

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

In the Matter of

LIFEWAY FOODS, INC.,

Respondent,

Case 13-CA-146689

and

Case 13-CA-140500

**BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL
UNION NO. 1,**

Case 13-CA-151341

Petitioner

**RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTION TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated: March 1, 2016

Submitted by:

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 13**

LIFEWAY FOODS, INC.

and

Case 13-CA-146689

**BAKERY, CONFECTIONARY, TOBACCO
WORKERS, AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL
UNION NO. 1**

Case 13-CA-140500

Case 13-CA-151341

**RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S CROSS-
EXCEPTION TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent, Lifeway Foods, Inc. ("Lifeway" or "Company"), pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), submits this opposition to the General Counsel's Cross Exception to the Decision of the Administrative Law Judge.

INTRODUCTION

While this case involves three separate charges and seems to involve a number of unrelated issues, it is, in fact, a fairly straightforward case, particularly given the limited exception filed by the General Counsel. The Company's work schedule for its Packing Department has been 5 a.m. to 6 p.m. for many years. A rogue supervisor, Meliton Ramos de la Rosa, in flagrant violation of Company policy, allowed a few select employees to leave before the end of their shifts for a short period of time in late 2014. When Lifeway learned of this misconduct, it reiterated its long-established work schedule for the Packing Department and gave the affected employees time to make arrangements so they could work their assigned schedule. Two of those employees, Maria Angamarca, Josefina Espinoza, however, chose insubordination

over working their assigned shift and were terminated after receiving numerous opportunities to comply.

There was no duty to bargain over the discipline of those two employees, or a third employee, Isaias Alarcon who was terminated for repeatedly sexually harassing other employees (a discharge that was upheld by the Region and on appeal to the Board in a separate case, 13-CA-138852). The Administrative Law Judge agreed. The General Counsel's sole exception to this finding has no merit.

BACKGROUND

I. Factual Background

On November 6, 2014, Charging Party, Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1 ("Union"), filed an initial charge (13-CA-140500) alleging that the Company violated the Act by unilaterally disciplining Isaias Alarcon without providing notice and an opportunity to bargain and refusing to bargain.¹ On May 1, 2015, the Union filed yet another unfair labor practice charge alleging that the Company failed to bargain collectively in good faith regarding, in relevant part, the discharges of Ms. Angamarca and Ms. Espinoza.

After the ALJ's decision on December 21, 2015, Counsel for the General Counsel each filed a single, limited Exception to the ALJ's decision that Lifeway had no obligation to provide the Union with advance notice and an opportunity to bargain before discharging Ms. Angamarca, Ms. Espinoza, and Mr. Alarcon.

¹ As discussed at the hearing in this matter, Charge No. 13-CA-138852, which alleged that the termination of Isaias Alarcon violated Sections 8(a)1 and (3) of the Act, was dismissed by the Region following a full investigation. The Board subsequently denied the Union's appeal of the Region's dismissal of the charge. Thus, the lawfulness of Mr. Alarcon's dismissal is not at issue in this case.

FACTS

I. The Parties

Lifeway Foods is a company conducting business in Illinois with places of business in Morton Grove, Niles and Skokie. (Tr. 264-65). Lifeway is engaged in the manufacture of cultured dairy products known as kefir, organic kefir, probiotic cheeses and related products. (Tr. 264). Morton Grove is the manufacturing facility, Niles is the distribution facility (also referred to as the “warehouse”) and Skokie is the cheese manufacturing facility. (Tr. 265). The alleged unlawful actions at issue in this Complaint all took place at the Niles facility. (Tr. 34, 123, 168).

II. The Certification Process

A representation election was held on June 19, 2014, after which the outcome was undecided. During the vote, a variety of objectionable irregularities occurred, including (i) Petitioner’s instructions to observers not to allow “any women to vote” and to challenge all drivers; (ii) Petitioner’s challenges to voters expressly included in an earlier decision by the Region on the scope of the Unit as well as those expressly included in the stipulated Unit; (iii) Board Agent misconduct at the Morton Grove facility; (iv) Board Agent misconduct at the Niles facility, namely the Board Agent’s substantive assistance to Petitioner’s “shy” observer and the lost challenge envelope and ballot of voter Brienne Sadowski (including the failure of the Board Agent to maintain custody of ballot boxes).

