

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

**LIFEWAY FOODS, INC.**

**13-CA-140500  
13-CA-146689  
13-CA-151341**

**And**

**BAKERY, CONFECTIONARY, TOBACCO  
WORKERS, AND GRAIN MILLERS  
INTERNATIONAL UNION, AFL-CIO-CLC,  
LOCAL UNION NO. 1**

**COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTIONS AND BRIEF IN  
SUPPORT OF GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION  
AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, of the National Labor Relations Act, Counsel for the General Counsel respectfully submits the following Cross Exceptions and Brief in Support of Cross Exceptions to the Decision and Recommended Order of Administrative Law Judge Mark Carissimi, that issued on December 21, 2015.<sup>1</sup>

**EXCEPTION**

Counsel for the General Counsel takes exception to that portion of the ALJD in which the ALJ found that Respondent was not obligated to provide the Union with advance notice and an opportunity to bargain before imposing discretionary discipline and discharging Isaias Alarcon, Maria Angamarca and Josefina Espinoza (ALJD p. 20).

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<sup>1</sup> Hereafter Lifeway Foods will be referred to as "Respondent" or "Employer"; Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local Union 1, AFL-CIO will be referred to as "the Union" or "Local 1"; the Administrative Law Judge will be referred to as the "ALJ"; the National Labor Relations Board will be referred to as the "Board". References to the ALJ's decision will be referred to as "ALJD." With respect to the record developed in this case, citations to pages in the initial transcript will be designated as "Tr.", followed by the page number. General Counsel's exhibits will be designated "GC", the Union's exhibits will be designated "U.", and Respondent's exhibits will be designated "R", each designation followed by its respective exhibit number.

## **BRIEF IN SUPPORT OF THE EXCEPTION**

### **I. BACKGROUND**

Respondent produces and packages yogurt drinks for national retail distribution. In June 2014, a majority of Respondent's employees elected the Union as their exclusive bargaining representative. On June 10, 2015, the Board issued an order overruling Respondent's objections to election and certified the results of the election (ALJD p. 3). Respondent, however, has failed and refused to meet and bargain in good faith with the Union.

In October 2014, Respondent made a discretionary decision to terminate its employee, Isaias Alarcon, but did not provide the Union with advance notice or an opportunity to bargain over its decision (ALJD p. 19). In February 2015, Respondent likewise made a discretionary decision to terminate the employment of its employees Maria Angamarca and Josefina Espinoza after Respondent, upon hearing their complaints of sexual harassment against their supervisor, unilaterally changed their work schedule and then terminated them when they were unable to comply with the new schedule. Once again, Respondent failed to provide the Union with advance notice or an opportunity to bargain over the discretionary decisions to discharge these employees. In each case, Respondent refused to bargain or respond to information requests by the Union about the terminations or the change in work schedule on grounds it was not obligated to do so (ALJD p. 19).

### **II. ANALYSIS AND ARGUMENT**

The ALJ erred in finding that Respondent had no obligation to notify the Union in advance or bargain with it over Respondent's discretionary decision to terminate employees Isaias Alarcon, Maria Angamarca, and Josefina Espinoza despite his acknowledgement that it is undisputed that Respondent did not give the Union notice or an opportunity to bargain over those decisions (ALJD p. 19-20). In *Alan Ritchey*, 359 NLRB No. 40 (2012), the Board held that an employer has a duty to bargain with its

employees' exclusive bargaining representative in the period between a Union election and reaching a first contract over discretionary changes to terms and conditions of employment, including serious discipline such as that imposed here on Alarcon, Angamarca, and Espinoza. While counsel for the General Counsel acknowledges that the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) overturned the Board's *Alan Ritchey* decision, the Supreme Court's decision was based solely on the composition of the Board at the time, not the underlying rationale of the decision.

