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June 30, 2016

VIA E-FILING

Gary W. Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: Oberthur Technologies of America
Cases 04-CA-128098; 04-CA-132055; 04-
CA-134781; and 04-CA-158860

Dear Mr. Shinnars:

Attached please find Counsel for the General Counsel's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter. A copy of this document has been served on the persons below by e-mail.

Very truly yours,

DAVID G. RODRIGUEZ
Counsel for the General Counsel

Enclosures:

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

OBERTHUR TECHNOLOGIES OF
AMERICA CORPORATION

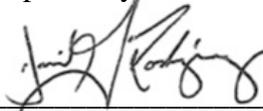
and

Cases 04-CA-128098
04-CA-132055
04-CA-134781 and
04-CA-158860

LOCAL 14M, DISTRICT COUNCIL 9,
GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

**BRIEF BY COUNSEL FOR THE GENERAL COUNSEL IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,



Dated: June 30, 2016

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I. PROCEDURAL HISTORY

The charge in Case 04-CA-128098 was filed by Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters, herein called the Union, on May 6, 2014 (GC-1(a)).¹ The charge in Case 04-CA-132055 was filed on July 2 (GC-1(c)). The charge in Case 04-CA-134781 was filed on August 15 (GC-1(e)). The charge in Case 04-CA-158860 was filed on August 26, 2015 (GC- 1(g)). The amended charge in Case 04-CA-158860 was filed on October 20, 2015.

On October 27, 2015, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 04- CA-128098; 04-CA-132055; 04-CA-134781; and 04-CA-158860, herein called the Complaint, alleging that Oberthur Technologies of America Corporation, herein called Respondent, has been engaging in conduct in violation of Section 8(a)(1) and (5) of the Act (GC-1(k)). Specifically, the Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by: (i) imposing discretionary discharges on Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum without notice to the Union or an opportunity to bargain; and (ii) delaying from March 13 to July 17 in furnishing relevant and necessary information requested by the Union.

In its Answer to the Complaint, Respondent denied the agency status of Vice President of Manufacturing Jean Francois Durand; denied the Union's status at the exclusive bargaining representative of the employees in the bargaining unit; and admitted that the discharges at issue were discretionary, but denied any obligation to give notice to, or bargain with, the Union over the discharges (GC-1(m)). The Answer also contended that the Union's certification was legally

¹ GC- (followed by a number) refers to General Counsel's exhibits and R- (followed by a number) refers to Respondent's exhibits. Numbers in parenthesis refer to pages in the official transcript. All dates are in 2014, unless otherwise indicated.

incorrect and therefore nonbinding; and that Section 10(c) of the Act prohibited a reinstatement remedy for Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum, as they were discharged for cause (GC-1(m)). On March 21, 2015, Respondent filed a First Amended Answer to rescind its admission that the discharges at issue were discretionary (GC-1(p)). On April 1, 2015, Respondent filed a Second Amended Answer that raised the affirmative defense that Regional Director Dennis Walsh did not have legal authority to issue the Complaint because he was nominated by an Acting General Counsel who served in violation of the Federal Vacancies Reform Act of 1998, 5 USC §§ 3345 et seq. (GC-1(r)).

A hearing on the allegations in the Complaint was held before Administrative Law Judge Arthur Amchan in Philadelphia, Pennsylvania on April 13, 2015. Administrative Law Judge Amchan issued his decision in this matter on June 16, 2016. This brief is filed in support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision.

II. FACTS

Background

On September 7, 2012, a representation election in a production and maintenance unit of employees, herein called the Unit, was held pursuant to a Stipulated Election Agreement (GC-2). *Oberthur Technologies of America Corp.*, 362 NLRB No. 198, slip op. at 7 (2015). Out of the 229 eligible voters, 108 voted in favor of representation by the Union, 106 voted against representation, and three voters cast challenged ballots. *Id.* In, November 2012, a hearing was held before Administrative Law Judge Raymond P. Green, herein called ALJ Green, over the determinative challenged ballots, objections to the representation election, and unfair labor practice allegations pursuant to a Complaint in Case 04-CA-086325. *Id.* at 7 and 8.

