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## NLRB Finds Duty to Bargain About Discipline Even Before Agreement on First Contract

By Adam Wit

Does an employer have a duty to bargain with a union, prior to the finalization of a first collective bargaining agreement, before imposing discretionary discipline on an employee? According to the National Labor Relations Board's recent decision in *Alan Ritchey, Inc. and Warehouse Union Local 6, International Longshore and Warehouse Union, AFL-CIO*, 359 NLRB No. 40 (Dec. 14, 2012), the answer is yes.

In April 2000, employees of Alan Ritchey, Inc. elected a union as their bargaining representative. After the election, but before a collective bargaining agreement had been negotiated, the employer disciplined multiple employees in accordance with its existing progressive discipline policy. The disciplines ranged from written warnings to discharges and involved application of the employer's normal performance standards and policies regarding absenteeism, insubordination, and threatening behavior. The employer did not notify the union or give it an opportunity to bargain about the disciplines before they were imposed.

The union, and the General Counsel of the NLRB, argued that each discipline was an unlawful unilateral change in a term or condition of employment because the employer had a duty to bargain with the union before imposition of discretionary discipline. The Board agreed. According to the Board, the duty to bargain about discipline "typically" arises during the period between a union's certification as the employees' bargaining representative and agreement on a first collective bargaining agreement. The Board did not rule as to whether a further duty to bargain about discipline exists after that time, but implied that the contractual implementation of a grievance arbitration process may suffice instead. The decision is not retroactive. As discussed below, the nature and extent of the employer's duty to bargain depends upon the nature and level of severity of the discipline.

### Is There a Duty to Bargain?

A unionized employer has a duty to bargain before implementing a change that has a material, substantial, and significant impact on an employee's term or condition of employment, assuming the change is subject to managerial discretion. In *Alan Ritchey*, the Board determined that discipline "unquestionably" changes an employee's terms and conditions of employment, especially with respect to suspensions, demotions, and terminations. Lesser forms of discipline (verbal or written warnings) have less impact on employees, but, according to the Board, are nevertheless changes subject to bargaining.

Comparing discipline to other unilateral changes, the Board determined that the nature of the discipline determines whether the employer has a duty to bargain before imposition. If the discipline is similar to an automatic change or a change to preserve the status quo (like an automatic, fixed wage increase), there is no duty to bargain. If, on the other hand, the discipline involves an exercise of managerial discretion, there is a duty to bargain.

In *Alan Ritchey*, each of the policies implicated by the disciplines in question allowed for the exercise of discretion when deciding whether, and to what degree, discipline should issue. In fact, management witnesses had testified that they maintained discretion in making those decisions. In other words, when determining whether to discipline, and the level of discipline to impose, the employer was guided by “fixed” policies but ultimately decided each case based upon the circumstances. The Board determined that in those circumstances the union had a right to advance notice and an opportunity to bargain about the discretionary aspect of each decision.

On the other hand, the Board held that the employer did not have a duty to bargain “over those aspects of its disciplinary decision that are consistent with past practice or policy.” Thus, for example, if an employer has an established practice of disciplining employees for absenteeism, the employer need not bargain about whether absenteeism is an appropriate reason to discipline. However, the employer must bargain about whether the employee was actually absent such that discipline was warranted. Similarly, if employees are routinely suspended for absenteeism, but the length of suspension is discretionary, the obligation to bargain is limited to the length of the suspension (assuming the absenteeism is not otherwise challenged).

## **When is the Duty to Bargain Triggered?**

The severity of the discipline determines when the duty to bargain is triggered. In cases involving suspension, demotion, discharge, or an “analogous sanction,” the Board held that the duty to bargain is triggered before the discipline is imposed. In those instances, the Board reasoned, the impact upon the employee and the potential harm to the perception of the union’s effectiveness as a bargaining representative justified pre-imposition bargaining. In cases involving “lesser sanctions” (such as verbal or written warnings), where the harm is less significant, the employer must still bargain but can wait until after discipline is imposed.

