

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WESTERN CAB COMPANY**

**and**

**Cases        28-CA-131426  
                  28-CA-132767  
                  28-CA-135801**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED-INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO/CLC**

**GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**TO: Gary W. Shinnars, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE – Room 5011  
Washington, DC 20570**

**Respectfully submitted,**

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## **A. INTRODUCTION**

By its Cross-Exceptions, Western Cab Company (Respondent) seeks to have the Board deny the sound reasoning of Administrative Law Judge Ariel Sotolongo (the ALJ) concerning Respondent's refusal to provide notice to and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC (the Union) over discretionary suspensions, discretionary discharges, and the Employer's change to its healthcare plan. Respondent's Cross-Exceptions are without merit and should be denied.

## **B. RESPONDENT'S CROSS-EXCEPTIONS**

### **1. Respondent's Cross-Exceptions 1 through 4 Regarding *Alan Ritchey***

#### **a. Nature of Respondent's Cross-Exceptions 1 through 4**

Respondent's first four Cross-Exceptions are all restatements of a single argument: that the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), was wrongly decided and that the ALJ did not have the authority to affirm the reasoning of *Alan Ritchey* after it was vacated by the Supreme Court's decision in *Noel Canning*, 573 U.S. \_\_\_, 134 S. Ct. 2550 (2014).

Respondent's argument is much ado about nothing as this case is before the Board, Respondent's own Cross-Exceptions are directed to the Board, and the Board undoubtedly has the right to re-affirm the rationale in *Alan Ritchey* if it so chooses. The *Alan Ritchey* issue was fully briefed in the original briefs to the ALJ by Counsel for the General Counsel (CGC), the Union, and by Respondent itself. Respondent therefore makes no new arguments in its Cross-Exceptions.

Moreover, the ALJ conceded that if the Board declines to re-adopt the rationale from *Alan Ritchey*, then his legal findings on that issue would be moot and his decision reversed.

ALJD 8:30-31.<sup>1</sup> CGC agrees with the ALJ’s plain logic, but simultaneously urges the Board to re-adopt *Alan Ritchey* for the reasons outlined in the ALJ’s decision and those outlined in both CGC and the Union’s original briefs to the ALJ.

**b. Discussion**

As discussed by the ALJ, *Noel Canning* presented ALJ’s across the country with an “unprecedented scenario,” as the Supreme Court vacated *Alan Ritchey* (and several other Board decisions) without actually weighing in on the reasoning or facts of *Alan Ritchey*. ALJD 2:fn.1. Contrary to Respondent’s Cross-Exception 2, the ALJ did not construe *Noel Canning* to be a tacit or implicit endorsement of the reasoning of *Alan Ritchey*. Instead, the ALJ found the reasoning of *Alan Ritchey* to be persuasive and that *Alan Ritchey* was more consistent with decades of Board precedent than the 2002 outlier decision in *Fresno Bee*, 337 NLRB 1161 (2002). ALJD 8:15-17. The ALJ confirmed that *Alan Ritchey*’s reasoning “is based on long-standing and well-settled principles” that Employers must notify the Union *before* they discretionarily impose changes that impact mandatory subjects of bargaining, and must also bargain over those issues. ALJD 8:1-20.

The ALJ cited the cases *Alan Ritchey* relied upon, including *NLRB v. Katz*, 369 U.S. 736 (1962), *Oneita Knitting Mills*, 205 NLRB 500 (1973), and *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001). ALJD 8:8-10. The Supreme Court in *Katz* confirmed that “an employer’s unilateral change in conditions of employment under negotiation is [...] a violation of [section] 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of [section] 8(a)(5) much as does a flat refusal.” *Katz*, 369 U.S. at 743. When an employer

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<sup>1</sup> RB\_\_\_ refers to Respondent’s Brief in support of Cross-Exceptions followed by page. Transcript references are: (Tr. \_\_\_:\_\_\_) showing transcript page and line or lines. ALJD \_\_\_:\_\_\_ refers to JD(SF)-33-15 issued by the ALJ on September 2, 2015, followed by page and lines. CEX \_\_\_:\_\_\_ refers to Respondent’s Cross Exceptions followed by page and line numbers.

