UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

800 River Road Operating
Company, LLC d/b/a Care One
at New Milford,

and Case No. 22-CA-204545

1199 SEIU United Healthcare
Workers East.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE CHARGING PARTY

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women. Most of the AFL-CIO's affiliate unions represent employees covered by the National Labor Relations Act. Those unions and the employees they represent have a direct interest in the National Labor Relations Board's rules regarding an employer's duty to provide notice and an opportunity to bargain over disciplinary decisions during the interim period between when a union is certified or recognized and when the employer and union reach a first collective bargaining agreement.

In a recent order in this case, the Board denied the motion of Charging Party 1199 SEIU United Healthcare Workers East ("the Union") to withdraw those aspects of its charge relating to discipline issued by Care One at New Milford ("Care One") during this interim period without first providing the Union notice and an opportunity to bargain as

required by *Total Security Management Illinois I, LLC*, 364 NLRB No. 106 (2016). *Care One at New Milford*, 368 NLRB No. 60, slip op. 1-2 (2019). In denying the Union's motion, the Board stated that "this case presents the Board with an opportunity to address significant issues of law under the National Labor Relations Act involving the obligation of the Respondent, and other employers, to engage in bargaining before imposing discipline on employees," *i.e.*, to "reconsider *Total Security Management*." *Ibid.*

The AFL-CIO files this brief *amicus curiae* to explain why *Total Security Management* is consistent with the unilateral change doctrine and with the Board's statutory responsibility to encourage the resolution of workplace disputes through collective bargaining. For those reasons, and because the alternative rule proposed by Care One would be significantly *more burdensome* than the notice and bargaining required by the existing rule, *Total Security Management* should be reaffirmed.[1]

1. The basic position of the General Counsel and Care One is that the employees' selection of the Union as their collective bargaining representative had no effect on Care One's freedom to unilaterally discipline or discharge employees without first providing notice to the Union and an opportunity to bargain.[2] That position is contrary to settled law defining an employer's duty to bargain under the Act.

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[1] The AFL-CIO expresses no view on the other issue in this case, which involves Care One's unilateral decrease of bargaining unit employees' work hours.

[2] Counsel for the General Counsel's Answering Brief to Respondent's Exceptions is cited herein as "GC Br." Respondent's Brief in Support of Exceptions is cited as "Resp. Br."

a. Section 8(a)(5) of the NLRA states that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d).

It has long been recognized that the appropriate time for employers and unions to meet and confer with respect to proposed changes to terms and conditions of employment is before the changes are implemented. *See May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 384-385 (1945). "The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987).

Terminating or suspending the employment of "workers works a dramatic change in their working conditions (to say the least), and if the company [terminates or suspends] them without consulting with the union and without having agreed to procedures for [terminations or suspensions] in a collective bargaining agreement it sends a dramatic signal of the union's impotence." *Advertisers Mfg.*, 823 F.2d at 1090. Accordingly, under the settled rule, once a union has been chosen as the employees' representative, terminations or suspensions of employment "are not a management prerogative. They

are a mandatory subject of collective bargaining." *Ibid*. And, "[u]ntil the modalities of [such employment actions] are established in the agreement, a company that wants to [terminate or suspend] employees must bargain over the matter with the union." *Ibid*. *See, e.g., Carpenters Local 1031*, 321 NLRB 30, 31 (1996).

The fact that the suspensions and termination in this case were carried out for disciplinary reasons does not change the fact that they represent changes – of the most profound sort – in the affected employees' terms of employment. Nor does that disciplinary rationale exempt Care One's employment actions from the statutory duty to bargain. Indeed, employee discipline is treated as a mandatory subject of bargaining precisely because disciplinary actions affect the employees' terms of employment. *See Good Hope Refineries, Inc. v. NLRB*, 620 F.2d 57, 59 (5th Cir. 1980) ("alteration of the counseling policy . . . had a direct impact on the employment relationship, since the employee's refusal to submit to the counseling session . . . became a permanent part of an employee's personnel file which could affect his future job security"); *Hobelmann Port Services, Inc.*, 317 NLRB 279, 279 (1995) (information about discipline issued since date of union's certification "presumptively relevant"). Nor does it affect Care One's duty to bargain that the three suspensions and the discharge at issue here were implemented on a case-by-case basis. *See Carpenters Local 1031*, 321 NLRB at 32 (duty to bargain over separate decisions to lay off two employees).

