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Oberthur Technologies of America Corporation and Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters Cases 04–CA–128098, 04–CA–132055, 04–CA–134781, and 04–CA–158860

June 17, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On June 16, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel and Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions,¹ and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

After an election won by the Union, but before the Union was certified as the unit employees’ bargaining representative, the Respondent discharged employees Albert Anderson, Harvey Werstler, Dan Clay, and Lawrence Bennethum. Although the Respondent exercised some discretion relative to these discharges, in each case it applied the same standards that had been in place prior to the union election. Accordingly, the judge correctly found that the Respondent had no duty to give the Union notice and opportunity to bargain *before* discharging these four employees.² The judge also correctly observed that under applicable precedent—specifically, *Fresno Bee*, 337 NLRB 1161 (2002)—an employer that applies unchanged standards in deciding to discharge an employee must bargain with the union *after* the discharge, upon request. And

¹ No exceptions were filed to the judge’s rejection of the Respondent’s claim that the complaint must be dismissed due to the alleged invalidity of the appointment of Dennis Walsh as the Regional Director for Region 4, or to the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) by unreasonably delaying its response to the Union’s March 13, 2014 information request.

² In *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), the Board held, for the first time, that if an employer exercises discretion under a preexisting disciplinary policy when it demotes, suspends, or discharges an employee, the employer must give the union notice and opportunity to

the judge also correctly recognized that the Union never requested after-the-fact bargaining regarding any of the four discharges. Nevertheless, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and opportunity to bargain. For the reasons that follow, we reverse.

Facts

The Union narrowly won a representation election in September 2012. In December 2012, the Board issued its decision in *Alan Ritchey*. See *supra* footnote 2. On February 20, 2013, Administrative Law Judge Raymond P. Green issued a decision upholding the Union’s election victory. By letter dated March 11, 2013, the Union requested bargaining “concerning the wages, benefits and working conditions of production employees at Oberthur Technologies,” further stating that “[t]his Union stands ready and willing to meet with the Company at a time and place mutually acceptable to bargain and come to terms on a Collective Bargaining Agreement covering production employees.” In addition to this general request to engage in collective bargaining for an initial labor contract, the Union in its March 11 letter also stated that

[s]hould the Company file exceptions to the [judge’s] decision, it is the position of the Union that any unilateral changes by the Company pertaining to terms and conditions of employment *or with respect to the issuance of discipline* without *first* providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available [to] it for the violation of law.

(Emphasis added.) By letter dated March 15, 2013, the Respondent informed the Union that it intended to appeal Judge Green’s decision to the Board and that until its exceptions were “finally resolved on appeal, the ALJ’s decision is not final and the Company has no obligation to bargain until that occurs.” The Respondent did file exceptions, and the Board issued its decision certifying the Union on August 27, 2015. See *Oberthur Technologies of America Corp.*, 362 NLRB 1820 (2015), *enfd.* 865 F.3d 719 (D.C. Cir. 2017) (also

bargain *before* it decides to take that action, subject to an exception for exigent circumstances. However, *Alan Ritchey* was invalidated as a result of the Supreme Court’s June 26, 2014 decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550. Subsequently, the Board reaffirmed the holding of *Alan Ritchey* in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). However, the Board decided to apply that holding prospectively only. *Id.*, slip op. at 11–12. This case was pending when *Total Security Management* issued, and therefore *Total Security Management* and its holding do not apply here. We express no view as to whether *Total Security Management* was correctly decided.

enforcing *Oberthur Technologies of America Corp.*, 364 NLRB No. 59 (2016).

During the interval between Judge Green’s decision and the Board’s, the Respondent discharged the four above-named employees.³ The relevant facts are as follows.

On or about February 4, 2014, the Respondent discharged employee Albert Anderson for using a forklift to lift another employee at least 15 feet in the air, a violation of the Respondent’s workplace safety standards.⁴ Union Representative John Potts asked the Respondent to provide the Union with documentation concerning Anderson’s discharge, but Potts did not request bargaining over the discharge. The Respondent furnished the documentation, but it also took the position that it had no duty to do so. Potts testified that he never requested bargaining over Anderson’s discharge, and there is no evidence that any agent or representative of the Union ever did so.

On or about July 14, 2014, the Respondent discharged employees Dan Clay and Harvey Werstler for fighting in the workplace, a violation of the Respondent’s Standards of Conduct.⁵ Again, Potts requested documentation concerning the discharges, but he did not request bargaining over either discharge. The Respondent furnished the documentation but reiterated its position that it had no duty to do so. Potts testified that he never requested bargaining over Clay’s or Werstler’s discharge, and there is no evidence that any agent or representative of the Union ever did so.

On or about July 27, 2015, the Respondent discharged employee Lawrence Bennethum for uttering a racially offensive comment, a violation of the Respondent’s zero tolerance policy regarding racially offensive comments in the workplace. Again, Potts requested documentation concerning Bennethum’s discharge, but he did not request bargaining over the discharge, and there is no evidence that any agent or representative of the Union ever did so.

As stated above, on August 27, 2015, the Board issued its Decision and Order, reported at 362 NLRB 1820, in which it certified the Union as the unit employees’ bargaining representative. By letter dated September 1, 2015, the Union again requested bargaining “concerning the

wages, benefits and working conditions of production employees at Oberthur Technologies,” and it reiterated its readiness and willingness “to meet with the Company at a time and place mutually acceptable to bargain and come to terms on a Collective Bargaining Agreement covering production employees.” In this letter, the Union also expressed its hope that the Respondent would “abide by the Board’s [August 27] decision,” in which the Board found that the Respondent had unlawfully delayed unit employees’ bonuses, transfers, promotions, and wage increases and ordered the Respondent to make employees whole. But the Union did not request postdischarge bargaining over the discharges of Anderson, Clay, Werstler, or Bennethum; indeed, it did not even mention their discharges in its September 1, 2015 letter. Neither did it reiterate its previous warning against discharging employees without giving the Union prior notice and opportunity to bargain, and it did not make a standing request for postdischarge bargaining. By letter dated September 22, 2015, the Respondent refused to bargain a second time, informing the Union that it intended to challenge the Board’s decision “in the courts.” On July 27, 2016, the Board granted the General Counsel’s motion for summary judgment and found that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union. 364 NLRB No. 59, *supra*.

Discussion

It may be helpful at the outset to clarify the difference between two separate and distinct bargaining obligations under the Act.

First, employers of union-represented employees have a duty, recognized by the Supreme Court in *NLRB v. Katz*,⁶ to refrain from unilaterally changing any term or condition of its unit employees’ employment that constitutes a mandatory subject of bargaining. In other words, before the employer can change a term or condition of employment, it must give the union notice of the proposed change and opportunity to bargain over it, and it must do so “sufficiently in advance of actual implementation . . . to allow a reasonable opportunity to bargain.”⁷

³ The Respondent does not except to the judge’s findings that the discharges were discretionary and that it did not give the Union prior notice of the discharges or opportunity to bargain over them.

⁴ The Respondent’s “Standards of Conduct” document lists the following examples of misconduct “that will result in disciplinary action and/or dismissal”: “[a]ny action that . . . could result in . . . personal injury,” “[a]ny action that endangers the health or safety of others, including violating a safety rule or practice,” and “[f]ailing to protect . . . persons while operating Company equipment.”

⁵ The Respondent’s Standards of Conduct lists the following examples of misconduct “that will result in disciplinary action and/or dismissal”: “[d]isorderly conduct, fighting or provoking a fight, . . . or engaging in acts of violence or threatening behavior, at Company or customer

facilities or work location,” “[a]ny action that . . . could result in . . . personal injury,” and “[a]ny action that endangers the health or safety of others.”

⁶ 369 U.S. 736 (1962).

⁷ *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). Depending on the circumstances, a “reasonable” opportunity to bargain need not be a lengthy opportunity: the Board has found as little as 2 days’ notice sufficient to satisfy the employer’s obligation under *Katz*. See *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975). More specifically, the opportunity the employer must provide to the union is an opportunity to *request* bargaining. If the union receives reasonable advance notice of a proposed change but fails to request bargaining, it waives the right to

Second, the Act places on unionized employers a duty to bargain in good faith regarding any and all mandatory subjects of bargaining when requested by the union to do so. Thus, as long as an employer does not change any term or condition of employment that constitutes a mandatory subject of bargaining, it is not required to give notice to the union regarding matters over which the union may wish to bargain. Rather, the employer's duty to bargain concerning mandatory subjects arises if and when the union requests bargaining.

In sum, when the employer proposes to change a term or condition of employment, the *employer* must act by giving the union notice and opportunity to bargain. If the employer does not make such changes, a *union* wishing to bargain over a mandatory subject must act by requesting bargaining.⁸

With these principles in mind, we turn to the precedent that directly controls the disposition of this case, *Fresno Bee*, supra. There, the Board held that when an employer does not change its pre-existing disciplinary policies but merely exercises some discretion in applying them, the imposition of discipline pursuant to those policies does not constitute a change in a term or condition of employment. *Katz* does not apply in such circumstances, and the employer is not required to give the union notice and opportunity to bargain before it makes its disciplinary decision. 337 NLRB at 1186–1187.⁹ However, the Board also held that although an employer “has no obligation to notify and bargain to impasse with the [u]nion before imposing discipline,” it does have “an obligation to bargain with the

[u]nion, upon request, concerning the discharges, discipline, or reinstatement of its employees.” Id. at 1187.

Under *Fresno Bee*, the outcome of this case is clear. The record shows that the Respondent did not change the standards pursuant to which it decided to discharge Anderson, Clay, Werstler, and Bennethum. Thus, even though it exercised discretion when applying those standards, it did not change any term or condition of employment, and therefore it was not obligated under *Katz* to give the Union prior notice and opportunity to bargain and did not violate Section 8(a)(5) by failing to do so. The judge so found, correctly.

It is equally clear that the Respondent did not violate Section 8(a)(5) by failing to bargain over the discharges upon request after the fact. As shown above, the Union never requested bargaining regarding any of the four discharges. Specifically, Union Representative Potts did not request bargaining in any of the letters to the Respondent concerning each of the four discharges. Moreover, there is no evidence that the Union ever made a bargaining request by any other means. In fact, Potts affirmatively testified that he never requested bargaining over the discharges of Anderson, Clay, or Werstler. Furthermore, the Union did not include, in either of its letters requesting bargaining with the Respondent for an initial labor contract, a demand to bargain over discharges, either pre-discharge or postdischarge. In the March 11, 2013 letter, the Union threatened litigation in the event the Respondent filed exceptions to Judge Green's February 20 decision—and thus refused the Union's request to bargain an initial labor contract—and subsequently issued discipline

bargain, and the employer may proceed to act. See, e.g., id. at 678–680 (dismissing 8(a)(5) allegation where union received notice that employer would administer polygraph tests beginning two days later, and union never sought bargaining either before or during testing); *American Buslines, Inc.*, 164 NLRB 1055, 1056 (1967) (dismissing 8(a)(5) allegation where employer gave union 1 week's notice of a change and the union “failed to prosecute its right to engage in” bargaining).

