Total Security Management Illinois 1, LLC *and* International Union Security Police Fire Professionals of America (SPFPA). Case 13–CA–108215

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The issue in this case is whether the Respondent acted unlawfully when it discharged three employees without first giving the Union notice and an opportunity to bargain about the discharges.[1] The judge found the discharges unlawful, relying on *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), which held that an employer is obligated to provide notice and an opportunity to bargain before imposing certain types of discipline, including discharge, on employees represented by a union but not yet covered by a collective-bargaining agreement. At the time of the Decision and Order in *Alan Ritchey*, however, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June, 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

In light of the Supreme Court's decision in *Noel Canning*, we reexamine de novo whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees, when a union has been certified or lawfully recognized as the employees' representative but has not yet entered into a collective-bargaining agreement with the employer. Having considered the issue, we again hold that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline, as defined below. Nevertheless, based on the unique nature of discipline and the practical needs of employers, the bargaining obligation we impose is more limited than that applicable to other terms and conditions of employment. We will apply today's holding prospectively and dismiss the allegations in this case, but we will provide guidance regarding the remedies that would be appropriate in later cases.

[1] On May 9, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

Background

The complaint alleges that the Respondent, a provider of security planning and security services, violated Section 8(a)(5) and (1) of the Act by discharging three unit employees without prior notice to or bargaining with International Union, Security, Police and Fire Professionals of America (the Union or SPFPA), which represents the employees.[2] The parties submitted, and the judge accepted, a stipulated record that establishes that the relevant facts are undisputed and the issue presented to us is the legal question whether the Respondent's acknowledged failure to bargain with the Union before discharging the three employees was unlawful.

Analysis

The primary question before us is whether an employer has a duty to bargain before disciplining individual employees, when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals. The issue arose in this case, as it typically will, after the employees voted to be represented by a union, but before the employer and union had entered into a complete collective-bargaining agreement or other agreement governing discipline.

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

[2] Other violations that were alleged in the complaint have been severed and resolved.

A. Facts

The parties stipulated to the following facts:

- The Union was certified as the exclusive representative of a bargaining unit that included security guards Jason Mack, Winston Jennings, and Nequan Smith on August 21, 2012.
- The Respondent discharged Mack, Jennings, and Smith on March 12, 2013.[3]
- The Respondent exercised discretion in discharging each of the employees; it did not apply any uniform policy or practice regarding discipline for their asserted misconduct.[4]
- The Respondent did not provide the Union notice or an opportunity to bargain over any of the discharges before implementing them.
- At the time of the March 12 discharges, the Respondent and the Union had not reached an initial collective-bargaining agreement or another binding agreement governing discipline.
- The Respondent did not have a reasonable, good-faith belief, at the time of the discharges, that any of the three employees' continued presence on the job presented a serious, imminent danger to the Respondent's business or personnel or that any of them engaged in unlawful conduct, posed a significant risk of exposing the Respondent to legal liability for the employee's conduct, or threatened safety, health, or security in or outside the workplace.
- "[T]he issue presented is Respondent's challenge to the legal validity of *Alan Ritchey, Inc.*, 359 NLRB 396 (2012) and the authority of the Acting General Counsel and the Regional Director to issue the Consolidated Complaint in this case."[5]

[3] Dates are in 2013 unless otherwise stated.

[4] According to the stipulation, the Respondent asserts that it discharged Mack for abandoning his post prior to completing his shift and falsifying company documents; Jennings, for refusing to cooperate with the Respondent's investigation of Mack, making misrepresentations to a supervisor, being insubordinate, and failing to report a coworker's violation of company policy; and Smith, for using profane and indecent language toward a supervisor and causing a disturbance at a client site. The record contains no other information about the asserted misconduct underlying the discharges.

The stipulation states that "[i]n the circumstances presented in this case, Respondent did not adhere to any uniform policy or practice with respect to issuing discipline regarding [the employees' asserted misconduct]." This language is ambiguous as to whether the Respondent adhered to *no* disciplinary policy or practice (i.e., it exercised unfettered discretion) or applied a disciplinary policy or practice that was not "uniform" because it permitted the exercise of discretion. A separate provision of the stipulation states that the "Respondent exercised discretion in imposing discipline and discharge for violations of its Security Officer's Personnel Policy Manual, Guidelines and Rules, and/or any other written or verbal policies or practices used or relied on by Respondent, including, but not limited to: [the employees' asserted misconduct]. As explained below, we conclude that there is an obligation to bargain over the discretionary aspects of discipline, a conclusion that would apply whether or not the Respondent has a policy that reduces (without eliminating) its discretion; thus, we need not resolve whether the Respondent's discretion was unfettered or partly limited by an unspecified policy or practice.

[5] We reject the Respondent's challenges to the authority of the Regional Director and the Acting General Counsel to act in this case. The Respondent argues that Regional Director Peter Ohr was invalidly appointed by a Board that included recess appointee Craig Becker; however, the Supreme Court's *Noel Canning* decision, above, established that Member Becker's recess appointment to the Board was valid. See also *Mathew Enterprise d/b/a Stevens Creek Chrysler Jeep Dodge v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254 (4th Cir. 2014). Thus, the Regional Director was appointed by a properly constituted Board.

Regarding the Acting General Counsel's authority, in its answer to the complaint, the Respondent raised the following affirmative defense:

> The Complaint should be dismissed because the Acting General Counsel was not properly appointed and therefore lacks statutory authority under the National Labor Relations Act to bring the Complaint or to delegate such authority to the Regional Director.

