

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

LIFEWAY FOODS, INC.)	
)	
Respondent)	
and)	Case Nos. 13-CA-146689
)	13-CA-140500
BAKERY, CONFECTIONARY, TOBACCO)	13-CA-151341
WORKERS, AND GRAIN MILLERS)	
INTERNATIONAL UNION, LOCAL NO. 1)	
)	
Charging Party)	

**Exception and Argument of the Charging Party
to the Recommended Decision of the Administrative Law Judge**

Charging Party excepts to that portion of the decision of the Administrative Law Judge finding that the Respondent did not violate Section 8(a)(5) of the Act by failing and refusing to bargain with Charging Party in connection with the discipline and discharge of three employees of Respondent, namely Maria Angamarca, Josefina Espinoza, and Isiais Alarcon.

Specifically, Charging Party excepts to the legal conclusion of the Administrative Law Judge ("ALJ") in his Decision finding that Respondent has no obligation under the Act to provide notice to or bargain with the Union regarding discretionary discipline

of employees. (ALJ Decision pp. 19-21). There is no dispute and the ALJ recognizes in his decision that Isiais Alarcon, Maria Angamarca, and Josefina Espinoza were all disciplined and discharged by Respondent without notice to the Union. (ALJ Decision p. 19 lines 40-44). The ALJ notes on page 19 lines 45 through 47 the Union requested bargaining regarding the discharges of Angamarca and Espinoza and that Respondent denied the request. The ALJ does not reference that the Union also requested bargaining over the discharge of Isiais Alarcon and Respondent failed to acknowledge the request. (Tr. 248-250, GC Ex. 3). The ALJ also notes that Angamarca and Espinoza are provided a full remedy given his finding that the implementation of the rule that caused their discharge was unlawful. (ALJ Decision p. 21, fn. 12). Isiais Alarcon however was not discharged pursuant to that rule change and therefore is provided no remedy by the ALJ decision.

Given that there is no dispute that the above-named employees were discharged without notice to the Union and that the discipline was discretionary the analysis is purely legal based on prior decision of the Board. Respondent maintained that in accordance with established Board precedent it has no duty to bargain individual disciplinary decisions. Charging Party argued that based on the rationale of the Board in *Alan Ritchey, Inc*, 359 NLRB No. 40 (2012), the ALJ should determine that

Respondent violated the Act. The ALJ declined stating that *Alan Ritchey* had been invalidated by the decision of the Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct 2550 (2014). Therefore, the ALJ determined that he was obligated to apply the last established Board precedent on the issue, namely the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002). (ALJ Decision pp. 20-21).

The Board in *Alan Ritchey, Inc*, 359 NLRB No. 40 (2012) determined that an Employer does have a duty to bargain with the chosen representative of its employees prior to the imposition of discipline that has a direct impact on employees, such as suspension or discharge. The rationale of the Board members who decided *Alan Ritchey* was that a requirement to provide notice to and bargain with a chosen representative regarding serious discipline including discharge was consistent with the long standing policy of the Board as adopted by the Courts on unilateral action by an Employer changing the terms and conditions of employment without bargaining with the Union. In its decision the Board stated that in cases prior to the one at bar the Board had never clearly and adequately explained whether and to what extent the this established policy applied to unilateral discipline of individual employees. In *Alan Ritchey* the Board sought to rectify this omission and drew on a long line of cases going back to *NLRB v. Katz*, 369 U.S. 736 (1962) which

established the obligation of an employer under Section 8(a)(5) of the Act to refrain from making unilateral changes to the terms and conditions of employment of represented employees.

