

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

DATE: February 16, 2017

TO: Claude T. Harrell, Jr., Regional Director
Region 10

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pac Tell Group, Inc., d/b/a U.S. Fibers
Cases 10-CA-121231; 10-CA-128904; 10-CA-
132482; and 10-CA-160256

Remedies Chron
530-0000-0000-0000
530-2025-0000-0000
530-4825-0000-0000
530-6067-2030-1700
625-4410-0000-0000
625-6601-0000-0000
625-6601-5000-0000

The Region submitted these cases for advice as to whether, under Board law predating *Alan Ritchey*,¹ the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after disciplining employees not yet covered by a contract with discharge, suspension, and written warnings. The Region seeks this guidance because, although it previously concluded that the Employer had violated Section 8(a)(5) under *Alan Ritchey* by not bargaining pre-imposition over discretionary discipline, the Board subsequently held in *Total Security Management*² that it would apply the rule first announced in *Alan Ritchey* only prospectively. The Region also requested advice on whether, in addition to seeking the traditional Board remedy for a Section 8(a)(5) refusal to bargain violation, it should seek a remedy analogous to that set out in *Transmarine Navigation Corp.*,³ given the fact that bargaining would occur years after the Employer took its disciplinary actions.

We conclude that the Employer violated Section 8(a)(5) under Board law predating *Alan Ritchey* not only for refusing to bargain post-imposition with the

¹ *Alan Ritchey, Inc.*, 359 NLRB 396 (2012).

² *Total Security Management Illinois 1*, 364 NLRB No. 106, slip op. at 1, 11-12 (Aug. 26, 2016).

³ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Union over the disciplinary discharges, but also over the written warning and suspension. We also conclude that the Union did not waive its right to bargain over these matters by failing to request bargaining after each disciplinary action because it would have been futile for the Union to have done so. Finally, we conclude that a *Transmarine* remedy is not appropriate.

FACTS

Pac Tell Group, Inc. d/b/a U.S. Fibers (“the Employer”) owns and operates a synthetic fiber manufacturing operation in Trenton, South Carolina, where it employs approximately 150 employees. In January 2012, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (“the Union”), began an organizing campaign at the Trenton facility.

On March 26, 2013, the Union filed a petition for an election in Case 10–RC–101166 seeking to represent a unit of employees that included all full-time and regular part-time production, janitorial, warehouse, shipping and maintenance workers employed at the facility, excluding office clerical employees, professional and confidential employees, guards and supervisors, as defined under the Act. On May 29 and 30, 2013, the employees voted in favor of Union representation in a Board held election. On September 13, 2013, the Regional Director issued a Supplemental Decision and Certification of Representative.⁴ By letter of September 17, the Union requested that the Employer bargain with it and provide certain requested information for that purpose. By letter of September 25, the Employer responded by stating:

It is the intention of Pac Tell Group, Inc., d/b/a US Fibers to seek review of the Regional Director’s decision granting certification. For this reason, we believe it would be premature to supply any information or to take any other actions consistent with a collective bargaining relationship at this time.

On September 27, the Employer filed with the Board in Case 10-RC-101166 a post-election request for review of the Regional Director’s Supplemental Decision.⁵

⁴ Between June 6 and August 9, 2013, objections had been filed and a hearing held for the representation case.

⁵ The Employer argued that substantial questions of law and policy were raised because of the absence of, and departure from, officially reported Board precedent in the Region Director’s Supplemental Decision. The Employer also argued that the

On (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) 2014, the Employer disciplined Employees #1 and #2, respectively, by discharging them. In (b) (6), (b) (7)(C) and early (b) (6), (b) (7)(C) 2014, the Employer disciplined Employees #3, #4, and #5 by discharging them. The Union did not request bargaining over these discharges because it believed it would have been futile to do so in light of the Employer's September 25, 2013 letter refusing to recognize and bargain with it.