To say that *Katz* requires an employer to give the union notice and opportunity to bargain before changing a term or condition of employment is an accurate but incomplete statement of the law. Where the employer and union are engaged in negotiations for a collective-bargaining agreement, the employer's “obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole,” subject to certain exceptions. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); see also *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). Here, however, the parties were not engaged in negotiations for a collective-bargaining agreement, and *Bottom Line Enterprises* does not apply.

⁸ See, e.g., *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297–298 (1939): “[T]here can be no breach of the statutory duty [to bargain] by the employer—when he has not refused to receive communications from his employees—without some indication given to him by

them or their representatives of their desire or willingness to bargain. . . . However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining. . . . To put the employer in default . . . the employees must at least have signified to [the employer] their desire to negotiate. . . . The employer cannot, under the statute, be charged with refusal of that which is not proffered.” See also *American Buslines*, supra, where the Board quoted part of the foregoing passage from *NLRB v. Columbian Enameling & Stamping* and added: “Although this statement was made in a different context, we think it applicable to the facts in this case. Here, Respondent gave the Union 1 week's advance notice of its plan to promote the porters and invited discussion of ‘any phase of this situation.’ Nevertheless, the Union failed to prosecute its right to engage in such discussion but contented itself by protesting the contemplated promotions in its letter dated February 10 and by subsequently filing a refusal-to-bargain charge.” 164 NLRB at 1055–1056.

⁹ *Fresno Bee* controls here, notwithstanding that the Board has overruled it twice. The Board did so the first time in *Alan Ritchey, Inc.*, supra. However, *Alan Ritchey* was invalidated as a result of the Supreme Court's decision in *NLRB v. Noel Canning*, supra. In 2016, the Board re-adopted the holding of *Alan Ritchey* in *Total Security Management*, supra. As stated above, however, *Total Security Management* applies prospectively only, and not in this case. See supra fn. 2.

unilaterally. In other words, the Union reminded the Respondent of the holding of *Alan Ritchey*, not to demand bargaining over discipline—the assumed context was that the Respondent would be *refusing* to bargain—but to threaten that discipline would result in the Union filing unfair labor practice charges. In the September 1, 2015 letter, after the Board certified the Union and before the Respondent said it would challenge that certification, the Union did not mention discipline or discharge at all, either generally or with respect to Anderson, Clay, Werstler, or Bennethum.

Despite his recognition that the Respondent had no duty to give the Union prior notice and opportunity to bargain before discharging any of the four employees, the judge nevertheless found that the Respondent violated Section 8(a)(5). His rationale was muddled. On the one hand, he cited *Fresno Bee* for the proposition that an employer has a duty to bargain *on request* postdischarge. *Fresno Bee* does indeed so hold. On the other, he found that the Respondent violated Section 8(a)(5) “by failing to provide notice and an opportunity to the Union to bargain over the terminations in this case—at any time.” Given the judge’s acknowledgment that the Respondent had no duty to give the Union notice and opportunity to bargain *before* the discharges, this statement can only be understood as an erroneous finding that the Respondent had, and failed to fulfill, a duty to give the Union notice and opportunity to bargain *after* the discharges. Under *Fresno Bee*, however, the duty to bargain after the fact regarding discharges is a duty to bargain *on request by the union*. And in finding that the Respondent violated the Act by failing to give the Union after-the-fact notice and opportunity to bargain, the judge excused the Union’s failure to request bargaining on

futility grounds. We reject the judge’s finding for the following reasons.

To begin with, the violation the judge found was not alleged in the complaint. The complaint alleged that the Respondent violated Section 8(a)(5) by discharging the four employees “without prior notice to the Union, and without having afforded the Union an opportunity to bargain.” As the judge recognized before his decision jumped the rails, he could not find the unfair labor practice alleged in the complaint unless “the Board were to reaffirm the *Alan Ritchey* rationale and find that it is applicable to this case.” The Board did reaffirm the *Alan Ritchey* rationale in *Total Security Management*, but it decided to apply it prospectively only, and therefore not to this case.¹⁰

More fundamentally, the violation the judge found was legally groundless. Under *Fresno Bee*, an employer has a duty to give notice and opportunity to bargain before it changes its disciplinary standards, but not before it makes a decision to discharge a particular employee pursuant to unchanged standards, even if the discharge decision involves some discretion.¹¹ Also under *Fresno Bee*, an employer has a duty to bargain about specific discharges after the fact, upon request.¹² But there is no such thing as a duty to provide after-the-fact notice and opportunity to bargain regarding specific discharge decisions.

Turning to the judge’s futility rationale, the judge reasoned that because the Respondent had refused the Union’s March 11, 2013 request to bargain for an initial collective-bargaining agreement, the Union was “justified in believing . . . that specifically requesting bargaining about the discharges would have been a useless endeavor.” We disagree with the judge’s rationale, both as a matter of law and a matter of fact.

¹⁰ The dissent dismisses this point, arguing that a failure to furnish *postdischarge* notice and opportunity to bargain is closely connected to the complaint allegation of a failure to furnish *pre-discharge* notice and opportunity to bargain and was fully litigated. We disagree that the unalleged issue is closely connected to the alleged violation. The complaint allegation of a failure to furnish *pre-discharge* notice was advanced as part of then-General Counsel Richard F. Griffin, Jr.’s initiative to furnish the Board with a vehicle to reinstate the holding of *Alan Ritchey*. See Memorandum GC 15–05, “Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section,” at 13 (Mar. 18, 2015) (“It is our view that the cases in which the Board endorsed the General Counsel’s theory when the Board didn’t, according to the Supreme Court’s *Noel Canning* decision, have a validly appointed quorum, were soundly reasoned and that the current Board should adopt the reasoning in those decisions as its own, such as the decision in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). Thus, we are authorizing complaints and urging the Board to adopt the reasoning set forth in these cases.”). Far from being closely connected to this initiative, the unalleged issue of *postdischarge* notice was entirely irrelevant to it. Moreover, the dissent’s contention that the alleged and unalleged claims involve “the same ultimate issue” of whether the Respondent unlawfully failed to notify and bargain with the Union regarding discipline—i.e., at any time, as though timing is a matter of no consequence—papers over

two critically important facts. First, until *Alan Ritchey*, the Board had *never* held that an employer applying unchanged disciplinary standards had a duty to give the union *pre-discharge* notice and opportunity to bargain. Thus, the alleged issue was based on a novel (and controversial) interpretation of the Act. Second, while employers have a *postdischarge* duty to bargain *on request*, the Board has *never* held that an employer applying unchanged disciplinary standards has a duty to give the union *postdischarge* notice. Thus, the latter issue is not just unalleged, it is based on an unprecedented interpretation of the Act.

¹¹ *Fresno Bee*, 337 NLRB at 1186–1187 (“The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline. Here, however, [r]espondent maintains detailed and thorough written discipline policies and procedures that long antedate the Union’s advent. . . . There is no evidence that [r]espondent did not apply its preexisting employment rules or disciplinary system in determining discipline herein. Therefore, [r]espondent made no unilateral change in lawful terms or conditions of employment when it applied discipline.”).

¹² *Id.* at 1187 (“While Respondent has no obligation to notify and bargain to impasse with the Union before imposing discipline, Respondent has an obligation to bargain with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees. . . . A union may, however, waive its right to bargain about a mandatory subject if it does not request bargaining.”).

As a matter of law, the duty at issue here is the duty to bargain *on request*. Even assuming that the Union believed the Respondent would refuse to bargain, its failure to request postdischarge bargaining cannot be excused on futility grounds. Without a request to engage in postdischarge bargaining, the Respondent neither incurred a duty to bargain nor refused to bargain in violation of Section 8(a)(5). See *Fresno Bee*, 337 NLRB at 1187 (“While [r]espondent has no obligation to notify and bargain to impasse with the [u]nion before imposing discipline, [r]espondent has an obligation to bargain with the [u]nion, upon request, concerning the discharges, discipline, or reinstatement of its employees. . . . A union may, however, waive its right to bargain about a mandatory subject if it does not request bargaining.”) (emphasis added); see also *Katz*, 369 U.S. at 743 (“A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) . . .”) (emphasis added); *Columbian Enameling & Stamping Co.*, 306 U.S. at 297–298 (“To put the employer in default . . . the employees must at least have signified to [the employer] their desire to negotiate. . . . The employer cannot, under the statute, be charged with refusal of that which is not proffered.”).

Invoking futility, the judge invented an unprecedented duty to give notice and opportunity to bargain over discharge decisions after the fact. In short, he converted a duty to bargain on request into an affirmative duty to provide notice and opportunity to bargain whenever an employer refuses to bargain for an initial labor contract in order to preserve its right to appeal an adverse decision in a representation case—even though the employer maintains the status quo and thus incurs no duty to give notice of a proposed change under *Katz*. There is no such rule of law, and we decline to invent it here.

But even assuming, as a matter of law, that futility could excuse a union’s failure to request after-the-fact bargaining over discharges, that excuse is not available to the Union here as a matter of fact. The Union’s failure to request bargaining cannot be excused on futility grounds because, at the time of its March 11, 2013 and September 1, 2015 letters to the Respondent, *it had no reason to expect that such a request would be futile*. On March 11, 2013, the Respondent had not yet refused to bargain. In its March 11 letter, the Union could have made a standing request for postdischarge bargaining, pre-discharge bargaining, or both. It did neither. Instead, it requested bargaining for an initial labor contract and threatened litigation over unilateral discipline *if* the Respondent refused to bargain. Again, on September 1, 2015, the Union had no basis to believe that a request for postdischarge bargaining would have been futile. When the Respondent refused the

Union’s March 11 request, it explained that it would not bargain because it intended to file exceptions to Judge Green’s decision. On August 27, 2015, the Board affirmed Judge Green’s decision in most respects and issued a certification of representative. The stated basis of the Respondent’s earlier refusal to bargain having been removed, the Union renewed its request to bargain for an initial contract in its letter of September 1. By that time, Anderson, Clay, Werstler, and Bennethum had been discharged. But the Union did not request after-the-fact bargaining over any of those discharges, even though it had no basis for believing that such a request would have been futile.

The dissent advances three arguments in support of her view that the judge’s decision should be affirmed. First, the dissent contends that the Union demanded bargaining over discipline. Second, the dissent says that even if the Union did not demand bargaining over discipline, its failure to do so should be excused on futility grounds. Third, the dissent claims that the Respondent had a duty to notify the Union of the discharges after the fact, and it violated Section 8(a)(5) by failing to do so. We have already addressed each of these arguments, which we find unpersuasive.