b. Care One acknowledges that "an employer would violate Section 8(a)(5) by unilaterally implementing a change in disciplinary standards or procedures," but argues that "an employer should not be found to violate Section 8(a)(5) by merely taking

disciplinary action consistent with its already-established disciplinary standards and procedures that represent the status quo" because those standards and procedures constitute "the 'dynamic status quo.'" Resp. Br. 13. That claim reflects a misunderstanding of how the Board's well-established unilateral change doctrine applies to entirely discretionary employer decisions, such as disciplinary decisions in most non-unionized workplaces.

In *NLRB v. Katz*, 369 U.S. 736, 743 (1962), the Supreme Court held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." For that reason, the Board has long held that an employer is required to maintain the status quo while engaged in negotiations for a first contract. *Bottom Line Enterprises*, 302 NLRB 373 (1991).

The Court in *Katz* recognized that there are circumstances in which a "company's long-standing practice" of making "automatic" changes such as "automatic [wage] increases to which the employer has already committed himself," 369 U.S. at 746, may constitute part of the status quo the employer is required to maintain – the so-called "dynamic status quo." *See generally* Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.14 (2d ed. 2004) ("[T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change."). However, a practice of changing terms and conditions of employment is only considered part of the status quo when the

changes at issue are "automatic" rather than "informed by a large measure of discretion." *Katz*, 369 U.S. at 746. Otherwise, "[t]here simply is no way . . . for a union to know whether or not there has been a substantial departure from past practice." *Ibid.*

The dissent in *Total Security Management* contended that, "to the extent an employer imposes discipline using the same disciplinary standards and procedures that have existed in the past, this *maintains* the status quo and is *not* a 'change' that requires bargaining." *Total Security Management*, 364 NLRB No. 106, slip op. 26 (Member Miscimarra, concurring in part and dissenting in part) (emphasis in original). The basic flaw of that argument is that it assumes the existence of a set of "disciplinary standards and procedures" specific enough to dictate results in individual cases before the union arrived on the scene – something that is almost never the case. Instead, the treatment of discipline in the non-unionized workplace is almost always like the merit raises at issue in *Katz* – "informed by a large measure of discretion" such that, in any individual case of discipline, "[t]here simply is no way . . . for a union to know whether or not there has been a substantial departure from past practice." 369 U.S. at 746.[3]

Cases illustrating the unrestrained discretion over discipline that employers exercise in non-unionized workplaces are legion. Typical is *Oberthur Technologies of*

[3] Logically, if *Total Security Management* dissent's argument were accepted, an employer would be *required* to provide entirely discretionary merit increases to employees during the interim period between certification or recognition and negotiation of a first contract based merely on the fact that it had done so in the past, since such rewards for good performance and behavior are the mirror-image of discipline. But *Katz* makes clear that this is not the law. 369 U.S. at 745-47. *See also Oneita Knitting Mills*, 205 NLRB 500, 502-03 (1973) (same).

America Corp., 368 NLRB No. 5, slip op. 17 (2019), in which the employer's Standards of Conduct and Disciplinary Policy states: "The Company reserves its right to demote, transfer, suspend, terminate or otherwise discipline any employee without prior warning should the Company, in its sole discretion, believe such action is warranted or appropriate." *See also Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. 7 (2016) (disciplinary procedure of a large non-unionized employer stating "the Company is free to terminate my employment at any time, for any reason, or for no reason at all"), *vacated in part on other grounds*, 367 NLRB No. 78 (2019). Even where there is nominally a "progressive disciplinary procedure" in place, non-unionized employers typically "reserve[] the right to determine what types of employee misconduct warrant disciplinary action" as well as "'sole discretion[]' to discipline without progressing through each stage of the disciplinary procedure." *Alan Ritchey, Inc.*, 359 NLRB 396, 414 & n.27 (2012).[4]