Since *Noel Canning*, supra, issued, several Board administrative law judges have analyzed the merits of *Alan Ritchey* and determined its rationale compelling, finding that employers do indeed have an obligation to notify and bargain with a bargaining unit's exclusive representative before imposing discretionary serious discipline on any unit member in that delicate and tenuous period between a union election and a first contract, absent an agreed interim grievance procedure. For example, in *Kitsap Tenant Services*, 2015 WL 5244982 (N.L.R.B.) (September 8, 2015), the Board, in the absence of exceptions, affirmed ALJ Ariel Sotolongo's Decision and Recommended Order (2015 WL 4709436) (2015) in which the ALJ applied *Alan Ritchey* to find that the employer violated Section 8(a)(5) when it did not notify or bargain with the Union prior to imposing status-changing discipline on four employees during the interim period between the union's certification and a first contract. ALJ Sotolongo explained that the reasoning of *Alan Ritchey* is sound, and on the assumption that the Board would soon reaffirm the decision, determined it was appropriate to apply the reasoning. See also *Western Cab Co.*, 2015 WL 5159229 (2015); *SMG Puerto Rico, II, LP*, 2015 WL 1756217 (2015); *Latino Express, Inc.*, 2015 WL 1205363 (2015); *South Lexington Management Corp.*, 2015 WL 400624 (2015) (ALJ's all applying *Alan Ritchey*).

The clear intent of the Board's *Alan Ritchey* decision is to preserve and give effect to employees' Section 7 rights to self-organization pending a union and employer reaching a first

collective-bargaining agreement, an aim solidly in line with Congress's intent in passing the NLRA. As the *Alan Ritchey* Board noted, the requirement of advanced bargaining lessens the "harm caused to the union's effectiveness" that would result if bargaining occurred only after discipline is imposed, and undermine a newly-elected union in the eyes of its new members. *Alan Ritchey*, supra at \*4. The Board went on to reason that requiring advance bargaining over discretionary discipline would permit the union to make arguments for a lesser discipline, generating "a more accurate understanding of the facts, a more even-handed and uniform application of rules and conduct,...a better and fairer result." *Id.* at \*8. No goal could be more in line with the purpose envisioned by Congress in enacting Section 7 of the Act.

Counsel for the General Counsel respectfully seeks a retroactive remedy to require Respondent herein to bargain with the Union over the discretionary discipline imposed upon Isaias Alarcon, Maria Angamarca, and Josefina Espinoza. It is the Board's practice to apply new rules in pending cases unless doing so would cause a "manifest injustice." *Foster Poultry Farms*, 352 NLRB 1147, 1151 (2008), citing *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-07 (1958). In making such a determination, the Board considers "reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007), citing *SNE Enterprises*, 344 NLRB 673 (2005). Thus, the Board balances the "ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, 344 NLRB 673 (2005), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

In the case at bar, retroactive application of the Board's 2012 *Alan Ritchey* decision will not result in any manifest injustice against Respondent. First, employers, including Respondent, were on notice of the advance bargaining requirement because the rationale of the decision stood undisturbed

for two years prior to the Supreme Court's *Noel Canning* decision. Second, as noted above, the harms the *Alan Ritchey* decision seeks to diminish are squarely encompassed in the purpose of Section 7 of the Act, and preventing its retroactive application would be contrary to the Act's statutory design. Finally, because Respondent already is obligated to bargain with the Union over its employees' terms and conditions of employment by virtue of the certification of representative issued by the Board on June 10, 2015, retroactive application will result in no harm or ill effect to Respondent.

### III. CONCLUSION

Respondent agrees that it made discretionary decisions to terminate Isaias Alarcon, Maria Angamarca, and Jofina Espinoza without providing the Union notice or an opportunity to bargain over those decisions. The Board's decision in *Alan Ritchey*, the rationale of which has been undisturbed since it issued in 2012, requires a finding that Respondent's conduct is violative of Section 8(a)(5) of the Act. Counsel for the General Counsel thus urges the Board to reaffirm its decision in *Alan Ritchey*, and order Respondent to bargain over the terminations.

**DATED** at Chicago, Illinois, this 16th day of February, 2016.

/s/ Melinda S. Hensel  
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INTERNATIONAL UNION, AFL-CIO, CLC,  
LOCAL NO. 1**

**AFFIDAVIT OF SERVICE OF: Counsel for the General Counsel's Cross-Exceptions to  
Administrative Law Judge's Recommended Decision and Order.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on February 16, 2016, I e-filed the above-entitled document with the NLRB Executive Secretary, and served it by e-mail upon the following persons, addressed to them at the following addresses:

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February 16, 2016

Melinda S. Hensel, Counsel for the General  
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Date

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*/s/ Melinda S. Hensel*

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