On February 20, 2013, ALJ Green, in relevant part, issued a Decision sustaining two of the challenges and overruling the third. 362 NLRB No. 198. ALJ Green then severed the unfair labor practice charge from the representation case and remanded the representation case to Region 4 for further processing. Id at 13. However, Respondent filed exceptions to ALJ Green's decision.

On March 11, 2013, following ALJ Green's decision, Union Vice President John Potts sent Respondent a letter requesting bargaining for a collective bargaining agreement (GC-2(a)). In the letter, Potts acknowledged the possibility that Respondent could file exceptions and stated:

Should the Company file exceptions to the AL[J]'s decision, it is the position of the Union that any unilateral changes by the Company pertaining to terms and conditions of employment or with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available it for the violation of law.

(GC-2(a)). On March 15, 2013, Respondent's General Counsel Timothy Feely responded to Potts by indicating that Respondent had no obligation to bargain until the Board resolved its appeal of ALJ Green's decision (GC-2(b)).

On August 27, 2015, the Board affirmed ALJ Green's decision and issued a Certification of Representative. However, Respondent continued to steadfastly refuse to bargain with the Union. On September 1, 2015, Potts sent Respondent another letter demanding bargaining (GC-3). On September 22, 2015, Respondent sent Potts a letter refusing to bargain and indicating its intent to challenge the Board's Certification (GC-4). In fact, Respondent has refused to acknowledge any duty to bargain with the Union since the September 7, 2012 representation election (23).

Employee Handbook

Since the time Union won the September 7, 2012, representation election, Respondent has maintained an employee handbook with the following relevant disciplinary provisions:

RULES OF CONDUCT

All employees are expected to conduct themselves in a professional, business-like manner. *Disregarding or failing to conform to these standards shall result in disciplinary action, as the Company may determine, ranging from counseling to dismissal.* This disciplinary policy creates no contractual rights for continued employment and does not modify the Company's policy of at-will employment. Because this policy is intended only as a guideline, examples of conduct that will result in disciplinary action and/or dismissal include, but are not limited to, the following:

...

20. Disorderly conduct, fighting or provoking a fight, horseplay, or engaging in acts of violence or threatening behavior, at Company or customer facilities or work location, or interfering with others in the performance of their jobs.

21. Threatening, intimidating, coercing, or interfering with anyone during working hours, at any work or work-related locations, while on Company or customer premises or business, or while in Company uniform.

...

29. Rude unprofessional or discourteous conduct or attitude toward Company personnel, clients, and visitors.

30. Failing to have or maintain satisfactory inter-personal relationships with Company personnel, client personnel, and visitors.

31. Any action that results in, or could result in, property damage or personal injury.

32. Any action that endangers the health or safety of others, including violating a safety rule or practice.

...

It is impossible to define rules for every conceivable situation that might arise. Activities that are not expressly covered in these rules will be handled on a case-

by-case basis. All employees are expected to act with good common sense and in a totally professional manner. *The Company reserves its right to demote, transfer, suspend, terminate or otherwise discipline any employee without prior warning should the Company, in its sole discretion, believe such action is warranted or appropriate.* The foregoing is not intended to and does not in any manner alter the at-will relationship between the Company and its employees.

VIOLENCE IN THE WORKPLACE

As part of its continuing efforts to maintain a professional and positive working environment, the Company has adopted a policy prohibiting workplace violence. Consistent with this policy, acts, attempts or threats of physical violence, including intimidation, harassment, and/or coercion that involve or affect the Company, and/or its employees, contractors, clients, and visitors, and/or that occur on Company property, will not be tolerated. *Any violation of this policy will result in disciplinary action, as the Company may determine in its sole discretion, ranging from verbal counseling to immediate dismissal.*

...