It should be noted that in *Alan Ritchey* the Board was reviewing the decision of an Administrative Law Judge who found the failure of the employer in that case to notify and bargain with the Union prior to disciplining employees did violate the Act citing the Board's decision in *Washoe Medical Center*, 337 NLRB 201 (2001). The Board noted that an argument had been raised regarding the application of *Washoe* given the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002). The Board explained that in *Fresno Bee* the Board had just adopted, without comment, the decision of an ALJ finding that individual discipline, rather than discipline policy, may, in the circumstances presented in that case, be unilaterally imposed. The *Alan Ritchey* Board determined that the rationale of the ALJ in *Fresno Bee* was "demonstrably incorrect" in that well established precedent required an employer to both maintain existing policies regarding terms and conditions of employment and to bargain over discretionary applications of that policy. *Alan Ritchey*, supra., at 9. The Board did reverse the finding of the ALJ in *Alan Ritchey* as to the 8(a)(5) violation finding that retroactive application of its decision would be unjust given that the Board had not clearly addressed the issue in past decisions. The *Alan*

Ritchey Board specifically stated that despite the conclusion that it reached being well grounded in the law the decision would be prospective only in that it may cause unexpected burden on employers.

As noted in the decision of the ALJ here the *Alan Ritchey* decision was effected by decision of the Supreme Court in *Noel Canning*. The rationale and Board policy however remain intact. Some Administrative Law Judge decisions however have recognized the foundation of the *Alan Ritchey* decision and continued to follow the Board's reasoning in that case and found that an Employer has violated the duty to bargain by suspending and terminating employees without bargaining with the Union. In one such decision, *Kitsap Tenant Support Services*, 2015 WL 4709436 (July 28, 2015), the Administrative Law Judge determined that the reasoning behind the *Alan Ritchey* decision was in accord with other Board decisions and, despite its no longer being precedent, adopted the reasoning in finding a violation of the Act. No exceptions were taken and the Board adopted the findings and conclusion of the Administrative Law Judge on September 8, 2015. 2015 WL 5244982.

Charging Party urges the current Board to adopt the policy set forth in *Alan Ritchey* regarding the 8(a)(5) obligation of an employer when seeking to impose serious discipline on a represented employee and find that Respondent herein violated

Section 8(a)(5) of the Act by unilaterally discharging three employees. Contrary to the facts and state of the law presented in *Alan Ritchey* however the Board should not deviate from its established practice in applying this restated policy and standards to all pending cases. *Deluxe Metal Furniture*, 121 NLRB 995 (1958). As discussed in *Alan Ritchey*, when deviating from that practice the inquiry is whether application will cause manifest injustice, balancing certain factors such as reliance on preexisting law, the effect of retroactivity on accomplishing the purpose of the Act, and any particular injustice arising from retroactive application. As the Board found in *SNE Enterprises*, 344 NLRB 673 (2005), the clarification of Board law and standards does not represent a departure from Board law even if the Board overturns Board precedent. In that case the Board determined that there was no need to deviate from Board policy regarding application of its decision to all pending matters given that the altering one approach to the issue of supervisory involvement in an election did not represent a significant departure from the law. Using the established balancing approach the case at bar, unlike the situation presented by *Alan Ritchey* which the Board found close on the issue of prospective application, there should be no "surprise" to employers or Respondent to have the Board reiterate that there is a policy which finds that the Act obligates employers to refrain from unilateral implementation of

serious discipline on represented employees where the employer exercises discretion. That policy arises from a well-settled Board law which does not permit an employer to unilaterally change terms and conditions of employment which have a material and substantial impact on employees.

Accordingly, the Board should reject the conclusion of the ALJ that Respondent did not violate Section 8(a)(5) of the Act by unilaterally discharging Isiais Alarcon, Maria Angamarca, and Josefina Espinoza and issue the appropriate remedy.

Respectfully submitted,
CORNFIELD AND FELDMAN

BY /s/ Gail E. Mrozowski
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January 19, 2016
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CERTIFICATE OF SERVICE

GAIL E. MROZOWSKI, an attorney, certifies that she served a copy of the foregoing EXCEPTION AND ARGUMENT OF THE CHARGING PARTY electronically on the following named parties of record on the 19th day of January, 2016:

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