On September 22, 2014, the Board issued a decision on review in Case 10-RC-101166, affirming the Regional Director's Certification of Representative. By letter of October 7, 2014, the Union again requested that the Employer recognize and bargain with it. By letter of October 20, 2014, the Employer informed the Union that it was refusing to recognize and bargain with the Union stating that it was engaging in a technical 8(a)(5) test of certification.

On (b) (6), (b) (7)(C) 2014, the Union filed a charge in Case 10-CA-139779 alleging that the Employer had violated Section 8(a)(5) by refusing to recognize and bargain with it as the employees' exclusive bargaining representative. On that same day, the Employer issued a written warning to Employee #6. On November 12, 2014, the Region issued complaint Case 10-CA-139779.

On (b) (6), (b) (7)(C) 2015, the Employer disciplined Employee #6 by discharging (b) (6), (b) (7)(C). On January 29, 2015, the Board issued its order in the test-of-certification case (10-CA-139779) finding that the Employer had violated Section 8(a)(5) by refusing to recognize and bargain with the Union.⁶ The Employer then filed its petition for review of that order with the U.S. Circuit Court of Appeals for the Fourth Circuit. On February 24, 2015, the Union requested that the Employer bargain over both the written warning it had issued to Employee #6, and (b) (6), (b) (7)(C) discharge. The Employer never responded to this request.

On April 6, 2015, the Region issued a consolidated complaint against the Employer in Cases 10-CA-104438, et al., and the accompanying Notice of Hearing scheduled the ALJ trial to begin on April 20, 2015. This consolidated complaint included the allegations that the Employer had violated Section 8(a)(5) by failing to bargain over the discretionary discipline it had issued to Employees #1 through #6.

Regional Director's decisions on certain factual issues were clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer and, by extension, the employees in the voting unit.

⁶ 362 NLRB No. 4.

On April 13, the parties entered into a stipulation to hold certain charges in abeyance contingent upon the Fourth Circuit enforcing the Board's order in the test-of-certification case and requiring the Employer to recognize and bargain with the Union. Under the stipulation, the parties agreed that if the circuit court enforced the Board's order, the Employer would admit to the Section 8(a)(5) allegations regarding its failure and refusal to provide the Union with notice and an opportunity to bargain over the imposition of discretionary discipline as required by the Board's decision in *Alan Ritchey*.⁷ The Employer retained the right to argue pursuant to Section 10(c) that backpay and reinstatement were not appropriate remedies for those violations.

On (b) (6), (b) (7)(C), 2015, the Employer suspended Employee #7, and it discharged (b) (6), (b) (7) eight days later. The Union did not make a specific demand to bargain over these disciplinary actions because it believed it would have been futile to do so.

On December 23, 2015, the Fourth Circuit enforced the Board's order in the test-of-certification case (10-CA-139779) and affirmed the Union's certification as the employees' exclusive bargaining representative.⁸ Pursuant to the stipulation for Cases 10-CA-104438, et al., the Employer amended its answer to the consolidated complaint for those cases and admitted the Section 8(a)(5) allegations regarding its failure to bargain over the discretionary discipline it had imposed on the unit employees.

⁷ 359 NLRB at 396, 403-04. In *Alan Ritchey, Inc.*, the Board held that discretionary discipline is a mandatory subject of bargaining and, therefore, even before the parties have reached an initial collective-bargaining agreement, employers may not impose certain types of discipline unilaterally. Where the discipline to be imposed has an "inevitable and immediate impact on employees' tenure, status, or earnings, such as suspensions, demotions or discharge," the employer must first notify and bargain with the union over all discretionary aspects of the proposed discipline. *Id.* at 403. This obligation attaches upon the "decision to impose discipline, but prior to its implementation." *Id.* The Board's decision in *Alan Ritchey* was subsequently vacated because it was issued by a panel that, under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted.

⁸ *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85 (4th Cir. 2015), enforcing 362 NLRB No. 4.

