

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. d/b/a U.S.)	
FIBERS,)	
)	
and)	Cases 10-CA-121231
)	10-CA-128904
UNITED STEEL, PAPER AND)	10-CA-132482
FORESTRY, RUBBER,)	10-CA-145740
MANUFACTURING, ENERGY, ALLIED-)	10-CA-160256
INDUSTRIAL AND SERVICE WORKERS)	
INTERNATIONAL UNION, LOCAL 7898)	
_____)	

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

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ATTORNEYS FOR RESPONDENT

July 5, 2016

I. OVERVIEW

Respondent Pac Tell Group, Inc. d/b/a U.S. Fibers (Respondent or U.S. Fibers) submits this Response to the Board's June 20, 2016 Order Transferring Proceeding to the Board and Notice to Show Cause (Notice to Show Cause). The Notice to Show Cause arises out of the General Counsel's May 6, 2016 Motion for Summary Judgment and the Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers Union, Local 7898's (the Union or the Charging Party) May 25, 2016 Motion for Summary Judgment (collectively Summary Judgment Motions).¹

Consistent with its answer to the complaint and a stipulation it entered into with the Union and the Regional Director for Region 10 in April 2015, Respondent challenges only the General Counsel's request for make-whole remedies in these cases. Specifically, the General Counsel is not entitled to an award of reinstatement and backpay for Rudy Perez, Jose Lal, David Martinez, Roberto Sanchez, Ventura Perez, Emilio Garcia, or Gabriel Lopez, because they were suspended and/or discharged "for cause" under Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c).²

II. STATEMENT OF FACTS

Respondent lost an election to the Union in May 2013. Respondent subsequently refused to bargain while it challenged the results of the election to the Fourth Circuit Court of Appeals through the Board's test-certification procedure.³ The Fourth Circuit denied Respondent's appeal on December 23, 2015. See *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85 (4th Cir. 2015).

¹ The Summary Judgment Motions generally present the same arguments.

² In relevant part, Sec. 10(c) reads: "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."

³ Respondent's principal argument on appeal was that the election was tainted by the pro-union conduct of four individuals whom Respondent classified and reasonably believed were supervisors as defined by Sec. 2(11) of the Act. Three of those individuals—Lal, Martinez, and Sanchez—are the subject of the instant charges.

Between the date of the election and the date of the Fourth Circuit's decision, Respondent suspended and discharged R. Perez, and discharged Lal, Martinez, Sanchez, V. Perez, Garcia, and Lopez, for various legitimate, non-discriminatory reasons, but without providing the Union notice or an opportunity to bargain about the decisions.⁴ The Union filed the underlying unfair labor practice charges claiming that Respondent's actions violated Section 8(a)(5) of the Act.⁵

On March 26, 2016, the General Counsel issued a complaint on the Section 8(a)(5) charges seeking a make-whole remedy in the form of reinstatement and backpay for each suspended/discharged employee. Respondent admitted in its answer that it violated Section 8(a)(5) by failing to provide the Union notice and an opportunity to bargain about the suspension and discharge decisions. However, Respondent explicitly denied that the General Counsel was entitled to make-whole remedies, because the individuals were all suspended and/or discharged "for cause" under Section 10(c).

Respondent's answer was consistent with the stipulation it entered into with the Union and the Regional Director for Region 10 in April 2015. See GC Mot. Exhs. A & B.⁶ In relevant respects, the Regional Director agreed through the stipulation to hold litigation of the instant cases in abeyance pending the outcome of the Fourth Circuit appeal. Respondent agreed that, if the

⁴ Respondent also issued a written warning to Lopez without providing the Union notice or an opportunity to bargain; however, as discussed in the General Counsel's Motion for Summary Judgment, reinstatement and backpay are not appropriate remedies for that alleged violation. See General Counsel's Motion for Summary Judgment (GC Mot.) p. 2 fn. 2. Consequently, Lopez's warning is not at issue here.

⁵ In the original charges, the Union also claimed that Respondent's actions violated Sec. 8(a)(3) and/or (4). Following the Region's investigation of each charge, however, those allegations were either dismissed or withdrawn. Thus, there is no dispute that the adverse employment actions were not discriminatory or retaliatory.