The very terms of such reservations of discretionary authority over discipline demonstrate that the employer made no promise to act consistently in its application of discipline in the past. As a result, once the union arrives on the scene, an employer who wishes to apply its disciplinary rules as the status quo while the parties are engaged in overall bargaining carries the affirmative burden of demonstrating that it even *had* a consistently-applied set of specific disciplinary rules. *See Consolidated Communications of Texas Co.*, 366 NLRB No. 152, slip op. 4 (2018) ("The party asserting the existence of a past practice bears the burden of proof on the issue[.]"). Unless the employer makes

[4] *Alan Ritchey* was invalidated by *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

this showing, the union has no way of knowing whether discipline instituted during bargaining is consistent with the employer's past practice or constitutes a material deviation from how the employer treated similar incidents before the employees selected union representation – leaving aside entirely the requirement that the employer must still bargain with the union over discretionary applications of its rules in individual cases. *Cf. Oneita Knitting Mills*, 205 NLRB at 502 ("The employees had no way of knowing in advance of receiving their increases how much the increases would be or how their own increases might compare with those of other employees or of those doing comparable work. Such matters are clearly appropriate for consideration and bargaining by the employees' chosen representative.").

Although Care One disputes whether an employer with a consistently-applied set of specific disciplinary rules should have to bargain over the application of those rules in individual cases, the company clearly acknowledges that, if *Total Security Management* were overruled, an employer would be required to "introduce[] evidence demonstrating that [it] has always considered [the particular disciplinary infractions at issue] to be serious, disciplinable offenses," Resp. Br. 13 n.9 – as well as show that it consistently applied those rules notwithstanding its stated reservation of discretionary authority over discipline – before it could apply its disciplinary policy unilaterally. *See also* Resp. Br. 15 (acknowledging that, in the absence of *Total Security Management*, "a comparison between the kind and degree of discipline the employer wishes to impose and the kind and degree of discipline the employer has a past practice of imposing" would be required); *id.* at 30 & n.24 (acknowledging that, if *Total Security Management* were

overruled, a remand may be required so that Care One may attempt to show "whether the four (4) disciplines at issue were similar in kind and degree to discipline taken by the Respondent previously").

What is entirely unclear, however, is why Care One believes that its proffered rule would be less burdensome or more practical than the current *Total Security Management* approach. In particular, it is difficult to understand why an employer would seek the burden of proving that it has defined disciplinary rules that it applied consistently in the past just so that it can apply those rules unilaterally during the limited period between the union's certification or recognition and the parties reaching a first contract. This is especially puzzling because, under *Total Security Management*, "the pre-imposition [bargaining] obligation attaches only with regard to the discretionary aspects of those disciplinary actions that have an inevitable and immediate impact on an employee's tenure, status, or earnings, such as suspension, demotion, or discharge." *Total Security Management*, 364 NLRB No. 106, slip op. 8. And, even with regards to these disciplinary actions, "the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed." *Ibid.* In sum, Care One seeks a rule that would require employers to undertake significantly more work for very little, if any, practical benefit and that would leave employers in a position of considerable uncertainty about whether they can lawfully impose discipline without first bargaining with the union.

c. For all of these reasons, the Board law that most appropriately applies when an employer seeks to make a discretionary change to working conditions while initial

contract negotiations are ongoing is not the dynamic status quo, but rather the *Stone Container* doctrine, which holds that an employer may make a change to a mandatory subject when the need for such a change arises as "a discrete event . . . that simply happens to occur while contract negotiations are in progress" with a newly-certified or recognized union, but only if the employer first provides the union notice and an opportunity to bargain. *Stone Container Corp.*, 313 NLRB 336, 336 (1993). *See also TXU Electric Co.*, 343 NLRB 1404 (2004); *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998). The *Stone Container* rule "deals with a situation in which piecemeal treatment is *unavoidable*, at least on an interim basis." *TXU Electric*, 343 NLRB at 1407 (emphasis added). In that limited circumstance, the *Stone Container* exception provides "a bargaining bridge to cross the transitional period when an employer must deal with that event while engaged in initial negotiations with a newly-recognized or certified union." *Ibid.* However, "[t]he principle has no broad application or disruptive potential." *Ibid.*

