UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

800 RIVER ROAD OPERATING
COMPANY, LLC d/b/a CARE ONE AT
NEW MILFORD

Case 22-CA-204545

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

RESPONDENT'S OPPOSITION TO CHARGING PARTY'S MOTION FOR PARTIAL WITHDRAWAL OF THE CHARGE

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I. INTRODUCTION

This matter is before the Board on Charging Party 1199 SEIU United Healthcare Workers East's (Charging Party or the Union) July 1, 2019 Motion for Partial Withdrawal of the Charge (Motion). Respondent 800 River Road Operating Company, LLC d/b/a CareOne at New Milford (Respondent or the Employer) opposes Charging Party's Motion for the reasons set forth below. The General Counsel also opposes Charging Party's Motion, as indicated in Charging Party's Motion.

II. BACKGROUND

On November 20, 2018, Administrative Law Judge Benjamin W. Green issued a decision finding that, inter alia, Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and an opportunity to bargain before suspending three employees and discharging another, as required by *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. (2016). The judge based his finding on the parties' stipulation of facts concerning the discipline (GC Exh. 4).[1]

On January 1, 2019, Respondent filed exceptions to the judge's decision, and a supporting brief, arguing, inter alia, that *Total Security* was wrongly decided and should be overturned for the reasons set forth by then-Member Miscimarra in his dissent. On March 14, 2019, counsel for the General Counsel filed an answering brief to Respondent's exceptions in which she also argued that *Total Security* should be overturned. Also on March 14, 2019, the Union filed an answering brief to Respondent's exceptions, asserting simply that it opposed Respondent's exceptions to the

[1] In pertinent part, the parties stipulated that, without providing the Union notice and an opportunity to bargain, Respondent suspended Jasmine Gordon on October 10, 2016, Linda Rhoads on February 1, 2017, and Jesus Mendez on March 23, 2017, and discharged Shantai Bills on January 4, 2017 (GC Exh. 4, ¶ 1).

judge's findings concerning *Total Security* for the reasons set forth in the judge's decision and by the Board in *Total Security* itself.

On July 1, 2019, the Union filed its Motion to withdraw its allegations that Respondent violated Section 8(a)(5) and (1) by failing to provide notice and an opportunity to bargain before suspending Gordon, Rhoads, and Mendez, and before discharging Bills. The Union asserts in its Motion that "it has further investigated the circumstances of the disciplinary actions addressed in the charge and determined that in each instance the employee engaged in misconduct and the misconduct was the reason for the discipline" (Charging Party's Motion for Partial Withdrawal of the Charge (CP Mot.) 1); however, the Union provides no details regarding its investigation or any new facts discovered as a result thereof.[2] The Union, therefore, contends that further processing of this aspect of the charge "would not effectuate the purposes of the Act." (CP Mot. 2.)

III. ARGUMENT

The Board should deny the Union's Motion because further processing of the *Total Security* allegations would effectuate the purposes of the Act and further the public interest given that *Total Security* was wrongly decided. It is obvious that the Union is simply attempting to avoid an imminent adverse decision, which is not a sufficient reason to justify a withdrawal.

A. Standard for Permitting Withdrawal

It is well-established that "[o]nly the Board is vested with discretion to determine whether a proceeding, once instituted, may be abandoned." *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1300 fn. 2 (2004) (citing *Robinson Freight Lines*, 117 NLRB 1483, 1485-1486 (1957), enfd. 251 F.2d 639 (6th Cir. 1958)); see also *Dow Chemical Co.*, 349 NLRB 104, 106

[2] Section 10(c) of the Act bars reinstatement and back pay remedies for employees suspended or discharged "for cause," which the Board in *Total Security* construed as meaning that "(1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge." 364 NLRB No. 106, slip op. at 15.