⁶ Case 10-CA-160256 involving R. Perez's suspension and discharge was not covered by the April 2015 stipulation because those decisions were not made until September 2015. By the time the Region investigated the charge and authorized complaint, the Fourth Circuit had ruled on the test-certification case. Consequently, Respondent admitted in its answer to violating Sec. 8(a)(5) with respect to R. Perez's suspension and discharge. But, as with the other individuals, Respondent denied that R. Perez was entitled to a make-whole remedy.

Fourth Circuit denied its petition, it would admit to the Section 8(a)(5) violations, but would deny that make-whole remedies were appropriate remedies within the meaning of Section 10(c).

The primary purpose of the stipulation was to avoid potentially unnecessary litigation of the Section 8(a)(5) charges while the Fourth Circuit effectively decided whether Respondent had a general obligation to recognize and bargain with the Union as the exclusive representative of its employees. The parties agreed to preserve the issue of the appropriateness of the remedy for this proceeding.

III. ARGUMENT

The General Counsel and the Charging Party generally argue that, by admitting that it failed to provide the Union notice and an opportunity to bargain over the suspension and discharge decisions, Respondent did not act “for cause” under Section 10(c) as a matter of law. The General Counsel’s and the Charging Party’s argument is squarely foreclosed by the plain language of Section 10(c) and established Board precedent.

A. Section 10(c) Precludes the Board from Automatically Awarding Make-Whole Remedies for Independent *Alan Ritchey* Violations

Contrary to the General Counsel’s and the Charging Party’s suggestion, the mere fact that Respondent may have violated Section 8(a)(5) under the reasoning applied by the Board in *Alan Ritchey*, 359 NLRB No. 40, slip op. (2012), does not mean that a make-whole remedy is *required*.⁷ To hold otherwise would disregard the plain language of Section 10(c), which precludes the Board from reinstating or ordering backpay to anyone who was suspended or discharged “for cause.”

The Board has explained that “cause” under Section 10(c) “effectively means the absence of a prohibited reason.” *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007) (quoting *Taracorp*

⁷ It should be noted that *Alan Ritchey* was invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, for purposes of the instant case, the validity of *Alan Ritchey* is not at issue.

Industries, 273 NLRB 221 (1984)). In both *Taracorp* and *Anheuser-Busch*, the Board declined to order a make-whole remedy, noting that the employees had engaged in misconduct that had no nexus to the separate unfair labor practice committed by the employer in its refusal to bargain with the union. In *Taracorp*, the Board explained, “[A]n employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and backpay even though the employee’s Section 7 rights may have been violated by the employer in a context unrelated to the discharge or discipline.” *Taracorp*, above at 222.

Here, as in *Taracorp* and *Anheuser-Busch*, Respondent suspended and discharged R. Perez, and discharged Lal, Martinez, Sanchez, V. Perez, Garcia, and Lopez, for reasons that undisputedly were not prohibited by the Act. Respondent’s only violation, contemplated by the April 2015 stipulation, was its failure to provide the Union notice or an opportunity to bargain before making the decisions. Unlike other cases involving *Alan Ritchey* violations, there are no allegations that Respondent suspended/discharged the individuals because of their union or other protected activity. Again, as noted *supra* fn. 5, the Union’s allegations of discrimination and retaliation were dismissed or withdrawn following the Region’s investigation of its charges.

Accordingly, Respondent’s failure to provide the Union notice or an opportunity to bargain about the decisions did not *cause* the decisions to be made—the employees’ unprotected misconduct did. Consequently, Section 10(c) precludes the Board from awarding make-whole remedies. See *Redway Carriers*, 274 NLRB 1359, 1359 fn. 4 (1985) (relying on *Taracorp* and finding that, although the employer violated Section 8(a)(5) by discharging employees without affording them pretermination hearings as required by the collective-bargaining agreement, it was “inappropriate to order make-whole relief where the employees’ discharges were not in themselves

unlawful, but the violations occurred solely in the procedures by which the discharges were carried out”).

B. *Taracorp* and *Anheuser-Busch* Are Not Distinguishable from This Case

The General Counsel and the Charging Party unconvincingly try to distinguish *Taracorp* and *Anheuser-Busch* by arguing that, in those cases, the discipline itself was not an unfair labor practice; rather, the employer’s unilateral imposition of rules or policies that resulted in the discipline were the violations. See GC Mot. p. 18; Charging Party’s Motion for Summary Judgment (CP Mot.) p. 5. This is a distinction without difference.