As a result of these irregularities, Lifeway timely filed objections on June 26, 2014. The Region conducted a hearing on the objections, which itself involved numerous irregularities and further objectionable conduct, including (i) the Hearing Officer violating Lifeway’s due process rights by permitting an insufficiently skilled Spanish-language translator to repeatedly

mistranslate and fail to translate the proceedings, despite Lifeway's objections, and refusing to permit Lifeway an opportunity to challenge inaccurate translations; (ii) the Hearing Officer violating Lifeway's due process rights by conducting substantive proceedings off the record and refusing to put the proceedings on record, over the objections of Lifeway; and (iii) the Hearing Officer violating Lifeway's due process rights by, over objections, allowing Petitioner's witness to testify a second time in contradiction to her prior testimony, coaching Petitioner on evidence, and presenting arguments for Petitioner.

Despite these grave irregularities and due process violations, the Hearing Officer overruled Lifeway's objections and issued a decision that was not supported by substantial evidence, that was based instead on mistakes and misunderstandings, and that violated Lifeway's due process rights, namely: (i) the Hearing Officer violating Lifeway's due process rights by relying on the wrong legal standards, repeatedly misunderstanding and confusing key testimony from both parties, and by issuing a Report that was disorganized, contradictory, and failed to cite to any part of the record; (ii) the Hearing Officer erring when he found that Petitioner's instructions to its observers not to allow "any women to vote," to challenge all drivers and its decision to make wholesale challenges to votes, like shipping logistics and drivers expressly included in the Region's earlier decision on the scope of the Unit as well as those expressly included in the stipulated Unit, did not destroy laboratory conditions and was not objectionable conduct; (iii) the Hearing Officer erring when he found that misconduct by Board Agents at Morton Grove, including prohibiting eligible voters, permitting Petitioner's observers to maintain and mark unofficial "red lists" of voters, and giving substantive assistance to Petitioner's observers during the morning and afternoon sessions at Morton Grove did not destroy laboratory conditions and was not objectionable conduct; (iv) the Hearing Officer erring

when he found that Board Agent Galliano’s substantive assistance to Petitioner’s “shy” observer at Niles did not destroy laboratory conditions and was not objectionable conduct; (iv) the Hearing Officer erred when he found that the Region’s loss of the challenge envelope and ballot of voter Brianne Sadowski and failure to maintain custody of ballot boxes did not destroy laboratory conditions and was not objectionable conduct.

As a result, Lifeway filed timely Exceptions and a brief in support on December 5, 2014. However, the NLRB, without any analysis and based on factual errors in its decision, simply adopted the decision of the Hearing Officer and improperly issued the Certificate of Representative for Case No. 13-RC-113284 on or about June 10, 2015.²

ARGUMENT

I. Opposition to General Counsel’s Exception: The ALJ Correctly Ruled that Lifeway Had No Obligation to Bargain Over Employee Discipline Prior to Certification.

The General Counsel excepts to the ALJ’s decision that Lifeway did not violate the Act by terminating Isaias Alarcon, Maria Angamarca, and Josefina Espinoza without first bargaining with the Union over the terminations. However, the ALJ rightly found that there exists no precedent to support such an obligation to bargain over employee discipline prior to certification—regardless of whether the termination was discretionary. Indeed, in response to the General Counsel’s original argument that the ALJ should follow the holding in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012)—the argument repeated in the General Counsel’s exception—the ALJ concluded simply that “*Alan Ritchey, Inc.* has been invalidated” and was not the Board’s existing precedent. ALJD, p. 20-21. Further, even if there were such a duty under the now-invalidated rule announced in *Alan Ritchey, invalidated by N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2557 (2014), Lifeway acted lawfully.

² Lifeway is testing the validity of the Certification in a pending unfair labor practice proceeding, 13-CA-156570.

