked of
21 Ms. Sarver by the ALJ himself:
22

23 The General Counsel alleged... that Respondent banned the TS magazine
24 from its premises in response to the Union's ad in the August 2014 issue.
Curiously, neither the General Counsel nor the Union introduced *any* evidence

25
26 ¹⁷ The Union's repeated reliance on *Uniserv*, 351 NLRB No. 86 (2007), e.g., at pp. 14-16
27 and fn, 7 of its Brief, is unwarranted. *Uniserv* does not limit the holding of the Board in *Anheuser-*
28 *Busch*, 351 NLRB 40 (2007), that employees terminated for cause should not profit from their
misconduct. *Uniserv* thus acknowledges a distinction between its facts and the *Anheuser-Busch*
facts and does not serve as to vitiate or redefine *Anheuser-Busch*'s result.

1 showing that Respondent knew in early August 2014 that the Union had placed an
2 ad in that month's issue of the TS magazine. Indeed, neither the General Counsel,
3 who called Sarver (Respondent's General Manager) as its witness, nor the Union,
4 ever asked Sarver if she or any other official of Respondent had ever seen the
5 Union's ad. Sarver, who spent the longest time on the stand than any other witness,
6 had a different explanation for the absence of the TS magazine in their drivers'
7 room. According to Sarver, starting in 2009, she requested TS Magazine to stop
8 delivering its issues at Respondent's facility, and disposed of them any time she
9 saw them. The reason was that many of the ads in the TS magazine aimed at taxi
10 drivers were offering rewards to lure them into bringing or 'diverting' customers to
11 their establishments, something that Sarver testified is illegal under Nevada law and
12 Las Vegas ordinances—as well as contrary to Respondent's policy. Indeed,
13 Respondent introduced into evidence copies of these statutes and ordinances that
14 indicate that the practice of 'diverting' customers is prohibited by law or ordinance
15 (Tr. 89–94 R. Exhs. 4; 5). Sarver conceded that she never had put the policy
16 banning the TS magazine in writing, and explained that it was difficult to police
17 such policy because the drivers could pick up the magazine(s) anywhere and leave
18 them in the drivers room or in the taxis. Additionally, she testified that the door to
19 the drivers' room is not locked and that anyone could walk 'off the street' and drop
20 off magazines (something Young admitted), suggesting that TS magazine had not
21 honored her request to stop delivering magazines at Respondent's premises.

22 I found Sarver's testimony to be straight-forward and credible, and her
23 explanation regarding Respondent's rationale for not welcoming the presence of TS
24 magazine in its premises to be reasonable and persuasive. While I also found
25 Young to be generally credible, I note that since she was not employed by
26 Respondent prior to June 2013, she could not address Sarver's testimony about the
27 existence of a policy toward TS Magazine since 2009—and no other witness
28 testified about this matter. Additionally, I note that while Young believed that the
absence of TS magazines at Respondent's premises a couple of days after the first
of the month was the result of the supply running out, it could have been the result
of Respondent confiscating and disposing of said magazines shortly before her
assigned shift began. Since Young was not around on those occasions, her
testimony as to what caused the absence of said magazines (prior to August 2014)
is not reliable. Accordingly, I credit Sarver's testimony as to why TS magazines
were barred from Respondent's premises. [Fn. 8 omitted; emphasis supplied.]

22 As to the discrepancy in Ms. Young's testimony about her conversation with Grigorov, the
23 ALJ found Ms. Young's earlier testimony more credible than her later explanation in response to
24 his own questioning.

25 Young testified that sometime in early August 2014, Respondent's drivers
26 held a union meeting. Sometime after the meeting, Young went to the driver's
27 room.... While there, she ran into another driver, Carlos Pena, who had not been at
28 the meeting. Young told Pena that he had missed a very good meeting, a[t] which
point Grigorov, who is Respondent's night shift manager (and admitted supervisor),
chimed in and told them that they did not need a union, or that he did not

1 understand why they needed a union. Neither Grigorov nor Pena testified.