For the reasons set forth below, we find no merit in the Respondent's argument that the Acting General Counsel was improperly or unlawfully "appointed." At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 556, 557 (9th Cir. 2016); *S.W. General, Inc. v. NLRB*, 796 F.3d 67, 73 (D.C. Cir. 2015), petition for rehearing en banc denied, Case No. 14–1107 (Jan. 20, 2016), petition for cert. granted 136 S.Ct. 2489 (Mem.) (June 20, 2016) (No. 15–1251). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondent's affirmative defense that the Acting General Counsel was "improperly and unlawfully appointed."

We acknowledge that the decisions in *Kitsap* and *S.W. General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap*, 816 F.3d at 558; *S.W. General*, 796 F.3d at 78. Although that question is still in litigation, we find that subsequent events have rendered moot any argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter:

On November 16, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

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

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court approved the Board's determination that an employer violates Section 8(a)(5) by making unilateral changes to the terms and conditions of employment of employees represented by a union. *Katz* held that such a change "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal" to bargain. Id. at 743 (footnote omitted).[6]

The imposition of discipline on individual employees alters their terms or conditions of employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices. That conclusion flows easily from the terms of the Act and established precedent. When an employee is terminated—whether for lack of work, misconduct, or other reasons—the termination is unquestionably a change in the employee's terms of employment. As the Board has held:

> Under Sections 8(a)(5) and 8(d), it is unlawful for an employer to refuse to bargain with respect to mandatory subjects of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209–210 (1964). Termination of employment constitutes such a mandatory subject.[7]

N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000); see *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works a dramatic change in their working conditions" and thus "[l]ayoffs are not a management prerogative [but] a mandatory subject of collective bargaining").[8] Similarly, when an employee is demoted or suspended without pay, the action represents a change in terms and conditions of employment. See, e.g., *Pillsbury Chemical Co.*, 317 NLRB 261, 261 fn. 2 (1995) (holding that employee's demotion and substantial wage reduction "rendered [employee's working] conditions so difficult or unpleasant" that constructive discharge was demonstrated).[9] Finally, in *Carpenters Local 1031*, 321 NLRB 30 (1996), the Board held that the suggestion in some prior Board decisions that "a change in terms or conditions of employment affecting only one employee does not constitute a violation of Section 8(a)(5) . . . is erroneous as a matter of law," and the Board overruled all such prior cases. Id. at 32.

Not every unilateral change that affects terms and conditions of employment triggers the duty to bargain. Rather, the Board asks, "whether the changes had a *material, substantial, and significant impact* on the employees' terms and conditions of employment." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (emphasis added). We draw on this basic principle today. Serious disciplinary actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees' tenure, status, or earnings. Requiring bargain-

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I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot the Respondent's affirmative defense challenging the circumstances of Solomon's "appointment" as Acting General Counsel.

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

[7] Sec. 8(d) describes the conduct required of an employer and its employees' bargaining representative pursuant to the obligation to "bargain collectively." As the dissent notes, Sec. 8(d) also limits the Board's ability to impose particular terms on parties; as explained below, today's decision does not exceed its limits.

[8] See also *Harris v. Quinn*, 134 S.Ct. 2618, 2636 (2014) ("Under federal law, mandatory subjects include . . . termination of employment . . .") (citing *N.K. Parker Transport*, supra); *Fallbrook Hospital Corp. d/b/a Fallbrook Hospital*, 360 NLRB 644, 655 (2014) ("An employer has an obligation to bargain with its employees' bargaining representative over terms and conditions of work. Termination of employment is unquestionably a mandatory subject of bargaining.") (citations omitted), rev. denied, enforcement granted by 785 F.3d 729 (D.C. Cir. 2015); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) ("A grievance about a discharge is clearly a mandatory subject of bargaining.").

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

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

ing *before* these sanctions are imposed is appropriate, as we will explain, because of the impact on the employee and because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed. Just as plainly, however, other actions that may nevertheless be referred to as discipline and that are rightly viewed as bargainable, such as oral and written warnings, have a lesser impact on employees, viewed as of the time when action is taken and assuming that they do not themselves automatically result in additional discipline based on an employer's progressive disciplinary system. Bargaining over these lesser sanctions—which is required insofar as they have a "material, substantial, and significant impact" on terms and conditions of employment—may properly be deferred until after they are imposed.[10]

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

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

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

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

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

In the decades since *Katz* and *Oneita Knitting*, across a range of terms and conditions of employment, the Board has applied the principle that even regular and recurring changes by an employer constitute unilateral action when the employer maintains discretion in relation to the criteria it considers.[11] For example, in *Washoe Medical Center*, 337 NLRB 202 (2001), the Board applied *Oneita Knitting* and concluded that an employer's "substantial degree of discretion" in placing newly hired employees into quartiles within their positions' wage ranges, based on subjective judgments, required the employer to bargain with the union before implementing the wage rates. Id. at 202. As discussed in detail below, the Board majority in *Washoe* expressly rejected the dissent's contention that there was no duty to bargain because "the [r]espondent's policy and procedure for setting initial wage rates entails the consistent application of uniform standards and, thus, curtails its exercise of discretion." Id. In *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001) (unpublished), the Board held that an employer's recurring unilateral reductions in

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

In short, the distinction we draw here among types of discipline for purposes of a *preimposition* duty to bargain does not modify Board precedents in other contexts concerning discipline.