In April 2016, the Employer and Union began meeting to conduct first contract bargaining. However, it appears that the parties have not yet specifically bargained over the individual disciplines and discharges.⁹

On May 6, 2016, the Region filed a Motion for Summary Judgment with the Board requesting that it reaffirm its ruling in *Alan Ritchey* and provide the seven discriminatees with a make whole remedy.

On August 26, 2016, while the Region's Motion for Summary Judgment was pending, the Board issued its decision in *Total Security Management*, which reaffirmed the rule in *Alan Ritchey*, but stated that it would be applied only prospectively.¹⁰ Upon direction from the Division of Advice, the Region moved to withdraw its Motion for Summary Judgment from the Board. The prospective application of the Board's decision in *Total Security* makes it necessary in the instant case to apply Board precedent predating *Alan Ritchey* to determine whether the Employer violated Section 8(a)(5) by refusing to bargain post-imposition over the disciplinary discharges, suspension, and written warning issued to the employees in 2014 and 2015. The related issue concerns the appropriate remedy in light of the relevant circumstances.

ACTION

We conclude that the Employer violated Section 8(a)(5) under Board law predating *Alan Ritchey* not only for refusing to bargain post-imposition over the disciplinary discharges, but also over the written warning and suspension. We also conclude that the Union did not waive its right to bargain over these matters by failing to request bargaining after each disciplinary action because it would have been futile for the Union to have done so. Finally, we conclude that a *Transmarine* remedy is not appropriate.

⁹ The Region requested an update from the Union regarding whether the parties had begun bargaining over the discharges and disciplines, but the Region has not yet received a response. An employee member of the bargaining committee reported that no bargaining has occurred over these issues. In any event, it does not appear that the parties have bargained to impasse over these issues.

¹⁰ 364 NLRB No. 106, slip op. at 1, 11-12.

I. The Employer Violated Section 8(a)(5) By Failing and Refusing to Bargain Post-Imposition Over the Discipline it Issued the Seven Employees, Including the Written Warning and Suspension.

An employer violates Section 8(a)(5) and (1) if it makes material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining.¹¹ Mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and employee.¹² “Employee discipline is unquestionably a mandatory subject of bargaining.”¹³ However, a union may waive its right to bargain over a mandatory subject such as employee discipline if it fails to request bargaining in a timely manner.¹⁴ Nevertheless, “there is no waiver if it is clear that a request would have been futile.”¹⁵

Consistent with the foregoing principles, and prior to its holding in *Alan Ritchey*, the Board affirmed an ALJ in *Fresno Bee* who held that an employer whose employees are represented by a union but not yet covered by a contract does not have a duty to notify the union and bargain to impasse before imposing disciplinary action, but does have a duty after imposing discipline to bargain with the union, upon request, over that action.¹⁶ The Board repeatedly has held that disciplinary actions resulting in

¹¹ See, e.g., *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (parties to a collective bargaining relationship are obligated to bargain in good faith over mandatory subjects; employer’s insistence to impasse on two permissive subjects constituted a refusal to do so).

¹² See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (affirming that prices for in-plant cafeteria and vending machine food and beverages were a mandatory bargaining subject because “[t]he terms and conditions under which food is available on the job are plainly germane to the ‘working environment’”).

¹³ *Fresno Bee*, 337 NLRB 1161, 1186 & n.78 (2002).

¹⁴ See, e.g., *N.K. Parker Transport*, 332 NLRB 547, 551 (2000).

¹⁵ *Id.* at 551, citing *L. Suzio Concrete Co.*, 325 NLRB 392, 398 (1998), *enfd.* 173 F.3d 844 (2d Cir 1999) (unpublished decision).