To begin with, the record evidence could not be more clear that the Union never demanded to bargain over discipline. As we have shown, in its March 11, 2013 letter, the Union requested bargaining for an initial collective-bargaining agreement, but as to discipline, it threatened litigation if the Respondent refused that request—i.e., if it filed exceptions to Judge Green’s decision—and subsequently imposed discipline unilaterally. “Should the Company file exceptions to [Judge Green’s] decision,” the Union wrote, unilateral issuance of discipline “will be met by the Union pursuing legal remedies available [to] it for the violation of law.” According to the dissent, this was a demand to bargain over discipline. In our view, a litigation threat conditioned on a *refusal* to bargain cannot reasonably be understood as a demand to bargain. And the September 1, 2015 letter did not mention discipline or discharge at all.

The dissent also contends that if the Union’s March 11, 2013 letter was insufficient to constitute a demand for bargaining, its “subsequent refusal-to-bargain charges put the Respondent on notice that the Union was, in fact, requesting bargaining over those discharges.” This contention fails on both legal and factual grounds. As a matter of law, it has been settled for over 50 years that the filing of an unfair labor practice charge does not constitute a request

to bargain.¹³ As a matter of fact, the Union did not file “refusal-to-bargain charges.” Its charges alleged that the Respondent had discharged employees without giving the Union an *opportunity to request* bargaining. The complaint that issued on these charges alleged likewise.

Next, our colleague takes issue with our futility analysis. Although she cites a barrage of cases, she does not contend that the Board has ever excused a union, on futility grounds, from the necessity under *Fresno Bee* of making a postdischarge bargaining request. The principal case she relies on, *Fall River Savings Bank*, 260 NLRB 911 (1982), was a unilateral-change case. As discussed above, the employer’s duty in a unilateral change case is to provide the union notice and opportunity to bargain prior to making changes to the terms or conditions of employment. In that situation, if the employer had already refused to bargain, it cannot defend against an 8(a)(5) unilateral-change allegation on the ground that it gave notice, but the union failed to request bargaining. But that is not this case. Here, the Respondent did not change a term or condition of employment, and therefore it had no duty to give the Union prior notice and opportunity to bargain.¹⁴ The dissent cites no case, and we are aware of none, holding on futility grounds that when an employer maintains the status quo, a duty to engage in postdischarge bargaining *on request* can materialize out of thin air without a request, and we decline to so hold here.¹⁵

Moreover, such a rule of law would be unavailing here in any event because the Union failed to request postdischarge bargaining in its letters of March 11, 2013, and

September 1, 2015, when it had no basis for believing that such a request would be futile. As to the March 11 letter, the reason for the Union’s failure is obvious. Plainly, the Union did not make a standing request for postdischarge bargaining in that letter, not because it believed such a request was *futile*—since the Union was making its first request to bargain in that letter, it had no basis for such a belief—but because it believed such a request was *unnecessary*. The *Alan Ritchey* decision had issued in December 2012, and that decision was not invalidated by the Supreme Court’s decision in *Noel Canning* until June 26, 2014. Thus, consistent with *Alan Ritchey*, on March 11, 2013, the Union believed it was on solid legal ground to threaten litigation if the Respondent issued discipline without giving the Union *pre-discharge* notice. And on September 1, 2015, when it renewed its request to bargain for an initial labor contract, the Union did not request postdischarge bargaining over any of the four discharges, even though, as explained above, it had no basis to believe that such a request would be futile.

Finally, the dissent says that even if the Respondent had no duty to give the Union pre-discharge notice, it had a duty to bargain regarding the discharges after the fact, and this duty entailed a duty to give post-discharge notice because otherwise, unions “can hardly be expected to request bargaining.” Of course, the Union *was* on notice of the discharges, it never requested postdischarge bargaining, and therefore the Respondent never failed or refused to bargain on request postdischarge in violation of Section 8(a)(5).¹⁶ But to the dissent’s theory of violation, under

¹³ See, e.g., *Boeing Co.*, 337 NLRB 758, 763 (2002); *Associated Milk Producers*, 300 NLRB 561, 563 (1990); *Citizens National Bank of Willmar*, 245 NLRB 389, 389–390 (1979); *American Buslines, Inc.*, 164 NLRB 1055, 1055–1056 (1967). The dissent contends these cases are inapposite and cites other cases, but those cases are distinguishable. *Seawane Coal Operators Association* stands for the proposition that where a union has requested bargaining for a contract, 167 NLRB 172, 176 (1967), the filing of refusal-to-bargain charges “renew[s]” the bargaining request, *id.* at 172 fn. 3. In *RC Aluminum Industries* and *Williams Enterprises*, the issue was whether the union had ever requested bargaining or recognition, respectively, at all. See 334 NLRB No. 64, slip op. at 2 fn. 3 (2001); 312 NLRB 937, 938 (1993), *enfd.* 50 F.3d 1280 (4th Cir. 1995). No such issue is presented here. There is no question that the Union requested bargaining for an initial collective-bargaining agreement. It requested, twice, that the Respondent bargain “concerning the wages, benefits and working conditions of production employees at Oberthur Technologies.” However, it never requested bargaining over discipline. And the charges it filed in this case neither renewed its general bargaining request nor alleged a refusal to bargain over discipline. Instead, they alleged that the Respondent failed to furnish the Union with pre-discharge notice and opportunity to request bargaining.

¹⁴ The dissent says we are “badly mistaken” in stating that the Respondent did not change a term or condition of employment. But we are simply applying *Fresno Bee*. Under that precedent, which governs here, the Respondent did not make a change requiring pre-discharge notice to the Union when it applied unchanged disciplinary standards in

discharging the four employees. See *supra* fn. 11. Although she claims that her contrary view is based on “common sense,” it happens to coincide with the holding of *Alan Ritchey*, which was invalidated, and of *Total Security Management*, which applies prospectively only and not in this case.

¹⁵ In *N.K. Parker Transport*, 332 NLRB 547 (2000), cited by the dissent, the Board excused the fact that the union did not request bargaining over the reinstatement of employee and union steward Steven Horsch where the employer had already made clear that it would not reinstate the employee. However, union steward Horsch had filed a grievance over his discharge, and therefore the employer was on notice that Horsch desired reinstatement. Here, in contrast, the Union never indicated that it sought post-discharge bargaining, and the Respondent never refused to bargain over any of the four discharges.

Citing *Norco Products*, 288 NLRB 1416 (1988), and *Peat Mfg. Co.*, 261 NLRB 240 (1982), the dissent claims that the Respondent “violated its statutory duty to notify the Union of the discharges,” *after* they were made, “in order to give the Union an opportunity to bargain.” But like *Fall River Savings Bank*, these cases were unilateral-change cases, and thus the employers in those cases were under a duty to give the union reasonable advance notice and opportunity to request bargaining pursuant to *Katz*. Here, the Respondent made no change and incurred no duty under *Katz*.

¹⁶ The dissent says the Respondent still should have given postdischarge notice, citing *IMI South, LLC d/b/a Irving Materials*, 364 NLRB No. 97 (2016). That case involved a transfer or relocation of unit work

Total Security Management, there is a duty to furnish pre-discharge notice, but that case does not apply here; under *Fresno Bee*, there is a duty to bargain postdischarge on request, but there was no request; and there is simply no authority in Board precedent for the dissent’s postdischarge notice doctrine.

Accordingly, for the foregoing reasons, we reverse the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and opportunity to bargain “at any time.”

ORDER

The Respondent, Oberthur Technologies of America Corporation, Exton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unreasonably delaying in responding to information requests from the Union.

(b) 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) Within 14 days after service by the Region, post at its Exton, Pennsylvania facility copies of the attached notice marked “Appendix.”¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the 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. If 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 February 4, 2014.

to a nonunion facility 15 miles away in another state, and the Board held that the employer could not rely on the fact that the union learned of this by chance to excuse its failure to give the union notice. *Id.*, slip op. at 4–5. But in *Irving Materials*, the issue was whether the employer violated the Act by failing to give the union notice and opportunity to bargain *before* it moved the work. That case has no bearing on the dissent’s unprecedented post-discharge notice proposal.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 4 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.

Dated, Washington, D.C. June 17, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Excusing the employer’s failure to notify and bargain with its employees’ union about the discharge of four employees, the majority finds that the union never requested bargaining. But that is both factually and legally incorrect. As a factual matter, the record demonstrates that after the Union won a Board election, it *did* prospectively demand bargaining over any discipline that the Respondent might issue against employees – which necessarily included the four discharges that followed. This specific demand by the union to bargain over discipline should easily decide this case.

But even assuming this specific demand had never been made, the result in this case should have been the same. Board law is clear that when an employer has unlawfully refused to recognize and bargain with a newly-elected union *at all*, the union is not required to engage in the futile act of demanding bargaining over each and every issue as it arises. That well-established principle, relied on by the judge, applies in this case.

Rather than adopting either of these rationales to affirm the judge’s well-supported finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to provide the Union with notice and an opportunity to bargain after discharging the four employees, the majority instead chooses to impose a new procedural requirement on newly-elected unions. The union

¹⁷ 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.”

must specifically request bargaining over discharges, even though the employer has unlawfully refused to recognize the union and to bargain with it on any subject. At the same time, the majority holds that the employer has no duty to notify the union of the discharges – despite having unlawfully excluded the union from the workplace—so that the union can make its (predictably futile) request for bargaining. The majority’s new Catch 22 for unions is purely arbitrary—and impermissible for that reason.¹ It has no support in Board precedent or in federal labor policy, and serves only to obstruct the collective bargaining that the Act is intended to encourage.²

I.

The Union won a representation election in September 2012, which triggered the Respondent’s duty not to make unilateral changes in employees’ terms and conditions of employment, even as it unsuccessfully challenged the election.³ The Board has explained that the “purpose of the rule is to prevent employers from postponing their bargaining obligation through dilatory tactics and spurious objections, and from gaining unfair advantage prior to the commencement of bargaining.”⁴

Ruling in a consolidated representation and unfair labor practice proceeding, an administrative law judge recommended that the Board issue a certification of representative in February 2013.

On March 11, 2013, the Union sent a letter to the Respondent demanding bargaining. The Union also explicitly requested bargaining over the issuance of any future discipline against the newly-represented employees, explaining:

Should the Company file exceptions to the administrative law judge’s decision, it is the position of the Union that any unilateral changes by the Company pertaining to terms and conditions of employment *or with respect to the issuance of any*

discipline without first providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter, or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available [to] it for the violation of law. (Emphasis added.)

The Respondent flatly rejected the Union’s bargaining demand, asserting in a March 15, 2013 letter that it had “no obligation to bargain” while it appealed the judge’s decision recommending certification to the Board.

The Respondent then discharged four employees: Albert Anderson on February 4, 2014; Dan Clay and Harvey Werstler on July 14, 2014; and Lawrence Bennethum on July 27, 2015.⁵ All of the discharges were discretionary. The Respondent failed to give the Union notice and an opportunity to bargain either before or after discharging the employees. The Union learned about the discharges from the employees, not the Respondent.

The Union requested information from the Respondent regarding the discharges. The Respondent was required to provide this information promptly, as part of its statutory duty to bargain with the Union.⁶ But, as my colleagues agree, the Respondent unlawfully delayed responding to the Union’s information request regarding employee Anderson. And although the Respondent eventually provided the requested information, it repeatedly asserted that its provision of information “should in no way be construed that [the Respondent] has any duty to provide this information to you in the future.”

