

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 12, 2017

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: CalPortland Co.
Case 28-CA-193540

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The Region submitted this case to Advice on the issue of whether, pursuant to the Board's decision in *Total Security Management Illinois 1, LLC*,¹ (1) the Employer's standard notification emails to the Union stating that it would be issuing discipline to employees provided the Union with notice and an opportunity to bargain concerning the discipline or presented the Union with a *fait accompli*; and (2) if the emails did constitute sufficient notice, the Union waived its right to bargain over the discipline by inaction. We conclude initially that the Employer had an obligation to engage in pre-imposition bargaining because its attendance and general disciplinary policies are discretionary as to whether and what type of discipline will be imposed for employee infractions. We also conclude that the Employer's email notices did not announce a *fait accompli* but provided the Union with notice and an opportunity to bargain pre-imposition over the discretionary disciplines, and that the Union waived its right to bargain over the disciplines by inaction.

FACTS

CalPortland Co. ("the Employer") operates a ready-mix cement plant in Phoenix, Arizona ("the 43rd Avenue facility"). On August 22, 2016, Charging Party-Teamsters Local 104 ("the Union") filed a petition for an election seeking to represent a unit of employees at that facility. On September 21, 2016, after winning an election two weeks earlier, the Regional Director issued a Certification of Representation, certifying the Union as the collective-bargaining representative of all the Employer's full-time and regular part-time ready-mix drivers and mechanics at the 43rd Avenue facility. The parties are currently bargaining over the terms of an initial collective-bargaining agreement.

¹ 364 NLRB No. 106 (August 26, 2016).

Between (b) (6), (b) (7)(C), 2016 and (b) (6), (b) (7)(C), 2017, the Employer issued five unpaid suspensions and one discharge. These disciplines were pursuant to either the attendance policy or the general disciplinary policy. The attendance policy provides, in relevant part:

Employees will be disciplined for failure to adhere to the Attendance Policy. The disciplinary process will begin once an employee has accumulated more than two (2) incidences in a six (6) month period. Any additional incident of an unscheduled absence or tardy will trigger the next step in the disciplinary process. Discipline may follow the steps listed below:

- Verbal Warning
- Written Warning
- Suspension — Three (3) Days (Management discretion will be exercised and can be a shorter or longer period of time)
- Termination

Management may make an exception for an unscheduled absence when an employee is able to provide a doctor's note confirming a medical need for the incident. When an employee calls off due to illness, but does not require medical attention, Management will review each incident and determine whether an exception will be made or not. Additionally, employees still in the 90-Day Introductory Period may progress to the final step in the disciplinary process at any time during this period.

Managers, in conjunction with the HR Department, will review and determine if any exceptions to the disciplinary process will be made. Additionally, all recommendations for termination made by a Manager will be reviewed and must be approved by the VP/General Manager and the Human Resources Department.

The Employer's general disciplinary policy states:

It may be necessary to discipline individuals who violate CalPortland's established standards and policies. Such action will be taken in order to correct such behavior and to ensure a clear understanding of the expected standards for the future. Employees will be given various opportunities to correct any unacceptable behavior.

Certain behavior may constitute grounds for verbal or written reprimand, suspension or possibly termination. Violations considered

to be major violations by CalPortland may subject the violator to immediate discharge. The local Management Team will review any major violations and will determine the appropriate discipline, up to and including termination.

Incidents classified as “At Fault” and which could have been prevented (including Safety related incidents) will be handled as follows:

1st incident – One (1) day suspension

2nd incident – Three (3) day suspension

The Management Team reserves the right to use its discretion in applying this Discipline under special and / or unique circumstances. Additionally, employees still in the Introductory Period may progress to the final step in the disciplinary process at any time during the Introductory Period.