[11] The dissent—accurately but irrelevantly—points out that several of the cases on which we rely did not involve decisions about discipline. Because we apply duty-to-bargain principles that are well established in the context of terms and conditions of employment other than discipline, it is logical that we rely on those cases here.

employees' hours of work were discretionary and therefore required bargaining: "[T]here was no reasonable certainty as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours appear[ed] to be unlimited." Id. at 294 (internal quotations omitted). In *Adair Standish Corp.*, 292 NLRB 890, 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), the Board required an employer to bargain regarding economically motivated layoffs, when the owner selected the employees to be laid off based not on seniority but on his own judgment of their ability. In so holding, the Board rejected the employer's argument that its failure to bargain was permissible "because of its past practice of instituting economic layoffs due to lack of work." The Board held that the employer's practice before its employees were represented did not provide a defense: once the union represented the employees, "the [r]espondent could no longer continue unilaterally to exercise its discretion with respect to layoffs."[12]

As explained above, discipline may alter core components of employees' terms and conditions of employment. Moreover, as the Board held in *Daily News of Los Angeles*, "the *Katz* doctrine . . . neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act." *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Consistency with these precedents and their underlying principles demands that we apply the *Oneita Knitting* approach to require bargaining before discretionary discipline (in the form of a suspension, demotion, discharge, or analogous sanction) is imposed, just as we do in cases involving discretionary layoffs, wage changes, and other changes in core terms or conditions of employment, where bargaining is required before an employer's decision is implemented.[13] Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the nature of discipline to be imposed. The obligation to provide notice and an opportunity to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.

This conclusion is strongly supported by the Board's reasoning in *Washoe Medical Center*, 337 NLRB 202 (2001). *Washoe* was the Board's only substantive discussion of the obligation to bargain over discretionary discipline prior to *Fresno Bee*, 337 NLRB 1161 (2002), on which the Respondent and dissent rely and which we discuss in more detail below.[14] In *Washoe*, the Board affirmed the judge's dismissal of 8(a)(5) charges arising out of individual acts of discipline, on the ground that the

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

[13] Disciplinary action is indisputably the sort of management decision that is "almost exclusively 'an aspect of the relationship' between employer and employee." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (quoting *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 178 (1971)). The dissent quotes *First National Maintenance* to suggest that we should find no obligation to bargain over the decision to impose discipline for the same reasons that the Court found no obligation to bargain over First National Maintenance's decision to partially terminate its business. But the Court made clear that it was not addressing management decisions that (like discipline) are almost exclusively an aspect of the relationship between employer and employee. Nor was the Court addressing management decisions that "have only an indirect and attenuated impact on the employment relationship." Id. at 676–677. Rather, the Court was considering "a third type of management decision, one that had a direct impact on employment . . . but had as its focus only the economic profitability of the contract [that the employer intended to terminate], a concern under these facts wholly apart from the employment relationship." Id. at 677. The Court characterized such a decision as "involving a change in the scope and direction of the enterprise," thus making clear that the considerations the Court applied for that type of decision simply do not apply to a decision to impose discipline.

[14] The dissent makes much of the fact that although the Act became law in 1935, it is only now that the Board is finding that employers have a pre-disciplinary duty to bargain. The timing that the dissent finds so troubling is easily explained, however, in light of the procedures prescribed by the Act for unfair labor practice cases. The Board can consider only those cases that a private party has initiated by filing a charge. Thus, the Board will address an issue only if it happens to arise in a case filed by a member of the public and, usually, only if it is necessary to the result in the case. *Washoe* presented the issue but did not require its resolution. *Fresno Bee*, as explained below, resolved it incorrectly. *Alan Ritchey*, in our view, resolved it correctly but was invalidated for procedural reasons. This is simply the nature of a process that relies primarily on case-by-case adjudication.

union there had not sought to engage in preimposition bargaining. Significantly, however, the Board expressly declined to rely on the alternative rationale articulated by the judge, a rationale tracking that of the judge in *Fresno Bee*. In refusing to apply that analysis, the *Washoe* Board stated:

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

337 NLRB at 202 fn. 1.[15]

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

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

Id. at 202. Although the discussion in *Washoe* concerned starting wage rates, its reasoning applies with equal force to other significant employment terms.

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

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

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

As observed, the *Fresno Bee* Board simply adopted the judge's rationale, and the dissent here would follow

[15] Although the dissent dismisses this rejection by the Board as dicta, it is notable that the Board was sufficiently troubled by the judge's misstatement to make a point of correcting it, rather than leaving it unaddressed, particularly given the Board's general demonstration of restraint in resolving the case on a narrow basis.

suit.[16] But the judge's rationale—the only rationale articulated in the decision—was demonstrably incorrect, and we decline to follow it. See *Goya Foods of Florida*, 356 NLRB 1461, 1463 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation."). Nor do we find the dissent's arguments in support of the decision persuasive. To the extent *Fresno Bee* is inconsistent with our conclusion here, it is overruled.