After the Board certified the Union on August 27, 2015,⁷ the Union sent another letter to the Respondent demanding bargaining, on September 1, 2015. The Respondent again refused to bargain with the Union (by letter dated September 22, 2015) in order to test the Union’s certification. The Union then filed refusal-to-bargain charges. On July 27, 2016, the Board found that the

notify and bargain with unions before imposing serious, discretionary discipline).

³ “It is well settled that absent compelling circumstances, an employer that chooses unilaterally to change its employees’ terms and conditions of employment between the time of an election and the time of certification does so at its own peril, if the union is ultimately certified.” *Overnite Transportation Co.*, 335 NLRB 372, 373 (2001), citing *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974), reversed and remanded on other grounds, 512 F.2d 684 (8th Cir. 1975).

⁴ *Overnite Transportation*, supra, 335 NLRB at 373.

⁵ The majority details the circumstances of the discharges, but the employees’ alleged misconduct is not at issue here, only the Respondent’s failure to bargain with the Union.

⁶ See generally *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967) (“There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.”).

⁷ *Oberthur Technologies of America Corp.*, 362 NLRB 1820 (2015).

¹ The Board’s adjudications are subject to review under the Administrative Procedure Act, which prohibits “arbitrary” agency action. 5 U.S.C. §706(2)(A). See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364. (1998).

² Sec. 1 of the Act provides that “[i]t is . . . the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining.” 29 U.S.C. §151.

I would order the Respondent to bargain on request with the Union over the discharges and their effects, but I would decline to order the make-whole remedies requested by the General Counsel and the Charging Party. See *Fallbrook Hospital*, 360 NLRB 644, 658 (2014), enf’d. 785 F.3d 729 (D.C. Cir. 2015).

I join the majority in affirming the judge’s dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify and bargain with the Union *before* discharging the employees. See *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 1 (2016) (declining to retroactively apply holding that employers must

Respondent had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.⁸

Meanwhile, as the Respondent contested the Union's status as bargaining representative, this case proceeded separately. The Union filed timely unfair labor practice charges concerning the four discharges in May-August 2015, the General Counsel issued a complaint, and an administrative law judge ultimately found that the Respondent violated the Act by failing to bargain with the Union over the discharges after the fact.⁹

The judge rejected the Respondent's argument that the Union had waived bargaining by not specifically requesting bargaining over the four discharges. Relying on: (1) the Union's March 11, 2013 request to bargain (which referred to future discipline) and the Respondent's general refusal to bargain, (2) the Respondent's failure to notify the Union of the four later discharges, and (3) the Respondent's statement it was not required to provide information to the Union concerning the discharges, the judge observed that the "Union was fully justified in believing that the Respondent had presented it with a 'fai[t] accompli' and that specifically requesting bargaining about the discharges would have been a useless endeavor."¹⁰ He added that "if the Respondent was willing to negotiate with the Union about the discharges, it was Respondent's obligation to so inform the Union in light of its previous refusal to recognize and bargain with the Union." As I will explain, the judge's analysis was sound in every respect. Indeed, it had even stronger support in Board precedent than the judge's decision reflects.

⁸ *Oberthur Technologies of America Corp.*, 364 NLRB No. 59 (2016), enf'd. 865 F.3d 719 (D.C. Cir. 2017) (also enforcing *Oberthur*, 362 NLRB 1820).

⁹ The majority argues that the judge's decision should be reversed in part because the complaint did not specifically allege that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify and bargain with the Union after discharging the employees. The Respondent did not raise this argument in its exceptions, and therefore, it is not properly before the Board. See Sec. 102.46(f) of the Board's Rules & Regulations. Nor does the judge's approach implicate due process. The issue decided is closely connected to the subject matter of the complaint and was fully litigated by the parties, satisfying the standard established by the Board in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd. 920 F.2d 130 (2d Cir. 1990). To begin, the post-discharge bargaining violation is closely connected to the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) by discharging the employees without giving the Union prior notice and an opportunity to bargain. See *Security Walls, Inc.*, 365 NLRB No. 99, slip op. at 6 (2017) (same). Both allegations arise from the same set of facts (the Respondent's discharge of the four employees) and both involve the same ultimate issue (whether the Respondent's failure to notify and bargain with the Union was unlawful). See *Pergament*, 296 NLRB at 334–335. Contrary to the majority's assertion, why the then-General Counsel issued the complaint is entirely irrelevant to this analysis. Further, the majority does not and cannot

II.

"An employer has an obligation to bargain with its employees' bargaining representative over terms and conditions of employment. Termination of employment is unquestionably a mandatory subject of bargaining."¹¹ There is no disagreement here about that point. As reflected in the Board's earlier *Oberthur* decisions, meanwhile, it is indisputable that at all relevant times, the Respondent had unlawfully refused to recognize and bargain with the Union. What divides the Board are two issues: (1) whether—in addition to the bargaining demand that it did make and the unfair labor practice charges that it filed—the Union was also required to specifically request bargaining over each of the four discharges after it learned of them from employees; and (2) whether the Respondent had a duty to notify the Union after discharging the employees, in order to provide an opportunity for postdischarge bargaining. The record evidence here, viewed in light of well-established labor-law principles, establishes that the Union did more than was necessary to hold the Respondent to its statutory obligation to bargain over the discharges. There is no support in labor law or labor policy for the majority's position that the Union was required to make some additional – and futile – request to bargain. It is equally clear that the Respondent was required to notify the Union of the discharges, as part of its duty to bargain with the Union.

A.

We can start by recalling what the Union *did* do and what the Respondent *failed* to do. To begin, in its March 11, 2013 letter to the Respondent, the Union prospectively

contend that the parties failed to fully litigate the issue. The opening statements at the unfair labor practice hearing clearly alerted the Respondent to the fact that the General Counsel was alleging a post-discharge bargaining violation and the testimony and post-hearing briefs addressed this issue. In these circumstances, there is no obstacle to finding the violation. See *Security Walls*, 365 NLRB No. 99, slip op. at 6.

¹⁰ As support for this conclusion, the judge properly cited the Board's decision in *Sunnyland Refining*, 250 NLRB 1180 (1980), enf'd. 657 F.2d 1249 (5th Cir. 1981) (table).

¹¹ *Fallbrook Hospital*, supra, 360 NLRB at 654–655 (finding that employer unlawfully failed to bargain over employee terminations and their effects, after decision and implementation), citing *N.K. Parker Transport, Inc.*, 332 NLRB 547, 551 (2000), and *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). See also *Security Walls, Inc.*, supra, 365 NLRB No. 99, slip op. at 18; *Fresno Bee*, 337 NLRB 1161, 1187 (2002) ("The law is clear that it is unlawful for an employer to refuse to bargain with respect to the termination or reinstatement of employees."), citing *N.K. Parker Transport* and *Ryder Distribution*, supra. Although the Board in *Total Security*, supra, overruled *Fresno Bee* to the extent that decision held that employers have no obligation to notify and bargain with the union about discretionary discipline before imposing it, *Total Security* did not question the well-established principle that discharges are a mandatory subject of bargaining and that employers must bargain post-discharge. 364 NLRB No. 106, slip op. at 3.

demand bargaining over the issuance of any future discipline against employees. The Union asserted that

any unilateral changes by the Company . . . with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain over those changes . . . will be met by the Union pursuing legal remedies available [to] it for the violation of law.

It has long been established that a request to bargain need not be made in any particular form to be valid.¹² The Union's message here was clear and unequivocal: it demanded bargaining over discipline.¹³ And the Respondent just as clearly rejected that demand in its March 15, 2013 letter, which asserted that it had "no obligation to bargain." Notably, the "Board treats a request for bargaining as continuing and . . . the failure to respond affirmatively to such a continuing request gives rise to a continuing violation. . . ."¹⁴

The Respondent, of course, did go on to discharge four employees – without notifying the Union, much less offering to bargain as had been demanded. How did the Union respond? Exactly as it had said it would: by filing unfair labor practice charges, after first requesting information from the Respondent about the discharges. Indeed, even if the Union's March 11, 2013 letter was somehow insufficient to constitute an advance demand for bargaining over the discharges, the Union's subsequent refusal

to-bargain charges put the Respondent on notice that the Union was, in fact, requesting bargaining over those discharges.¹⁵ As the Board recently explained, a union's request for information about the discipline of employees demonstrates that it is "seeking to bargain over the nature of the disciplines being imposed," and "[a]ny doubt that an employer may have as to whether a union has made a bargaining request is resolved when a union files an unfair labor practice charge."¹⁶

To the extent that the Union was required to request bargaining over the discharges at issue here, then, the Union clearly satisfied that requirement by prospectively demanding bargaining over the issuance of any discipline, by requesting information about the discharges, and by filing refusal-to-bargain charges. The majority's contrary position—that the Union *waived* its right to bargain – completely fails to recognize the significance of this record evidence under Board precedent.

B.

There is no basis in Board law for requiring the Union to do any more than it did to preserve its statutory right to bargain over the discharges. The crucial fact here is that the Respondent expressly rejected any legal obligation to bargain with the Union over any subject at any time, refusing to recognize the Union as the bargaining representative of its employees. The Board (with judicial

¹² E.g., *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971). Thus, there is no merit to the majority's claim that the Union's March 11, 2013 letter was not a bargaining demand or to the majority's repeated criticism of the Union for failing explicitly to demand post-discharge bargaining over individual discharges in either of its letters to the Respondent. The majority does not cite a single case where the Board has ever required such specificity. Indeed, in *Fresno Bee*, supra, for example, the union was held *not* to have waived its right to bargain over employee terminations when "although the [u]nion did not make a formal demand for bargaining, it protested [the employer's] termination of employees and demanded their reinstatements, which can be taken as requests to bargain about those mandatory subjects." 337 NLRB at 1187. The majority calls *Fresno Bee* "the precedent that directly controls the disposition of this case," but my colleagues neglect this aspect of the decision.

¹³ As the Board explained in *Security Walls, Inc.*, a "union's request that an employer rescind a unilateral action, coupled with a threat to file an unfair labor practice charge if the employer does not do so, is sufficient to express a request to bargain." 365 NLRB No. 99, slip op. at 4, citing *Indian River Memorial Hospital*, 340 NLRB 467, 468–469 (2003). Thus, the majority errs in asserting that the Union's March 11, 2013 letter cannot reasonably be understood as a bargaining demand because the Union threatened to file unfair labor practice charges in response to the Respondent's unilateral issuance of discipline. See also *Al Landers Dump Truck*, supra, 192 NLRB at 208; *Fresno Bee*, supra, 357 NLRB at 1187.

¹⁴ *Iowa Electric Light & Power Co.*, 264 NLRB 144, 145 fn. 5 (1982), enfd. 717 F.2d 433 (8th Cir. 1983), cert. denied 466 U.S. 903 (1984).