In *Taracorp*, *Anheuser-Busch*, and this case, employees were suspended/discharged because they engaged in misconduct unrelated to their union or other protected concerted activity. It is irrelevant that the discipline followed a unilaterally implemented rule in *Taracorp* and *Anheuser-Busch*. What is relevant is that the employees’ misconduct, and *not* their employers’ refusal to bargain, is what caused their discharge.

The General Counsel’s and the Charging Party’s attempt to distinguish *Taracorp* and *Anheuser-Busch* is further undermined by several recent cases in which administrative law judges have denied reinstatement and backpay remedies for *Alan Ritchey* violations even though the discretionary discharge decisions were not made on the basis of a unilaterally implemented work rule.

In *Western Cab Company*, JD(SF)-33-15 (Sept. 2, 2015), for example, Administrative Law Judge Ariel L. Sotolongo rejected identical arguments by the General Counsel that make-whole remedies were appropriate for an *Alan Ritchey* violation.⁸ Judge Sotolongo explained, “The ‘cause’ or ‘reason’ for the employees’ discharge or suspension in this case was their *conduct*, none of

⁸ *Western Cab* also involved the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers Union.

which was protected by the Act.” Id. at 12 (emphasis in original). He continued, “Conversely, the ‘cause’ or ‘reason’ of their discharge or suspension was *not* Respondent’s unlawful failure to bargain—which was rather the *effect* or result of Respondent’s conduct.” Id. (emphasis in original). To hold otherwise, Judge Sotolongo observed, would “at best, define ‘cause’ in an unnatural, even tortured, manner” and “[a]t worst . . . could be seen as an artifice devised to facilitate an ‘end run’ around the plain meaning of Sec. 10(c).” Id.

Judge Sotolongo similarly rejected the General Counsel’s request for make-whole remedies in *Kitsap Tenant Support Services, Inc.*, JD(SF)-29-15 (July 28, 2015), opining as follows:

[T]he General Counsel . . . appears to advocate for a “strict liability” theory of violations in cases involving failure to engage in pre-imposition bargaining. In other words, if an employer discharges or suspends an employee without first bargaining with the union, for example, the employee must be re-instated and awarded back pay, regardless of how justified the discharge may have been in the first place. This argument appears to run afoul of the language in Sec. 10(c) Thus, a fundamental question exists as to whether the Board has the authority to grant such “strict liability” remedy in these circumstances, particularly since there is no evidence or allegations that these employees were disciplined for engaging in union or protected activity—which is the exclusive domain of the Board.

Id. at 15 fn. 27.⁹

At least one other judge has explicitly rejected the General Counsel’s theory and denied reinstatement and backpay in these circumstances. In *Oberthur Technologies of America Corporation*, JD-53-16 (June 16, 2016), Administrative Law Judge Arthur J. Amchan held as follows:

As a general proposition, an employee who has not engaged in protected activity and is discharged for misconduct is not entitled to a make whole remedy. . . . [E]mployees Anderson, Werstler, Clay and Bennethum were discharged for misconduct unrelated to any protected activity. There is also no evidence that there was any unlawful unilateral change in Respondent’s disciplinary policies that was related to their discharges. Therefore, pursuant to Section 10(c) of the Act, these employees are entitled to neither backpay nor

⁹ The Board adopted Judge Sotolongo’s order in *Kitsap* in the absence of exceptions. See *Kitsap*, Case 19-CA-108144 (2015) (not reported in Board volumes).

reinstatement. The consequences of failing to bargain over these discharges is limited by Section 10(c) to the posting of a notice.

Id. at 9 (footnote omitted).¹⁰

Accordingly, *Taracorp* and *Anheuser-Busch* dictate that a make-whole remedy is not an automatic consequence where an employer violates Section 8(a)(5) by failing to provide the union notice or an opportunity to bargain over a discretionary discipline or discharge decision. To hold otherwise would effectively eviscerate Section 10(c)'s plain language whenever an employee is disciplined or discharged for reasons not otherwise prohibited by the Act (i.e., "for cause").