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

Weingarten, which is grounded in Section 8(a)(1), seeks to ensure that employers carrying out investigations do not restrain or coerce employees in the exercise of their Section 7 rights to engage in concerted activity for mutual aid or protection. An employee who seeks her union representative's assistance in responding to an employer's investigation that may lead to discipline is, quite literally, engaging in "concerted activit[y] for the purpose of . . . mutual aid or protection" under Section 7. For this reason, the *Weingarten* right is held by the employee, not by the union. It must be asserted by the employee, not by a union representative, and it can be

[16] The dissent argues that no change has occurred when disciplinary actions are imposed subject to an existing discipline process or practice (which the dissent, without record support, presumes to be the situation here). Even assuming that a disciplinary process or practice was in place and was not itself modified, we reject the dissent's contention that no legally cognizable change has occurred when an employer relies on the existing process or practice to take disciplinary action against an employee. To argue that, in such a case, nothing has changed evinces an utter failure to consider the matter from the viewpoint of the disciplined employee whose rights are at issue: she will undoubtedly, and quite reasonably, be certain that her terms and conditions of employment have changed. Further, if the imposition of disciplinary action were not a change in terms and conditions of employment, as the dissent contends, there would be no obligation to bargain over discipline either before *or after* imposing it, and there would seemingly be no foundation for the longstanding consensus that grievance procedures are a mandatory subject of bargaining.

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

Further, the right that we adopt today does not conflict with the representations in the Board's *Weingarten* brief, in which "the Board acknowledge[d] that the duty to bargain does not arise *prior to* the employer's decision to impose discipline." Brief for the Board at 10 (emphasis added); see also id. at 15, 16. As explained elsewhere in this decision, the obligation to provide the union with notice and an opportunity to bargain arises *after* the employer has decided, at least preliminarily, that discipline is warranted, but before the employer has actually imposed discipline. Contrary to the dissent's argument, this approach is consistent with our decisional bargaining requirements in other contexts, and simply embodies the principle that an employer must bargain in good faith about its intended action before its decision is finalized and implemented. *Weingarten* rights, in contrast, arise while the employer is still investigating whether misconduct occurred and warrants discipline.

The dissent treats the Board's pre-*Weingarten* decisions and its *Weingarten* brief to the Court as having pledged that the Board would never find an obligation to bargain before the imposition of discipline, and the Court's *Weingarten* decision as having relied on those purported pledges. But, as explained, the right at issue here differs materially from that addressed in the *Weingarten* decision or in the briefs and decisions leading to it. In *Weingarten*, a grievance-arbitration procedure was in place, and the issue was whether Sec. 8(a)(1), not Sec. 8(a)(5), required an employer to permit a union representative to be present at an investigatory interview. It is immaterial whether, at the time of *Weingarten*, the Board contemplated the existence of the bargaining obligation that we address today. Even if the Board had, at that time, expressly disclaimed the right that we address here, it is well established that the Board may change its position as long as it explains its rationale for the change. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("a Board rule is entitled to deference even if it represents a departure from the Board's prior policy" (citing *Weingarten*, supra at 265–266); *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1076–1077 (D.C. Cir. 2002) ("The Board is at liberty to change its policies as long as it justifies the change with a reasoned explanation.") (quotation marks and citation omitted); *Kmart Corp. v. NLRB*, 174 F.3d 834, 842 (7th Cir. 1999) ("[T]his Court has held that the Board is free to change its mind on matters of law that are within its competence to determine, provided it gives a reasoned analysis in support of the change.") (quotation marks and citation omitted). We explain today why finding an obligation to provide notice and an opportunity to bargain before the imposition of discipline better effectuates the Act's policy of encouraging collective bargaining under Sec. 8(a)(5) than the Board's prior denial of that obligation.

waived by the employee. See, e.g., *Appalachian Power Co.*, 253 NLRB 931, 933 (1980), enfd. mem., 660 F.2d 488 (4th Cir. 1981). In contrast, the obligation to refrain from unilateral action regarding mandatory subjects of bargaining is grounded in Section 8(a)(5). Moreover, the two rights arise at different points in time: the *Weingarten* right arises during an investigation into whether discipline is merited, while the right to notice and an opportunity to bargain arises after such an investigation results in a preliminary determination that discipline is warranted, but prior to its imposition. Thus, although the *Weingarten* Court agreed with the Board that an employer's *refusal to bargain* with a union in an investigatory meeting that may lead to discipline does not violate Section 8(a)(1), the Court, contrary to the dissent's contention, expressed no view concerning whether the employer's unilateral decision to discipline an employee violates Section 8(a)(5) by denying the employees' chosen representative the right to participate in good-faith bargaining over mandatory subjects of bargaining.

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

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

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

D. An Obligation to Bargain Prior to Imposing Discipline is not an Unreasonable Burden

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

With regard to possible delay that a bargaining obligation may cause in implementing discipline, we have sought in our decision today to minimize the burden on employers in that regard to the greatest extent possible consistent with our duty to protect Section 7 rights, including the right of employees to be represented by their chosen representative.[18]

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

Second, where the pre-imposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This entails sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion. It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to infor-

[18] The dissent contends that our efforts to accommodate the competing rights and interests at issue only worsen the effects of this decision by creating widespread uncertainty and extensive litigation. For reasons explained elsewhere in this decision, we disagree.

mation requests. (Again, we note that, in this context, the scope of the duty to provide information is limited to information relevant to the subject of bargaining: the discretionary aspects of the employer's disciplinary policy.) The aim is to enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer may impose the selected disciplinary action and then continue bargaining to agreement or impasse. Moreover, the employer has no duty to bargain over those aspects of its disciplinary decision that are controlled by nondiscretionary elements of existing policies and procedures. Thus, the less discretion an employer exercises, the less bargaining will be required of the employer.