2 In view of the changing phraseology used by Young, as discussed in fn. [9],
3 I conclude that what Grigorov said was ‘you don’t need a union,’ and then said ‘I
4 don’t I don’t understand why you need a union,’ but did not ask ‘why do you need a
5 union?,’ which is something that Young added at the very end of her testimony,
6 making it less credible.

7 Decision, p. 6:12-23, *see also* fn. 9, explaining the discrepancy in Ms. Young’s testimony and
8 demonstrating that the ALJ obviously credited at least part of Ms. Young’s testimony:

9 Initially, Young testified that Grigorov had said that they did not need a
10 *meeting*, that he did not understand why they needed a *meeting*. (Tr. 121). At the
11 conclusion of Young’s testimony, I asked her to clarify, since Grigorov’s comments
12 did not seem particularly noteworthy, or comporting to the allegations of the
13 complaint. At this point, Young clarified that Grigorov had said that they did not
14 need a *union*, adding that he then asked ‘what do you need a union for? (Tr. 139-
15 140). [Emphasis supplied.]

16 As a sound and general rule, credibility is left to the trier of fact who has heard the
17 testimony, observed the witnesses, and asked questions when deemed appropriate. This is also the
18 rule in NLRB proceedings which are uniquely within the ALJ’s purview and not lightly overturned
19 by the Board. Often cited by the Board, *Standard Dry Wall Products, Inc.*, 91 NLRB No. 103
20 (1950), explains at p. 1 that although the Board is ultimately responsible for determining the facts,
21 it relies heavily on the ALJ’s credibility findings:

22 [A]s the demeanor of witnesses is a factor of consequence in resolving issues of
23 credibility, and as the Trial Examiner, but not the Board, has had the advantage of
24 observing the witnesses while they testified, it is our policy to attach great weight to
25 a Trial Examiner’s credibility findings insofar as they are based on demeanor.
26 Hence we do not overrule a Trial Examiner’s resolutions as to credibility except
27 where the clear preponderance of *all* the relevant evidence convinces us that the
28 Trial Examiner’s resolution was incorrect. [Emphasis supplied.]

29 *See, J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, 26, n. 1 (October 1, 2015), *citing*
30 *Standard Dry Wall* (“The Board’s established policy is not to overrule an administrative law
31 judge’s credibility resolutions unless the clear preponderance of all the relevant evidence
32 convinces us that they are incorrect”). To the same effect, in *Noel Canning v. NLRB*, 705 F.3d
33 490, 495 (D.C. Cir. 2013), *aff’d on other grounds, Noel Canning v. NLRB*, 134 S.Ct. 2550, 289

1 L.Ed. 2d 538 (2014), the D.C. Circuit Court of Appeals noted that it was “loath to overturn the
2 credibility determinations of an ALJ unless they are ‘hopelessly incredible, self-contradictory, or
3 patently insupportable.’ It is thus acceptable.” *Citing Stephens Media, LLC v. NLRB*, 677 F.3d
4 1241, 1250 (D.C. Cir. 2012), and *Monmouth Care Center v. NLRB*, 672 F.3d 1085, 1091 (D.C.
5 Cir. 2012), the Circuit Court of Appeals concluded that it had “no reason to set aside a credibility
6 determination where ‘the ALJ credited the testimony of the union’s negotiation over that of
7 petitioners’ representative... based on a combination of testimonial demeanor and a lack of
8 specificity and internal corroboration for the petitioners’ claims.’”