(GC-12) (emphasis added). The Rules of Conduct policy lists 56 specific violations, while the Violence in the Workplace policy lists eight specific instances that constitute threats, attempts, and acts of violence (GC-12). The Handbook also contains an Unlawful Harassment Policy that prohibits unlawful harassment and indicates that violations of the policy “will result in disciplinary action up to and including termination of employment” (GC-12).

Albert Anderson

On February 4, Respondent discharged Unit employee Albert Anderson without notice to the Union or an opportunity to bargain (27). The Union learned of Anderson’s discharge from the employee himself, and was never advised of the discharge by Respondent (27). On March 13, Potts sent a letter to Respondent’s Counsel, Kevin McCormick, requesting information concerning Anderson and another Unit employee’s discharges (GC-5). On March 18, McCormick sent a letter to Potts indicating Respondent’s intent to furnish the requested information the following week (GC-6).

However, Respondent did not furnish the requested information until July 17 (29; GC-7). That day, McCormick sent a letter to Potts indicating that Anderson was discharged for “using a forklift to lift another employee at least fifteen feet in the air to conduct a year-end inventory” (GC-7). According to McCormick, Anderson’s misconduct violated rules 31 and 32 of the Employee Handbook (GC-7; GC-12). Moreover, according to McCormick, Anderson’s misconduct was particularly egregious because it was judged have been intentional (GC-7). Respondent did not offer the Union any explanation for why it did not furnish the requested information until 17 weeks after it was initially requested (30).

According to Human Resources Director Kurt Johnson, in late January, it came to the attention of Respondent’s human resources department that employees Albert Anderson and Emery Flowers had engaged in unsafe acts using a forklift (51). As part of Respondent’s routine investigation to such reports, Johnson spoke with Anderson and Flowers and reviewed surveillance footage of the incident (51-52). According to Johnson’s written investigatory report, on January 30, he, Supervisor Dennis Kane, and Human Resources Manager Christine Troutner met with Anderson and Flowers to discuss the investigation into their misconduct (GC-13). During the meeting, Johnson informed Anderson and Flowers that their safety violation was serious and the told him and Anderson that the investigation was on-going and that the nature of the discipline had yet “to be determined” (GC-13).

Following the meeting, as per the usual course of investigations into reports of employee misconduct, Johnson met with other management officials to decide how to respond to Anderson and Flowers’ misconduct (91). Among the management officials in attendance during this meeting was Training and Development Manager Nancy Kelly (106).

Not all safety violations or violations of Rule 32 result in discharge (86; 110). Depending on the nature of the safety violation, Respondent may order an employee to undergo retraining, counseling, or coaching in lieu of more severe disciplinary action (110). However, during their meeting, Johnson and Kelly decided to discharge Anderson and Flowers due to the egregiousness of their safety violation (94-95; 109).

Dan Clay and Harvey Werstler

On July 14, Respondent discharged Unit employees Dan Clay and Harvey Werstler without notice to the Union or an opportunity to bargain (31). The Union learned of their discharges from Werstler, and was never advised of the discharges by Respondent (31). On July 24, Potts sent a letter to McCormick requesting information concerning Clay and Werstler's discharges (GC-8). On August 11, McCormick sent a letter to Potts explaining the reasons for Respondent's decision to discharge Clay and Werstler (GC-9).

McCormick explained that on July 6, Clay and Werstler engaged in a verbal altercation that escalated to both employees shoving each other several times (GC-9). McCormick explained that Clay and Werstler were discharged for violating Rules 20; 21; 29; 31; 32; and the Violence in the Workplace Policy (GC-9). During his testimony, Johnson stated that Respondent has a "zero tolerance" policy for violence in the workplace (82). However, Respondent's Violence in the Workplace policy notes only that violations of the policy "will result in disciplinary action, as the Company may determine in its sole discretion, ranging from verbal counseling to immediate dismissal" (GC-12). In addition, although Johnson testified that all employees that had ever violated Rules 20 and 21 had been discharged, he also testified that Respondent had not discharged all employees that ever violated Rules 29 and 32.