¹⁵ The majority baselessly criticizes my characterization of the Union's charges as alleging refusals to bargain. The Union alleged that the Respondent discharged the employees without notice and an opportunity

to bargain. The Union also filed refusal-to-recognize-and-bargain charges that the Board addressed in *Oberthur*, supra, 364 NLRB No. 59. It is irrelevant that those charges were resolved in a separate proceeding.

¹⁶ *Security Walls*, supra, 365 NLRB No. 99, slip op. at 4. See, e.g., *RC Aluminum Industries*, 334 NLRB No. 64, slip op. at 2 fn. 3 (2001), enfd. 326 F.3d 235 (D.C. Cir. 2003). See also *Williams Enterprises*, 312 NLRB 937, 938–939 (1993) (noting that the "Board has . . . held that an 8(a)(5) charge, standing alone, can constitute a demand for recognition" and finding that union's charge left "no doubt as to the [u]nion's position"), enfd. 50 F.3d 1280 (4th Cir. 1995). The Board has described a refusal-to-bargain charge as "clear and unmistakable notice to the [employer] that the [u]nion intend[s] to exercise the rights flowing from its certification and, as such, . . . tantamount to an explicit request to bargain." *Sewanee Coal Operators Assn.*, 167 NLRB 172, 172 fn. 3 (1967).

The majority's attempt to distinguish decisions other than *Security Walls* is unavailing. The majority relies on its incorrect view that the Union never requested bargaining over discipline and that its unfair labor practice charge did not renew its bargaining request or allege a refusal to bargain over discipline. Based on this erroneous premise, the majority mistakenly insists that it is well settled that an unfair labor practice charge does not constitute a bargaining demand in these circumstances. But the cases the majority cites are inapposite. They simply stand for the proposition that *when an employer recognizes a union* and gives the union notice and an opportunity to bargain, a union's charge, standing alone, is insufficient to preserve its bargaining rights. See, e.g., *Boeing Co.*, 337 NLRB 758, 763 (2002) (employer gave union 3-months' notice and multiple opportunities to bargain and union refused to bargain and only filed charges). By contrast, in this case and those cited above, the employers failed to recognize and bargain with the unions and/or the unions did more than file charges. In such circumstances, the Board has repeatedly held that a charge can constitute a bargaining demand.

approval) has held repeatedly that a request to bargain is futile—and thus unnecessary—where the employer has refused to recognize or bargain with the union until a court enforces a Board order to do so.¹⁷ This well-established rule applies here, and the majority’s failure to follow it is inexplicable.

Recall the facts of this case: Well before the discharges occurred, the Respondent informed the Union that it would not bargain until the resolution of its test of the Union’s certification. Specifically, on March 15, 2013, the Respondent rejected the Union’s initial bargaining demand, in which the Union had asserted that any unilateral issuance of discipline would be unlawful. The Respondent repeated its refusal to bargain on September 22, 2015.¹⁸ Instead of recognizing and bargaining with the Union after its valid election victory, the Respondent challenged the Union’s status as bargaining representative to the bitter legal end, when the United States Court of Appeals for the District of Columbia Circuit finally enforced the Board’s order finding that the Respondent had violated Section 8(a)(5) of the Act. In these circumstances, and consistent with Board law, a specific request by the Union to bargain over the discharges was not required: it would have been futile.¹⁹

¹⁷ E.g., *Peat Mfg. Co.*, 261 NLRB 240, 240 fn. 2 (1982) (union was not required to request bargaining over employee’s layoff, where employer was challenging union’s certification: “[i]n these circumstances, it would have been a futile gesture for the [u]nion specifically to request bargaining about the [employee’s] layoff”) (collecting cases); *Sunnyland Refining Co.*, supra, 250 NLRB at 1181 fn. 3 (“[O]nce a union requests bargaining and an employer states it is refusing to bargain in order to test the [union’s] certification, it is futile and unnecessary for the union to continue to request bargaining.”).

The courts have endorsed the Board’s analysis in this situation and analogous cases. See, e.g., *NLRB v. Union Carbide Caribe, Inc.*, 423 F.2d 231, 234–235 (1st Cir. 1970) (finding unilateral wage increase unlawful, despite union’s failure to request bargaining after employer notified it of increase: where employer had refused to recognize union, “union could not be expected to make what promised to be a totally futile gesture—another demand for bargaining”), enfg. 173 NLRB 931 (1968). See also *NLRB v. Seaport Printing & Ad Specialties*, 589 F.3d 812, 817 (5th Cir. 2009) (union was not required to request bargaining where employer had withdrawn recognition from union), enfg. 351 NLRB 1269 (2007).

¹⁸ The majority claims that the Union had no basis to believe that a request for post-discharge bargaining would have been futile when it sent its September 1, 2015 letter to the Respondent. Of course, futility is an objective standard, not a subjective one, and here that standard is clearly satisfied. The Respondent had repeatedly refused to recognize and bargain with the Union while it challenged the Union’s election victory and the Respondent confirmed that a request to bargain would have been futile in its September 22, 2015 letter. It would be nonsense to suggest—and the majority does not suggest—that if the Union had only made sufficiently specific and perfectly timed requests to bargain over the individual discharges, the Respondent would have bargained. And because there was no chance of bargaining, as even the majority implicitly admits, then the requirement the majority imposes here is arbitrary—an empty formality, demanded for no good statutory reason.

The Board’s decision in *Fall River Savings Bank*²⁰ neatly illustrates how and why the Board should find a violation in this case. There, while the employer was challenging the union’s certification, it unilaterally changed mandatory work hours, constructively discharging an employee who could not comply with the new requirement. Adopting the decision of an administrative law judge, the Board found a violation of Section 8(a)(5). It rejected the employer’s defense that the union had failed to specifically request bargaining over the new requirement. The Board contrasted the union’s supposed failure with cases where the employer *had* recognized a union and thus “effectively put the union on constructive notice that it would be amendable to negotiations over any changes in working conditions contemplated.”²¹ In the case before it, however, the employer had “refused to recognize the [u]nion . . . and rejected all efforts by the [u]nion to obtain recognition and to negotiate.”²² Thus, the employer could not “claim that the [u]nion had waived its rights,” because “[i]t would certainly have been a pointless exercise in futility for the [u]nion to have requested negotiation concerning the unilateral change in hours. . . .”²³

Here, too, any request by the Union to bargain over the discharges “would have been a pointless exercise in

In any case, after the Union demanded bargaining over the issuance of any discipline in its March 11, 2013 letter, there was no need for the Union to reiterate a request to bargain over each individual discharge as they occurred. The Board treats a request for bargaining as continuing. See *Iowa Electric Light & Power Co.*, supra, 264 NLRB at 145 fn. 5.

¹⁹ That the Respondent provided information concerning the discharges to the Union—after the Union had learned of the discharges from employees and had requested information from the Respondent—does not alter the situation, because the Respondent repeatedly asserted (falsely) that it had no legal duty to provide such information.

²⁰ 260 NLRB 911 (1982).

²¹ *Id.* at 916. Even where an employer has recognized the union, however, a request to bargain will be excused where it would be futile. See, e.g., *N.K. Parker Transport*, supra, 332 NLRB at 551 (joint employers unlawfully refused to bargain over reinstatement of discharged employee; union’s request to bargain would have been futile because employers had made clear they would not reinstate employee).

²² *Id.*

²³ *Id.* The majority criticizes my reliance on *Fall River Savings Bank*, supra, arguing that because that case involved a unilateral change, it is inapplicable here—where, my colleagues claim, the Respondent did not change a term or condition of employment. The majority also wrongly contends that my contrary position is based on *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), and *Total Security*, supra, 364 NLRB No. 106. The majority’s arguments are mistaken. To begin, I have clearly recognized that *Alan Ritchey* and *Total Security* do not apply here. See supra, fn. 2. Rather, my view that discharge obviously changes an employee’s terms and conditions of employment is based on common sense—the employment relationship is severed, and the employee’s prior tenure is over—even if an employer’s disciplinary policies do not change. The Respondent’s discretionary decision to discharge the employees ended their employment altogether. Thus, contrary to the majority’s assertion, the Board’s decision in *Fall River Savings Bank* is clearly relevant to this case.

futility,” given the Respondent’s steadfast refusal to recognize it as the employees’ representative. As our decisions make undeniably clear, the Board does not require unions to make futile requests for bargaining in order to preserve their statutory right to bargain—not least when an employer has unlawfully refused to recognize the union in the first place.

Further, if there was any lingering doubt about the Respondent’s unwillingness to bargain, the Respondent confirmed that a request to bargain would be futile by failing to notify the Union about the discharges.²⁴ As I will explain, even if Respondent had no duty to notify the Union *before* the discharges were made, it still had a duty to bargain with the Union after the fact,²⁵ and this duty necessarily entails promptly notifying the Union about the discharges.

C.

Under well-established Board law, it is clear that the Respondent violated its statutory duty to notify the Union of the discharges, in order to give the Union an opportunity to bargain.²⁶ This notice obligation is consistent with an employer’s general duty to notify a union about changes in mandatory subjects of bargaining, whether notification must come before an employer decision is implemented (as is most common) or afterwards, as traditionally has been the case for discretionary discipline.²⁷ If employers had no such duty, a union might never learn of the bargainable issue. This is particularly true when an employer, like the Respondent here, has unlawfully refused to recognize a union and the union is effectively excluded from the workplace. In those circumstances, the union cannot be presumed to have knowledge of bargainable matters, and without that knowledge, it can hardly be expected to request bargaining. The duty to bargain in

good faith, then, entails notifying the union, so that bargaining can occur – as opposed to deliberately keeping the union in the dark.

Remarkably, the majority claims that the administrative law judge here “invented” the duty to provide notice and an opportunity to bargain. My colleagues rely on the fact that under *Fresno Bee*,²⁸ the Respondent had no duty to provide the Union with notice and an opportunity to bargain *before* discharging the employees. But just because the Respondent was not required to provide prior notice here does not mean the Respondent was excused from providing any notice at all. Employers have a duty to bargain after discharging employees, and this duty necessarily includes the duty to notify unions about the discharges. Not surprisingly, the majority fails to cite a single Board case holding that employers have no duty to provide notice in these circumstances. Such a rule would make no statutory sense, because the Act is intended to promote collective bargaining, and notice to the union obviously serves that purpose. The majority’s *sub silentio* change in Board law will frustrate collective bargaining, preventing unions from effectively representing employees.

D.

The majority nevertheless insists that “[t]he duty at issue here is the duty to bargain *on request*” (emphasis in original) and that even if “the Union believed the Respondent would refuse to bargain, its failure to request postdischarge bargaining cannot be excused on futility grounds.” In light of the well-established principles of Board law already discussed, the majority is simply wrong. No authority cited by the majority supports its claim.