Third, an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.[19] The scope of such exigent circumstances is best defined going forward, case by case, but it would surely encompass situations where (for example) the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace. Thus, our holding today does not prevent an employer from quickly removing an employee from the workplace, limiting the employee's access to coworkers (consistent with the employer's legal obligations) or equipment, or taking other necessary actions to address exigent circumstances when they exist.[20]

Finally, an employer need not await an *overall* impasse in bargaining before imposing discipline, so long as it exercises its discretion within existing standards. Considering the practicalities of discipline, we hold that so long as the employer continues to apply existing standards and procedures for discipline, the employer's duty is simply to bargain over the discretionary aspect of the discipline, in accord with today's decision. After fulfilling its pre-imposition responsibilities as described above, the employer may act, but it must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse.[21] We believe such a rule appropriately defines the statutory duty to bargain in good faith in this area critical to both employers and employees.[22]

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

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

[21] The dissent's provocative suggestion that a union would demand bargaining for the reinstatement of an employee who was discharged because he "killed, assaulted, or raped a coworker" (perhaps an employee represented by the union) demonstrates the dissent's inclination to gin up fear of a falling sky, rather than to seriously grapple with parties' bargaining obligations. With respect to pre-imposition bargaining, of course, such a situation would demonstrably come within the exigent-circumstances exception discussed above. With respect to post-imposition bargaining—an obligation that already exists under current law—we see no basis for the dissent's concern. Even assuming the imagined felonious employee were not imprisoned and thus unavailable for reinstatement, we have no doubt that such bargaining would reach agreement or impasse in exceedingly short order.

[22] An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim agreement expressly waiving the union's right to pre-imposition bargaining and providing for some mutually satisfactory alternative, such as a grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargaining agreements.

The dissent suggests an effort, in violation of Sec. 8(d), to coerce employers into reaching interim grievance and arbitration agreements. We emphasize that, within the requirements of good-faith bargaining, parties remain free to structure their bargaining and address their issues in whatever mutually agreeable ways best suit their needs, including by reaching more limited agreements or by simply meeting their pre-imposition obligation to bargain. See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 29–CA–158754, JD(NY)–27–16 (judge's decision, August 1, 2016) (employer and union reached agreement to hold what they called an "*Alan Ritchey* meeting" before discharging any unit employee). Contrary to the dissent, there is no "heavy finger on the scale" or ominous "offer that employers cannot refuse"; there is simply an available alternative that employers can take or leave, as they choose. In any event, even if the option of a safe harbor were to have the effect of motivating employers to reach interim agreements, such motivation would be entirely consistent with the policies of the Act, which encourage not only the process of collective bargaining but also the reaching of a collectively bargained agreement. And an employer's motivation to reach an interim agreement, so as to regain flexibility that it had before its employees unionized, is no different from the employer's motivation to negotiate a management-rights clause; in both situations, the employer's choice to negotiate a provision is simply a rational response to the legitimate incentives of the Act. We no more impose an interim agreement on employers here than the *Katz* doctrine imposes management-rights clauses on employers who seek to avoid having to bargain over otherwise mandatory subjects of bargaining under the Act. Whatever incentives the Act creates for employers, they remain free to make the strategic choices they see fit, within the limits of the law.

The dissent also predicts the virtual collapse of contract bargaining under an avalanche of disciplinary disputes, which it refers to as "single-issue bargaining." We disagree with the dissent's argument that we

Thus, the narrow scope of the bargaining obligation and the limited nature of the duty to bargain are tailored to minimize their effect on an employer's ability to effectively manage its work force. For example, in a workplace where the employer has an established practice of disciplining employees for absenteeism, the decision to impose discipline for such conduct will not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. Instead, bargaining will be limited to the specific case at hand: for example, if the employer consistently suspends employees for absenteeism but the length of the suspension is discretionary, bargaining will be limited to the latter issue. Our expectation is that bargaining over the limited topics that implicate employer discretion will yield expeditious results, and that it will, in fact, be the norm that parties will reach agreement without testing the limits of the pre-imposition bargaining period. If our expectation proves inaccurate, any constraint on the employer's ability to effectuate its desired discipline will be limited, as we have made clear, because we impose no duty to bargain to impasse prior to imposing discipline.

To hold otherwise, as the dissent would, and permit employers to exercise unilateral discretion over discipline after employees select a representative—i.e., to proceed as before despite the fact that the employees have chosen to be represented—would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union (typically, newly certified or recognized) that represents the employees impotent.[23] Employees covered by the Act attain union representation after participating in a government-sanctioned process and only if a majority demonstrates a desire for representation. Employees do not lightly undertake that process. If, after employees follow this path, their chosen representative can lawfully be denied the opportunity to represent them, especially in such a critical context as significant disciplinary action, the employees might reasonably conclude that their statutory rights are illusory. In addition, as Circuit Judge Posner explained in a case involving unilateral layoffs after the union was certified but before a first contract was executed:

> The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them. Of course, if the change is authorized by the collective bargaining agreement, it is not in derogation of the union and is not an unfair labor practice. But there was no agreement here. Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.

NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1090 (7th Cir. 1987) (citations omitted). An employer's unilateral exercise of discretion in imposing serious discipline without

have created an obligation to engage in single-issue bargaining, contrary to the Board's overall-impasse doctrine. The cases on which the dissent relies for this proposition all involve a party's preconditioning contract bargaining progress on the resolution of a single issue that is part of the contract negotiations. Here, in contrast, the individual disciplinary actions are stand-alone issues that are separate and distinct from the issues to be resolved in contract bargaining. Indeed, by the dissent's reasoning, every grievance proceeding to resolve an employee disciplinary issue would amount to improper single-issue bargaining.