(2007) (same). Consistent with that principle, Section 102.9 of the Board's Rules and Regulations provides, in pertinent part, that "[a] charge may be withdrawn . . . after the case has been transferred to the Board . . ., upon motion, with the consent of the Board." The Board will only grant its consent, thereby allowing a charge to be withdrawn, when doing so will effectuate the purposes of the Act and/or further the public interest. See *Dow Chemical*, above at 106 (Member Schaumber dissenting in part) ("Granting the motion to permit the Union to withdraw its charges will neither effectuate the purposes of the Act nor further the public interest.").

B. Permitting Withdrawal Will Not Effectuate the Purposes of the Act or Further the Public Interest.

Permitting the Union to withdraw its allegations that Respondent violated the Act by failing to provide notice and an opportunity to bargain before suspending three employees and discharging another would not effectuate the purposes of the Act or further the public interest.

Total Security does not represent sound labor policy, because it cannot be squared with long-standing Board precedent governing decision and effects bargaining. Moreover, *Total Security* conflicts with Section 8(a)(5) and 8(d) of the Act, as well as the Supreme Court's decision in *NLRB v. Weingarten*, 420 U.S. 251 (1975). Further, *Total Security* imposes impractical and unworkable bargaining requirements that disrupt business operations and create obstacles to the negotiation of a first contract. For these reasons, which are clearly articulated by then-Member Miscimarra in his dissent, the current General Counsel has intimated for some time now that *Total Security* should be overruled. See, e.g., GC Memorandum 18-02 (Mandatory Submissions to Advice) (Dec. 1, 2017) (identifying *Total Security* as a decision that "might support issuance of a complaint, but where we also might want to provide the Board with an alternative analysis").

The instant case presents an ideal opportunity for the Board to consider and adopt the General Counsel's new theory in the interests of countless employers and unions who are

confronted with the issue of pre-discipline bargaining on a daily basis. See *Metropolitan Taxicab*, above at 1300 fn. 2 ("[T]he instant case presents important considerations that militate in favor of final resolution of the issue raised. This is one of several cases considered together by the Board because each raised the issue of independent contractor versus employee status under Sec. 2(3) of the Act."); *Meat Cutters (AFL-CIO) Local 150F*, 151 NLRB 386, 387 (1965) ("When an unfair labor practice is filed, the General Counsel proceeds, not in the vindication of private rights, but as the representative of an Agency entrusted with the enforcement of public law and the assertion of the public interest therein.").

Moreover, a Board decision as to whether *Total Security* remains extant law will promote stability in Respondent's relationship with the Union while good faith contract negotiations continue. See *Midland Electrical Contracting Corp.*, 365 NLRB No. 87, slip op. at 3 (2017) ("It is well established that the fundamental purpose of the Act is to foster and maintain stability in bargaining relationships.") (citing *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958)). Contrary to the Union's claim, the issue is not moot simply because the Union now purports to agree that the employees who are the subject of this case engaged in misconduct, and their misconduct was the reason for the discipline. While the parties continue to bargain in good faith, the facility has over 200 employees, which means there will almost certainly be other pre-disciplinary bargaining situations while contract negotiations continue.

Of further importance, the matter has been fully litigated, exceptions and briefs have been filed, and Respondent, the Union, the General Counsel, and the Division of Judges have expended considerable resources to reach this point. See *Metropolitan Taxicab*, above at 1300 fn. 2 ("This matter has been fully litigated, exceptions and briefs have been filed, and considerable time and

resources have been invested by the Board in consideration thereof."). Declining to rule on the issue in this case would serve no other purpose than to "kick the can" down the road.

C. The Union is Attempting to Avoid an Adverse Decision on the Merits.

The Union's ill-timed Motion is premised on its professed sudden realization that the employees about whom it filed an unfair labor practice charge nearly two years ago engaged in misconduct, and their misconduct was the reason for the discipline. Considering the General Counsel's recent formal change in its position concerning the viability of *Total Security*, the only reasonable inference that can be drawn is that the Union's Motion is a frantic attempt to avoid an adverse decision on the merits.