Moreover, the Board has held that the futility doctrine can excuse a union’s failure to request bargaining over a mandatory subject. See *N.K. Parker Transport*, supra, 332 NLRB at 551 (“A union may waive its right to bargain about a mandatory subject if it does not request bargaining. The Board has held, however, that there is no waiver if it is clear that a request to bargain would have been futile.”). Termination of employment is clearly a mandatory subject. *Id.* Thus, the majority errs in claiming the futility doctrine cannot apply here.

²⁴ The majority emphasizes that the Union independently learned of the discharges from employees, but this did not relieve the Respondent of its duty to notify the Union. See, e.g., *IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97, slip op. at 4-5 (2016). Further, even if the Respondent had notified the Union, the Board’s decisions make clear that the Union still would not have been required to request bargaining, given the Respondent’s refusal to recognize the Union, which made such a request futile. See *Lauren Mfg. Co.*, 270 NLRB 1307, 1308-1309 (1984), citing *Union Carbide*, supra, 423 F.2d at 235; *Sunnyland Refining*, supra, 250 NLRB at 1181 fn. 3.

²⁵ See *Security Walls*, supra, 365 NLRB No. 99, slip op. at 18.

²⁶ In *Norco Products*, 288 NLRB 1416, 1421-1422 (1988), enf. 944 F.2d 909 (9th Cir. 1991), cert. denied 503 U.S. 972 (1992), for example,

the Board explained that once an employer decides to lay off employees, the employer must provide the union with notice and an opportunity to bargain. See also *Peat Mfg.*, supra, 261 NLRB at 240 fn. 2 (finding request to bargain over employee’s layoff would have been futile where the employer failed to fulfill its “initial responsibility to notify” the union about the layoff and that the employer violated 8(a)(5) and (1) by failing to notify the union and give it an opportunity to bargain).

The majority mistakenly argues that *Norco Products*, supra, and *Peat Mfg.*, supra, are somehow inapplicable because they involved unilateral changes. In fact, those cases – which involved the employers’ duty to provide notice and an opportunity to bargain *after* deciding to lay off employees – are very similar to this case, where the Respondent decided to discharge employees, triggering a duty to notify the Union.

²⁷ See, e.g., *Stilley Plywood Co.*, 94 NLRB 932, 969 (1951) (“It is settled law that an employer is obligated to notify the collective bargaining representative of his employees of any . . . contemplated changes in the wages and working conditions of his employees . . . in order to afford the bargaining representative an opportunity to discuss” the changes with the employer), enf. 199 F.2d 319 (4th Cir. 1952), cert. denied 344 U.S. 933 (1953).

²⁸ 337 NLRB at 1186-1187.

Certainly, the majority does not rely on the language of the Act. The statute nowhere explicitly makes an employer's duty to bargain over a mandatory subject contingent on a union's request or implies that a union's failure to request bargaining can never be excused (as for futility). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." ²⁹ Section 8(d), in turn, defines "to bargain collectively" as the "performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."³⁰ Neither provision contemplates that an employer that has unlawfully refused to recognize a union may escape its duty to bargain over a specific change in working conditions simply because the unrecognized union has failed to request bargaining over that specific change – despite having requested to bargain both generally and over a particular category of prospective changes (such as employee discipline).

Neither of the Supreme Court decisions cited by the majority has any application to this case. In *Katz*,³¹ which involved an employer's unilateral changes in working conditions during negotiations with a recognized union,

²⁹ 29 U.S.C. §158(a)(5).

³⁰ 29 U.S.C. §158(d).

³¹ *NLRB v. Katz*, 369 U.S. 736 (1962).

³² *Id.* at 743 (emphasis added).

³³ See, e.g., *Norco Products*, supra, 944 F.2d at 909; *NLRB v. National Car Rental System, Inc.*, 672 F.2d 1182, 1188–1189 (3d Cir. 1982); *Summyland Refining*, supra, 657 F.2d at 1249; *Seaport Printing*, supra, 589 F.3d at 817; *Union Carbide Caribe*, supra, 423 F.2d at 234–235. See also *Taft Coal Sales & Associates v. NLRB*, 586 Fed.Appx. 525, 530–531 (11th Cir. 2014); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003); *NLRB v. Pepsi Cola Bottling Co.*, 24 Fed.Appx. 104, 114–115 (4th Cir. 2001); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1259–1260 (6th Cir. 1995); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286–1287 (7th Cir. 1989); *Alfred M. Lewis Inc. v. NLRB*, 587 F.2d 403, 409 (9th Cir. 1978); *Local No. 152 v. NLRB*, 343 F.2d 307, 310 (D.C. Cir. 1965).

The majority fails to even attempt to grapple with this so-called "bar-
rage of cases," which clearly demonstrate that the Board's futility doctrine is well established and has been uniformly approved by the courts.

³⁴ *NLRB v. Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292 (1939).

³⁵ *Id.* at 297–298.

³⁶ The issue in *Columbian Enameling* was whether the employer had unlawfully refused to bargain with the union over the settlement of a strike that began before the National Labor Relations Act was enacted. Without ever conducting an election—which is now required before an employer may be compelled to recognize a union, see *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974)—the Board determined: (1) that the union was entitled to represent employees because it had majority support among employees at the relevant time, and (2) that that employer should have understood that the union desired to bargain, based on communications not from the union, but rather from Department of Labor mediators who had interceded. *Columbian Enameling & Stamping Co.*, 1 NLRB 181 (1936), enf. denied 96 F.2d 948 (7th Cir. 1938).

the Court rejected the view that a showing of bad faith was required to establish a violation of the employer's statutory duty to bargain. In that context, the Court observed (using language quoted by the majority) that a "refusal to negotiate in fact as to any subject which within [Section] 8(d), and about which the union seeks to negotiate, violates [Section] 8(a)(5)."³² The Court did not address whether, how, or when the union's desire to negotiate must be communicated to the employer. Those issues were not implicated in the case. Nothing in *Katz*, then, casts doubt on the Board's longstanding futility doctrine, which has been applied consistently in the six decades following *Katz*, with judicial approval.³³

The Court's 1939 decision in *Columbian Enameling*,³⁴ also cited by the majority, is similarly inapt. The majority quotes, out of context, the Court's observation that "[t]o put the employer in default . . . the employees must at least have signified to [the employer] their desire to negotiate. . . ."³⁵ The facts of *Columbian Enameling*—which involved the employer's alleged refusal to bargain with a union over the settlement of a strike, after federal mediators interceded—bear no resemblance to the facts here; moreover, the old case was decided under a now-superseded legal regime.³⁶ In any case, neither the Board, nor

Rejecting the Board's holding, the Supreme Court observed first that the Act imposed a duty to bargain only on the employer, not the union. (Following the Taft-Hartley Amendments of 1947, that is no longer the case, as Sec. 8(b)(3) of the Act establishes.) The Court then explained that bargaining requires two willing parties, that normally the process will be initiated by the union, and that the employer need not respond to bargaining overtures from a third party:

Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer

. . . .

[W]e think it plain that the statute does not compel [the employer] to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees without violation of law. . . .

To put the employer in default here the employees must at least have signified to [the employer] their desire to negotiate.

306 U.S. at 297–298 (emphasis added). In *Columbian Enameling*, then, the employer could not fairly have been expected to bargain with the union, under the (unusual) circumstances there.

The contrast with this case is obvious. Here, the Union won a Board election and demanded bargaining itself; the Respondent contested the Union's status at all relevant times. The Court's reference to the "normal course of transactions" involving employers and unions, meanwhile, clearly refers to situations where the employer has recognized the union

the federal appellate courts have ever interpreted *Columbian Enameling* as foreclosing or limiting the Board's futility doctrine – to the contrary. Thus, the Board, interpreting the Court's decision, has observed that “it is apparent that the test of whether a proper request [to bargain] has been made was not designed to invite meaningless ‘game playing’” and that “where the employer is aware, through direct or indirect means, of an intention to bargain by the employee representative, the inquiry is ended.”³⁷ Similarly, in light of *Columbian Enameling*, the Tenth Circuit has held that a union's request to be recognized clearly implies a request to bargain and that the employer's corresponding refusal to recognize the union means that a specific request to bargain would be futile – “utterly vain and useless and a mere formality.”³⁸

The majority's reliance on *Fresno Bee*³⁹ is similarly unavailing. To begin, there was no occasion for the *Fresno Bee* Board to address the applicability of the futility doctrine in cases involving postdischarge failure to bargain allegations. There, the union had adequately requested bargaining over the discharges and reinstatements, and the employer had expressed its willingness to bargain.⁴⁰ Further, the *Fresno Bee* Board relied on *N.K. Parker Transport* for the proposition, quoted by the majority here, that “[a] union may . . . waive its right to bargain about a mandatory subject if it does not request bargaining.”⁴¹ In *N.K. Parker Transport*, however, the Board also recognized that “[t]he Board has held . . . that there is no waiver if it is clear that a request would have been futile.”⁴² The *N.K. Parker Transport* Board then applied the futility

doctrine to excuse the union's failure to request bargaining over reinstatements.⁴³ Nothing in *Fresno Bee*, then—much less the decision it cited with approval, *N.K. Parker Transport*—supports the majority's assertion that proposition a union's failure to request postdischarge bargaining cannot be excused on futility grounds.

Instead of confronting the overwhelming weight of Board and judicial precedent, the majority faults the Union, insisting that it “had no basis to believe that such a request would be futile” because of its actions after the Respondent refused its initial bargaining request, including renewing its request to bargain for an initial contract. This assertion simply adds insult to injury. That the Union chose to request bargaining more than once—despite its futility—does not make reiterating such a request at every opportunity a requirement of Board law. The majority's view unfairly reverses the roles of the Union and the Respondent. The Board's earlier decisions conclusively establish that the Respondent (not the Union) is the wrongdoer here, having unlawfully refused to recognize and bargain with the Union. As the Fifth Circuit pointed out in an analogous case, a “company's decision to challenge a union's legitimacy *a fortiori* indicates the company's unwillingness to bargain with that union and places the responsibility on the company for any failure to initiate bargaining that results.”⁴⁴

III.

It is a “centuries-old ‘fundamental maxim of jurisprudence,’ deeply rooted in common sense, that the law does not require ‘useless,’ ‘vain,’ or ‘futile’ acts.”⁴⁵ When it

and a bargaining relationship has been established – not the situation here.

³⁷ *Schreiber Freight Lines*, 204 NLRB 1162, 1168 (1973).

The majority's citation to *American Buslines, Inc.*, 164 NLRB 1055 (1967), where the Board dismissed a refusal-to-bargain allegation based in part on *Columbian Enameling*, is inapposite. There, unlike the present case, the employer recognized the union and gave the union notice and an opportunity to bargain; rather than request bargaining, the union merely wrote a letter protesting the proposed promotions and filed refusal-to-bargain charges. *Id.* at 1056. Here, of course, the Respondent refused to recognize the Union and failed to give the Union notice and an opportunity to bargain after discharging the employees; meanwhile, the Union had prospectively requested bargaining over the issuance of any discipline, as well as later filing charges.

