Alan Ritchey, Inc. *and* Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO. Cases 32–CA–018149, 32–CA–018459, 32–CA–018526, 32–CA–018601, and 32–CA–018693

December 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The central question posed by this case is one the Board has never adequately addressed in its broader doctrinal context under Section 8(a)(5) of the National Labor Relations Act: whether an employer whose employees are represented by a union must bargain with the union *before* imposing discretionary discipline on a unit employee.[1] This question will usually arise only during the period after the union has become the employees' bargaining representative, but before the parties have agreed upon a first contract, and only if the parties have not agreed upon an interim grievance procedure. We hold today that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline unilaterally. Nevertheless, based on the unique nature of discipline and the practical needs of employers, the bargaining obligation we impose is more limited than that applicable to other terms and conditions of employment.[2] We will apply today's holding prospectively.

Background

The United States Postal Service (USPS) contracts with the Respondent for, among other things, the inspection and repair of nonmotorized mail-handling equipment. The Respondent performs these services at several facilities, including, as pertinent here, its Richmond, California facility, which it opened in August 1999, and where it employed approximately 250 employees at all relevant times. On April 13, 2000,[3] a majority of the Respondent's employees in an appropriate bargaining unit voted in favor of representation by Warehouse Union Local 6, International Longshore and Warehouse Union.

The General Counsel alleged that, following the employees' selection of the Union as their bargaining representative, the Respondent committed multiple violations of Section 8(a)(5), (3), and (1) of the Act. No exceptions were filed to the judge's dismissal of a number of these allegations.[4]

I. THE DISCRETIONARY IMPOSITION OF DISCIPLINE

As stated above, the primary question raised in this case is whether an employer has a duty to bargain before unilaterally disciplining individual employees, when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals. The issue arises in this case, as it typically will, after the employees voted to be represented by the Union, but before the parties entered into a

[1] Member Hayes is recused from participating in this case, and he took no part in the consideration or disposition of this case.

[2] On April 19, 2002, Administrative Law Judge Burton Litvack issued the attached decision. In addition to the exceptions and briefs filed by the parties, amicus briefs were filed by the Employers Association of the Northeast and by LPA, Inc., both urging reversal of the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain before imposing discipline on individual employees. A third amicus brief urging affirmance of the judge's finding in this regard was filed jointly by the AFL–CIO; the American Postal Workers Union, AFL–CIO; and the Newspaper Guild-CWA, AFL–CIO. The Charging Party filed a brief in response to LPA's amicus brief. Section I of this Decision addresses this issue in depth. Section II of this Decision addresses the other issues before the Board on exceptions.

On September 25, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB 628 (2009). Thereafter, the Charging Party filed a petition for review in the United States Court of Appeals for the Ninth Circuit. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

In the two-member decision, the Board severed and remanded to the judge the question of whether the Respondent made a change in the enforcement of its efficiency standard and in the sanctions for failing to meet that standard that constituted a substantial and material change in terms and conditions of employment sufficient to require preimplementation bargaining with the Union. We adopt and incorporate by reference only that portion of the two-member decision severing and remanding the above-specified question. On February 4, 2010, the judge issued a supplemental decision and recommended Order concluding that no such change in enforcement had occurred. On April 27, 2010, the Board adopted the judge's supplemental decision in the absence of exceptions.

We adopt the judge's finding, for the reasons stated in his initial decision, that the Respondent did not violate Sec. 8(a)(3) in its enforcement of its efficiency standards.

[3] All dates are in 2000 unless otherwise indicated.

[4] In addition, on July 18, 2003, the Board approved the parties' joint motion to remand a portion of the case to the Regional Director for approval of settlement and partial withdrawal of charges concerning the judge's finding that the Respondent violated Sec. 8(a)(5) by reducing the work hours of mechanics in the container repair department.

collective-bargaining agreement or other binding agreement governing discipline.

The Board has held in a variety of other contexts that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment—even where it has previously done so routinely or at regularly scheduled intervals. If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, e.g., the amount of annual wage increases, it must first bargain with the union over the discretionary aspect. See, e.g., *Oneita Knitting Mills*, 205 NLRB 500 (1973). The Board has never clearly and adequately explained whether (and, if so, to what extent) this established doctrine applies to the unilateral discipline of individual employees. We now conclude that it does, and that an employer must provide its employees' bargaining representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes. Nevertheless, because we apply this rule prospectively only, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) when it refused to bargain with the Union over certain disciplinary actions here.

A. Facts and Judge's Decision

The Respondent imposed the discipline at issue for absenteeism, insubordination, threatening behavior, and the failure to meet efficiency standards. The sanctions ranged from a formal warning to discharge, and were imposed pursuant to the Respondent's five-step progressive disciplinary system—consisting of counseling, verbal warning, written warning, suspension, and termination—which had been in effect since the Respondent began operations at the Richmond facility in August 1999.

Prior to the arrival of the Union on the scene, the Respondent maintained various efficiency standards and guidelines. On January 18, 2000, new Plant Manager David Williams announced that inspectors would be expected to achieve a minimum performance level of 80 percent of the USPS's efficiency standard.[5] From the April 13 union election to the end of September, the Respondent issued performance-related discipline to approximately 41 inspectors, consisting of 22 verbal warnings, 29 written warnings, 22 suspensions, and 14 discharges. The Respondent also maintained absenteeism standards pursuant to which a specific number of unexcused absences resulted in a specific level of discipline. For any 12-month period, the rule prescribed the following disciplinary actions: 2 to 4 unexcused absences, counseling; 5 or 6, verbal warning; 7 or 8, written warning; 9 or 10, suspension; and 11 or more, termination. In addition, the Respondent maintained an employee handbook containing general rules of conduct enforceable by discipline. "[I]nsubordination (refusal to follow management's instructions)" was among the handbook's examples of inappropriate conduct or behavior, "for which corrective counseling or other disciplinary action, including termination, may be taken." In a separate section addressing violence and weapons, the handbook "expressly prohibit[ed] acts or threats of violence by or against any employee" and stated that the Respondent "may immediately terminate the employment of any employee who threatens or engages in any act of violence."