¹⁶ *Fresno Bee*, 337 NLRB at 1187. In *Alan Ritchey*, 359 NLRB at 402, and as reaffirmed in *Total Security Management*, 364 NLRB No. 106, slip op. at 7, the Board

discharge are mandatory subjects over which an employer has a post-imposition obligation to bargain.¹⁷ In addition, Board precedent strongly supports the conclusion that lesser forms of discipline are also mandatory bargaining subjects. In general, an employer's disciplinary system and "work rules, especially those involving the imposition of discipline" are mandatory bargaining subjects.¹⁸ Thus, an employer violated Section 8(a)(5) by unilaterally enforcing stricter discipline that resulted in a written warning and suspension.¹⁹ Moreover, employers have violated Section 8(a)(5) by unilaterally changing from a disciplinary system based on oral warnings to one based on written warnings.²⁰ Such a change significantly affects the employees' working conditions because written warnings are more formal and become part of an employee's personnel file, which could have an impact on their future job security.²¹

Applying this precedent here, we conclude that the Employer violated Section 8(a)(5) by failing and refusing, post-imposition, to bargain over the discipline of Employees #1 through #7, including the written warning given to Employee #6 and the suspension of Employee #7. As noted above, Board precedent makes it clear that

overruled *Fresno Bee* to the extent that it held that an employer does not have an obligation to engage in pre-imposition bargaining over certain types of discipline.

¹⁷ See, e.g., *Fresno Bee*, 337 NLRB at 1187; *Fallbrook Hospital*, 360 NLRB 644, 654-55 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015); *N.K. Parker Transport*, 332 NLRB 547, 551, 563 (2000); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991), *Crestfield Convalescent Home*, 287 NLRB 328, 328 (1987).

¹⁸ See, e.g., *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

¹⁹ See, e.g., *Adair Standish Corp.*, 290 NLRB 317, 319, 327-29 (1988) (employer violated Section 8(a)(5) by unilaterally imposing stricter discipline for tardiness that resulted in written warning to one employee and two-day suspension of another), enfd. in relevant part 912 F.2d 854, 863 (6th Cir. 1990).

²⁰ See, e.g., *Golden Stevedoring*, 335 NLRB 410, 415-16 (2001); *Migali Industries*, 285 NLRB 820, 820-21 (1987); *Amoco Chemicals Corp.*, 211 NLRB 618, 618 n.2 (1974), enfd. in relevant part 529 F.2d 427, 431 (5th Cir. 1976). See also *Rahco, Inc.*, 265 NLRB 235, 257 (1982) (finding employer violated Section 8(a)(5) by unilaterally implementing new formalized system of issuing written warnings and disciplining employees where it previously had lacked any kind of system).

²¹ See *Golden Stevedoring*, 335 NLRB at 415; *Amoco Chemicals Corp.*, 211 NLRB at 618, n.2.

the Employer had a duty to bargain with the Union over its disciplinary actions that resulted in discharge.²² We conclude that this bargaining obligation also extended to the written warning to Employee #6 and the suspension of Employee #7 because those personnel actions are “plainly germane to the ‘working environment’” in that they have the potential to impact the two employees’ future job security.²³ In other words, like the discharges, these lesser forms of discipline involved significant changes to the employees’ working conditions and, as a result, constituted mandatory subjects of bargaining.

The Employer’s primary defense to these allegations is that the Union waived its right to bargain over the disciplinary actions because it never requested bargaining. Contrary to the Employer’s defense, we conclude that the Union did not waive its right to bargain over the disciplinary actions because it would have been futile for the Union to repeatedly request bargaining. Where an employer informs a union that it is refusing to recognize and bargain because it intends to pursue its legal challenges to the union’s certification, the union is not required to make repeated requests to preserve its bargaining rights.²⁴ That principle squarely applies here. Soon after the Region certified the Union in mid-September 2013, it requested bargaining and information from the Employer, who informed the Union that it refused to recognize and bargain because it was pursuing its appeal of the certification decision. Between the Union’s initial request for bargaining and September 22, 2014, when the Board affirmed the Regional Director’s supplemental decision certifying the Union in Case 10-RC-101166, the Employer discharged Employees #1 through #5. The Union did not request bargaining over the disciplinary actions during that time because it believed it would have been futile to do so in light of the Employer’s prior rejection. On October 7, 2014, about two weeks after the Board’s decision in the representation case, the Union again requested recognition and bargaining. The Employer replied that it refused to recognize and bargain with the Union because it was engaging in a technical 8(a)(5) violation to test the Union’s certification. In late October 2014, the

²² See the cases cited at footnote 17, above.