10 Likewise, in *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB No. 82, 1996 WL 368341,
11 *6 (1996), the Board adopted the ALJ’s decision, explaining its position as to the ALJ’s credibility
12 determinations:

13
14 Weight is given to the administrative law judge’s credibility determinations
15 because she ‘sees the witnesses and hears them testify, while the Board and the
16 reviewing court look only at the cold records.’ *NLRB v. Walton Mfg. Co.*, 369 U.S.
17 404, 408 (1962). In discussing the deference owed credibility determinations based
18 on demeanor, referred to as testimonial inferences, in *Penasquitos Village v. NLRB*,
19 565 F.2d 1074, 1078-79 (9th Cir. 1977), the Ninth Circuit stated:

20 All aspects of the witness’s demeanor—including the expression of
21 his countenance, how he sits or stands, whether he is inordinately
22 nervous, his coloration during examination, the modulation or pace
23 of his speech and other non-verbal communication—may convince
24 the observing trial judge that the witness is testifying truthfully or
25 falsely.

26 In addition to these subjective evaluations of witness demeanor, credibility
27 resolutions are also based on the weight of the respective evidence, established or
28 admitted facts, inherent probabilities, and reasonable inferences which may be
drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711 fn. 1 (1989)
(where demeanor is not determinative, credibility may also be based on the weight
of the evidence, established or admitted facts, inherent probabilities, and reasonable
inferences drawn from the record as a whole); *Gold Standard Enterprises*, 234
NLRB 618 fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979)
(failure of administrative law judge to make credibility findings diminishes the
importance of the demeanor factor) *V & W Castings*, 231 NLRB 912, 913 (1977),
enfd 587 F.2d 1005 (9th Cir. 1978) (where a clear preponderance of all relevant
evidence convinces the Board that demeanor credibility resolutions are incorrect, it
is impelled to substitute its own judgment). Such credibility findings were referred
to in *Penasquitos Village*, supra, as *derivative inferences*. Where required, I have

1 made both demeanor and derivative credibility determinations after carefully
2 weighing all the testimony and the demeanor of the witnesses and bearing in mind
3 the general tendency of witnesses to testify as to their impressions or interpretations
4 of what was said rather than attempting to provide verbatim accounts. [Emphasis
5 supplied.]

6 *See also, NLRB v. Allied Medical Transport, Inc.*, __ F.3d __, 2015 WL 5935187 (11th Cir. 2015),
7 quoting *NLRB v. Goya Foods of Fla.*, 525 F.3d at 1117, 1126 (11th Cir. 2008) (“[C]ourts are bound
8 by the credibility choices of the [administrative law judge]’ unless they are ‘inherently
9 unreasonable,’ self-contradictory’ or ‘based on an inadequate reason.’”).

10 The ALJ’s Decision in this case is supported by detailed descriptions of why the ALJ
11 credited the testimony of one witness over the other with regard to distinct issues. There is no
12 grounds for upsetting the ALJ’s credibility determinations in this case.

13 V. THE 8(a)(1) ISSUES

14 The Union’s challenge to ALJ Sotolongo’s determination of the Sec. 8(a)(1) issues
15 amounts to a challenge of the ALJ’s well-supported and explained credibility determinations. As
16 noted above, such a challenge is difficult to mount and inappropriate where there is conflicting
17 testimony to be resolved by the ALJ and deference is to be accorded to his or her determination
18 unless it appears “hopelessly incredible, self-contradictory, or patently insupportable.” *Noel*
19 *Canning*, 705 F.3d at 495. As demonstrated below, the Union has not met its burden on any of its
20 Section 8(a)(1) challenges to the ALJ’s Decision.

21 A. CONVERSATIONS ABOUT THE UNION

22 A conversation differs from an interrogation in general because a conversation, even about
23 work matters, is deemed non-threatening while interrogation is not. *NLRB v. Sunnyland Packing*
24 *Co.*, 369 F.2d 787, 793-94 (5th Cir. 1966), thus holds that the Board “should not prohibit casual,
25 moderate interrogation which could not be considered as threats, coercion or as forecasting
26 reprisals” as “[s]uch interrogation is not unlawful per se...” *Sunnyland* then concludes that
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1 “[o]nly when the interrogation tends to restrain, coerce or interfere with employees in the exercise
2 of their rights under the Act is such interrogation proscribed by Section 8(a)(1).” A recent case,
3 *Garcia v. High Flying Foods*, 2015 WL 773054 (S.D. Cal. 2015), quoting *Amalgamated Meat*
4 *Cutters and Butcher Workmen of North America, Local No. 365 v. NLRB*, 435 F.2d 668, 669 (9th
5 Cir. 1970), notes that even “union topics that arise during casual conversation between employers
6 and employers are not necessarily coercive,” explaining:

8 An employer’s interrogation must be associated with []express or implied
9 threats or promises, or form part of an overall pattern tending to restrain or coerce
10 employees with regard to their protected activities.... When the inquiries are not
under taken in a threatening manner but are only isolated instances free of coercion
and without any systematic intimidation in the background, they are not unlawful.

11 *See also, Hotel Employees and Restaurant Employees Union v. NLRB*, 760 F.2d 1006, 1008-09 (9th
12 Cir. 1985) (similarly rejecting an 8(a)(1) violation, even when an employer questions an employee
13 as to his or her union views: “Employers often mingle with their employees, and union activities
14 are a natural topic of conversation. A standard which considers the totality of the circumstances
15 surrounding an employee interrogation is a realistic approach to the enforcement of section
16 8(a)(1)”; *Gossen Co. v. NLRB*, 719 F.2d 1354, 1358 (7th Cir. 1983) (“interrogation as to what
17 employees expect to gain from a union is, on its face, uncoercive where unattended by threats of
18 reprisal or promises of reward”); *NLRB v. Ralph Printing and Lithographing Co.*, 379 F.2 687,
19 690-91 (8th Cir. 1967) (noting that alleged 8(a)(1) interrogation violations raised issues of
20 “credibility” and that an interrogation is not unlawful per se if not conducted with such animus as
21 to be coercive in nature, concluding that the conversation at issue was not “part of systematic
22 intimidation” of employees, “but at best was isolated and casual in nature. The questioning,
23 moreover, was totally devoid of any coercive statements, which are usually characteristic of an
24 unlawful interrogation. The isolated form of interrogation, we believe, was insufficient to violate
25 the rights of Respondent’s employees.... [C]oercive interrogation is not supported by substantial
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1 evidence in the record.”); and *Excavation-Construction, Inc. v. NLRB*, 660 F.2d 1015, 1022-23 (4th
2 Cir. 1981) (mere inquiry about union activity, not with regard to taking action against employees
3 for union activity, was not actionable, moreover, the conversation took place where there was “no
4 atmosphere of unnatural formality”).

5
6 By attempting to characterize the conversation between Mr. Grigorov and Ms. Young as
7 “an interrogation in violation of the Act,” the Union impermissibly overreaches by assuming for
8 itself the ALJ’s role of the trier of fact and arbiter of credibility. Union Brief, p. 26, ll. 5-6 (“Once
9 Young’s testimony is credited, then Grigorov’s statements become an interrogation”). With regard
10 to this charge, the ALJ heard the testimony, questioned the witnesses as he chose, and found as
11 follows as to the exchange between Young, a cab driver who worked for Western Cab since June
12 2013,¹⁸ and Grigorov, a night shift manager:¹⁹

13
14 Young testified that sometime in early August 2014, Respondent’s drivers
15 held a union meeting. Sometime after the meeting, Young went to the driver’s
16 room... While there, she ran into another driver, Carlos Pena, who had not been at
17 the meeting. Young told Pena that he had missed a very good meeting, a[t] which
18 point Grigorov, who is Respondent’s night shift manager (and admitted supervisor),
19 chimed in and told them that they did not need a union, or that he did not
20 understand why they needed a union. Neither Grigorov nor Pena testified.

21 In view of the changing phraseology used by Young, as discussed in fn. [9],
22 I conclude that what Grigorov said was ‘you don’t need a union,’ and then said ‘I
23 don’t I don’t understand why you need a union,’ but did not ask ‘why do you need a
24 union?,’ which is something that Young added at the very end of her testimony,
25 making it less credible.