That characterization – a discrete discretionary change that the employer must make notwithstanding that overall bargaining is ongoing – describes the disciplinary matters that are the subject of the *Total Security Management* rule. In the event of a serious infraction of the employer's rules, the employer presumptively "c[an] not wait for an overall impasse" in negotiations to address the issue, but rather "ha[s] to do *something* with respect to th[e] matter." *TXU Electric*, 343 NLRB at 1407 (emphasis in original). Under *Stone Container*, as with *Total Security Management*, the employer is privileged to address the issue outside of overall negotiations, but only if it "provide[s] the union with notice and an opportunity to bargain over the discretionary aspects of its decision *before*

proceeding to impose the discipline." *Total Security Management*, 364 NLRB No. 106, slip op. 8. *Compare TXU Electric*, 343 NLRB at 1407 (summarizing *Stone Container* rule: "As long as the union is given notice and opportunity to bargain as to [the discrete event], the employer can carry out the changes even if there is no overall impasse as of the time of the change."). There is no rational basis for the Board to treat individual employee discipline – which is a mandatory subject of bargaining – any differently than any other time-sensitive bargaining matter that may arise during overall negotiations for a first contract and that is subject to the *Stone Container* rule.

2. The General Counsel and Care One contend that the *Total Security Management* rule is "practically unworkable" and "has created havoc in the post-certification workplace by . . . creating a confusing and unworkable bargaining standard before implementation of discipline." GC Br. 32. *See also* Resp. Br. 20. But the General Counsel and Care One provide precisely *zero* empirical evidence in support of these hyperbolic claims. In fact, experience on the ground demonstrates that the *Total Security Management* rule has been a striking success, encouraging parties to quickly address disciplinary matters that arise during negotiations for a first contract before those matters can fester and interfere with overall bargaining. Given this practical success, it is difficult to understand why the agency charged by Congress with "encouraging the practice and procedure of collective bargaining" by promoting "practices fundamental to the friendly adjustment of industrial disputes," 29 U.S.C. § 151, would seek to vacate the *Total Security Management* rule.

a. It hardly bears stating that a policy encouraging pre-implementation bargaining over individual disciplinary decisions is likely to lead to the speedy resolution of many disputes and, in that way, contribute to a productive overall bargaining relationship between the parties. This is especially important because such bargaining often takes place in the immediate aftermath of hard-fought unionization campaigns, a situation where tensions between supervisors and employees often run high and may be expressed through the supervisors' more rigorous enforcement of disciplinary rules.

In this setting, pre-implementation bargaining over individual disciplinary decisions has special utility. As the National War Labor Board long ago observed,

> "It has been the experience of the National War Labor Board to discover in many cases coming before it that the high officials of the Companies and the Unions concerned frequently are unaware of the facts and merits of a given dispute in which their Company or union has become involved. This happens to be particularly true of disputes which started as relatively minor grievances within the plant and which in most instances could and would have been adjusted very quickly by the president of the Company or his representative if he had known about them prior to their developing into disputes of major significance resulting in their certification to the National War Labor Board." *Termination Report of the National War Labor Board*, vol. 1, 113 (1947) (quoting *General Chemical Co.*, Case No. 267, at 392 (1942)).

The key point is to "give[] recognition to the right" to discuss discipline "when it is most useful to both employee and employer." *NLRB v. J. Weingarten, Inc.*, 420 U.S.