The Respondent's progressive disciplinary system applied to all four causes of discipline at issue here except, possibly, to discharge for threatening behavior. Nevertheless, in all four areas, the Respondent admitted that it exercised its discretion in deciding whether to impose discipline and what form of discipline to impose. Indeed, the handbook expressly reserved to the Respondent the right to exercise discretion in the enforcement of its policies, stating in its introductory section that violations of the handbook's policies and procedures, or reasonable suspicion of such violations, "may result in disciplinary action," but that "[f]rom time to time, situations may arise which warrant consideration and flexibility on the part of management." In discussing the progressive disciplinary system, the handbook expressly reiterated, and arguably enlarged, the Respondent's discretion in the application of the system, stating:

> . . . . [I]n certain circumstances, and at management's sole discretion, it may be necessary to impose an action, up to and including termination of employment, without prior notice or counseling and without progressing through each stage of the disciplinary guidelines. *Determination of appropriate action will be*

[5] According to Williams, based on extensive time studies, USPS established Standards of Work setting the expected inspection rates for the various sizes and types of mail bags, trays, sleeves, and lids. R. Exh. 7 lists the USPS processing standards for 18 different items, ranging from inspecting 130 "#1 canvas mailbags" per hour to inspecting 706 small plastic trays per hour. Williams testified that the Respondent's contract with USPS required the Respondent to attain at least 95 percent compliance with the USPS efficiency standards overall in order to receive the compensation set in the contract. By setting a minimum efficiency standard of 80 percent for all employees while expecting many inspectors to achieve higher efficiencies, Williams intended the inspectors to reach an overall efficiency standard above 80 percent, and, by subsequently increasing the minimum efficiency standard, to meet or exceed the USPS standards.

made on a case-by-case basis based on the nature and severity of the occurrence. [Emphasis added.]

The Respondent's witnesses admitted that discretion was exercised in making the disciplinary decisions at issue. With regard to the Respondent's enforcement of its efficiency standards, Plant Manager Williams acknowledged that application of the performance standards was not "hard and fast," stating: "You reviewed each employee and just dealt with the circumstances . . . [;] nothing in life is ever straight numbers." Williams testified regarding three inspectors who were treated leniently when their performance fell short: Francis Young, because her husband died; Amelia Santos, because she was unable to work consecutive days in a particular position; and Anita Benjamin, because she worked in a low-volume area where it was difficult to maintain rhythm.[6]

The Respondent similarly exercised discretion in applying the attendance guidelines. Two employees with nine unexcused absences each were given a verbal warning and a written warning, respectively. An employee with 62 unexcused absences received a verbal warning, while another with 10 unexcused absences was discharged. Again, Williams acknowledged that discretion was exercised in applying the absenteeism guidelines, testifying that "every single case is going to be different based on the circumstances . . . [;] there is always discretion involved." Human Resources Manager Brandee Chorro agreed that "we use discretion," adding that she has "never come across any attendance policy that has been set in stone and so rigid without using some type of discretion."

The Respondent's discharge of LaTachianna Pontiflet for insubordination on May 31 and of Mandrell Miller for threatening behavior on October 13 were also admittedly exercises of discretion. Regarding inappropriate conduct such as insubordination, the Respondent's employee handbook stated that "[t]he nature and severity of an offense will be considered in determining disciplinary action to be taken." Consistent with the handbook, Williams testified that there was "discretion in the insubordination policy as to whether an employee was terminated or not." Chorro agreed that there was "discretion as to . . . insubordination," but she also testified that threatening behavior was "usually grounds for termination."[7] Nonetheless, as stated above, the employee handbook provided that the Respondent may immediately terminate an employee who engages in threatening conduct, and it further reserved for the Respondent the discretion whether to involve law enforcement in relation to any particular violation of the policy.[8]

On May 26, the Union notified the Respondent by letter that it was protesting the Respondent's unilateral disciplinary actions. In the letter, the Union stated that the Respondent was required by law to afford the Union "prior notice, and an opportunity to bargain, before taking disciplinary action against bargaining unit employees." The Respondent, however, did not provide the Union with notice or an opportunity to bargain about any of the disciplinary actions at issue.

The General Counsel argued that each act of discipline was a unilateral change because it did not represent an automatic execution of established policy (e.g., a standard wage increase on the anniversary of an employee's employment). The judge agreed with the General Counsel, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and afford it an opportunity to bargain before disciplining inspectors for failing to meet minimum efficiency standards, disciplining employees for absenteeism, and discharging employees Pontiflet (for insubordination) and Miller (for threatening behavior).[9] The judge relied heavily on the Board's decision in *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001). The Respondent excepted to the judge's decision.

B. Discipline Unquestionably Works a Change in Employees' Terms and Conditions of Employment

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court approved the Board's determination that an employer violates Section 8(a)(5) of the Act by making unilateral changes to represented employees' terms and conditions of employment. *Katz* held that such a change "is a circumvention of the duty to negotiate which frustrates

[6] Although Williams' testimony indicated that USPS had extensive control over the work that the Respondent's employees performed and the overall pace at which they were required to perform it, USPS did not control the means by which the Respondent achieved the required overall efficiency. Williams expressly acknowledged that USPS had no input regarding any discipline of the Respondent's employees.

[7] Although Chorro testified that employees' threats against coworkers or supervisors were usually grounds for immediate discharge, the judge found that the decision to terminate involved "some determination as to the severity of [the] threatening behavior" and, thus, also involved discretion. We add that discretion is also exercised in classifying particular actions or statements as threats.

[8] Regarding threats and violence, the handbook stated, "[t]he Company may take additional action against employees and nonemployees who engage in such behavior, such as notifying the police or other law enforcement personnel and prosecuting violators of this policy to the maximum extent of the law."