Lawrence Bennethum

On July 22 or 27, 2015, Respondent discharged Unit employee Lawrence Bennethum without notice to the Union or an opportunity to bargain (34; GC-10; GC-11). The Union learned of his discharge from Bennethum himself, and was never advised of the discharge by Respondent (31).

On October 2, 2015, McCormick submitted a position statement to the National Labor Relations Board regarding Respondent's reasons for discharging Bennethum (GC-11). McCormick explained that Bennethum was discharged for making a racially inappropriate comment (GC-11). According to Respondent, Bennethum's conduct violated Rules 20, 21, 29, the Equal Employment Opportunity Clause, and the Harassment Policy (GC-11). McCormick added that other employees had been "disciplined and/or discharged" for "similar types of inappropriate behavior" (GC-11). Johnson's testimony generally corroborated the information in McCormick's position statement. Johnson also testified that he felt that he had no discretion in discharging Bennethum due to the egregiousness of his conduct (83).

However, Respondent has not discharged all employees that ever made racially or sexually inappropriate statements to other employees. Respondent imposed a three-day suspension on Jeremy Hubsher for asking another employee whether he was the "head nigger in charge" (87). Respondent also did not discharge another employee, Barry Toltzis, who was found to have directed sexually suggestive comments to a female employee and was disciplined with a final warning (87-88). During redirect, Johnson downplayed the seriousness of Toltzis infraction, testifying that he "was singing romantically to a female employee on the floor, in addition to being somewhat suggestive in comments" (88). In regard to Hubsher, Johnson testified that Human Resources Manager Lisa Petit had conducted the investigation into

Hubsher's misconduct and that Johnson had disagreed with her decision to impose a three-day suspension (96).

III. ARGUMENT

A. The Administrative Law Judge erred by declining to find that Respondent violated Section 8(a)(1) and (5) of the Act by imposing discretionary discharges on Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum without notice to the Union or an opportunity.

Unilateral change in terms and conditions of employment

It is well settled that an employer violates Section 8(a)(1) and (5) of the Act by unilaterally implementing employee terms and conditions of employment without first providing its collective bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962). *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). Furthermore, an employer is forbidden from refusing to bargain over mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U.S. 203 (1964). In that regard, the Board has held that termination of employment is a mandatory subject of bargaining. *N.K. Parker Transportation Inc.*, 332 NLRB 547, 551 (2000).

The Board has held, across a range of terms and conditions of employment, that once an exclusive bargaining agent is selected, the employer may implement changes pursuant to past practices, but must bargain over any discretionary aspects of those changes. See, e.g., *Washoe Medical Center., Inc.*, 337 NLRB 202, 202 (2001) (although employer had a practice of placing new employees into wage range quartiles, employer's substantial degree of discretion exercised in deciding which range to place employees in required bargaining with the union prior to implementation); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (employer's recurring

unilateral reduction in employees' hours of work required bargaining because there was no reasonable certainty as to the timing and certainty of a reduction in hours); *Adair Standish Corp.*, 292 NLRB 890 n.1 (1989) (employer required to bargain over economic layoffs because layoff decision was not based on seniority but rather the employer's assessment of the employees' ability); *Oneita Knitting Mills*, 205 NLRB 500, 500 (1973) (while employer was obligated to maintain its merit increase program, employer was required to bargain the timing and amount of such increases).

While the Board's requirement that employers bargain the discretionary aspects of their changes once employees select a bargaining representative is nothing new, in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the Board further defined to what extent an employer must bargain about certain types of discretionary disciplinary action once a bargaining representative is selected. Specifically, the Board held that during the period after a union is recognized, in the absence of a first contract or interim grievance procedure, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion or discharge. *Id.* at 1-2, 8-10.

The decision in *Alan Ritchey* was issued by a Board, which was subsequently found in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) to have been unlawfully comprised. While some Administrative Law Judges have declined to apply the holding in *Alan Ritchey*, others have been guided by the decision and have found violations based on the fact that the decision is consistent with well settled principles of Board law. See e.g. *Fairfield Toyota*, 2014 WL 2507632 (June 3, 2014).