recognizes a union as its employees' exclusive bargaining representative, that employer has two primary duties under *Katz*. First, it must refrain from making changes to preexisting terms and conditions of employment without bargaining to agreement or impasse. Second, it must bargain over any *application* of those preexisting terms and conditions "[...] to the extent that discretion has existed in determining" how to apply those conditions to employees. *Oneita Knitting Mills*, 205 NLRB 500, 501 fn.1 (1973). As the ALJ rightly noted, the Board's vacated decision in *Alan Ritchey* is merely the natural outflow of those cases, holding that an employer's discretionary application of discipline - up to and including termination - is not exempt from these bedrock requirements of initial bargaining.

Thus, rather than mechanically applying *Fresno Bee*, the ALJ adopted the *Alan Ritchey* reasoning as "valid and persuasive." ALJD 8:29.<sup>2</sup> While *Alan Ritchey* itself may have vanished in the wake of *Noel Canning*, its reasoning remains untouched and its logic undiminished. Respondent's citation of other recent ALJ decisions, in which said ALJ's refused to apply *Alan Ritchey*'s rationale, in no way undermines the underlying rationale of *Alan Ritchey*.<sup>3</sup> Those decisions only show that until the Board weighs in on the issue post-*Noel Canning*, different ALJ's may find different rationales persuasive. Indeed, they have. For example, ALJ Sotolongo previously adopted *Alan Ritchey*'s reasoning in *Kitsap Tenant Support Services, Inc.*, JD(SF)-29-15 (July 28, 2015). ALJ Cates approved of the *Alan Ritchey* rationale in *SMG Puerto Rico, II, LP*, JD(ATL)-07-15 (April 17, 2015). ALJ Esposito applied *Alan Ritchey* without caveats in *TGF Management Group Holdco, Inc.*, JD(NY)-05-15 (January 15, 2015), a decision which the Board

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<sup>2</sup> Respondent's own Brief in support of Cross-Exceptions includes this quote from the ALJ. RB 6:25

<sup>3</sup> RB 5-6; The cases referenced are ALJ Goldman's decision in *Ready Mix USA LLC*, 2015 WL 5440337 (NLRB Div. Judges, September 15, 2015), ALJ Cracraft's decision in *Adams & Associates*, 2015 WL 3759560 (NLRB Div. Judges, June 26, 2015), ALJ Locke's decision in *McKesson Corp.*, 2014 WL 5682510 (NLRB Div. Judges, November 4, 2014), and ALJ Muhl's opinion in *High Flying Foods*, JD-29-15, 2015 WL 2395895 (2015).

later adopted in the absence of exceptions. So there is a split among ALJ's, but no ALJ binds the others.

In its fourth Cross-Exception, Respondent attempts to shift the bargaining burden to the Union by arguing that the Union knew these kinds of disciplines and discharges would occur and, therefore, had a responsibility to make ongoing requests to bargain with Respondent over them. Respondent's argument hinges on the fact that trial testimony indicated that bargaining committee members discovered that some suspensions and discharges had happened after the fact. CEX 3:21-25. This, to Respondent, created an obligation for the Union to request *post facto* bargaining every time the Union discovered *Alan Ritchey*-type unilateral changes. RB 3:11-19. This is incorrect reasoning.

First, Respondent's reliance upon *Hartmann Luggage Co.*, 173 NLRB 1254 (1968), is misplaced. In *Hartmann Luggage*, the employer gave direct notice of proposed layoffs to several employee bargaining committee members at least four days before the scheduled layoffs. *Id.* at 1255. Because those bargaining committeemen immediately informed the union's business agent about the proposed layoffs, the Board considered the union to have constructive notice about the pending layoffs. *Id.* The Board considered this adequate notice because the union had constructive notice several days *before* the layoffs. *Id.* at 1256. Conversely, in this case, employee Teffera discovered that a few employees had been discharged or terminated from the disciplined employees (or former employees, as it were) and not from Respondent. (Tr. 188-189). In addition, Teffera's testimony on this point indicates that this handful of post facto discoveries occurred in 2012 or 2013 - near the beginning of the parties' bargaining - and not near in time to the 121 discharges and suspensions at issue in the instant case. (Tr. 198). Thus, *Hartmann Luggage* is wholly inapposite.