[9] Although the complaint alleged both decision and effects bargaining violations, the judge addressed and found a decision bargaining violation only. The General Counsel did not except to the judge's failure to make a finding regarding effects bargaining. Thus, the issue is not before us.

the objectives of § 8(a)(5) much as does a flat refusal" to bargain. Id. at 743 (footnote omitted).[10]

In the present case, all parties agree that the imposition of discipline on individual employees that alters their terms or conditions of employment implicates the duty to bargain if it is unconstrained by preexisting employer policies or practices. That conclusion flows easily from the terms of the Act and established precedent. When an employee is terminated—whether for lack of work, misconduct, or other reasons—the termination is unquestionably a change in the employee's terms of employment. As the Board has held:

> Under Sections 8(a)(5) and 8(d),[11] it is unlawful for an employer to refuse to bargain with respect to mandatory subjects of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209-210 (1964). Termination of employment constitutes such a mandatory subject.

N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000).[12] Similarly, when an employee is demoted or suspended without pay, the action represents a change in terms and conditions of employment. See, e.g., *Pillsbury Chemical Co.,* 317 NLRB 261, 261 fn. 2 (1995) (holding that employee's demotion and substantial wage reduction "rendered [employee's working] conditions so difficult or unpleasant" that constructive discharge was demonstrated).[13] Finally, in *Carpenters Local 1031*, 321 NLRB 30 (1996), the Board held that the suggestion in some prior Board decisions that "a change in terms or conditions of employment affecting only one employee does not constitute a violation of Section 8(a)(5) . . . is erroneous as a matter of law," and the Board overruled all such prior cases. Id. at 32.

Not every unilateral change that affects terms and conditions of employment triggers the duty to bargain. Rather, the Board asks "whether the changes had a *material, substantial, and significant impact* on the employees' terms and conditions of employment." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (emphasis added). This test is a pragmatic one, designed to avoid imposing a bargaining requirement in situations where bargaining is unlikely to produce a different result and, correspondingly, where unilateral action is unlikely to suggest to employees that the union is ineffectual or to precipitate a labor dispute. We draw on this basic principle, adjusted to fit the present context, today. Disciplinary actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees' tenure, status, or earnings. Requiring bargaining *before* these sanctions are imposed is appropriate, as we will explain, because of this impact on the employee and because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed. Just as plainly, however, other actions that may nevertheless be referred to as discipline and that are rightly viewed as bargainable, such as oral and written warnings, have a lesser impact on employees, viewed as of the time when action is taken and assuming that they do not themselves automatically result in additional discipline based on an employer's progressive disciplinary system. Bargaining over these lesser sanctions—which is required insofar as they have a "material, substantial, and significant impact" on terms and conditions of employment—may properly be deferred until after they are imposed.[14]

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[10] The Supreme Court in *Katz* therefore agreed with the Board that the employer acted unlawfully when, during bargaining with a newly certified union, it made unilateral changes to its sick leave policy and to its processes for granting both automatic and merit-based wage increases. Id. at 744–747.

[11] Sec. 8(d) describes the conduct required of an employer and its employees' bargaining representative pursuant to the obligation to "bargain collectively."

[12] See also *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works a dramatic change in their working conditions" and thus "[l]ayoffs are not a management prerogative [but] a mandatory subject of collective bargaining"); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) ("A grievance about a discharge is clearly a mandatory subject of bargaining.").

[13] Significantly, the Board in *Pillsbury Chemical* also held, contrary to the judge, that the employer had violated Sec. 8(a)(5) by informing the demoted employee of the demotion and layoff decision without first providing the union notice and an opportunity to bargain over the decision and its effects. Id. at 261–262.

Cf. Falcon Wheel Division L.L.C., 338 NLRB 576 (2002) (holding that the layoff of one employee was a material, substantial, and significant change). A suspension would affect an employee in much the same way that a temporary layoff would, if not more so.

[14] We recognize that warnings may in certain cases demonstrate supervisory authority to discipline or to effectively recommend discipline. See, e.g., *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1425 fn. 23 (2010). In assessing supervisory status, however, our concern is with what the issuance of warnings reflects about the authority of the individual imposing the discipline over other employees, not with the warning's immediate effect on the terms and conditions of the employee receiving it. Further, nothing in the distinction we draw for the specific purpose at issue in this case suggests that a bargaining representative would not have a right to obtain information concerning warnings and similar personnel actions under the broad relevance standard applicable to information requests.

In short, we do not intend to suggest that the distinction we draw here among types of discipline for purposes of a *preimposition* duty to bargain modifies Board precedents in any other context in which discipline is relevant.

C. The Board Has Consistently Held that Discretionary Changes in Terms and Conditions of Employment Cannot Be Unilateral

The Board has recognized that an employer's obligation to maintain the status quo sometimes entails an obligation *to make* changes in terms and conditions of employment, when those changes are an established part of the status quo. Thus, if an employer has an established practice of granting employees a 1-percent increase in wages on the anniversary of their hire date, an employer not only does not violate its duty to bargain by making that change unilaterally, it violates its duty if it *fails* to do so. *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), affd. 485 F.2d 1239 (6th Cir. 1973); see also *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970) ("The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."). A corollary to this rule, however, is that an employer must always bargain over the discretionary aspect of the change in question.

Oneita Knitting Mills, 205 NLRB 500 (1973), illustrates this proposition. There, the Board held that an employer violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases. The Board explained:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan* [supra]) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B.* v. *Katz,* 3[69] U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Id. at 500. *Katz* itself involved an employer's grant of merit increases that were "in no sense automatic, but were informed by a large measure of discretion." *NLRB v. Katz*, 369 U.S. at 746.