A. Lifeway Foods Had No Duty To Bargain Over The Discharges

1. The ALJ Correctly Ruled that *Alan Ritchey* is a *Noel Canning* Decision and is No Longer the Law.

In *NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2557 (2014), the Supreme Court found the President’s appointment of Sharon Block, Richard Griffin, and Terence Flynn to the NLRB, made during a three-day break in the Senate’s session, was not a valid use of the Recess Appointments Clause. As such and as is well-known, all NLRB decisions issuing from the time of the appointment of Block, Griffin, and Flynn until the subsequent, valid appointment of new board members are invalid, because the Board lacked a quorum of validly appointed members. *See id.* at 2558. *Alan Ritchey* is one of many such orders.

That *Alan Ritchey* was invalidated by *Noel Canning* has been recognized by both the General Counsel and Board ALJs. *E.g.*, *Ready Mix USA, LLC*, JD-52-15, 2015 WL 5440337 (NLRB Div. of Judges Sept. 15, 2015) (“The General Counsel concedes that in light of *Noel Canning*, *Alan Ritchey* ‘is no longer considered binding precedent.’); *Adams & Associates, Inc. & McConnell, Jones, Lanier & Murphy, LLP*, JD(SF)-25-15, 2015 WL 3759560 (NLRB Div. of Judges June 16, 2015); *McKesson Corp.*, JD(ATL)-30-14, 201 L.R.R.M. (BNA) ¶ 2009 (NLRB Div. of Judges Nov. 4, 2014) (“*Alan Ritchey* was issued by a panel that under *NLRB v. Noel Canning*, [] was not properly constituted.”) (quoting the General Counsel’s brief); *see also* Office of General Counsel, NLRB, *Subject: Washington River Prot. Solutions, Case 19-CA-125339*, 2014 WL 6603994, at *5 n.1 (Oct. 14, 2014) (same).

In a string of recent decisions, Board ALJs have declined to follow *Alan Ritchey* when presented with similar circumstances. *Adams & Associates, Inc.*, JD(SF)-25-15, 2015 WL 3759560 (June 16, 2015) (post-*Noel Canning* discipline); *High Flying Foods*, 21-CA-135596, 2015 WL 2395895 (NLRB Div. of Judges May 19, 2015) (same); *see also* *McKesson Corp.*,

JD(ATL)-30-14, 201 L.R.R.M. (BNA) ¶ 2009 (Nov. 4, 2014) (declining to apply *Alan Ritchey* even to post-*Alan Ritchey*/pre-*Noel Canning* discipline). The ALJ in this case correctly held, and was bound by, valid Board precedent holding there is no duty to bargain over imposition of discipline pursuant to a pre-existing disciplinary policy. *Fresno Bee (In Re McClatchy Newspapers, Inc.)*, 337 NLRB 1161, 1186 (2002).

2. The ALJ’s Decision Should Be Upheld Because *Alan Ritchey* Was Not the Law at the Time of the Terminations.

Alan Ritchey also cannot apply to this case because *Noel Canning* invalidated it well before the employment decisions at issue. The Supreme Court issued *Noel Canning* on June 26, 2014. Lifeway discharged Mr. Alarcon four months later on October 14, 2014, and discharged Ms. Angamarca and Ms. Espinoza nearly eight months later on February 5, 2015. (Tr. 80, 386-87). As one ALJ noted, the discharges “post-dated *Noel Canning* and thus occurred when it was clear that *Alan Ritchey* could no longer be relied upon. Under these circumstances, **it would work an injustice to require Respondent to adhere to *Alan Ritchey*.**” *Adams & Associates, Inc.*, JD(SF)-25-15, 2015 WL 3759560 (emphasis added). An equal injustice would occur here if Lifeway was required to adhere to a novel rule from a defunct decision.

B. The Company Did Not Violate the Rule Announced in *Alan Ritchey*.

Even if *Alan Ritchey* was good law (which it is not), it was not violated by the circumstances presented to the ALJ. *Alan Ritchey* “concern[ed] a novel theory that a discharge can violate Section 8(a)(5) of the Act if the employer does not notify and bargain with the Union before acting.” *McKesson Corp.*, JD(ATL)-30-14, 201 L.R.R.M. (BNA) ¶ 2009. However, that theory does not apply here because: (1) all three employees were terminated prior to certification of the Union, as discussed above; (2) all three employees were terminated after *Noel Canning* was decided; (3) Lifeway reasonably and in good faith believed that, in Mr. Alarcon’s case,

Company employees had been jeopardized and would continue to be and the Company exposed to legal liability by leaving Mr. Alarcon in the workplace; and (4) Lifeway's decision to terminate not only Mr. Alarcon but also Ms. Angamarca and Ms. Espinoza were not discretionary.