On (b) (6), (b) (7)(C) 2016, the Employer’s Director of Human Resources and Industrial Relations sent the Union an email stating that Employee 1 “will be” suspended for attendance violations. The email stated, in relevant part, “I wanted to make you aware of the following discipline notices we will be issuing to employees at 43rd Avenue following progressive discipline. The disciplinary process begins once an employee has accumulated more than two incidents in a six month period. . . If you have any questions, please give me a call.”²

On (b) (6), (b) (7)(C) the Employer issued Employee 1 the suspension, which was served on (b) (6), (b) (7)(C) through (b) (6), (b) (7)(C). On (b) (6), (b) (7)(C) the Employer sent the Union an email stating that Employee 2 will be suspended for attendance violations.³ The Employer issued the suspension to Employee 2 on (b) (6), (b) (7)(C). On (b) (6), (b) (7)(C) the Employer sent the Union an email stating that Employee 3 will be suspended for attendance violations. The Employer issued the suspension to Employee 3 on (b) (6), (b) (7)(C), which was served on (b) (6), (b) (7)(C) through (b) (6), (b) (7)(C). Also on (b) (6), (b) (7)(C), the Employer sent the Union an email stating that Employee 4 will be suspended for an accident involving (b) (6), (b) (7)(C). The Employer issued Employee 4 the suspension on (b) (6), (b) (7)(C), which was served (b) (6), (b) (7)(C) through (b) (6), (b) (7)(C).

² During the investigation of the charge, the Employer’s HR Director asserted that (b) (6), (b) (7)(C) was aware of the Employer’s obligation to bargain over the issuance of discipline and these emails were specifically sent in order to provide the Union notice of the Employer’s intention to issue discipline.

³ The language in this and the following emails from the Employer to the Union was the same, in relevant parts, as the (b) (6), (b) (7)(C), 2016 email.

On (b) (6), (b) (7)(C) 2017, Employee 5 was involved in a jobsite incident that resulted in a customer complaint about (b) (6), (b) (7)(C) work performance. On (b) (6), (b) (7)(C) the Employer placed Employee 5 on paid administrative leave to investigate the incident. On (b) (6), (b) (7)(C), the Union called the Employer to discuss Employee 5's administrative leave and the investigation. The Employer interviewed the customer and Employee 5 about what had occurred. (b) (6), (b) (7)(C), the Employer called the Union to discuss the results of its investigation and Employee 5's possible discharge. The parties also bargained over the discipline to be issued. The Employer proposed discharge with the accumulated backpay, and the Union proposed a last-chance agreement. The Employer stated that the parties were at impasse over the appropriate discipline. On (b) (6), (b) (7)(C), the Employer discharged Employee 5 for (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and paid (b) (6), (b) (7) backpay for the time (b) (6), (b) (7)(C) had been on administrative leave.

On (b) (6), (b) (7)(C) the Employer sent the Union an email stating that Employee 6 will be suspended for attendance violations. On (b) (6), (b) (7)(C), the Employer issued the suspension to Employee 6, which was served from (b) (6), (b) (7)(C) through (b) (6), (b) (7)(C). None of the emails from the Employer to the Union about prospective disciplines included the date of implementation. The Employer did not notify the Union when the disciplines were actually implemented. The Union neither requested bargaining nor otherwise replied to any of the Employer's five emails about discipline.

ACTION

We conclude initially that the Employer had an obligation to engage in pre-imposition bargaining because its attendance and general disciplinary policies are discretionary as to whether and what type of discipline will be imposed for employee infractions. We also conclude that the Employer's email notices did not announce a *fait accompli* but provided the Union with notice and an opportunity to bargain pre-imposition over the discretionary disciplines, and that the Union waived its right to bargain over the disciplines by inaction.

I. The Employer Has an Obligation to Bargain Because Its Disciplinary Policies are Discretionary

In *Total Security Management*, the Board considered whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized but has not yet entered into a collective-bargaining agreement with the employer.⁴ The Board held, *inter alia*, that discretionary discipline is a mandatory subject of bargaining, and

⁴ 364 NLRB No. 106, slip op. at 1.

therefore, employers must give unions notice and an opportunity to bargain before imposing certain serious types of disciplinary actions.⁵

Here, the Employer's attendance and general disciplinary policies are sufficiently discretionary that discipline pursuant to those policies is a mandatory subject of bargaining. In the attendance policy, the Employer reserves discretion with respect to the number of days an employee may be suspended for attendance violations and exceptions to the policy due to illness or other unspecified circumstances. The attendance policy also gives the Employer discretion to immediately discharge employees for attendance violations during their introductory period. The Region's investigation revealed that the Employer has exercised its discretion under this policy by allowing employees to accumulate more than the triggering number of violations before issuing the next level of progressive discipline.