In the decades since *Katz* and *Oneita Knitting*, across a range of terms and conditions of employment, the Board has applied the principle that even regular and recurring changes by an employer constitute unilateral action when the employer maintains discretion in relation to the nature or extent of the changes. In *Washoe Medical Center*, which the judge relied on here, the Board applied *Oneita Knitting* and concluded that an employer's "substantial degree of discretion" in placing newly hired employees into quartiles within their positions' wage ranges, based on subjective judgments, required the employer to bargain with the union before implementing the wage rates. 337 NLRB at 202. As discussed in detail below, the Board majority in *Washoe* expressly rejected the dissent's contention that there was no duty to bargain because "the [r]espondent's policy and procedure for setting initial wage rates entails the consistent application of uniform standards and, thus, curtails its exercise of discretion." Id. In *Eugene Iovine*, 328 NLRB 294 (1999), the Board held that an employer's recurring unilateral reductions in employees' hours of work were discretionary and therefore required bargaining: "there was no reasonable certainty as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours appear[ed] to be unlimited." Id. at 294 (internal quotations omitted). In *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), the Board required an employer to bargain regarding economically motivated layoffs, when the owner selected the employees to be laid off based, not on seniority, but on his own judgment of their ability. In so holding, the Board rejected the employer's argument that its failure to bargain was permissible "because of its past practice of instituting economic layoffs due to lack of work." The Board held that the employer's practice before its employees were represented did not provide a defense and that once the union represented the employees, "the [r]espondent could no longer continue unilaterally to exercise its discretion with respect to layoffs."[15]

[15] Reviewing courts have similarly concluded that discretionary decisions are subject to bargaining. See *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (rejecting employer's defense that unilateral economic layoffs were "in accordance with its established practice" and thus were lawful; the court held that, even assuming that economic layoffs are not inherently discretionary, the employer's "layoff procedure was *ad hoc* and highly discretionary: before layoff, decisions were made whether to transfer employees to a busier department, to implement a permanent or part-week layoff, and to follow seniority or other methods in selecting the employee to lay off"), abrogated on other grounds by *Hoffman Plastic Compounds*, 535 U.S. 137 (2002); *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875–876 (5th Cir. 1979) (the court, rejecting employer's "conten[tion] that the [wage] increases were in compliance with a periodic survey of wages and benefits and were, therefore, not subject to bargaining," found "the increases were not automatic, in that Allis-Chalmers exercised considerable discretion in determining the timing and amount. Therefore, the union could properly demand bargaining.").

As explained above, discipline may alter core components of employees' terms and conditions of employment. Moreover, as the Board held in *Daily News of Los Angeles*, "the *Katz* doctrine . . . neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act." *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Consistency with these precedents and their underlying principles demands that we apply the *Oneita Knitting* approach to require bargaining before discretionary discipline (in the form of a suspension, demotion, discharge, or analogous sanction) is imposed, just as we do in cases involving discretionary layoffs, wage changes, and other changes in core terms or conditions of employment, where bargaining is required before an employer's decision is implemented. Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.

This conclusion is strongly supported by the Board's reasoning in *Washoe*, cited by the judge in this case. In *Washoe*, the Board affirmed the judge's dismissal of 8(a)(5) charges arising out of individual acts of discipline, stating:

> We affirm the judge's recommended dismissal of the allegation that the Respondent unlawfully failed to bargain before-the-fact, i.e., before the planned imposition of specific discipline on particular employees. The record does not establish that the Union at any time sought to engage in such before-the-fact bargaining.

But the Board expressly declined to rely on the alternative rationale articulated by the judge, a rationale that parallels that offered by the Respondent here.

> In light of the Board's holding in *Oneita Knitting Mills* . . . we reject the judge's comment . . . that "[I]t is not sufficient that the General Counsel show only some exercise of discretion to prove the alleged violation; the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures." [Footnote omitted.]

Id. at. 202 fn. 1.

In fact, the *Washoe* Board applied the holding in *Oneita Knitting* not only to reject the judge's suggestion that the employer had no duty to bargain over individual acts of discipline absent a change in its disciplinary policies, but also to reject a parallel argument concerning the assignment of initial wage rates to new employees. The Board stated:

> the issue is *not* whether the Respondent unilaterally discontinued its practice of establishing discretionary starting wage rates for newly hired employees based on numerous criteria. Rather, the issue is whether the Respondent failed to provide the Union with advance notice and an opportunity to bargain about the *implementation* of these discretionary wage rates, as required by *Oneita*, supra.
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> . . . .
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> [The employer's] judgments [in selecting and weighting the criteria on which it rated new employees] are necessarily subjective, as it is unlikely that any two applicants or employees will be precisely comparable. It is this substantial degree of discretion, as well as the unavoidable exercise of such discretion each time the Respondent establishes a wage rate for a new employee, that requires the Respondent to bargain with the Union, pursuant to the Board's holding in *Oneita*.

Id. at 202. That statement, albeit dicta, expressly rejected the basis for dismissing the allegations advanced by the Respondent here.

Amici argue, however, that the Board held in *Fresno Bee*, 337 NLRB 1161 (2002), that an employer has no preimposition duty to bargain over discretionary discipline. There, the Board, without comment, affirmed a judge's dismissal of 8(a)(5) charges arising out of the imposition of individual discipline. The General Counsel, drawing on the principles and precedent that we discuss here, had argued that the employer "exercised considerable discretion in disciplining in its employees and is therefore required to bargain to impasse with the Union over each and every imposition of discipline." 337 NLRB at 1186. The judge rejected this argument, but her rationale for doing so misunderstood the Board's case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment.

As her decision reveals, the judge's error was to conclude that because the employer had not changed its disciplinary *system*, the imposition of discipline with respect to individual employees, even if it involved the exercise of discretion, did not amount to a unilateral change. The

judge recognized that the "discipline administered to unit employees by [the employer] is, at least in part, discretionary." Id. at 1186. Nevertheless, the judge reasoned that the "fact that the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified, does not vitiate the system as a past practice and policy." Id. The General Counsel had not contended that the employer's "discipline policies were unilaterally altered," and "[t]here was no evidence that [the employer] did not apply its preexisting employment rules or disciplinary system in determining discipline." Id. "*Therefore*," the judge concluded, the employer "made no unilateral change in terms and conditions of employment when it applied discipline." Id. at 1186–1187 (emphasis added).

Under our case law, the judge's conclusion was a non sequitur. As we have explained, the lesson of well-established Board precedent is that the employer has both a duty to maintain an existing policy governing terms and conditions of employment *and* a duty to bargain over discretionary applications of that policy. It was no answer to the General Counsel's argument in *Fresno Bee*, then, to say that because the employer's disciplinary policy had stayed the same, the employer had no duty to bargain over discretionary disciplinary decisions. Nor did it suffice to point out that the employer had bargained over the discipline *after* it was imposed: the General Counsel was arguing for a *preimposition* duty to bargain. Id. at 1187.