As for the dissent's hypothesized ill effects on bargaining, especially first-contract bargaining, we think it equally plausible that bargaining to address limited issues regarding individual disciplines will help the parties to gain negotiating experience and develop a relationship that will assist them in negotiating a collective-bargaining agreement.

[23] Courts have recognized that employees are particularly vulnerable to unfair labor practices when the bargaining relationship is new and the parties are negotiating for an initial contract. See, e.g., *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992) (reversing district court's denial of interim injunctive relief; observing that the "[t]he Union was only recently certified by the Board and the employees were bargaining for their first contract" and that "[t]hese two facts make bargaining units highly susceptible to management misconduct"); see also *Ahearn v. Jackson Hospital Corp*., 351 F.3d 226, 239 (6th Cir. 2003) (affirming grant of interim injunctive relief and noting that "the Union was quite new and had not even signed its first contract") (citing *S. Lichtenberg*, supra). For at least 10 years, the agency's General Counsels have expressly sought "to protect these new bargaining relationships, and therefore protect employee free choice." See General Counsel Memo GC 06-05 at 1 (Meisburg, April 19, 2006). See also General Counsel Memo GC 07-08 at 1 (Meisburg, May 29, 2007) ("[I]nitial contract bargaining constitutes a critical stage of the negotiation process in that it provides the foundation for the parties' future labor-management relationship. Unfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize."); id. at 2 ("Unilateral changes may also force unions to bargain from a position of disadvantage, render the unions powerless in the eyes of unit employees, and tend to erode employee support for the union at a time when the union has not had adequate opportunity to establish a strong relationship with the represented employees."); General Counsel Memo GC 08-08 at 2 (Meisburg, May 15, 2008) (stating goal of "encouraging parties who are new to collective bargaining to approach these relationships with an openness and commitment to the process of good faith collective bargaining."); General Counsel Memo GC 14-03 at 2 (Griffin, April 30, 2014) ("Effective enforcement of the Act requires that we protect employees' right to exercise their free choice regarding unionization, to participate in an election free of coercion, and to have their elected representative negotiate a first contract unencumbered by the impact of unfair labor practices.").

first giving the union notice and an opportunity to bargain would send employees the same signal as the imposition of unilateral layoffs.

Recognition that discretion is inherent—in fact, unavoidable—in most kinds of discipline confirms that a bargaining obligation attaches to the exercise of such discretion. Granting merit increases, as in *Katz*, *Oneita Knitting*, and subsequent cases, is also inherently discretionary, as are many decisions regarding economic layoffs.[24] Nonetheless, we require bargaining over those inherently discretionary decisions. The inevitability of discretion in most decisions to discipline does not support treating it differently from other forms of unilateral change; indeed, it makes bargaining over disciplinary actions that much more critical.

E. Application to This Case

The stipulated record before us demonstrates that the discharges at issue have all the characteristics of discipline that requires pre-imposition bargaining pursuant to our analysis above. It is undisputed that no such bargaining occurred. Accordingly, we would typically apply the above analysis and find that the Respondent violated Section 8(a)(5) as alleged. Nevertheless, for reasons we will explain, we have determined not to apply today's holding retroactively. As a result, we reverse the discretionary discipline violations found by the judge and dismiss the corresponding allegations of the complaint.

1. The discharges at issue meet the test for discipline that requires pre-imposition bargaining, but no such bargaining occurred

The discharges of Jason Mack, Winston Jennings, and Nequan Smith plainly had material, substantial, and significant impacts on their terms and conditions of employment. In addition, as the Respondent has stipulated, the discharges were discretionary and it imposed them without notice to or bargaining with the Union, which had been certified as the affected employees' exclusive representative. No collective-bargaining agreement or other agreement addressing grievance processing regarding the employees had been agreed to by the Respondent and the Union. As further stipulated, at the time of the discharges, the Respondent did not have a reasonable, good-faith belief that any of the three employees' continued presence at the job presented a serious, imminent danger to the Respondent's business or personnel or that any of them engaged in unlawful conduct, posed a significant risk of exposing the Respondent to legal liability for the employee's conduct, or threatened safety, health, or security in or outside the workplace. Pursuant to our analysis above, the discharges at issue are covered by the obligation to bargain before imposition, an obligation that the Respondent did not meet.

2. Retroactive application to the instant case is inappropriate

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

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

Id. (citations omitted); see also *Allied Mechanical Services*, 356 NLRB 2 (2010) (incorporating by reference 352 NLRB 662 (2008)), enfd. 668 F.3d 758 (D.C. Cir. 2012). Although the issue here is a close one, we believe that the controlling factors weigh against retroactive application.

The discharges at issue here took place after the Board's decision in *Alan Ritchey*[25] had imposed the obligation to bargain before imposing discipline in the circumstances that exist here, and it had overruled the prior incorrect precedent set forth in *Fresno Bee*, supra. Yet *Alan Ritchey*'s validity already was questionable in light of the Federal court proceedings in *Noel Canning*, supra. Shortly before the discharges, the District of Columbia Circuit had issued a decision broadly invalidating the appointments of two of the three Board members who had participated in deciding *Alan Ritchey*. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).[26] And critical-

[24] See, e.g., *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986).

[25] 359 NLRB 396 (2012).