C. *Anheuser-Busch* Does Not Hold that a Failure to Bargain over a Termination Based on Misconduct Is Not for Cause

The General Counsel and the Charging Party attempt to rescue their argument by relying on the Board's statement in *Anheuser-Busch*, above at 648, that "a termination of employment that is accomplished without bargaining with the representative union is unlawful under Section 8(a)(5) and is not 'for cause.'" GC Mot. p. 18; CP Mot. p. 5. However, as Judge Sotolongo wisely observed in *Western Cab*, above at 11-12, the *Anheuser-Busch* Board was referring to terminations that are a consequence of an employer's unilateral decision to subcontract or otherwise discontinue work, rather than terminations that are a consequence of employees' own misconduct. Judge Sotolongo relied on the Board's use of lay-offs as an example of such a violation to support his construction of the phrase "termination of employment." Id. at 11. Thus, Judge Sotolongo concluded, "it is reasonable to infer that 'termination of employment,' as used by the Board in [*Anheuser-Busch*] is not the same as 'suspended or discharged for cause' as defined by Sec. 10(c)." Id. at 12.

¹⁰ Interestingly, Judge Amchan noted that he issued two decisions in other cases in which he found employees were entitled to a make-whole remedy under similar circumstances; however, he acknowledged that in neither case did the employer raise Section 10(c) as a defense. *Oberthur*, above at 9 fn. 7. Thus, he aptly recognized, "[I]t could be that I was mistaken in ordering a make-whole remedy in those cases." Id.

Further supporting Judge Sotolongo’s construction of the *Anheuser-Busch* Board’s reference to “terminations” is the fact that *Alan Ritchey* had not even been decided at the time *Anheuser-Busch* was decided. In other words, when *Anheuser-Busch* was decided, employers had no obligation to bargain with a newly-certified union before imposing discretionary discipline. Therefore, the *Anheuser-Busch* Board’s reference to “terminations” could not have been referring to unilateral discretionary termination decisions that are a consequence of employees’ misconduct.

D. The Absence of a Make-Whole Remedy Does Not Render *Alan Ritchey* Meaningless

The General Counsel and the Charging Party also argue that in the absence of a make-whole remedy for violations premised on an *Alan Ritchey* theory, the rule in *Alan Ritchey* is “meaningless.” GC Mot. p. 15; CP Mot. pp. 3-4. These fears are misplaced and overstated.

The rule in *Alan Ritchey*, even if it were binding precedent, is not meaningless when an employer’s decision is not “for cause.” If an employer subject to the rule in *Alan Ritchey* fails to provide notice or an opportunity to bargain before suspending or disciplining an employee, the employer cannot defend against a reinstatement and backpay order under Section 10(c) unless the suspension/discharge is “for cause.” If the decision is otherwise prohibited by the Act, it is not “for cause.”

Regardless, the mere unavailability of a “make-whole” remedy does not render *Alan Ritchey* “meaningless.” In fact, many, if not most, unfair labor practices are remedied by posting a notice to employees. If an *Alan Ritchey* Section 8(a)(5) violation is unaccompanied by a Section 8(a)(3) violation, a posting remedy would be perfectly appropriate.

Further, there are many common employment situations involving discipline for cause when employing a “make-whole” remedy for refusal to bargain would produce absurd results. For example, requiring reinstatement and backpay to former employees whose employment was

terminated “on the spot” for criminal behavior, violent acts, sexual assaults, and other causes unconnected with protected rights under the Act would produce results entirely inconsistent with Section 10(c) and the policy of the Act.

Additionally, backpay and reinstatement is *not* the preferred remedy when the sole allegation is the refusal-to-bargain over a particular employment decision. In other refusal-to-bargain situations, the Board has imposed the remedy developed in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), where backpay is awarded from five days after the Board’s decision until such time bargaining has commenced and been satisfactorily completed. Assuming that any remedy other than posting would be appropriate in this situation, the *Transmarine* remedy would be one which the Board has fashioned for situations such as this. It would also avoid violating Section 10(c).

Finally, even if *Alan Ritchey* is meaningless without a make-whole remedy, that is not a license for the Board to disregard Section 10(c).

E. The Board Has Rejected the General Counsel’s and the Charging Party’s Precise Arguments

As a final matter, the Board should deny make-whole remedies in this case for the same reasons it recently denied the General Counsel’s Motion for Summary Judgment on this precise issue in *Security Walls, LLC*, 361 NLRB No. 29, slip op. (2014). In *Security Walls*, the General Counsel issued a complaint alleging that, inter alia, the employer violated Section 8(a)(5) by exercising its discretion to suspend and terminate an employee without providing the union prior notice and an opportunity to bargain about the decisions. *Id.* at 1. The General Counsel sought reinstatement and backpay as a make-whole remedy for the alleged violations. *Id.* Both the General Counsel and the employer moved for summary judgment. *Id.*