26 * * *

27 Initially, Young testified that Grigorov had said that they did not need a
28 *meeting*, that he did not understand why they needed a *meeting*. (Tr. 121). At the
conclusion of Young’s testimony, I asked her to clarify, since Grigorov’s comments
did not seem particularly noteworthy, or comporting to the allegations of the
complaint. At this point, Young clarified that Grigorov had said that they did not
need a *union*, adding that he then asked ‘what do you need a union for?’ (Tr. 139-
140). (Emphasis supplied).

Decision, p. 6:10-23, and fn. 5.

¹⁸ Decision, p. 4:16-18.

¹⁹ Decision, p. 3:11.

1 In making his credibility determination based on the testimony and his own questioning of
2 Ms. Young, and concluding there was no 8(a)(1) violation, the ALJ exercised his responsibility in
3 assessing credibility of the testimony. Moreover, he did not find the conversation between Young
4 and Grigorov to be threatening or coercive. This conclusion is based on an analysis of the
5 evidence observation of the demeanor of the witnesses, questioning of witnesses where he saw fit,
6 and well-supported by precedent; it should be enforced. *Derby Refining Co. v. NLRB*, 1979 WL
7 4858, *1 (10th Cir. 1979) (enforcing determination of ALJ as confirmed by Board as to 8(a)(1)
8 interrogation issue: “The administrative law judge’s opinion reviews the evidence fairly and in
9 detail, and candidly states his opinions as the trier of fact with respect to the witnesses’ credibility
10 and the conclusions he made after hearing from both participants in each incident. We find there is
11 substantial evidence in the record to support his determinations....”). The same should result here:
12 the fact finder’s determination should be respected.

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15 **B. THE TRIP SHEET MAGAZINE**

16 The *Trip Sheet* magazine is not a union publication devoted to promotion of the Union or
17 other unions. Instead, it is a small format magazine, replete with ads and lists of events. Examples
18 of it were admitted in evidence, *e.g.*, GCX 3 and 4.

19 Western Cab produced testimony, which the ALJ credited, that since 2009 Western Cab
20 had a practice of throwing out the magazines and banning their delivery to the breakroom because
21 Western Cab believed *Trip Sheet* was geared to enticing drivers to break state and local law
22 forbidding them from taking customers to destinations other than requested by the customer. The
23 Union placed an ad aimed at Western Cab in the August 2014 issue of the magazine.

24
25 The Union miscasts the existence in the August 2014 *Trip Sheet* of a Union ad and some
26 letter to the editor about Western Cab as sufficient to support finding of an 8(a)(1) violation. In
27 this regard, the Union relies on the testimony of Joan Young, who started work at Western Cab in
28

1 June 2013, as to the company's practice with regard to the magazine. Western Cab, however, is a
2 family-owned business, run by the founder's widow, three daughters and Martha Sarver, a 40+
3 year employee and now its General Manager. TR 30. Ms. Sarver testified that the *Trip Sheet*
4 magazine used to be in the break room "long ago," but had not been there "for a long time." TR,
5 46. In response to ALJ Sotolongo's questioning, Ms. Sarver explained the problem with the
6 magazine is that it explained to drivers "what businesses are friendly to them, meaning that they
7 will pay them a fee if they bring customers to them." TR 48. Ms. Sarver also explained that if she
8 saw the *Trip Sheet* magazines at Western Cab, she would "[t]hrow them in the garbage" as her
9 practice "[s]ince the summer of 2009." TR. 89-90; *see also*, TR 93 (again repeating that since
10 2009, whenever she saw the *Trip Sheet* or other efforts to entice drivers to take gratuities from
11 businesses, Ms. Sarver would "[t]hrow them in the dumpster..."). Ms. Sarver also testified that
12 she asked the company not to deliver them in 2009. TR. 94; TR 95 ("My policy was just to not
13 have it on the property so they weren't tempted by it.").
14
15

16 In response to Judge Sotolongo's questioning, Ms. Sarver testified:

17 Because in 2009 the Nevada Revised Statutes and the Nevada
18 Administrative Code it became a big deal about diverting passengers. And it was –
19 you're not supposed to do that. So we would get a lot of information, flyers and
20 things from strip clubs, massage parlors saying you know bring people here and
21 we'll give you \$100 a head for the people you bring. So any literature that came to
22 our office like that we just start throwing in the garbage because if we had to have
23 the drivers say that they're not going [to] divert people I didn't think it was right to
24 have all this stuff on the property that tells them to divert people.