The general disciplinary policy also allows the Employer to exercise discretion. The Employer determines which behaviors constitute grounds for discipline and whether the behavior is considered a major violation. The Employer then determines the appropriate discipline for major violations, up to and including discharge, and specifically reserves the right to use discretion in applying its disciplinary policy in special circumstances. Since the Employer possesses and exercises discretion with respect to its disciplinary policies, discipline is a mandatory subject of bargaining and the Employer must provide the Union with notice and an opportunity to bargain prior to imposing serious discipline.

II. The Employer Provided the Union Notice and an Opportunity to Bargain

Where an employer gives a union notice of a planned change to a mandatory subject of bargaining, the union must act with due diligence to request bargaining over that subject or it may be found to have waived its right to bargain over the proposed change.⁶ However, the Board does not require a union to request bargaining, as a condition precedent for a Section 8(a)(5) violation, where the request would be futile, or where the employer presented the union with a fait accompli.⁷ The

⁵ *Total Security Management* recognizes an employer's duty to provide notice to and an opportunity to bargain with a union before imposing only "disciplinary actions such as suspension, demotion, and discharge [that] plainly have an inevitable and immediate impact on employees' tenure, status, or earnings." *Id.*, slip op. at 3-4.

⁶ See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001).

⁷ *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982) (bargaining request unnecessary "if the notice is too short a time before implementation or . . . the employer has no intention of changing its mind"), *enfd.* 722 F.2d 1120 (3d Cir. 1983).

Board has found that a primary factor in determining whether an employer's notice to a union of a proposed change to a mandatory subject is a fait accompli is whether the union receives notice of the change prior to the employees it represents.⁸ Similarly, an employer's use of definite language will indicate a fait accompli when accompanied by objective evidence of the employer's fixed intent to implement the change as announced.⁹ Such objective evidence can be statements by an employer disclaiming its duty to bargain over the changes or an employer's rejection of a union's request to bargain.¹⁰ Similarly, an employer that implements the change without prior notice to the union demonstrates the requisite intransigence.¹¹

⁸ *Id.* at 1017 (the "most important factor" in finding the employer presented the union with a fait accompli is that the employer notified the employees directly of its intent to change the attendance and absentee procedure while no special notice was given to the union); *see also Times Union, Capital Newspapers Division*, 356 NLRB 1339, 1352 (2011) ("When an employer first presents a policy to its employees without going through the Union, the Union's role as the exclusive bargaining agent of the employees is undermined."); *S&I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1 (1993) ("[T]he Respondent's announcement directly to employees of unilateral action (the change in pay periods from weekly to biweekly) indicates its intent to make changes without bargaining with the Union.").

⁹ *See Aggregate Industries*, 359 NLRB 1419, 1423 (2013) (finding the employer had a "fixed intent" to transfer unit work because it used the phrases "going to" and "will be" to convey an unconditional message to the union that the change would occur, in addition to the employer's repeated false assertion that the parties had already discussed and agreed to the change), *reaffirmed and incorporated by reference* 361 NLRB No. 80 (2014), *enf. denied* 824 F.3d 1095 (D.C. Cir. 2016); *Pontiac Osteopathic Hosp.*, 336 NLRB at 1023-24 (finding a fait accompli when the employer informed the union of its intent "to unilaterally implement several wage and benefit revisions" within the context of a memorandum that the employer posted on its bulletin boards explaining the revision to employees; such a posting "ordinarily occurred only when decisions were final"); *see also Dixie Electric Membership Corp.*, 358 NLRB 1089, 1092 (2012) (finding a fait accompli where the employer admitted making the decision to transfer unit work three months before notifying the union, informed the employees of the transfer a week before notifying the union, and "definitively phrased as a final decision" the notice to the union stating that the changes "will be" implemented), *reaffirmed and incorporated by reference* 361 NLRB No. 107, slip op. at 1 n.1 (2014), *enf. denied*. 814 F.3d 752 (5th Cir. 2016).