The Board noted an exception to this rule in “exigent circumstances.” Where the 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,” the employer can discipline immediately, provided that, “promptly afterward,” the union is given an opportunity to bargain about the decision and its effects. Examples of such circumstances include situations in which an employee has engaged in unlawful conduct or where there is a “significant risk” that the employee’s continued presence will expose the employer to legal liability, or threatens safety, health, or security in the workplace.

## **To What Extent Must an Employer Bargain Before Imposing Discipline?**

Even where there is a pre-imposition duty to bargain, the employer need not bargain to impasse before imposing discipline. Rather, before imposing discipline, the union must be given “sufficient advance notice” to provide for “meaningful discussion” about the reason for, and level of, discipline to be imposed. The union must also be given an opportunity to request and review relevant information about the discipline. Once the employer meets this obligation, discipline may be imposed. The employer must continue to bargain after that point, however, until agreement or impasse is reached with respect to the discipline.

## **Practical Recommendations for Working Within the Board’s Decision**

### ***Consider Implementation of an Interim Grievance Procedure***

Employers seeking to avoid uncertainty in satisfying the duty to bargain before imposing discipline should consider negotiating an interim grievance procedure with the union before a full collective bargaining agreement is reached. This type of procedure should acknowledge the employer’s right to discipline consistent with its policies and practices and clearly and unmistakably provide for the employer’s right to impose discipline before notifying or negotiating with the union. The Board sanctioned this type of “safe harbor” in *Alan Ritchey*, noting that an

interim grievance procedure would “permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargaining agreements.” The downside to this strategy is that the employer is subjecting itself to potential arbitration prior to reaching an initial labor agreement. Unions are likely to trumpet that as a negotiation victory. Further, employers who agree to a pre-contract grievance-arbitration process may be giving up an important piece of leverage in negotiations, as unions in first contract situations may concede on other demands to obtain such a process. However, for some employers, such a pre-contract grievance-arbitration agreement may be better than multiple trips to the NLRB related to whether bargaining properly occurred as to a particular discipline situation.

### ***Communicate with the Union About the Intent to Impose Discipline***

In instances where the employer prefers to avoid any type of formalized grievance procedure before a collective bargaining agreement is reached, it should, when necessary, notify the union of the *intent* to discipline before discipline is imposed. Notification should occur after the employer has conducted whatever investigation needs to be done and decided upon a plan of action with respect to the policy violation at issue and level of discipline to be imposed, keeping in mind that pre-imposition bargaining is required only in cases involving more serious discipline, like suspension, demotion or termination.

The notification should identify the employee to be disciplined, the basis for the discipline, and the intended level of discipline. It should also give the union a reasonable but definite time-frame within which to bargain about the discipline. The notification should make clear that, if the union does not indicate an intent to bargain about the discipline within that time frame, the employer will conclude that the union does not intend to bargain and will proceed with the discipline. In some instances, a union waiver of the right to bargain may occur.

### ***“Suspension Pending Investigation” in “Exigent Circumstances”***

As discussed above, the Board acknowledged that in “exigent circumstances” employers can discipline immediately, as long as the union is promptly notified afterwards and bargaining occurs. In these instances, the Board indicated that employers could suspend an employee “pending investigation, as many employers already do.” The employer can then proceed with whatever investigation is needed, and bargain with the union regarding the suspension and any additional discipline that might result from the investigation.

### ***Consider Additional Language in the Collective Bargaining Agreement***

The parties in *Alan Ritchey* had not yet agreed upon a collective bargaining agreement when the disciplines in question were imposed, and this was the context within which the Board’s decision was rendered. Given prior decisions of the current Board, there is a risk that in a future case the Board could impose a duty to bargain discipline upon employers with existing collective bargaining agreements. While this is less likely in instances where the parties have well-established management rights, a longstanding grievance procedure, and a practice of imposing discipline without prior notification or bargaining, it is a concern. Employers may be able to reduce this risk by preserving their right to impose discipline without first notifying and bargaining with the union through strong management rights language in their collective bargaining agreement.

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