251, 262 (1975). When such discussions occur *before* discipline is issued, "'[p]articipation by the union representative might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and policies concerned at this stage, [and] to give assistance to employees who may lack the ability to express themselves in their cases. . . .'" *Id.* at 262 n.7 (quoting *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958)). Such "'good faith discussion . . . may solve many problems, and prevent needless hard feelings from arising,'" *ibid.*, hard feelings that may otherwise interfere with the parties' ability to reach an initial collective bargaining agreement.

In contrast, once "the decision to impose discipline has become final," "it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished." *Weingarten*, 420 U.S. at 263-64. At that point, "[t]he employer may then be more concerned with justifying his actions than re-examining them." *Id.* at 264. *Total Security Management*'s requirement of pre-implementation bargaining accords with this proven labor relations truth – that it is far easier to resolve a dispute before a final decision has been reached and both sides dig into their respective adversarial positions.

b. The practical experience of parties bargaining under the *Total Security Management* rule bears out this basic truth. Because the vast majority of bargaining over individual discipline under *Total Security Management* involves parties *complying* with the law, there are no reported decisions concerning such successes. For that reason, we provide brief summaries of the experience of bargaining over individual discipline

pursuant to *Total Security Management* that have been shared with us by union lawyers representing different unions in different industries around the United States.[5]

The majority of *Total Security Management* cases involve straightforward bargaining over individual disciplinary matters that arise while the parties are bargaining for a first contract. Despite the seemingly quotidian nature of the pre-implementation bargaining obligation, the concrete results of requiring the parties to engage in such bargaining can be quite significant.

For example, a union lawyer in Ohio reports "a good experience under *Total Security Management* that I think benefited the employer, as well as the employee."[6] Specifically, while negotiating a first contract, the employer notified the union that it planned to discharge a bargaining unit member. The employee was a strong union supporter and the union planned to file an unfair labor practice charge, even though the union was aware that the employer had a credible defense. Simultaneously, the employee made clear that she was considering filing a discrimination charge against the employer

[5] We believe the information provided herein is sufficient to demonstrate the obvious point that the *Total Security Management* rule "encourag[es] practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151. However, to the extent the Board believes it would benefit from a more fulsome exploration of the examples cited here, we encourage the Board to issue a Notice and Invitation to File Briefs to the public and conduct public hearings where both union and employer representatives can share their practical bargaining experiences under the *Total Security Management* rule.

[6] Correspondence on file with the undersigned author of this brief. In the event that the Board invites *amicus* briefs from the public and/or schedules public hearings in this case, the undersigned will strongly encourage this correspondent, and all those who provided empirical evidence regarding their experiences under the *Total Security Management* rule to the AFL-CIO, to submit that evidence to the Board.

with the Equal Employment Opportunity Commission (EEOC). The union and employer engaged in *Total Security Management* bargaining and reached an agreement where the employee received a severance package and the employer received a release of all claims related to the discharge. The lawyer notes that the severance package helped the employee financially while she looked for another job, while the release of claims saved the employer the cost of defending against a ULP charge and a possible EEOC charge. The lawyer also notes that the parties were able to resolve the matter quickly and that bargaining over the individual discipline did not distract from negotiations for an overall contract.

A union lawyer in New York reports an example of how the *Total Security Management* rule is helpful to parties in the particular circumstances of the health care industry. In that industry, the lawyer explains, an employer is typically required to suspend an employee from work pending an investigation when there is an allegation that the employee has engaged in conduct that resulted in harm to a patient. This speed of the investigation, therefore, is typically of great concern to the employee, since she is deprived of income for however long it takes the employer to complete the investigation. Spurred by the obligation to bargain under *Total Security Management*, and recognizing that this recurring issue was likely to arise in individual cases, the employer and union engaged in *Total Security Management* bargaining on the topic. The parties reached an agreement that accounted for both sides' interests – allowing the employer to immediately suspend an employee pending investigation, but requiring the employer to conclude its investigation within five days.