²³ *Ford Motor Co. v. NLRB*, 441 U.S. at 498. Indeed, the Employer concedes that under Board precedent predating *Total Security*, an employer has an obligation to bargain, upon request, over disciplinary actions less than discharge.

²⁴ See, e.g., *L. Suzio Concrete Co.*, 325 NLRB at 398. See also *Sunnyland Refining Co.*, 250 NLRB 1180, 1181 n3 (1980) (“once a union requests bargaining and an employer states it is refusing to bargain in order to test the certification, it is futile and unnecessary for the union to continue to request bargaining”), *enfd.* 657 F.2d 1249 (5th Cir. 1981).

Union filed a Section 8(a)(5) charge in Case 10-CA-139779, which became the test-of-certification case. In (b) (6), (b) (7)(C) 2015, the Employer then issued a written warning to Employee #6 and discharged (b) (6), (b) (7)(C). In late February 2015, the Union requested that the Employer bargain over the written warning and discharge of Employee #6. The Employer never responded to that request. In (b) (6), (b) (7)(C) 2015, it suspended and discharged Employee #7, and the Union did not make any specific bargaining demand over that disciplinary action. However, it is undisputed that the Employer did not agree to recognize and bargain with the Union until after the Fourth Circuit in December 2015 affirmed the Union's certification. That was consistent with the Employer's position in September 2013, when it rejected the Union's first bargaining request. These facts clearly show that the Employer was refusing to recognize and bargain with the Union until it had exhausted all of its legal challenges to the Union's certification. Thus, the evidence clearly establishes that at all relevant times, it would have been futile for the Union to request bargaining with the Employer after each time it imposed discipline.

II. A *Transmarine* Remedy is Not Appropriate Here.

We conclude that a *Transmarine* remedy is not appropriate here. The traditional remedies for an employer's refusal to bargain post-imposition over employee discipline include an appropriate cease-and-desist order and an affirmative order requiring the employer, upon request, to meet and bargain with the union over the discipline.²⁵ Those remedies have been considered sufficient to return the affected employees to the pre-violation status. Although there has been a significant passage of time since the bargaining violations occurred in this case, it would be inconsistent with this remedial policy to grant the discriminatees more of a remedy now than they would have received two or three years ago. Furthermore, we note that a *Transmarine* remedy is designed to address the limitations on a union's ability to meaningfully bargain over the effects of a decision that the employer did not have to bargain about, such as a plant closure, sale, or relocation.²⁶ The Union here is not limited to effects bargaining; it can bargain with the Employer over its decision to discipline the seven employees. In other words, the traditional remedy in this case already provides for more of an affirmative bargaining obligation than in the usual *Transmarine* context. Finally, requesting a *Transmarine* remedy here would require seeking a change to the Board's current remedial policy for a situation that should rarely reoccur. In future

²⁵ See, e.g., *N.K. Parker Transport*, 332 NLRB at 552; *Ryder Distribution Resources*, 302 NLRB at 91-92.

²⁶ See, e.g., *AG Communication Systems Corp.*, 350 NLRB 168, 172-73 (2007), *affd.* sub nom. *Electrical Workers Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009).

cases, *Total Security Management* applies, which will ensure that employers fulfill their statutory bargaining obligation over discretionary discharge and suspension at the most effective time – i.e., prior to imposition. In light of all of these considerations, we conclude that a *Transmarine* remedy is not appropriate in this case.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) when it refused to recognize and bargain with the Union post-imposition over all of the disciplinary actions it took, but it should not seek a *Transmarine* remedy.

/s/
B.J.K.

H:ADV.10-CA-121231.Response.U.S.Fibers. (b) (6), (D)