25 TR 90, RX 4 and 5 (copies of the Nevada Anti-Diversion statutes and municipal code). In
26 addition, Western Cab introduced through Ms. Sarver a copy of a local news story condemning
27 local business practices of giving driver's kickbacks, further described by Ms. Sarver:

28 It became a very large issue in town with cab drivers diverting people and they
were going, taking them places just to get extra money from the strip clubs and
massage parlors, whatever it was it was paying because it was a gratuity that was
being given by businesses and not the passenger.

1 That ALJ Sotolongo, noting that Ms. Young was not employed at Western Cab until 2013,
2 credited Ms. Sarver's testimony as to her practice with regard to *Trip Sheet* magazines since 2009,
3 is not surprising. This dispute turns on a credibility question, the ALJ's resolution of which is
4 supported by the record and not a reasonable grounds for overturning the ALJ's Decision.
5

6 C. DISPARAGEMENT OF THE UNION

7 The Union argues that ALJ Sotolongo erred by failing to find that Western Cab violated
8 Section 8(a)(1) when owner Marilyn Moran allegedly disparaged the Union in front of and
9 interrogated bargaining committee member Gezahegne Teffera. Ms. Moran is alleged to have
10 asked "why are you doing this to us?" This is another issue in which the ALJ's assessment of the
11 witness's credibility is to be respected absent gross error, which does not exist.²⁰ Moreover,
12 although the Union appears to be proceeding on a series of purportedly "disparaging" statements
13 such as "why are you doing this to us?" together with statements that the company did not want to
14 "change" from its "family-run" style, those statements are not actionable, as the ALJ properly
15 found:
16

17 I note that... the General Counsel could not cite any cases directly on point
18 to support its argument. Indeed, the General Counsel concedes that the Board has
19 held that words of disparagement alone are insufficient to violate Sec. 8(a)(1).
20 *Sears Roebuck & Co.*, 305 NLRB 193 (1991), and that 'the Act countenances a
21 significant degree of vituperative speech in the heat of labor relations,' *Atlas*
22 *Logistics*, 357 NLRB No. 37, slip op. at 4 (2011). Nonetheless, the General
23 Counsel argues that such comments violate the Act if made in the context of other
24 coercive statements that suggest that Respondent would not bargain in good faith
25 and that the employees' choice of the Union would be futile. As an example, the
26 General Counsel cites Respondent's comments that they did not like change and
27 would like to keep things as they were. The inherent weakness of this argument is
28 that the General Counsel has not alleged any other comments made at this meeting

25 ²⁰ The General Counsel and Union did not present clear evidence as to who even made the
26 purportedly disparaging statements and the General Counsel proceeded without amending the
27 Complaint to conform to the testimony. For example, while Mr. Teffera testified that Helen
28 Martin, not Marilyn Moran, made the supposed disparaging statements, the Complaint was never
amended back to name her. TR. 1989. Nor was there any credible testimony that either Helen
Martin or Marilyn Moran had ever made the supposed statements.

1 as unlawful, since it would be hard-pressed to do so, let alone allege[] that
2 Respondent was bargaining in bad faith or otherwise conveyed the message that
negotiations were futile.