Section 102.24(a) of the Board's Rules and Regulations requires parties desiring to file motions in a case to do so "promptly." A motion to withdraw a charge filed nearly two years ago—particularly one grounded in facts that have not changed during that time—can hardly be deemed "prompt."

It is important to note that the Union's brief points to no specific newly discovered facts supporting its sudden realization that the employees engaged in misconduct. This is not surprising. Not only have the facts not changed since the Union filed its charge, the Union has been in possession of all the information it now portends establishes "for cause" for ***over two years***, since June 2, 2017, when Respondent produced information regarding the challenged suspensions and discharge in response to the Union's information requests. At no time since then has the Union requested additional information or claimed that Respondent failed to provide information as requested.

In short, the Union could have—indeed, ***should*** have—“further investigated” the circumstances long before the parties and the Board expended considerable time and resources litigating the matter.

D. Cases Relied on by the Union are Distinguishable.

1. *Dow Chemical*

The Union relies heavily on *Dow Chemical*, 349 NLRB 104, a case in which the primary issue was whether the employer dominated or supported an internal employee group that arguably met the definition of a “labor organization” in violation of Section 8(a)(2). After a hearing and an administrative law judge decision—but before the Board’s ruling on the employer’s exceptions to the decision—the employer made changes that effectively ended its alleged domination/support of the employee group. The charging party union then sought to withdraw its Section 8(a)(2) allegation, and the General Counsel supported the charging party union’s request. Id. at 104.

The Board granted the withdrawal request, concluding that doing so would “effectuate the policies of the Act by conserving Board resources that would otherwise be required to decide the issues[,]” and “by enabling the Board to expedite issuance of its decision” in the remaining portions of the case. Id. at 104. The Board further concluded that it was “unlikely that a Board decision on the merits . . . would provide relevant guidance to the parties” because it “would address the operational facts as they existed at the time of the hearing[,]” and “given the substantial changes [the employer] has made in the interim, that decision would not address the potential factual or legal issues regarding [the employer’s] current or future operations.” Id. at 105.

The Board next rejected the employer’s argument that a decision on the merits was needed to provide guidance to employers generally regarding the issues. Id. In so doing, the Board observed that “the guidance flowing from [its decisions] can be beneficial, but it is not the prime

reason for the decision." Id. The Board then distinguished *Metropolitan Taxicab*, 342 NLRB 1300, in which the Board rejected the charging party's request to withdraw.

The Board explained that, in *Metropolitan Taxicab*, the issue of whether taxi drivers were statutory employees or independent contractors "was an undisputedly live and important issue to all involved parties." *Dow Chemical*, above at 105. On the other hand, the Board observed, the issue [in *Dow Chemical*] of whether the employer's "now-abandoned" practices in dealing with an internal employee group violated the Act was "clearly less vital and significant." Id.

The instant case, like *Metropolitan Taxicab*, can easily be distinguished from *Dow Chemical*. First, as discussed above, the issue of whether Respondent has an obligation to provide the Union notice and an opportunity to bargain before imposing discretionary discipline is not moot simply because the Union now believes the employees at issue in this case were disciplined "for cause." Given the breadth of *Total Security*—imposing a pre-discipline bargaining obligation on employers for *any* "serious discipline"—there undoubtedly will be numerous disciplinary situations that arise during bargaining. Given the uncertainty surrounding the notion of a "pre-discipline bargaining obligation," Respondent, the Union, and the employees deserve to know how they should proceed moving forward.

Second, the issue of whether an employer has an obligation to provide a union notice and an opportunity to bargain before imposing discretionary discipline is a critical issue affecting thousands of employers, unions, and employees involved in first contract bargaining situations. Indeed, because *all* employers are confronted with situations that might warrant discipline, the issue here is considerably more important than whether taxicab drivers are statutory employees or independent contractors, which was at issue in *Metropolitan Taxicab*.

Finally, *Dow Chemical* is distinguishable because the General Counsel in that case supported the charging party's withdrawal request. Here, on the other hand, the General Counsel agrees with Respondent's position not only that *Total Security* should be overturned, but that the Union's request to withdraw the charge allegation should be denied.