As to Mr. Alarcon, *Alan Ritchey* spelled out an exception from any obligation to bargain prior to imposing individual discipline, where "the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct, poses a significant risk of exposing the employer to legal liability for his conduct, or threatens safety, health, or security in or outside the workplace." *Alan Ritchey*, 359 NLRB No. 40 at *11.

Lifeway's decision to discharge Mr. Alarcon took place after Mr. Alarcon had repeatedly harassed a coworker in violation of Company's sexual harassment policy, after the coworker filed a harassment complaint, after Mr. Alarcon threatened to retaliate against the coworker, after multiple coworkers corroborated those allegations, and after Mr. Alarcon himself acknowledged his conduct. Failing to promptly discipline Mr. Alarcon for his admitted, intentional misconduct toward a coworker would have exposed the coworker to further harassment and retaliation and the Company to substantial financial liability under a variety of federal, state, and local anti-discrimination and anti-harassment laws. No federal, state, or local agency or court recognizes the NLRA as a defense to claims that an employer has ignored credible reports of discrimination and harassment of its employees. The Region agreed, and dismissed the Union's unfair labor practice charge that sought a remedy for Mr. Alarcon, 13-CA-138852. The Board upheld the Region's decision on appeal. Accordingly, Mr. Alarcon's termination, without prior bargaining, was fully consistent with the now-invalidated rule in *Alan Ritchey*. See *Alan Ritchey*, 359 NLRB No. 40 at *11.

As to all three employees, assuming for the sake of argument that *Alan Ritchey* holds any precedential value—which it does not—that decision expressly limited the requirement to bargain to the *discretionary* imposition of discipline. “If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, . . . it must first bargain with the union over the *discretionary* aspect.” *Alan Ritchey*, 359 NLRB No. 40 at *1 (emphasis added). “Accordingly, where an employer’s disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that *an employer must maintain the fixed aspects of the discipline system* and bargain with the union over the discretionary aspects (if any), *e.g.*, whether to impose discipline in individual cases and, if so, the type of discipline to impose.” *Id.* at *7 (emphasis added).

Here, Lifeway, like nearly all employers, has long-standing, fixed policies and practices of disciplining employees who engage in unlawful sexual harassment and of requiring employees to adhere to a set schedule and disciplining employees who fail to do so. (*See, e.g.*, Tr. 334, 344-45, 366, 371-72, 390). Most importantly, unlike *Alan Ritchey*, the General Counsel here presented no evidence that any similarly-situated employee was not disciplined after either engaging in unlawful sexual harassment or failing to work as scheduled.

C. The *Alan Ritchey* Rationale Cannot Apply Retroactively Under Board Law.

Even if the Board were to accept the General Counsel’s arguments and find that the discipline in this case was a mandatory subject of bargaining, such a finding should only be applied prospectively and not to this case. In *Alan Ritchey*, the Board held that its decision to require bargaining before issuing discretionary discipline should only be applied prospectively because its sudden reversal of standing Board precedent would impose unexpected burdens on

the employer. 359 NLRB No. 40. The Board’s reasoning for prospective application in *Alan Ritchey* applies even more strongly in this case.

Retroactive application of the *Alan Ritchey* rationale would cause Lifeway “manifest injustice” under the Board’s three factors in *SNE Enterprises*, 344 NLRB 673, 673 (2005). The Company reasonably relied on *Fresno Bee* in light of the Supreme Court’s *Noel Canning* decision. *Id.* There is no evidence in the record that Lifeway has ever engaged in preimposition bargaining over discipline or that employers commonly did so after *Noel Canning*. *Id.* Retroactivity would not be essential in achieving the purposes of the Act, either, *id.*: Mr. Alarcon’s discharge was upheld in a separate case and the ALJ has ordered relief for Ms. Angamarca and Ms. Espinosa using a different rationale.³ ALJD, at 12, 24. In the event that the Board overturns this standing precedent, it should only do so prospectively in order to avoid placing great, unexpected burdens on Lifeway.