As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale—the only rationale articulated—was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee*. See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation."). To the extent *Fresno Bee* contradicts our conclusion here, it is overruled.[16]

Amicus LPA asserts that *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court agreed with the Board's holding that an employee has a Section 7 right to union representation in investigatory interviews that the employee reasonably believes may lead to discipline, precludes the bargaining obligation we impose today. Properly understood, however, the rights and duties adopted here are in harmony with those addressed by *Weingarten*. In affirming the Board's recognition of the right to union representation in certain investigatory interviews, the Court agreed with the Board's qualification that the employer had no obligation to bargain with the union representative. Id. at 259–260. But the Board's representations and the Court's ruling addressed the investigatory interview only.[17] That is, the limited right confirmed in *Weingarten* applies only to an employer's investigation—an investigation that may or may not lead to discipline affecting an employee's terms and conditions of employment—and arises only when the employer seeks to interview the employee as part of such an investigation. In other words, an investigation by itself is not, and may not result in, a change in employees' terms and conditions of employment and thus does not implicate discipline or Section 8(a)(5) of the Act.

Weingarten, which is grounded in Section 8(a)(1), seeks to ensure that employers carrying out investigations do not restrain or coerce employees in the exercise of their Section 7 rights to engage in concerted activity for mutual aid and protection. An employee who seeks her union representative's assistance in responding to an employer's investigation that may lead to discipline is, quite literally, engaging in "concerted activit[y] for the purpose of . . . mutual aid or protection" under Section 7. For this reason, the *Weingarten* right is held by the employee, not by the union. It must be asserted by the employee, not by a union representative, and it can be waived by the employee. See, e.g., *Appalachian Power Co.*, 253 NLRB 931, 933 (1980). In contrast, the obligation to refrain from unilateral action regarding mandatory subjects of bargaining is grounded in Section 8(a)(5). Moreover, the two rights arise at different points in time: the *Weingarten* right arises during an investigation into

[16] In *Pennsylvania State Corrections Officers Assn.*, 358 NLRB No. 19 (2012), the Board adopted without discussion a judge's recommendation to dismiss the allegation that unit employees were discharged without notice to their union or an opportunity to bargain. Although the discharges at issue were not disciplinary, a portion of the judge's analysis relied on *Fresno Bee*. We do not, however, view *Fresno Bee* as essential to the Board's decision in *Pennsylvania State Corrections*, in light of the judge's unchallenged finding in that case that the union received notice of the discharges but failed to request bargaining.

[17] See *NLRB v. J. Weingarten, Inc.,* Brief for the Board, 1974 WL 186290 (U.S.). In a handful of pre-*Weingarten* decisions, too, the Board referred to the absence of an obligation to bargain. See *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enf. denied 482 F.2d 842 (7th Cir. 1973); *Illinois Bell Telephone Co.*, 192 NLRB 834 (1971); *Jacobe-Pearson Ford*, 172 NLRB 594 (1968). Like the *Weingarten* brief and decision, however, those Board decisions addressed whether employees have a right to union assistance at investigatory interviews, *not* whether the union has a right to notice and an opportunity to bargain before the employer implements its decision to impose discipline.

Further, the right that we adopt today does not conflict with the representations in the Board's *Weingarten* brief, in which "the Board acknowledge[d] that the duty to bargain does not arise *prior to* the employer's decision to impose discipline." Brief for the Board at 10 (emphasis added); see also id. at 15, 16. As explained elsewhere in this decision, the duty to provide the union with notice and an opportunity to bargain arises *after* the employer has decided to impose discipline, but before actually imposing it.

whether discipline is merited, while the right to bargaining arises after such an investigation results in a decision to impose discipline, but prior to its implementation. Thus, although the *Weingarten* Court agreed with the Board that an employer's *refusal to bargain* with a union in an investigatory meeting that may lead to discipline does not violate Section 8(a)(1), the Court expressed no view concerning whether the employer's unilateral decision to discipline an employee violates Section 8(a)(5) by denying the employees' chosen representative the right to participate in good-faith bargaining over mandatory subjects of bargaining.

As stated above, it is our view that the well-established *Weingarten* right and the bargaining obligation adopted here work in conjunction to ensure that the participants' rights are respected at each stage of the disciplinary process. Thus, an employer with a represented work force would have the following legal obligations:

As *Weingarten* established, the employer must permit the union to be present at an investigatory interview with an employee, should the employer decide to conduct one, if the employee reasonably believes that the investigation could lead to discipline and requests the union's presence. The employer need not bargain with the union at that interview, however. (As *Weingarten* further established, if the employer is unwilling to allow the union to be present at the investigatory interview, the employer may forgo the interview.)

Under today's decision, after the employer has decided (with or without an investigatory interview) to impose certain types of discipline, it must provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to implement the decision. As explained below, at this stage, the employer need *not* bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse *after* imposing discipline.

D. An Obligation to Bargain Prior to Imposing Discipline Will Not Be Unduly Burdensome for Employers

We recognize that an obligation to bargain prior to imposing discipline may, in some cases, delay the employer's action or change the decision that it would have reached unilaterally. With regard to the latter, it is our view that permitting the employee to address the proposed discipline through his or her representative in bargaining is likely to lead to a more accurate understanding of the facts, a more even-handed and uniform application of rules of conduct, often a better and fairer result, and a result the employee is more able to accept. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 668 (1981) ("The concept of mandatory bargaining is premised on the belief that collective discussions . . . will result in decisions that are better for both management and labor and for society as a whole.").

With regard to possible delay that a bargaining obligation may cause in implementing discipline, we do not perceive that our decision today will unduly burden employers in that regard.

First, as explained above, the pre-imposition obligation attaches only with regard to the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion, or discharge. Thus, we expect that most warnings, corrective actions, counselings, and the like will not require preimposition bargaining, assuming they do not automatically result in additional discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining.