In addition, Board precedent does not require blanket requests to bargain about prospective unannounced changes in terms and conditions of employment, nor was it the Union's responsibility to monitor every possible employee for discharge and suspension. *See, e.g., Eugene Iovine, Inc.*, 328 NLRB 294, 294, n.1 (1999) (employer unlawfully implemented discretionary reduction in work hours where union had no notice of or opportunity to bargain over reduction before it occurred), *enforced*, 1 F. App'x 8 (2d Cir. 2001); *Adair Standish Corp.*, 292 NLRB 890, n.1 (1989) (employer could no longer unilaterally exercise its discretion with respect to layoffs after union was certified), *enforced in relevant part*, 912 F.2d 854 (6th Cir. 1990). The ALJ rightly devoted a full paragraph to this point in his decision, noting that it is Respondent's responsibility to alert the Union about Respondent's decisions to discharge or discipline, and the Union's later discovery of these discharges did not revoke Respondent's duty. ALJD 8-9.

Moreover, CGC reiterates that only requiring Respondent to provide notice about unilateral changes *after* the fact relegates the Union "to the status of a supplicant, a position incompatible with the purposes and policies of the Act." *Kajima Engineering and Construction, Inc.*, 331 NLRB 1604, 1620 (2000).

It is true that Respondent began providing limited advance notice to the Union about pending disciplines and discharges *after* the Union made an express request for such information in June 2014, but this action did not excuse Respondent from its pre-existing responsibilities. Nor did it erase the approximately 121 suspensions and discharges Respondent made without notice or bargaining during the preceding 6 months. The only thing that Respondent's sudden

cooperation really indicates is that “Respondent got the message” about its unlawful conduct after the Union filed the instant charges.<sup>4</sup>

Finally, Respondent objects to the portion of the ALJ’s notice to employees which states that the “National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.” RB 8:1-25. Respondent argues that this language is inappropriate because the ALJ only applied *Alan Ritchey* prospectively and not retroactively. RB 7:24-25. However, *Alan Ritchey* itself included this same Notice language, even though the *Alan Ritchey* Board admitted it was overturning opposing precedent in the form of *Fresno Bee*. 359 NLRB No. 40, slip op. at 14. Respondent also ignores that the ALJ found it to have violated Section 8(a)(5) of the Act on other counts, including that it unlawfully made unilateral changes to its health insurance plan. Respondent’s arguments lack merit and should be rejected by the Board.

**2. Respondent’s Cross-Exception 5 Regarding Its Change to Employee Health Insurance**

Respondent’s final substantive Cross-Exception is that a new federal requirement under the Affordable Care Act relieved Respondent of its responsibility to notify the Union and bargain over changes to its healthcare plan. CEX 4:15-17. As set forth below, this argument has been rejected by the Board for decades. Because Respondent had discretion in how it applied the mandate, there is nothing in this case which presents a special circumstance justifying a deviation from that precedent.

**a. Facts**

Respondent does not attack the ALJ’s summation of the background facts regarding this allegation, so that summation is quoted directly. “Respondent learned in December 2013, that the

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<sup>4</sup> The ALJ made this comment in an aside during the trial. (Tr. 110:5-6).

Affordable Care Act (ACA) would require certain changes in its employee health care plan. Among these, was a change requiring that employees be eligible for healthcare benefits after 60 days of employment, which was a significant change from Respondent's plan, which made employees eligible after a year of employment." ALJD 14:16-20.