The General Counsel argued that “the undisputed facts establish that the Respondent imposed discretionary discipline upon an employee in the bargaining unit, at a time that it had recognized the Union, but before the parties had agreed upon a first contract, in violation of Section 8(a)(5) and (1) under *Alan Ritchey*.” Id. at 1-2. The employer argued that it *had* entered into a contract with the union relieving it of any pre-imposition bargaining obligation under *Alan Ritchey*.¹¹ Id. at 1. Regardless, the employer contended, “because it discharged [the employee] for cause, Section 10(c) of the Act bars the General Counsel’s requested make-whole remedy.” Id. (footnote omitted). In response, the General Counsel argued, as he does here, that “Section 10(c) does not bar an order of reinstatement and backpay because the Respondent’s exercise of discretion in deciding to discharge [the employee] means that his discharge was not relevantly ‘for cause.’” Id. at 2.

The Board found “that the General Counsel’s and the Respondent’s Motions for Summary Judgment have failed to establish the absence of a genuine issue of material fact, or that either party is entitled to judgment as a matter of law” on the allegation that the employer violated Section 8(a)(5) by failing to notify or bargain with the union over the employee’s suspension and discharge. Id. Accordingly, the Board ordered that the proceeding be remanded to the regional director “for the purpose of arranging a hearing before an administrative law judge limited to the [suspension/discharge refusal-to-bargain allegations].” Id. at 3.¹²

The General Counsel and the Charging Party in this case offer many of the same arguments premised on the same theories advanced and rejected by the Board in *Security Walls*. Specifically, in both cases, the General Counsel argued that the *Alan Ritchey* Board “clearly contemplated” a

¹¹ This was the basis for the employer’s summary judgment motion in that case. Respondent in the instant case does not advance a similar theory because it has not entered into a contract with the Union.

¹² A hearing in that case was necessary, in part, to resolve the issue of whether the employer and the union had entered into a contract relieving the employer of a pre-imposition bargaining obligation.

make-whole remedy, and that, without such a remedy, the rule in *Alan Ritchey* would be “meaningless.” See GC Mot. pp. 12, 15; *Security Walls*, Case 13-CA-114946, General Counsel’s Motion for Summary Judgment p. 9 (Exhibit A).

Additionally, in both cases, the General Counsel cited cases such as *Carey Salt Co.*, 358 NLRB No. 124, slip op. (2012), for the proposition that the Board routinely orders reinstatement and backpay where discipline and discharge decisions result from an unlawful unilateral change. See GC Mot. p. 14; Exhibit A p. 9.

Finally, in both cases, the General Counsel argued that the Board’s decision in *Anheuser-Busch* does not bar a make-whole remedy, in light of *Uniserv*, 351 NLRB 1361 (2007). See GC Mot. pp. 16-20; Exhibit A pp. 9-10.

In this case, the General Counsel and the Charging Party argue there is no genuine issue of material fact concerning whether R. Perez, Lal, Martinez, Sanchez, V. Perez, Garcia, and Lopez were suspended and/or discharged “for cause” under Section 10(c), because Respondent’s failure to provide the Union notice and an opportunity to bargain over the discretionary decisions ipso facto means no “cause” existed. As the Board in *Security Walls* aptly recognized, however, the General Counsel’s and the Charging Party’s position does not hold water.

IV. CONCLUSION

The General Counsel is not entitled to an award of reinstatement and backpay for R. Perez, Lal, Martinez, Sanchez, V. Perez, Garcia, or Lopez. The complaint does not allege that their suspension/discharges were because of their union or other protected activity and, as confirmed in *Anheuser-Busch* and *Taracorp*, an employee suspended or discharged for any reason not prohibited by the Act (i.e., for cause) is not entitled to reinstatement and backpay under Section 10(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on July 5, 2016, the foregoing Respondent's Response to Notice to Show Cause in the above-captioned cases has been filed electronically and served on the following via e-mail:

<p>Antonia Domingo United Steel Workers Union 60 Boulevard of the Allies, Room 807 Pittsburgh, PA 15222 adomingo@usw.org</p>	<p>Timothy W. Means National Labor Relations Board Region 10, Subregion 11 Republic Square, Suite 200 4035 University Parkway Winston-Salem, NC 27106 timothy.mearns@nlrb.gov</p>
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s/ Reyburn W. Lominack, III
Reyburn W. Lominack, III, Esquire