¹⁰ *See Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB 41, 43 (1997) (in finding a fait accompli, the Board focused on testimony of the employer that it did not believe the change to the attendance policy needed to be bargained, therefore acknowledging it did not intend to bargain in good faith with the union), *enf. denied*. 162

On the other hand, the Board will not find a *fait accompli* where an employer has provided the union with sufficient notice of a proposed change such that a request to bargain would not be futile, especially where other objective evidence indicates a lack of futility.¹² Further, an employer's use of a "positive tone" in its notice or presentation of a proposed change "as a fully developed plan" are not necessarily sufficient on their own to demonstrate that the employer has no intention of bargaining.¹³

Applying these principles here, we conclude, based on the evidence as a whole, that there is insufficient evidence to indicate that a request by the Union to bargain concerning the proposed disciplines would have been futile. The Employer sent an email to the Union prior to issuing each of the five suspensions in this case. Although the Employer did use "positive language" in each email that informed the Union it "will be issuing" discipline pursuant to its discretionary policies, there is no additional objective evidence to indicate that a request by the Union to engage in pre-imposition bargaining would have been futile. By providing specific notice to the Union prior to notifying the employees of their discipline, the Employer conveyed that it was ready

F.3d 513 (7th Cir. 1998); *UAW-DaimlerChrysler Natl. Training Ctr.*, 341 NLRB 431, 433 (2004) (when the union called the employer to discuss the layoff, the employer said the decision was a "done deal" and there was nothing to talk about); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993) (finding that the employer's refusal to delay implementation of the change after the union requested bargaining was objective evidence that bargaining would be futile).

¹¹ See, e.g., *Mercy Hospital of Buffalo*, 311 NLRB at 873.

¹² See, e.g., *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001) (no violation where employer provided notice six months before the planned work relocation and two weeks before employees had to decide whether to accept retirement offer); *WPIX, Inc.*, 299 NLRB 525, 526 (1990) (union not excused from obligation to request bargaining when it had one week actual notice of employer's intent to change mileage rate and there was no evidence of prior refusals to bargain over the issue).

¹³ See, e.g., *Bell Atlantic Corp.*, 336 NLRB at 1086-87 (no *fait accompli* even though employer announced plan, i.e., that it would close the facility and relocate unit work, in "positive tone" to the union and almost simultaneously informed employees); *Haddon Craftsmen*, 300 NLRB 789, 790-91 (1990) ("positive language" and presentation of "fully developed plan" in notice of employee reclassifications did not relieve union of obligation to request bargaining), *affd. mem. sub nom. Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991).

to abide by its bargaining obligation.¹⁴ Indeed, the emails from the Employer's HR Director stated, "[i]f you have any questions, please give me a call." There also were no contemporaneous statements by the Employer that it had no duty to bargain over the discipline, which would have indicated a fixed intent.¹⁵ In fact, the Employer did engage in pre-imposition bargaining with the Union over the discipline to be issued to Employee 5 after the investigation of the incident involving a customer complaint. The Employer also acknowledged its bargaining obligation to the Region during the investigation of the charge and said that it intentionally sent the emails to the Union on account of that obligation. Finally, the Union does not claim that it construed the language of the Employer's emails as precluding pre-imposition bargaining over the disciplines.

Based on all of the preceding factors, there is insufficient objective evidence to find that the Employer's emails to the Union about the proposed disciplines constituted a *fait accompli*. Thus, the Employer satisfied its obligation under *Total Security* to provide the Union with notice and an opportunity to bargain before imposing discretionary discipline.

III. The Union Waived Its Right to Bargain by Inaction

As noted earlier, a union may be found to have waived its right to bargain by failing to make a timely request to do so once notified by an employer of a proposed change to a mandatory subject.¹⁶ A union need not use specific language in requesting

¹⁴ See the cases cited in note 8, *supra*.