2. *Colorado Sprinkler* and *Loshaw Thermal Technology*

The Union also cites unpublished decisions by the Board granting motions to withdraw charges in *Colorado Sprinkler*, Case 27-CA-115977 (2019) (CP Mot. Appx. B), and *Loshaw Thermal Technology, LLC*, Case 05-CA-158650 (2018) (CP Mot. Appx. F). Both cases involved allegations that a construction industry employer unlawfully repudiated its bargaining relationship with a union after the expiration of a collective-bargaining agreement. The principal issue in both cases was whether the relationship—initially established under Section 8(f)—had converted to Section 9(a) status under the standard set forth in *Staunton Fuel & Material*, 335 NLRB 717 (2001).

The administrative law judges in both cases applied *Staunton Fuel* and concluded the employers had unlawfully repudiated their respective bargaining relationships. The employers filed exceptions to the judges' conclusions, asking the Board to overrule *Staunton Fuel*. Like the Union in the instant case, the charging parties in *Colorado Sprinkler* and *Loshaw Thermal Technology* were apparently spooked by the General Counsel's subsequent reversal of his position concerning whether *Staunton Fuel* should be overruled; consequently, they filed motions to withdraw the underlying charges.

In each case, the Board granted the charging party's respective motion to withdraw, without discussing the merits. In *Colorado Sprinkler*, the charging party argued that withdrawal was appropriate because the alleged misconduct occurred, and the relevant collective-bargaining

agreement expired, over six years earlier, litigation was expected to continue for another three years, and the primary economic remedy sought by the charging party—unpaid benefit contributions—was being pursued in a separate withdrawal liability arbitration proceeding. In *Loshaw Thermal Technology*, the charging party argued simply that it was a small local union with limited resources, and it had decided those resources could best be used elsewhere rather than in continuing to pursue the litigation.

The Board's decision to permit withdrawal in *Colorado Sprinkler* and *Loshaw Thermal Technology* does not support the Union's position in the instant case that withdrawal is appropriate. First, the issue in those cases—whether the employer unlawfully repudiated a bargaining relationship—is unlikely to recur. It is reasonable to assume that neither employer will enter into another pre-hire collective-bargaining agreement that includes language even remotely suggesting recognition of a union as a Section 9(a) representative.[3] Respondent, on the other hand, will no doubt have occasion to discipline employees while good faith contract negotiations continue; and, consequently, the issue of whether Respondent has an obligation to provide notice and an opportunity to bargain before imposing the discipline will almost certainly recur.

Second, unlike in *Colorado Sprinkler*, the underlying issue here—Respondent's unilateral suspension of three employees and discharge of another—is not six-years old, nor did it arise out of a collective-bargaining agreement that has long since expired. Again, suspensions and discharges are almost certainly likely to recur while good faith contract negotiations continue.

Third, unlike in *Loshaw Thermal Technology*, the Union is not a small local union with limited resources. According to its website, the Union has over 400,000 members throughout Massachusetts, New York, New Jersey, Washington, D.C., and Florida, and is "the largest and

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[3] Indeed, the employer in *Colorado Sprinkler* had not entered into any such agreements in at least 6 years.

fastest-growing healthcare union in the nation." ABOUT 1199SEUI (available at https://www.1199seiu.org/about, last accessed July 12, 2019).

IV. CONCLUSION

For the reasons set forth above, the Board should deny the Union's Motion to withdraw the underlying charge allegation that Respondent unlawfully failed to provide notice and an opportunity to bargain before suspending three employees and discharging another. Granting the Union's Motion would not effectuate the purposes of the Act or further the public interest.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of July, 2019, Respondent 800 River Road Operating Company, LLC d/b/a Care One at New Milford's Opposition to Charging Party's Motion for Partial Withdrawal of the Charge in the above-captioned case has been e-filed with the NLRB and has been served on the following by electronic mail:

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