[26] The Board generally applies a "nonacquiescence policy" to appellate court decisions that conflict with Board law and regards such adverse rulings solely as the law of that particular case, unless the Board precedent at issue is reversed by the Supreme Court. See *D.L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007); *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), revd. 60 F.3d 1195 (6th Cir. 1995); *Arvin Industries*, 285 NLRB 753, 757 (1987). For that reason, appellate court decisions generally do not control the Board's resolution of other, unrelated proceedings.

ly, as described above, the Supreme Court ultimately ruled that the challenged Board members had not been validly appointed, thus retroactively nullifying *Alan Ritchey* on procedural grounds.

We need not agree with the Respondent's argument that it reasonably relied on *Fresno Bee*, rather than *Alan Ritchey*, as the relevant precedent[27] in order to recognize the unusual circumstances surrounding this case. In light of those circumstances, we find that applying the rule adopted here (albeit first announced in *Alan Ritchey*) to cases preceding today's decision would create a particular injustice under the third prong of our test, and thus such application would constitute manifest injustice.

We believe that today's change in the law is well grounded in Board doctrine and better serves the policies of the Act. Retroactivity, however, is not essential to achieving those benefits, and it will foreseeably impose unexpected burdens on employers, in light of *Noel Canning*'s outcome. For these reasons, we apply our holding only prospectively.

F. Application to Future Cases

Because we apply today's holding prospectively, we will dismiss the complaint and order no remedy. But, in the interest of administrative efficiency, we provide guidance to Board personnel and labor practitioners, who will apply this decision in the first instance in forthcoming cases, about the appropriate remedies for unfair labor practices arising under today's decision.

If a respondent violates Section 8(a)(5) by failing to provide notice to the union and an opportunity to bargain before it imposes discretionary discipline, the Board's standard remedies for an unlawful unilateral change should be granted.[28] Thus, the remedy should not be limited to a cease-and-desist order, an affirmative order to bargain before changing employees' terms and conditions of employment by imposing discretionary discipline,[29] and notice posting. Rather, make-whole relief would also be appropriate, including reinstatement and backpay, as explained below. A respondent may, however, raise an affirmative defense that the discipline was "for cause" as that term is used in Section 10(c) of the Act, and, therefore, that reinstatement and backpay may not be awarded. We explain below what must be shown to support such a defense.

1. General remedial principles at issue

Under well-established precedent,

> the remedial aim of a Board order is "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Accordingly, when an employer violates Section 8(a)(5) by changing its employees' terms and conditions of employment without affording their bargaining representative an opportunity to bargain, the standard affirmative remedy is to order the employer to rescind its unlawful unilateral changes on the union's request . . . . See *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011) (standard affirmative remedy for unlawful unilateral changes to the terms and conditions of employment is immediate rescission of changes and return to status quo ante).

UPS Supply Chain Solutions, Inc., 364 NLRB 25, 25 (2016). See also *Southwest Forest Industries*, 278 NLRB 228, 228 (1986) (It is well established that a make-whole order restoring the status quo ante is the normal remedy when an employer has made unlawful unilateral changes in its employees' terms and conditions of employment.) (citing cases), enfd. 841 F.2d 270 (9th Cir. 1988); *Beacon Piece Dyeing and Finishing Co.*, 121 NLRB 953, 963 (1958). The unilateral changes that give rise to violations under today's decision—that is, the imposition of disciplinary actions such as suspension, demotion, and discharge—would typically result in loss of pay or employment status, necessitating backpay and reinstatement to make affected employees whole. *Goya Foods*, supra (the Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change), quoting *Grand Rapids Press*, 325 NLRB 915, 916 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000).[30] The Supreme Court has long en-

[27] Nor does the stipulated record indicate what understanding of its bargaining obligations the Respondent had or relied on when it discharged the employees at issue.

[28] Particularly egregious cases, or those involving recidivist respondents, may warrant consideration of enhanced remedies, in accordance with our usual remedial practices.

[29] As explained above, an employer's obligation to bargain *before* implementing discretionary discipline does not require that the bargaining continue to agreement or impasse; however, the employer's duty to continue bargaining after implementation does require full bargaining to agreement or impasse. In a case alleging an unlawful failure to bargain prior to implementation, the respondent employer, by definition, will have already imposed discipline or discharge unilaterally, and our pragmatic reasons for allowing more limited pre-imposition bargaining will no longer apply. Thus, the appropriate remedy will include the bargaining obligation that applies whenever discipline has already been implemented: bargaining to agreement or impasse.

[30] Consistent with our precedent, a respondent may seek to show that make-whole remedies are inappropriate in a particular case. See also *Consec Security*, 328 NLRB 1201, 1201 (1999) (explaining that, at the compliance stage, employer can raise defenses to reinstatement and backpay remedy for employees' discharge in violation of Sec. 8(a)(5)); *Randolph Children's Home*, 309 NLRB 341, 341 (1992) (ordering reinstatement and backpay to remedy employee's discharge under a unilaterally revised rule, but allowing employer an opportunity "to

dorsed the Board's use of make-whole remedies. *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)) ([M]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.).

In some cases, it may happen that a respondent that unlawfully fails to provide prediscipline notice and an opportunity to bargain, under the analysis we adopt today, complies with its obligation to bargain to agreement or impasse after it has imposed discipline. Such compliance with the post-discipline bargaining obligation does not moot or cure the pre-discipline bargaining violation, but it may affect the scope of remedial relief. Thus, when parties have bargained to agreement after the discipline,[31] an order providing for backpay, running from the date of the unilateral discipline until the date on which the parties reached agreement, would generally be appropriate to the extent that the parties' agreement does not provide such backpay.[32] This assumes that the parties' agreement does not purport to settle the pre-discipline bargaining violation; if it does purport to do so, that aspect of the agreement, if challenged, will be subject to analysis under the Board's standard for reviewing non-Board settlement agreements set forth in *Independent Stave Co.*, 287 NLRB 740 (1987).