Consistent with the Board's prior discretionary unilateral change precedent cited above,

the *Alan Ritchey* decision found that the pre-imposition duty to bargain attaches only to “the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees’ tenure, status or earnings including suspension, demotion and discharge.” 359 at slip op. 8.

Similar to the Board’s definition of discretion found in changes to other terms and conditions such as wage increases, discretion is exercised when an employer’s disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but the employer determines what type of discipline will be issued based on the particular circumstances. *Id.* at 6. In addition, the employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy. *Id.* at 11.

When the duty is triggered, the employer’s obligation is to simply provide the union with sufficient advance notice to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline and the extent to which the decision involves an exercise of discretion. *Id.* at 11. After providing notice and opportunity to bargain, the employer need not bargain to agreement or impasse before it implements its decision, so long as it bargains to impasse or agreement after it implements. *Id.*

Finally, in exigent circumstances, such as where the employer has a reasonable belief the employee’s continued presence on the job poses a serious, imminent danger to the employer’s business or personnel, the employer can immediately suspend the employee, provided that it promptly provides the union with notice and an opportunity to bargain over the decision and its effects. *Id.* at 10-11.

While the Board’s decision in *Alan Ritchey* is no longer considered binding precedent, its

application of long standing Board precedent has continued vitality. In the instant case, the evidence clearly establishes that, with respect to the terminations of Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum, Respondent failed to provide the Union with any notice whatsoever (27; 31; 34). There would also seem to be no question that the discipline that was imposed was the result of the exercise of discretion. The discretion involved is codified in the policies set forth in Respondent's employee handbook (GC-12). Moreover, an examination of Respondent's decision making process in each case established that Respondent exercised discretion and judgment before deciding whether and to what extent each employee should be disciplined.

The level of discretion necessary before a duty to bargain attaches has been much debated, but never fully articulated by the Board. In *NLRB v. Katz*, the Supreme Court found that an employer had a duty to bargain with the union over merit wage increases where which were "in no sense automatic, but were informed by a large measure of discretion." 369 U.S. at 746. However, an employer does not have a duty to bargain prior to the imposition of discipline if it continues to issue discipline within the parameters of a preexisting disciplinary system that relies upon objective standards and criteria circumscribing its discretion. *Fresno Bee*, 337 NLRB at 1186-87; *Alan Ritchey*, 354 NLRB No. 79, slip op. at 4.

The Administrative Law Judge correctly found that the discharges at issue in this case were discretionary. Here, the language in Respondent's employee handbook is clear that the Respondent reserves the right to determine "in its sole discretion" the level of discipline warranted by any violation of any rule. Therefore, the nature and severity of discipline imposed on employees is determined solely by the management officials investigating a particular employee's misconduct. There is nothing in Respondent's disciplinary policies that

circumscribes its discretion in any way.

Anderson's discharge was discretionary

Respondent discharged Anderson for violating safety rules (GC-7; 94-95; 109). Training and Development Manager Kelly and Human Resources Manager Johnson admitted that not all safety violations result in discharge (86; 110). Although Johnson had clear video evidence that Anderson committed a safety violation, to which he later confessed, Johnson did not immediately proceed to discharge Anderson. Instead, Johnson warned Anderson that he would impose disciplinary action, but had not yet determined the nature of the action to be taken (GC-13). Johnson and Kelly later met to determine how to respond to Anderson's misconduct (91). They decided that due to the "seriousness," "egregiousness," and "intentional" nature of his rule violations, his misconduct warranted discharge (GC-7; 94-95; 109). This is precisely the type of unfettered discretionary action that employers have long been prohibited from taking without bargaining with its employees' collective bargaining representative. There was nothing "automatic" about the nature of Respondent's response to Anderson's misconduct. Instead, his discharge was the result of a deliberative process guided by management's subjective assessments as to the seriousness of Anderson's safety violation.