Finally, a union lawyer in Georgia reports his experience of a union and employer agreeing to an interim grievance and arbitration procedure during the period when the parties were bargaining for a first contract. The lawyer explained that the employer preferred dealing with discipline through an agreed-upon grievance system rather than on a case-by-case basis, in part because the employer believed it would be more efficient, just as it is after a collective bargaining agreement is signed. For its part, the union viewed the interim grievance procedure as a benefit because it demonstrated the value of union representation to employees even before the parties had reached a first contract.

In sum – and there are many more stories like those described above of successful *Total Security Management* bargaining over individual discipline laying the foundation for constructive long-term collective bargaining relationships – the General Counsel's and Care One's claim that the *Total Security Management* rule is unworkable or creates havoc in the workplace is contrary to the empirical evidence of parties' actual experience under the rule.

3. The facts of this case vividly illustrate both why the *Total Security Management* rule is correct as a matter of law as well as the practical benefits of pre-implementation bargaining over individual discipline.

First, Care One's claim that its pre-existing discipline system constituted a sufficiently fixed policy to constitute the "dynamic status quo," Resp. Br. 13 & n.9, is belied by the record in this case. Care One's employee handbook, which includes the company's discipline policy, states bluntly in its introduction that "either you or the

Center may terminate the relationship at any time, for any reason." GC Ex. 5 at 4. Later in the handbook, the discipline policy itself states:

> "The following highlights a list of actions that the Center may use while administering discipline. Please note that these are guidelines only, and are not intended to imply a series of 'steps' that will be followed in all instances. Any of the disciplinary actions described below, including termination, may be initiated at any stage of the process depending on the nature of the specific inappropriate behavior, conduct, or performance and other relevant factors.
>
> - ✓ Verbal or Written Warning
> - ✓ Suspension or Suspension Pending Further Investigation
> - ✓ Final Written Warning
> - ✓ Termination of Employment" GC Ex. 5 at 18.

In other words, prior to the Union arriving on the scene, Care One reserved to itself the right to discipline or terminate any employee "at any time, for any reason," GC Ex. 5 at 4, without regard to whether the employee had previously been subject to discipline, and without regard to how Care One had treated other employees who engaged in similar behavior. That disciplinary policy, which vests all discretion in the employer and contains no fixed criteria that would allow the Union "to know whether or not there has been a substantial departure from past practice," *Katz*, 369 U.S. at 746, is not the sort of policy that an employer may apply without first providing the union with notice and an opportunity to bargain.

Second, based on the Union's representations to the Board that, upon further investigation of the circumstances surrounding the discipline in this case, "the disciplinary actions complained of were for cause . . . and therefore no reinstatement or make-whole remedy is available," CP Mot. for Partial Withdrawal of the Charge 1-2, it seems exceedingly likely that, if Care One had agreed to engage in pre-implementation bargaining with the Union in the first instance, the two sides would have quickly reached a resolution that would have avoided the significant delay and litigation costs that have occured in this case. Preparation for bargaining requires both sides to ascertain "the facts and merits of a given dispute." *Termination Report of the National War Labor Board* at 113 (citation and quotation marks omitted). As a result, in most cases, the dispute is likely to "be[] adjusted very quickly . . . prior to [it] developing into [a] dispute[] of major significance," *ibid.*, since the parties must engage in "good faith discussion" *before* "the decision to impose discipline has become final." *Weingarten*, 420 U.S. at 262-63 & n.7 (citation and quotation marks omitted).

Instead, Care One – and now the General Counsel – seeks to eliminate altogether the pre-implementation duty to bargain over serious discipline while the parties are negotiating a first contract on the alleged basis that such duty is neither required by the Act nor practical. As we have shown, both arguments are incorrect. *Total Security Management* was correctly decided as a matter of NLRA law and represents a common-sense way for the Board to promote "practices fundamental to the friendly adjustment of industrial disputes arising out of difference as to wages, hours, or other working

conditions" and thus fulfill its statutory duty to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151.

CONCLUSION

The Board should reaffirm *Total Security Management*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2019, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Charging Party was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following in the manner specified below:

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