¹⁵ *Cf. Aggregate Industries*, 359 NLRB at 1423 (finding *fait accompli* in context of employer's repeated false statements during bargaining that the parties had already discussed and agreed upon the charge at issue); *Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB at 43 (the employer testified that it did not believe the change needed to be bargained, therefore acknowledging it did not intend to bargain in good faith with the union); *UAW-DaimlerChrysler Natl. Training Ctr.*, 341 NLRB at 433 (when the union called the employer to discuss the layoff, the employer said the decision as a "done deal" and there was nothing to talk about).

¹⁶ *See, e.g., KGTV*, 355 NLRB at 1285 (union waived its right to bargain over the employer's decision to lay off employees by requesting to bargain only over the effects of the decision and failing to request bargaining over the decision itself, where the employer's decision was not a *fait accompli*); *Bell Atlantic Corp.*, 336 NLRB at 1086 (union waived its right to bargain over a plant closure and transfer of bargaining unit work when the union failed to demand to bargain for four months after receiving notice of the changes from the employer).

bargaining to defeat a finding of waiver, but must clearly indicate in some form a desire to bargain.¹⁷ The amount of time the Board will find sufficient to allow a union to request bargaining depends on the specific facts of the case.¹⁸ The Board has held that as little as two days can provide a union with sufficient opportunity to request bargaining.¹⁹

Here, the Union made no request to bargain regardless of how much time passed between each of the Employer's emails notifying it of a proposed disciplinary action and the implementation of that discipline. Depending on which employee was involved, the Union had between three and 28 days to take some action. It only had to reply to the Employer's emails with some request to discuss the proposed discipline or a phone call, as it did in (b) (6), (b) (7)(C) 2017 with the investigation and discipline for Employee 5's incident involving a customer complaint, to have satisfied its duty to request bargaining. Since the Union did not act with "due diligence" by asking the

¹⁷ *Compare Armour & Co.*, 280 NLRB 824, 828 (1986) (finding a union properly alerted the employer that it did not acquiesce to the employer's proposal when it stated that it wanted to "discuss" the employer's position, even though the word "bargain" was never used), *with Richmond Times-Dispatch*, 345 NLRB 195, 199 (2005) (finding employer did not violate Section 8(a)(5) by eliminating a holiday bonus where the union initially replied by letter that it was willing to bargain over the announced change, but then did not contact the employer about bargaining), *and Haddon Craftsmen*, 300 NLRB at 790-91 (finding employer did not violate Section 8(a)(5) by reclassifying employees into lower paying jobs where union president, after employer informed him of planned change, believed reclassification was a done deal and expressed only the need to retrain some senior employees).

¹⁸ *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991) ("What period of time is found sufficient for a union to request bargaining will depend upon the facts of each case."), *enfd.* 984 F.2d 1562 (10th Cir. 1993).

¹⁹ *See Medicenter Mid-South Hospital*, 221 NLRB 670, 680 (1975) (two days' notice sufficient for the union to request bargaining about polygraph tests, and the union waived bargaining by not requesting to bargain over the tests or to delay implementation to allow for bargaining); *Talbert Manufacturing*, 264 NLRB 1051, 1054 (1982) (four days' notice for the initial reduction of hours and "at least 2 days" notice for further reduction in hours provided sufficient opportunity for union to request bargaining) (citing *Hartmann Luggage Co.*, 173 NLRB 1254, 1255-56 (1968) (finding four and a half days' notice before planned layoffs was reasonable)).

Employer about the emails or responding to them in any manner, it waived its right to pre-imposition bargaining over these five instances of discretionary discipline.²⁰

Based on the preceding analysis, the Region should dismiss this allegation, absent withdrawal.

/s/
J.L.S.

ADV.28-CA-193540.Response.CalPortland. (b) (6), (b) (7)

²⁰ The Employer remains bound under *Total Security Management* to bargain over future serious discretionary discipline. Acquiescence by a union to previous unilateral changes by an employer does not operate as a waiver of its right to bargain regarding future changes. *See, e.g., Owens-Corning Fiberglas Corp.*, 282 NLRB 609, 609 (1987) (finding that the employer made unlawful unilateral modifications to its employee purchase plan despite the union previously having acquiesced to changes to the plan).