Second, where the preimposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This duty entails sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion. It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests. (Again, we note that, in this context, the scope of the duty to provide information is limited to information relevant to the subject of bargaining: the discretionary aspects of the employer's disciplinary policy.) The aim is to enable the union to effectively represent employees by (for example) providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to bargain continues after imposition. Moreover, the employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy. Third, an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that pre-

sents exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.[18] The scope of such exigent circumstances is best defined going forward, case-by-case, but it would surely encompass situations where (for example) the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct, poses a significant risk of exposing the employer to legal liability for his conduct, or threatens safety, health, or security in or outside the workplace. Thus, our holding today does not prevent an employer from quickly removing an employee from the workplace, limiting the employee's access to coworkers (consistent with its legal obligations) or equipment, or taking other necessary actions to address exigent circumstances when they exist.[19]

Finally, an employer need not await an *overall* impasse in bargaining before imposing discipline, so long as it exercises its discretion within existing standards. In *Stone Container Corp.*, 313 NLRB 336 (1993), the Board held that the rule established in *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), barring an employer from making unilateral changes in terms and conditions of employment during bargaining prior to either agreement or an overall impasse in negotiations, does not prevent an employer from maintaining a dynamic status quo with respect to "a discrete event, such as an annually scheduled wage review . . ., that simply happens to occur while contract negotiations are in progress." *Stone Container*, 313 NLRB at 336. In such cases, the Board has held that an employer satisfies its obligation to bargain if it maintains the status quo as to the timing of and criteria for making the discrete, regularly scheduled decisions and gives the union "reasonable advance notice and an opportunity to bargain" over the discretionary application of those criteria. *Neighborhood House Assn.*, 347 NLRB 553, 554 (2006).

The Board has not, however, specified exactly what the extent of the bargaining obligation is under *Stone Container*. In fact, twice since *Stone Container*, the Board has expressly found it unnecessary to reach the question of whether the employer must bargain to agreement or impasse over the discrete matter at issue before acting unilaterally. *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776 fn. 4 (2006); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 542 fn. 3 (2004), enfd. 426 F.3d 455 (1st Cir. 2005). Here, we again find it unnecessary to resolve that question in the typical *Stone Container* situation involving "a discrete event scheduled to occur during bargaining." *Neighborhood House*, 347 NLRB at 554. In such cases, because the discrete event, such as an annual wage adjustment, is regularly scheduled, both parties are well aware of it in advance, and it would not be unduly burdensome to require bargaining to agreement or impasse on the discrete issue prior to unilateral action. See, e.g., id. at 554 fn. 6 (explaining that in *TXU Electric Co*., 343 NLRB 1404 (2004), the Board applied *Stone Container* "where a discrete event occurs every year at a given time").

Although discipline represents a "discrete event . . . that simply happens to occur while contract negotiations are in progress," it is neither regularly scheduled nor, in fact, scheduled in any manner. Considering the practicalities of this unique circumstance, we hold that so long as the employer continues to apply existing standards and procedures for discipline, the employer's duty is simply to bargain over the discretionary aspect of the discipline, in accord with today's decision. After fulfilling its preimposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse. Cf. *Daily News of Los Angeles*, 315 NLRB at 1244 fn. 2 (concurring opinion) (asserting that *Stone Container* would allow employer, after giving the union notice and an opportunity to bargain, to implement its proposal on the discrete issue without reaching impasse even on the discrete issue, but noting that, "[o]f course, absent impasse, the employer may have to continue bargaining after implementation, and such bargaining could include demands for retroactive application of any agreement ultimately reached"). We believe such a rule appropriately defines the statutory duty to bargain in good faith concerning all terms and conditions of employment in this area critical to both employers and employees.[20]

Thus, the narrow scope of the bargaining obligation and the limited nature of the duty to bargain will not impede an employer's ability to effectively manage its

[18] The Board has developed an analogous approach to the duty to bargain over other issues where economic exigencies exist. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).

[19] In the circumstances described, an employer could suspend an employee pending investigation, as many employers already do. An employer who takes such action should promptly notify the union of its action and the basis for it and bargain over the suspension after the fact, as well as bargain with the union regarding any subsequent disciplinary decisions resulting from the employer's investigation.

[20] An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargaining agreements.

workforce. For example, in a workplace where the employer has an established practice of disciplining employees for absenteeism, the decision to impose discipline for such conduct will not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. Instead, bargaining will be limited to the specific case at hand: e.g., whether the employee actually was absent and merited discipline under the established practice. Similarly, if the employer consistently suspends employees for absenteeism, but the length of the suspension is discretionary, bargaining will be limited to that issue (assuming the fact of absenteeism is not contested). Our expectation is that, when bounded by past practice and policy, bargaining over the limited topics that implicate employer discretion will yield expeditious results, and that it will, in fact, be the norm that parties will reach agreement before the necessity of testing the limits of the pre-imposition bargaining period. If our expectation proves inaccurate, any infringement on the employer's ability to effectuate its desired discipline will be limited (as we have made clear), because we impose no duty to bargain to impasse prior to imposing discipline.

To hold otherwise, and permit employers to exercise unilateral discretion over discipline after employees select a representative—i.e., to proceed with business as usual despite the fact that the employees have chosen to be represented—would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union (typically, newly certified) that purportedly represents the employees impotent. Employees covered by the Act attain union representation only after participating in a government-sanctioned process and only if a majority desires representation. We appreciate that they do not lightly undertake that process and exercise their free choice. If, after employees follow this path, their chosen representative can lawfully be denied the opportunity to represent them, especially in such a critical context as significant disciplinary action, the employees might reasonably conclude that their statutory rights are illusory. In addition, as Judge Posner explained in a case involving unilateral layoffs after the union was certified but before a first contract was executed:

> 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. Of course, if the change is authorized by the collective bargaining agreement, it is not in derogation of the union and is not an unfair labor practice. But there was no agreement here. Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.

NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1090 (7th Cir. 1987) (citations omitted). An employer's unilateral exercise of discretion in imposing serious discipline without first giving the union notice and an opportunity to bargain would send employees the same signal as the imposition of unilateral layoffs.