Clay and Werstler's discharges were discretionary

Clay and Werstler were discharged for engaging in a physical confrontation (GC-9). Johnson testified about Respondent's "zero tolerance" policy toward violence in the workplace (82). However, Respondent's zero tolerance policy is nowhere to be found in the employee handbook (GC-12). In fact, Respondent's "Violence in the Workplace" policy reserves it unfettered discretion in deciding how to respond to these types of violations, which are serious by their very nature (GC-12). Respondent cannot have it both ways. It established a policy that

allowed its managers flexibility in deciding how to respond to violent behavior by its employees, yet now asks the Board to ignore the very policy it put into writing. This is not a case where Respondent could not anticipate each and every single type of hypothetical misconduct and what discipline could result from it. This is a case where Respondent clearly anticipated the possibility of violence in the workplace and decided to give its managers full discretion in deciding how to discipline employees charged with such violations. Respondent's discharge of Clay and Werstler was discretionary because Respondent's employment policies explicitly preserve its right to decide how to respond to acts of violence in the workplace.

Bennethum's discharge was discretionary

Respondent discharged Bennethum for making a racially inappropriate comment (GC-11). During his testimony, Johnson also professed a "zero tolerance" for racial slurs in the workplace (84). However, once again, this zero tolerance policy is nowhere to be found in Respondent employee handbook (GC-12). In fact, Respondent's handbook allows managers full discretion in responding to violations of its rules and Harassment Policy (GC-12).

Although Johnson professed to feeling as if he had no choice but to discharge Bennethum, that is plainly incredible. Respondent suspended employee Jeremy Hubsher for three days for making a racially inappropriate comment (87). During re-direct, Johnson clarified that Hubsher's misconduct had been investigated by another human resources official and that Johnson had disagreed with the disciplinary response to Hubsher's misconduct (96). This testimony only serves to confirm the discretionary nature of Respondent's disciplinary policies. When an employer's disciplinary response to comparable rules violations can vary depending on the subjective judgment of the manager tasked with enforcing workplace rules, the policies are, by definition, discretionary.

In the end, these are the very types of instances where the Board has consistently decided that an employer has a duty to bargain with its employees' exclusive bargaining representative. There was nothing "automatic" about the discharges of Anderson, Clay, Werstler, and Bennethum. On the contrary, Johnson very clearly had full authority to determine the appropriate level of discipline in each case, and he used that authority to discharge the employees for what he judged to be serious infractions.

Respondent took these actions without any notice to the Union and without affording it a meaningful opportunity to bargain. As Respondent failed to satisfy its obligation to bargain with respect to each act of discipline that was imposed, it should be found to have violated Section 8(a)(1) and (5) of the Act. The Administrative Law Judge erred in refusing to treat discretionary discipline as any other type of unilateral change in terms and conditions of employment.

B. The Administrative Law Judge erred by finding that Section 10(c) of the Act prohibits the award of backpay and reinstatement to employees discharged in violation of Section 8(a)(5) of the Act.

In *Alan Ritchey*, the Board decision applied prospectively, and as a result, the Board did not define the remedy for *Alan Ritchey* terminations. 359 NLRB No. 40 (2012). However, the Board clearly held an employer's failure to provide advance notice and opportunity to bargain over discretionary disciplines with an immediate impact on employees' tenure, status and earnings is an unlawful unilateral change in violation of Section 8(a)(5) of the Act. *Id.* In unilateral change cases, the Board orders the restoration of the status quo ante, including reinstating and making whole discharged employees. See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216-217 (1964). Such a remedy is appropriate here.

Restoring the status quo ante is necessary for three reasons: 1) to make the employees whole for any losses suffered because of the employer's unlawful unilateral change. See, e.g., *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 2-3 (2011); 2) to prevent the employer from reaping benefit from its unfair labor practices. *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953, 963 (1958); and 3) to ameliorate the negative impact on employees' confidence in the union as a bargaining representative caused by the unfair labor practice. *Die Supply Corp.*, 160 NLRB 1326, 1344 (1966).