³⁸ *NLRB v. Burton-Dixie Corp.*, 210 F.2d 199, 201 (10th Cir. 1954). See also *National Car Rental System*, *supra*, 672 F.2d at 1188-1189 (although under *Columbian Enameling* employer “was under no obligation to seek out the bargaining representative,” union was not required to request bargaining over unilateral change where change was “announced as a fait accompli” and “a request to bargain . . . would [have been] futile”).

³⁹ 337 NLRB at 1187.

⁴⁰ *Id.*

⁴¹ *Id.*, citing *N.K. Parker*, 332 NLRB at 551.

⁴² 332 NLRB at 551.

⁴³ *Id.* The majority's attempt to distinguish *N.K. Parker Transport* fails. The majority argues that the employer there was aware the employee sought reinstatement from his grievance and that the Union here, by contrast, never indicated that it sought to bargain over the discharges. But, of course, the Union prospectively demanding bargaining over the issuance of any discipline. And even if the Union failed to adequately request bargaining, its failure to do so should be excused on futility grounds. The majority also mistakenly asserts that unlike in *N.K. Parker Transport*, where the employer had made clear that it would not reinstate the employee, here, the Respondent never refused to bargain. That claim ignores the essential fact about this case: that the Respondent, at all relevant times, refused to recognize and bargain with the Union at all.

⁴⁴ *Seaport Printing*, *supra*, 589 F.3d at 817.

⁴⁵ Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process, 521, 522 (2002) (footnotes collecting authority omitted). See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (“The law does not require the doing of a futile act.”). The Latin maxim is *lex non cogit ad inutilia*. One familiar illustration of the principle is in contract law, where “the performance of a condition is excused when it is obvious that the other party will not keep its promise to perform whether or not the conditions occurs.” 13 *Williston on Contracts* §39:39 (4th ed. 2018). See also 17B C.J.S. *Contracts* §674 (2019) (“The law does not require a party to perform futile acts as a condition precedent to asserting its rights.”); 17A Am. Jur. 2d *Contracts* §687 (2019) (“[T]he failure by one party to fulfill conditions precedent – such as notice, demand, tender, and the like

comes to collective bargaining, federal labor law does not, either. But here the majority—explicitly and contrary to precedent—insists that to preserve its statutory right to bargain, the Union was required to perform a futile act: request bargaining, again, from an employer that had unlawfully refused to recognize it. Imposing such a requirement, while relieving employers of their duty to provide unions with notice after discharging employees, is arbitrary. These changes serve only to frustrate the policy of the National Labor Relations Act, which is to “encourage[] the practice and procedure of collective bargaining” (in the words of Section 1⁴⁶) and not “to invite meaningless ‘game playing,’”⁴⁷ as my colleagues do. Accordingly, I dissent.

Dated, Washington, D.C. June 17, 2019

 Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the Federal 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 refuse to bargain collectively with Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters (the Union) by unreasonably delaying in responding to the Union’s information requests.

— is excused when the other party repudiates the contract and denies liability under it...”).

⁴⁶ 29 U.S.C. §151.

⁴⁷ *Schreiber Freight Lines*, supra, 204 NLRB at 1168.

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

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

The Board’s decision can be found at www.nlr.gov/case/04-CA-128098 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1045 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



David G. Rodriguez, Esq., for the General Counsel.
Kevin C. McCormick, Esq. (Whiteford, Taylor and Preston, L.L.P.), of Baltimore, Maryland, for the Respondent.
Mark Kaltenbach, Esq. (Markowitz and Richman), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 6, 2016. Local 14M filed the charges giving rise to this matter on May 6, July 2, August 14, 2014, and August 26, 2015. The General Counsel issued a consolidated complaint on October 27, 2015.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by discharging four bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent concerning the discipline of these employees. The General Counsel also alleges that Respondent unlawfully delayed providing the Union with information it had requested four months earlier, regarding one of these discharges.¹ The Union won a representation election on September 7, 2012, 2–3 years prior to the discharge of the employees in question. In that election 108 eligible voters voted for union representation by the Charging Party Union; 106 voted against representation. On February 20, 2013, Administrative Law Judge Raymond Green issued a decision in a

¹ The Union alleged in its charges that at least some of these employees were terminated in violation of Sec. 8(a)(3) and (1). The General Counsel did not find merit to these allegations and did not issue a complaint on this basis.

combined unfair labor practice/representation case. He sustained the Union's challenge to the eligibility of two voters on the grounds that they were professional employees. Judge Green found another employee whose ballot was challenged to be an eligible voter. Following Judge Green's decision, the Union on March 11, 2013, requested that Respondent commence bargaining. Respondent rejected the demand and filed exceptions to Judge Green's decision with the Board.

Between the time of Judge Green's decision and the Board's decision discussed below, Respondent terminated four employees without giving the Union notice of their discharges and an opportunity to bargain about these discharges.

Upon review of Judge Green's decision, the Board certified the Union as bargaining representative of a unit of Respondent's employees described below on August 27, 2015, 362 NLRB 1820.

All full-time employees in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at 523 at James Hance Court, Exton, Pennsylvania; but excluding all other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

Respondent has continued its challenge to the certification of the Union.

The General Counsel relies on the rationale in *Alan Ritchey*, 359 NLRB 396 (2012), a decision invalidated by the United States Supreme Court due to the composition of the Board at the time of the decision.

Respondent concedes that it did not give the Union prior notice of the discharges of its employees or give it an opportunity to bargain over the discharges. It contests the validity of the Union's certification, the General Counsel's reliance on the *Alan Ritchey* rationale and also argues that the discharge of the four employees was not discretionary within the meaning of the *Alan Ritchey* decision.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, manufactures plastic credit and identification cards at a facility in Exton, Pennsylvania. It also has facilities in Chantilly, Virginia and Los Angeles, California. In the year prior to the issuance of the complaint, Respondent sold and shipped goods valued in excess of \$50,000 directly to points outside of Virginia, Pennsylvania and California. Respondent admits, and I find, that it is an employer

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On March 11, 2013 the Union demanded bargaining concerning unit employees' wages, benefits, and working conditions. The demand letter addressed disciplining of unit employees as follows:

Should the Company file exceptions to the ALJ's decision, it is the position of the Union that any unilateral changes by the Company pertaining to terms and conditions of employment or with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available it for the violation of law.

On March 15, Respondent rejected this demand indicating that it intended to appeal the administrative law judge's decision of February 20, 2013. In that decision the Judge sustained the Union's challenge to the ballots of two employees, which in effect resulted in the Union winning the 2012 representation election by a margin of 108 to 106.

On March 13, 2014, the Union requested that Respondent provide it with documentation pertaining to the February 4, 2014 terminations of unit employees, Albert Anderson and Emery Flowers. Respondent complied with this request on July 17, 2014. However, Respondent reiterated its position that it had no obligation to bargain with the Union, including any obligation to provide the documentation pertaining to the terminations.

After the Board affirmed the judge's ruling and certified the Union on August 27, 2015, the Union again demanded bargaining on September 1, 2015. Respondent rejected this demand as well, indicating its intent to challenge the Board's decision in the United States Courts of Appeals.

The Employee Terminations at Issue

Albert Anderson

On December 31, 2013, Albert Anderson and his leadman, Emery Flowers, were placing stickers on company inventory at Respondent's Exton facility. Anderson drove the forklift, while Flowers stood on the elevated forks placing the stickers. The forklift moved horizontally and vertically while Flowers stood on the forks. Flowers was not wearing a safety belt to prevent him from falling off the forks. Respondent investigated the incident, which was captured on video, and terminated both employees on or about February 4, 2014. Both Anderson and Flowers had been trained in the safe operating procedures for forklifts and were certified to operate them.²

On March 13, the Union requested information regarding the discharge of Anderson and Flowers. Respondent replied on March 18, indicating that it would provide the information the

trucks is authorized.

OSHA does not require employers to terminate employees to violate this rule. However, an employer, who allows employees to violate this standard are subject to OSHA citations and penalties.

² The relevant OSHA regulation appears to be at 29 CF 1910.178 (m)(3):

Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of

following week. On July 17, Respondent provided to the Union the information that it requested on March 13. However, Respondent's counsel stated at the close of the letter that it should not be construed to mean that Respondent had any duty to provide the information to the Union.

Dan Clay and Harvey Werstler

Respondent terminated Dan Clay and Harvey Werstler on or about July 14, 2014 for fighting on the production floor. The Union learned of these discharges from Werstler. It requested information from Respondent about the discharges on July 24, which it received on August 11. Respondent's counsel reiterated his opinion that Respondent had no duty to provide the information.

Lawrence Bennethum

In July 2015, a group of employees were meeting on the production floor of Respondent's Exton facility. A female employee did not have a hair bonnet that employees wear to prevent hair from getting into the product. Somebody asked Bennethum to get a hair bonnet for the female employee. Bennethum responded, "Did the color of my skin change?" Respondent terminated Bennethum on or about July 27, 2015. The Union learned of the termination from Bennethum.

Respondent has Terminated Other Employees for Similar Infractions

In an effort to defend against the General Counsel's assertion that the terminations of Anderson, Clay, Werstler and Bennethum were discretionary, Respondent introduced uncontroverted evidence that it terminated other employees for the same or very similar infractions.

Respondent's Disciplinary Policies

Respondent's employee handbook (GC Exh. 12) contains its Standards of Conduct and Disciplinary Policy at pages 25-29:

STANDARDS OF CONDUCT
RULES OF CONDUCT

All employees are expected to conduct themselves in a professional business-like manner. Disregarding or failing to conform to these standards shall result in disciplinary action, as the Company may determine, ranging from counseling to dismissal. This disciplinary policy creates no contractual rights for continued employment and does not modify the Company's policy of at-will employment. Because this policy is intended only as a guideline, examples of conduct that will result in disciplinary action and/or dismissal include, but are not limited to, the following:

- 20. Disorderly conduct, fighting or provoking a fight, horseplay or engaging in acts of violence or threatening behavior, at Company or customer facilities or work location, or interfering with others in the performance of their jobs.
- 31. Any action that results in, or could result in, property damage or personal injury.
- 32. Any action that endangers the health or safety of others, including violating a safety rule or practice.
- 34. Carrying unauthorized property or persons while operating

Company equipment.

35. Failing to protect property or persons while operating Company equipment.

55. Engaging in any activity that is in conflict with the best interests of the Company.

It is impossible to define rules for every conceivable situation that might arise. Activities that are not expressly covered in these rules will be handled on a case-by-case basis. All employees are expected to act with good common sense and in a totally professional manner. 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. The foregoing is not intended to and does not in any manner alter the at-will relationship between the Company and its employees

At page 28, Respondent's handbook addresses violence in the workplace. That section specifically includes hitting or shoving an individual or attempting to do so. As with other violations of company policy, the handbook specifically states:

Any violation of this policy will result in disciplinary action, as the Company may determine in its sole discretion, ranging from verbal counseling to immediate dismissal.