Acknowledging that discretion is inherent—and perhaps unavoidable—in many kinds of discipline does not alter the conclusion that a bargaining obligation attaches to the exercise of such discretion. Granting merit increases, as in *Katz*, *Oneita Knitting*, and subsequent cases, is also inherently discretionary, as are many decisions regarding economic layoffs.[21] Nonetheless, we require bargaining over those inherently discretionary decisions. The inevitability of discretion in most decisions to discipline does not support treating it differently from other forms of unilateral change; indeed, it makes bargaining over disciplinary actions that much more critical.

E. Application to This Case

We have no difficulty here in finding that the discipline at issue was discretionary. Nevertheless, for reasons we will explain, we have determined not to apply today's holding retroactively. As a result, we reverse the discretionary discipline violations found by the judge, and dismiss the corresponding allegations of the complaint.

1. The discipline at issue was discretionary

The fact that the Respondent has disciplined employees in the past pursuant to a progressive disciplinary policy for broadly defined offenses does not establish a sufficiently nondiscretionary past practice privileging what would otherwise clearly be unilateral changes in the individual employees' terms and conditions of employment.[22] Moreover, as discussed above, the Respondent admitted that it exercised discretion in its choices of

[21] See, e.g., *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d at 711.

[22] See *Eugene Iovine*, 328 NLRB 294, 294 (1999) (employer's failure to establish consistent past practice prevented it from demonstrating that practice had not changed). Cf. *Toledo Blade*, supra (holding that change from uniform rule on when discipline is to be imposed to case-by-case—i.e., discretionary—determination was mandatory subject of bargaining).

whether and how severely to discipline employees for particular violations. As the judge found, the Respondent reserves the right to determine what types of employee misconduct warrant disciplinary action and the "nature and severity of an offense"; for certain types of misconduct, the Respondent reserves the right, at its "sole discretion," to impose discipline without progressing through each stage of its stated disciplinary procedure. The Respondent's plant manager and human resources manager both testified that discretion was exercised in disciplining individual employees.[23] In sum, the record compels a finding that the Respondent's imposition of the discipline at issue here was discretionary.

2. Retroactive application to the instant case is inappropriate

"The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage. The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001) (quotations omitted). Put differently, we apply new rules and other changes prospectively where retroactive application would cause "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005). As the Board has explained,

> In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

Id. (citations omitted); see also *Allied Mechanical Services*, 356 NLRB No. 1 (2010) (incorporating by reference 352 NLRB 662 (2008)), enfd. 668 F.3d 758 (D.C. Cir. 2012). Although the issue here is a close one, we believe that the controlling factors weigh against retroactive application.

The discipline at issue here pre-dated the Board's 2002 decision in *Fresno Bee*, supra, which held (incorrectly, we have concluded) that there is no pre-imposition duty to bargain over discretionary discipline. The Respondent, then, could not have relied on *Fresno Bee* in acting unilaterally. That said, at the relevant time, Board precedent did not speak clearly and directly to the issue – indeed, it was essentially silent. The issue, in other words, was not one that seems to have been raised before and certainly not one that was widely recognized. To that extent, it would not have been unreasonable for the Respondent to believe that it could decline to bargain with the Union without committing an unfair labor practice.

We are not aware of any evidence that a practice of preimposition bargaining over discipline has ever been common in workplaces governed by the Act. In contrast, *postimposition* bargaining, in the form of a grievance-arbitration system, is commonplace. These practical considerations persuade us that retroactive application of our holding could well catch many employers by surprise and, moreover, expose them to significant financial liability insofar as discharges and other disciplinary actions that could trigger a backpay award are involved.

To be sure, we believe that today's change in the law is well-grounded in Board doctrine and better serves the policies of the Act. Retroactivity, however, is not essential to achieving those benefits, and it may impose unexpected burdens on employers. For these reasons, we will apply our holding only prospectively.

II. THE REMAINING ALLEGATIONS AT ISSUE

We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by bargaining in bad faith and dealing directly with employees.[24] We also agree with the judge, again for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by unilaterally making the following changes in employees' terms and conditions of employment: implementing a new work rule deeming leave from work an unexcused absence if taken with less than one week's prior notice; changing the work shift and working hours of the unit inventory clerk; implementing a plan to hire temporary employees directly rather than through temporary employment agencies and paying temporary employees at a different rate for performing bargaining-unit work; and changing the shift times for the first-shift processing department employees during the Memorial Day holiday.

We agree only in part with the judge's finding that the Respondent violated Section 8(a)(5) and (1) when it unilaterally reduced the number of nonworking holidays. The contract between the Respondent and USPS gives USPS the right to change any contract term at its discretion. On April 18, the USPS modified its contract with the Respondent to change Memorial Day and Labor Day from nonworking to working holidays. As a result, the

[23] Williams and Chorro acknowledged that discretion played a role in the discharges of employee Miller and employee Pontiflet.

[24] As to the direct dealing violation, we agree with the judge that the Respondent violated Sec. 8(a)(5) by polling employees and discussing with them a reduction in force in the container repair department, and by offering employees triple pay for working on Memorial Day if they worked the previous Saturday and did not miss any days of work the following week. See sec. IV.J.3 and IV.J.4 of the judge's decision.

Respondent eliminated Memorial Day and Labor Day as nonworking holidays without affording the Union notice and an opportunity to bargain over either the decision or its effects. We agree with the judge that the Respondent breached its duty to bargain with the Union over the effects of the holiday reduction. As to the decision, however, we reverse the judge's finding of a violation. The Respondent's hands were tied by USPS's contract modification, and thus the Respondent was not obligated to bargain over the decision. *Long Island Day Care Services*, 303 NLRB 112, 117 (1991) (finding no violation because "there was nothing of substance to bargain about" due to the respondent's "total lack of discretion" over a federally subsidized wage increase).