The General Counsel relies on several ALJ decisions in arguing that *Alan Ritchey*’s rationale should apply and that should it apply retroactively. However, all of these cases are distinguishable for three reasons: first, unlike this case, they each involved the imposition of *discretionary* discipline; second, unlike this case, they all involved the imposition of discretionary discipline *post-Alan Ritchey* but *pre-Noel Canning*; third, unlike this case, the judges’ application of *Alan Ritchey* was essential to imposing a remedy for violations of the Act. *Kitsap Tenant Services*, JD(SF)-29-15, 2015 WL 4709436 (NLRB Div. of Judges July 28, 2015), *adopted without exceptions*, 2015 WL 5244982 (Sept. 8, 2015) (*post-Alan Ritchey/pre-Noel*

³ Although the Company will again raise the issue during the compliance phase, it continues to take the position as it did at the hearing and in its post-hearing brief that neither Ms. Angamarca nor Ms. Espinoza are entitled to the reinstatement or backpay remedy ordered by the ALJ. The Supreme Court has held that employees who do not possess valid authorizations for employment in the United States are not entitled to backpay and, owing to their lack of employment authorization, cannot be reinstated as a remedy for any alleged violations of the Act. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002) (holding that the NLRB’s backpay award to unauthorized workers unduly trenches on federal immigration policy).

Canning discretionary discipline); *Western Cab Co.*, 2015 WL 5159229 (same ALJ, post-*Alan Ritchey*/pre-*Noel Canning* discretionary discipline); *SMG Puerto Rico, II, LP*, JD(ATL)-07-15, 2015 WL 1756217 (NLRB Div. of Judges Apr. 17, 2015) (post-*Alan Ritchey*/pre-*Noel Canning* discretionary discipline); *Latino Express, Inc.*, JD(SF)-09-15, 2015 WL 1205363 (NLRB Div. of Judges Mar. 17, 2015) (same); *So. Lexington Mgmt. Corp.*, JD(ATL)-02-15, 2015 WL 400624 (NLRB Div. of Judges Jan. 29, 2015) (same). Because the discipline considered in those cases was discretionary, unlike the discipline here, the cases are inapposite. Setting aside that crucial difference does not change this fact. Because those employers did not rely on then-applicable Board law and because the application of *Alan Ritchey* in those cases was essential to imposing a remedy, the *SNE Enterprises* factors weigh in a completely different direction in those cases compared to this case and cases like *Adams & Associates, Inc.*, and *High Flying Foods*. Accordingly, the handful of cases cited by the General Counsel are distinguishable.

D. The Bargaining Unit Was Not And Is Not Properly Certified

The Company has no obligation to bargain with this Union because the bargaining unit was not and is not properly certified by the NLRB. A representation election was held on June 19, 2014, after which the outcome was undecided. During the polling periods, a variety of objectionable irregularities occurred, leading the Company to timely file objections on June 26, 2014. The Region conducted a hearing on the objections, which itself involved numerous irregularities and further objectionable conduct. Despite these grave irregularities and due process violations, the Hearing Officer overruled Lifeway's objections and issued a decision that (1) was not supported by substantial evidence, (2) was based instead on mistakes and misunderstandings, (3) relied on the wrong legal standards, (4) confused and misunderstood key

testimony from both parties, and (5) was disorganized, contradictory, and failed to cite to any part of the record.

As a result, Lifeway filed timely Exceptions and a brief in support of them on December 5, 2014. However, the NLRB, without any analysis and based on factual errors in its own decision, simply adopted the decision of the Hearing Officer and improperly issued the Certificate of Representative for Case No. 13-RC-113284 on or about June 10, 2015.⁴

The Board should deny the General Counsel's Exception and affirm the ALJ's decision.

Respectfully submitted on March 1, 2016.

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⁴ Lifeway is testing the validity of the Certification in a pending unfair labor practice proceeding, 13-CA-156570.

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the Charged Party, LIFEWAY FOODS, INC., states that a true and correct copy of the foregoing was electronically filed with the Board and served upon the following persons on Tuesday, March 1, 2016 via the method and at the addresses indicated below:

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