Bennethum's conduct appears to violate Respondent's Equal Employment Opportunity and Unlawful Harassment policies set out at pages 11-15:

The Company prohibits unlawful harassment in any form, including:

- VERBAL CONDUCT such as epithets, derogatory comments, slurs or unwanted sexual advances, invitations or comments, in violation of the Company's Equal Employment Opportunity policy.

At page 15 the handbook states that:

Where the Company has determined that conduct in violation of this policy has occurred, the Company will take appropriate disciplinary action.

In summary, nothing in the Respondent's handbook mandates automatic termination for the offenses committed by Anderson, Clay, Werstler or Bennethum.

There is no evidence in this record of any employees receiving less serious discipline than Anderson, Clay and Werstler for substantially similar conduct. However, with regard to the termination of Bennethum, there is such evidence. An employee who asked another employee, "if he was the head N . . . in charge?" received only a 3-day suspension. Also, the degree of discipline for safety and violence infractions depends on Respondent's assessment of whether they were sufficiently egregious to warrant termination (Tr. 94-95, p. 110).

*Analysis*³

Respondent violated Section 8(a)(5) and (1) by failing to bargain about the discharges after the fact

I decline the General Counsel's invitation to apply the rationale of the *Alan Ritchey* decision. Until the Board adopts that rationale, I am bound by existing precedent. Moreover, even if the Board were to reaffirm its holding in *Alan Ritchey*, it must decide whether it will apply that rationale only prospectively, as it did in the 2012 decision, or retrospectively.⁴

If the Board were to reaffirm the *Alan Ritchey* rationale and find that is applicable to this case, I would find that Respondent violated the Act by failing to notify the Union in advance and offering it the opportunity to bargain over the four discharges herein. "Discretionary" in this context is the opposite of "Automatic." For example, if an employer has a uniformly applied rule that any violation of a particular safety requirement will automatically result in termination regardless of the circumstances (e.g., failure to lock out/tag out a machine before doing maintenance work) the decision to terminate an employee would not be discretionary. Here, however, Respondent clearly reserved the right to impose lesser forms of discipline. The fact that it usually or even always terminated employees for these types of misconduct does not change the fact that in these circumstances termination was discretionary.

Regardless of the fate of the *Alan Ritchey* rationale, Respondent violated the Act pursuant to existing Board precedent. An employer has an obligation to bargain with the Union, upon request, concerning disciplinary matters, even if it has no obligation to notify and bargain to impose with the Union before imposing discipline, *Fresno Bee*, 337 NLRB 1161, 1186-1187 (2002); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). This is certainly true when, as in this case, its existing disciplinary policy did not require termination, *Sigma Network Corp.*, 317 NLRB 411, 417 (1995). An employer's disciplinary system constitutes a term of employment that is a mandatory subject of bargaining, *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

An employer's obligation to bargain with a Union begins on the date of a representation election in which the Union prevails, regardless of when the Union is certified or when litigation over that certification is concluded—at least to the extent that an employer makes unilateral changes in wages, hours or working conditions. An employer which makes such changes does so at its peril, *Mike O'Connor Chevrolet Buick-GMC Co.* 209 NLRB 701 (1974), enf. denied on different grounds, 512 F.2d 684 (8th Cir. 1975).⁵

The imposition of discipline, particularly the termination of an employee is an obvious change in that employee's working conditions. In this regard the Board had held that a failure to notify

and bargain with a union over layoffs between an election and certification violates Section 8(a)(5) and (1), *Bundy Corp.*, 292 NLRB 671 (1989). Thus, Respondent violated Section 8(a)(5) and (1) by failing to provide notice and an opportunity to the Union to bargain over the terminations in this case-at any time.

The Union did not Waive its Bargaining Rights by not Specifically Requesting Bargaining Over the Terminations of Anderson, Clay, Werstler, and Bennethum

The Union requested that the Respondent bargain with it on March 11, 2013. 4 days later Respondent informed the Union that it would not recognize the Union or bargain with it. Consistent with this position, Respondent never notified the Union that it discharged Anderson, Clay, Werstler and Bennethum. Moreover, when providing information to the Union in response to the Union's requests for information about the terminations of Anderson, Clay, and Werstler, Respondent explicitly stated that it was under no obligation to provide the information. Thus, the Union could reasonably conclude that Respondent's position that it had no obligation to notify and bargain with the Union about anything had not changed. Thus, the Union was fully justified in believing that Respondent had presented it with a "fait accompli" and that specifically requesting bargaining about the discharges would have been a useless endeavor, *Sunnyland Refining Co.*, 250 NLRB 1180, 1181 fn. 4 (1980).

Furthermore, I conclude that if Respondent was willing to negotiate with the Union about the discharges, it was Respondent's obligation to so inform the Union in light of its previous refusal to recognize and bargain with the Union. Had Respondent been willing to bargain with the Union, it should have notified the Union that it was willing to bargain about the discharges of Anderson, Clay and Werstler when it complied with the Union's information requests. The fact that Respondent failed to give any notice to the Union that it discharged Clay, Werstler, and Bennethum, even after receiving and complying with the Union's information request concerning Anderson, also indicates that a specific request to bargain over these discharges would have been futile.

Respondent Violated Section 8(a)(5) and (1) by waiting 4 Months to Comply with the Union's Information Request Regarding Anderson's Termination

A 4-month delay, or less, in providing information may violate Section 8(a)(5) and (1)—particularly when an employer fails to offer a legitimate explanation for the delay, e.g., *Bundy Corp.*, 292 NLRB 671 (1989). The circumstances in this case warrant such a conclusion particularly since Respondent terminated Anderson on February 4, 2014 and never notified the Union that it had done so. Further, the size of the production that satisfied the

³ I will not address Respondent's contention that this case must be dismissed on the grounds that Acting General Counsel Lafe Solomon had no authority to nominate Regional Director Dennis Walsh, who issued the complaint. The Board's decision in *American Baptist Homes of the West*, 364 NLRB No. 13, slip op. 7 fn. 19 (2016) is dispositive on this issue.

⁴ For the same reason I will not address the General Counsel's contention that Respondent is obligated to pay for discriminatees' expenses while searching for work.

⁵ In *Howard Plating Industries*, 230 NLRB 178 (1977), the Board held that an employer does not violate the Act in refusing to engage in negotiations for a collective bargaining agreement with a union, which has won a representation election, during the period in which the union has not been certified. This holding is limited to an employer's refusal to engage in contract negotiations ("plenary bargaining"), *Alta Vista Regional Hospital*, 357 NLRB 326, 327 fn. 5 (2011) [Also cited as *San Miguel Hospital Corp.*]. It has no bearing on an employer's obligation to refrain from unilateral changes, such as the imposition of discipline.

information request (GC Exh. 7), provides no basis for concluding that Respondent had any legitimate reason for dragging its feet in providing this information.

Finally, for a collective-bargaining representative to have a meaningful opportunity to bargain over a discharge, it must be promptly notified and its information requests regarding the reasons for the discharge must be complied with promptly. In this case, Respondent failed to notify the Union of the discharge, took four months to provide the Union with the requested information, and then implicitly, in its response to the Union's information request, indicated that it had no intention of bargaining with the Union about anything. I have considered all these factors in finding that the 4-month delay in providing the information violates the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

A threshold issue is whether a make whole remedy, i.e. reinstatement and backpay is precluded in this case by virtue of the language of Section 10(c) of the Act, "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

As a general proposition, an employee who has not engaged in protected activity and is discharged for misconduct is not entitled to a make whole remedy. This is so even in cases in which the employee was not afforded his or her rights under *Weingarten v. NLRB*, 420 U.S. 251 (1975),⁶ or the employer discovers the misconduct through unlawful means, such as with an unlawfully hidden surveillance camera, *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007). In this case there is no evidence that the discharged employees' terminations were related in any way to conduct protected by the Act.⁷

As the Charging Party points out, Section 10(c) also does not prevent a make-whole remedy in a limited number of other situations in which an employee was discharged for misconduct unrelated to protected activity. One such situation is when an employer unilaterally changes a disciplinary rule and it is not clear that the employee would have been discharged under the employer's rules that existed prior to the illegal unilateral change, *Uniserve*, 351 NLRB 1361 fn. 1 (2007).⁸

In the instant case employees Anderson, Werstler, Clay and Bennethum were discharged for misconduct unrelated to any

protected activity. There is also no evidence that there was any unlawful unilateral change in Respondent's disciplinary policies that was related to their discharges. Therefore, pursuant to Section 10(c) of the Act, these employees are entitled to neither backpay nor reinstatement. The consequences of failing to bargain over these discharges is limited by Section 10(c) to the posting of a notice.⁹

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) of the Act in failing to notify the Union of the discharges of employees Anderson, Werstler, Clay, and Bennethum.

2. Respondent violated Section 8(a)(5) and (1) of the Act in failing to provide the Union an opportunity to bargain over the discharges of employees Anderson, Werstler, Clay, and Bennethum.

3. Respondent violated Section 8(a)(5) and (1) in unreasonably delaying its response to the Union's March 13, 2014 information request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Oberthur Technologies of America, its officers, agents, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters as the exclusive collective-bargaining representative of all full-time employees in litho printing, finishing card and sheet, ink, facilities janitorial, card auditing plastics, pre-press composition, QC [quality control], smart card embedding, screen making, screen printing, production expeditor, quality systems analyst, warehouse plastic, customer service manufacturing, and maintenance departments at 523 at James Hance Court, Exton, Pennsylvania; but excluding all other employees, temporary and seasonal employees, confidential employees, guards and supervisors as defined in the Act.

(b) Unreasonably delaying its response to the Union's information requests.

(c) 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) Within 14 days after service by the Region, post at its Exton, Pennsylvania facility copies of the attached notice marked

⁶ An employer violates the Act pursuant to *Weingarten* if it conducts an investigatory interview after denying the employee the assistance of a union representative.

⁷ I have issued 2 decisions in which I found that employees were entitled to a make-whole remedy under similar circumstances to the instant case, *Total Security Management Illinois 1*, 13-CA-108215 (May 9, 2014) and *Security Walls, LLC*, 16-CA-152423 (Jan. 21, 2016). In neither case was the language of Sec. 10(c) raised by the employer. I was not aware that this was an issue. Depending on the ultimate outcome of the instant case, it could be that I was mistaken in ordering a make-whole remedy in those cases.

⁸ In this situation, however, the employer may be able to avoid a make-whole remedy in the compliance stage by showing that it would have discharged the employee under the policies that existed prior to the unlawful unilateral change.

⁹ *Pressroom Cleaners*, 361 NLRB 643 (2014), cited by the Charging Party did not involve the discipline of employees. Thus, that decision has no bearing on this case.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

“Appendix.”¹¹ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the 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 February 4, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C., June 16, 2016

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

¹¹ 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

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to notify and offer to bargain in good faith with Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters over the discipline or discharge of any bargaining unit employee.

WE WILL NOT unreasonably delay responding to information requests from Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

The Administrative Law Judge’s decision can be found at www.nlr.gov/case/04-CA-128098 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”