We also agree, but only in part, with the judge's findings concerning the Respondent's rule prohibiting union talk. The complaint alleged that the Respondent violated Section 8(a)(1), (3), and (5) by implementing the rule. The judge found that the Respondent unilaterally promulgated the rule in violation of Section 8(a)(5) and that it discriminatorily enforced the rule in violation of Section 8(a)(3) and (1). We agree with the judge, for the reasons he states, that the Respondent's promulgation of the rule violated Section 8(a)(5). We also find that promulgation and enforcement of the rule, which prohibited employees from discussing the Union or union-related matters during worktime while allowing all other topics of conversation except racial slurs, constituted an independent violation of Section 8(a)(1). See *Jensen Enterprises,* , 339 NLRB 877, 878 (2003) (finding violation in a general ban on discussion of all union-related topics during working time). There is no evidence, however, that the Respondent disciplined any employees for violating the rule. Thus, we will dismiss the 8(a)(3) allegation.

We dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by changing welder Kevin Lynch's work assignments. These assignments were consistent with past practice. The record establishes that Lynch had been experiencing an excessive amount of down time. On June 6, Lynch was asked to perform container repair mechanic work when he had no welding work to do. The record indicates that Lynch previously had performed such work. Moreover, his written job description stated that "[o]ther duties may be assigned" in addition to the enumerated "[e]ssential [d]uties and responsibilities" of his welder classification. In these circumstances, we find that the assignment was not a unilateral change. See *Outboard Marine Corp.*, 307 NLRB 1333, 1338–1339 (1992) (finding no substantial and material change in practice of having employees available to fill a variety of positions on the plant floor where employees acknowledged same practice existed before), enfd. mem. 9 F.3d 113 (7th Cir. 1993).

ORDER[25]

The National Labor Relations Board orders that Alan Ritchey, Inc., Richmond, California, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing the Union or union-related matters during working time, when there is no such prohibition as to conversations about any other subjects.

(b) Failing or refusing to recognize and bargain in good faith with Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit, by insisting, as a condition precedent to resuming face-to-face collective bargaining, that the Union provide it with a complete contract proposal, including all economic items; by delaying the appointment of a substitute authorized bargaining representative; and by demanding to meet at an unreasonable location for bargaining.

(c) Undermining the Union as the bargaining representative of its employees by bypassing the Union and dealing directly with its employees in an appropriate bargaining unit concerning wages, hours, or other terms and conditions of employment.

(d) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

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[25] We modify the judge's recommended Order to conform to the violations found and in accordance with the Board's standard remedial language. We substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and we modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and any other monetary awards shall be paid with interest compounded on a daily basis. In the remedy section of his decision, the judge recommended a 10-month extension of the certification year, but he omitted from his recommended Order language giving effect to this remedy. We grant the General Counsel's exception and the Charging Party's cross-exception concerning the judge's inadvertent omission, and we modify the recommended Order accordingly. In addition, the judge recommended that the notice be posted in Spanish as well as English. The judge did not explain the basis for his recommendation, however, and we find no support in the record for a finding that a substantial number of the Respondent's employees have limited English proficiency. Accordingly, we reject the judge's recommendation for bilingual notice-posting. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 989 fn. 61 (2007), enfd. in relevant part sub nom. *S & F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009).

(e) Failing or refusing to bargain collectively and in good faith with the Union concerning the effects resulting from the elimination of Memorial Day and Labor Day as nonworking holidays.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule prohibiting employees from discussing the Union or union-related matters during working time.

(b) On request by the Union, rescind the following unilateral changes: (i) the work rule mandating that leave would count as an unexcused absence if taken without at least one week's prior notice; (ii) changes in shift times for the first-shift processing department employees during Memorial Day weekend; (iii) changes in the work shift and the working hours of the unit inventory clerk; and (iv) hiring temporary employees directly rather than through temporary employment agencies and paying them at a different hourly rate than bargaining-unit employees for performing bargaining-unit work.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, processing, container repair, and quality and data departments employees, including inspectors, material handlers, banders, stretch wrappers, receivers, loaders, unloaders, forklift operators, tray repair operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors, palletized quality auditors—initial inspectors, and final inspectors employed by Respondent at its Richmond, California facility; excluding all employees performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies, outside contractor employees, office clerical employees, janitors, managers, supervisors, acting supervisors, confidential employees, professional employees, data analysts, plant maintenance leads, guards, and supervisors as defined by the Act.

The Union's certification is extended ten months from the date the Respondent begins to comply with this Order.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(e) On request, bargain with the Union in good faith concerning the effects of the elimination of Memorial Day and Labor Day as nonworking holidays.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Richmond, California, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2000.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 14, 2012

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing the Union or union-related matters during working time, when there is no such prohibition as to conversations about any other subjects.

WE WILL NOT fail or refuse to recognize and bargain in good faith with Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our bargaining-unit employees by insisting, as a condition for resuming face-to-face collective bargaining, that the Union provide us with a complete contract proposal, including all economic items; by delaying the appointment of a substitute authorized bargaining representative; or by demanding to meet at an unreasonable location for bargaining.

WE WILL NOT undermine the Union as the bargaining representative of our employees by bypassing the Union and dealing directly with our unit employees concerning wages, hours, or other terms and conditions of employment.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union concerning the effects resulting from the elimination of Memorial Day and Labor Day as nonworking holidays.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the work rule prohibiting you from discussing the Union or union-related matters during working time.

WE WILL, on the Union's request, rescind the following unilateral changes: (i) the work rule mandating that leave would count as an unexcused absence if taken without at least one week's prior notice; (ii) changes in shift times for the first-shift processing department employees during Memorial Day weekend; (iii) changes in the work shift and the working hours of the unit inventory clerk; and (iv) hiring temporary employees directly rather than through temporary employment agencies and paying them at a different hourly rate than bargaining-unit employees for performing bargaining-unit work.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, processing, container repair, and quality and data departments employees, including inspectors, material handlers, banders, stretch wrappers, receivers, loaders, unloaders, forklift operators, tray repair operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors, palletized quality auditors—initial inspectors, and final inspectors employed by Respondent at its Richmond, California facility; excluding all employees performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies, outside contractor employees, office clerical employees, janitors, managers, supervisors, acting supervisors, confidential employees, professional employees, data analysts, plant maintenance leads, guards, and supervisors as defined by the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, on request, bargain with the Union in good faith concerning the effects of the elimination of Memorial Day and Labor Day as nonworking holidays.

ALAN RITCHEY, INC.