3 Respondent, on the other hand, cited several examples of cases where
4 employers have uttered either identical or closely similar words as the ones used
5 here ('why are you doing this to us?'), that the Board found would not be unlawful.
6 See, e.g., *McDonald Land & Mining Co., Inc.*, 301 NLRB 463, 465 (1991);
7 *Springfield Hospital*, 281 NLRB 643 (1986); *Berger Transfer and Storage, Inc.*,
8 253 NLRB 5, 12 (1980). I cannot distinguish the[i]r cases from the present one,
and the General Counsel has not even attempted to do so. Accordingly, and in light
of the fact that Respondent made no other coercive or threatening statements at this
meeting or at any other time, I conclude that Moran's statement did not violate Sec.
8(a)(1) of the Act.

9 Decision, p. 16.²¹

10 The Union cannot be allowed to ignore the fact that the First Amendment still operates,
11 even in labor settings. Thus, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), disposes of
12 the Union's arguments, explaining:

13 [W]e do note that *an employer's free speech right to communicate his views to his*
14 *employees is firmly established and cannot be infringed by a union or the Board.*
15 Thus, s 8(c) (29 U.S.C. s 158(c)) merely implements the First Amendment by
16 requiring that the expression of 'any views, argument, or opinion' shall not be
17 'evidence of an unfair labor practice,' so long as such expression contains 'no threat
18 of reprisal or force or promise of benefit' in violation of s 8(a)(1). Section 8(a)(1),
in turn, prohibits interference, restraint or coercion of employees in the exercise of
their right to self-organization.

19 *See also, McDonald Land & Mining*, 301 NLRB 61 (1991), affirming ALJ's decision that inquiry
20 of employee who supported union – "Why are you doing this?" – did not violate the Act as the
21 question was not posed in the context of threats or other unlawful acts.

22 The Union points to no "threat of reprisal or force or promise of benefit," but the owner
23 family's sentiments and those are protected free speech under circumstances of this matter.
24

25
26 ²¹ At fn. 22, ALJ Sotolongo noted that in *Pony Express Courier Corp.*, 283 NLRB 868
27 (1987), the Board found a similar statement ("why are you doing this to me?") to be violative of
28 Section 8(a)(1) where the manager who made the statement also called the employee to whom he
was speaking a "sneak" and a "snake." There is no similar evidence here.

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VI. CONCLUSION

Western Cab's position is that *Alan Ritchey* is null and void and should not have been relied upon by ALJ Sotolongo in any way, shape or form. It would be difficult to image that the U.S. Supreme Court would say that when it invalidated *Alan Ritchey* as the product of an unconstitutionally-composed Board, it did not really mean it and that it was acceptable for NLRB Administrative Law Judges and others to rely on *Alan Ritchey's* holding in order to find employers engaged in business under the NLRA to be guilty of 8(a)(5) violations.

If any of the principles of *Alan Ritchey* are going to be applied to Western Cab, then the ALJ's Decision is correct and the remedy should not include reinstatement and/or backpay. *Alan Ritchey* did not award these remedies because the Board recognized that its holding amounted to a major change in the law and that it would not be fair to hold the employer liable for such a remedy in the case that changed the law. Given *Alan Ritchey's* invalidation, a prospective-only ruling has to be followed until a new Board re-announces the ruling or some other ruling in this regard.

For the reasons stated above, Western Cab respectfully requests that the ALJ's Decision and Recommended Order not be modified as requested by the Union.

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Attorneys for Respondent

1 CERTIFICATE OF SERVICE

2 I hereby certify that a true and correct copy of the foregoing **WESTERN CAB**
3 **COMPANY'S RESPONSE TO CHARGING PARTY'S BRIEF IN SUPPORT OF**
4 **EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE**
5 **ADMINISTRATIVE LAW JUDGE** was served via E-Gov, E-Filing, on this 27th day of
6
7 October, 2015, on the following parties:

8 Gary Shinnors
9 Executive Secretary
10 National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

11 And a true and correct copy was served via e-mail on this 27th day of October, 2015 to the
12 following:

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25 /s/ Rosalie Garcia
26 An Employee of Hejmanowski & McCrea LLC