The ALJ continued, "Respondent began notifying its bargaining unit employees of a new eligibility period [mandated by the Affordable Care Act] in order to afford them the opportunity to enroll." ALJD 14:20-22. More importantly, the ALJ stated that "[i]t is *undisputed* that Respondent never notified or bargained with the Union regarding these changes." ALJD 14:22-23 (emphasis added). Thus, there is no disagreement about whether the Employer made changes to its healthcare plan or that it made those changes without notification to the Union or an offer to bargain about the changes.

Finally, and as omitted by Respondent from its Brief, the ALJ found that:

"ACA requires employers (and individuals) to comply with certain minimum requirements with regard to healthcare coverage, and one of these minimum requirements appears to be that employees be eligible to receive benefits after 60 days of employment. As far as I am aware, there is no provision in ACA that prohibits or precludes employers from granting employees healthcare benefits before 60 days of employment, or for that matter offering employees benefits that exceed the minimum standards required by ACA. Thus, Respondent had a certain degree of discretion in deciding how to best comply with ACA." ALJD 15:4-10.

Having found the Employer possessed discretion in how to comply with the ACA, the ALJ had only to follow the broad, well-paved path of Board precedent in order to find Respondent in violation of the Act.

#### **b. Discussion**

Healthcare is a mandatory subject of bargaining and an employer may not change its health insurance plan without notice and bargaining. *See NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002) (affirming Board's finding that employer violated Section 8(a)(5) by

unilaterally changing health insurance plans and explaining that “[s]uch unilateral action will also often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them.”), *enforcing* 336 NLRB 258 (2001).

The Board has long held that “if an employer possesses discretion regarding how to implement a Federal mandate, unilateral implementation of the mandate itself remains unlawful because bargaining can still occur over the discretionary component of the mandate.” *Warren Unilube, Inc.*, 358 NLRB No. 92, slip op. at 5-6 (2012) *See also, e.g., Hanes Corp.*, 260 NLRB 557, 562-563 (1982) (failure to consult with a union concerning an OSHA-mandated respirator program violated the Act, where the type of respirator to be selected remained discretionary); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (failure to consult with a union regarding the OSHA-mandated designation of “competent persons” was unlawful, where the selection methodology remained discretionary). This is not an academic distinction. As the ALJ rightly found, “Respondent had a certain degree of discretion in deciding how to best comply with ACA. Had the Union been notified of these events, and afforded the opportunity to bargain, it might have been able to propose better terms for its members, and might have persuaded Respondent to agree to such better terms.” ALJD 15:9-13. We will never know what might have been because Respondent did not provide notice to the Union that the plan had changed until nearly six months after implementation. (Tr. 36, 87, 165-167).

The Board has already affirmed another administrative law judge’s finding that the ACA does not relieve employers of the responsibility to bargain over health insurance. “We are all waiting to see the implications of the Affordable Care Act. But the duty to bargain is not suspended until it is fully implemented and all its implications clear. Respondent had a statutory

duty to bargain over health care *in the negotiations*, not at some future time of its choosing.”  
*Latino Express*, 360 NLRB No. 21, slip op. at 19 (2014).

While *Latino Express* dealt with an employer who refused to bargain over healthcare because it did not know how the ACA would affect its bargaining or choice of plans, its implication is clear: if the issues surrounding the insurance requirements of the ACA do not excuse an employer from bargaining, those issues do not excuse an employer from giving notice of proposed changes and offering to bargain about the effects of those changes. If the respondent in *Latino Express* could not escape its bargaining obligation due to the uncertainties involved with the ACA, neither should Respondent escape its obligations here.

### C. CONCLUSION

Respondent’s Cross-Exceptions are without merit and should be denied by the Board. The Board should affirm the ALJ’s decision.

Dated at Phoenix, Arizona, this 10<sup>th</sup> day of November, 2015.

Respectfully submitted,

**/s/ Kristin E. White**

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## CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CA-131426 et al., was served via E-Gov, E-Filing, and Electronic Mail, on this 10<sup>th</sup> day of November 2015, on the following:

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*/s/ Dawn M. Moore*

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