These reasons readily apply to the present case. First, failing to give the Union notice and opportunity to bargain permitted Respondent to unilaterally impose discipline, which in turn directly harmed employees. The employees should be made whole by reinstatement and backpay to compensate them for their losses caused by Respondent's violation of the Act. Second, without the make-whole remedies, Respondent will reap the "fruits of its violations." *Beacon Piece Dyeing*, supra at 963. It will have unlawfully changed significant terms and conditions of employment, while excluding the Union from bargaining, thereby weakening the Union's ability to effectively represent employees. Moreover, Respondent would reap the economic benefit of not having to pay backpay and reinstate the employees it unlawfully discharged. Lastly, as the Board stated in *Alan Ritchey*, to "permit employers to exercise unilateral discretion over discipline after employees select a representative. . . would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual and would render the union... impotent." 359 NLRB No. 40, slip op. at 14. Respondent must restore the status quo ante in order to dispel the negative impact on employees' confidence in their elected representative.

Section 10(c) of the Act does not preclude a make-whole remedy in this case.² In *Uniserv*, the Board ordered reinstatement and a make-whole remedy for employees discharged under a new, unilaterally-implemented drug testing policy. 351 NLRB 1361, 1361 n.1, 1362 (2007). There, the Board made clear that because the new policy was an unlawful unilateral change, and that change constituted "cause" for discipline, the employer had to reinstate and pay backpay unless it could show that the employees would have been discharged under the preexisting policy. *Id.* In cases, like here, where Respondent administers a wholly discretionary discipline system, there is no established "cause" standard for termination. Respondent essentially creates a new standard each time it makes a disciplinary decision. Thus, Respondent cannot show that the employees in this case would have been discharged under a pre-existing policy. Finally, to not enforce a make-whole remedy would render Respondent's duty to bargain over changes in the terms and conditions of employment toothless—there would be no incentive to abide by the obligations set forth in the Act if the only sanction were an eventual order to bargain long after the employer had unlawfully terminated the employee.

The Administrative Law Judge, relying partly on the Board's decision in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), found that the Union was not entitled to a make-whole remedy because Anderson, Clay, Werstler, and Bennethum were not discharged for conduct protected by the Act. ALJD p. 9. However, in *Anheuser-Busch*, there was no dispute over whether the employees involved would have been disciplined for the conduct in which they engaged. 351 at 651. The *Anheuser-Busch* decision did not turn on a dispute over the level of

² Section 10(c) states in relevant part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." 29 USC § 160(c).

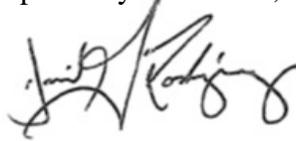
discipline issued to employer, but merely over whether the unlawful method it used to discover the misconduct warranted a make whole remedy.

The Board's decision in *Uniserv* is particularly instructive on the significance of this distinction. In *Uniserv*, the Board noted that it was unclear whether the discharged employees would have been terminated under the employer's previous discretionary drug testing policy. 351 at 1361, fn 1. Therefore, due to this uncertainty, the Board ordered reinstatement and backpay for the unilaterally discharged employees. *Id.* Here, because the discharges were discretionary in nature, it is entirely unclear whether Anderson, Clay, Werstler, and Bennethum would have been discharged had the Employer honored its duty to bargain with the Union. This uncertainty, absent in *Aheuser-Busch*, warrants a make-whole remedy. For these reasons, the Administrative Law Judge erred in finding that Section 10(c) of the Act bars backpay, reinstatement, and reimbursement for search-for-work expenses in order to remedy the unlawful discharges of Anderson, Clay, Werstler, and Bennethum.

IV. Conclusion

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to: (1) find that the Administrative Law Judge erred in failing to find that Responder violated Section 8(a)(1) and (5) by failing to give the Union notice and an opportunity to bargain prior to imposing discretionary discharges on Anderson, Clay, Werstler, and Bennethum.; and (2) find that the Administrative Law Judge erred in failing to order Respondent to reinstate and award backpay and search for work expenses to Anderson, Clay, Werstler, and Bennethum.

Respectfully Submitted,



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