In cases in which the respondent failed to provide notice and an opportunity to bargain before imposing discipline but the parties have bargained in good faith to impasse after the discipline, backpay will be ordered for the pre-discipline bargaining violation. Backpay in such a case would normally run from the date of the discipline until the date on which the parties reached impasse.[33]

avoid its remedial obligation to [employee] by demonstrating that it would have discharged him even absent his violation of the unilaterally promulgated rule"). As explained below, we will adhere to the compliance process when presented with the argument that reinstatement and backpay are inappropriate because a discipline was assertedly "for cause."

[31] As a practical matter, it may be less likely that an unfair labor practice charge will be filed when the parties have reached an agreement.

[32] See, e.g., *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 821 (2004) (limiting backpay for unilateral change to the date the parties reached an agreement permitting the change). In most such cases, the employer's backpay responsibility would likely be minimal.

[33] Because the employer may impose the discretionary discipline after the parties have reached impasse, ordering a reinstatement or rescission remedy would appear to be impractical in most circumstances where the parties are at impasse.

We do not rule out the possibility that the backpay period may be shortened by the application of standard compliance principles. See, e.g., *Hawaii Tribune Herald*, 356 NLRB 661 (2011) (clarifying standard under which Board will assess whether employee's post-discharge misconduct bars reinstatement or tolls backpay), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012). In addition, normal principles regarding mitigation of damages would apply to calculations of the backpay due to discharged employees.

2. Section 10(c) of the Act

We reject the argument that the remedial limitation found in Section 10(c) of the Act necessarily precludes make-whole relief in all cases arising under today's decision. Rather, its application will turn on the specific facts of each case. The limitation at issue in Section 10(c) consists of a single sentence, stating: "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 backpay, if such individual was suspended or discharged for cause."[34] Despite the facial breadth of that language, the Supreme Court has expressly rejected the argument that the "for cause" provision bars a full remedy for layoffs that

[34] That provision, which was added in 1947, appears in the midst of Sec. 10(c)'s grant of broad authority to the Board to determine whether violations of the Act have occurred and to order action that will remedy those violations. It is not explained or clarified by nearby statutory language, and its legislative history indicates that it was intended to address Sec. 8(a)(3) violations turning on employer motivation. See *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401 fn. 3 (1983) (citing the legislative history and observing that the provision's insertion "was sparked by a concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of anti-union animus even though the worker had been guilty of gross misconduct. . . . The provision was thus a reaction to the Board's readiness to infer anti-union animus from the fact that the discharged person was active in the union . . . ."). The Board has applied Sec. 10(c)'s limitation on make-whole relief in certain cases arising under Sec. 8(a)(5), and we do not decide today whether the Board erred in doing so.

To be clear, Sec. 10(c) is a limitation on the Board's remedial authority once it has found an unfair labor practice, and the only remedies it addresses are reinstatement and backpay. Neither the text of Sec. 10(c) nor its legislative or interpretive history places any limit on whether the Board may find an unfair labor practice in the first instance, when the General Counsel has proved the elements of the violation, or on whether the Board may order remedies other than reinstatement and backpay when it finds such an unfair labor practice.

We are unpersuaded by the dissent's contrary belief that Sec. 10(c) applies also to the initial finding of an unfair labor practice and that no violation can be found, in any case involving suspension or discharge, unless the General Counsel demonstrates the absence of cause. We note, initially, that the expressly remedial language of the 10(c) provision at issue defeats the argument that Sec. 10(c) limits the Board's authority to find a violation. Further, in a somewhat different context, the Board has already rejected the dissent's "novel theory"—repeated nearly verbatim today—that cause is a factor in assessing liability and therefore its *absence* must be shown by the General Counsel. See *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1134–1135 (2014) ("'Section 10(c) places the burden on the General Counsel only to prove the unfair labor practice, not to disprove an affirmative defense.' [*NLRB v. Transportation Management*, 462 U.S.] at 401 fn. 6. Thus, the Court implicitly rejected our colleague's contention that Congress meant to require the General Counsel to prove that the employer's action was not for 'cause.'") We continue to find the dissent's effort to reinterpret *Transportation Management* unpersuasive, and we reaffirm the Board's prior rejection of the argument.

"stem[] directly from a refusal to bargain." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964).[35]

The Board has applied the Section 10(c) remedial limitation in only a handful of cases, and we find, contrary to the dissent, that none of those cases bars the award of make-whole relief for an employer's failure to bargain prior to imposing discretionary discipline. First, we are unpersuaded that make-whole relief in this context is precluded by *Taracorp Industries*, 273 NLRB 221 (1984), which addressed the types of remedies appropriate for a violation of an employee's right, under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), to have a union representative present at an investigatory interview that may result in discipline. In *Taracorp*, the Board interpreted Section 10(c) to mean that an employee discharged or disciplined for misconduct is not entitled to reinstatement and backpay "even though the employee's Section 7 rights may have been violated by the employer in a context unrelated to the discharge or discipline." *Taracorp*, 273 NLRB at 222. The Board explained that "there simply is not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." By contrast, in cases arising under today's decision, the unfair labor practice is the unilateral imposition of discipline that was imposed directly in response to the perceived misconduct, creating a much stronger nexus between the unfair labor practice at issue and the reason for the discipline.[36] Simply put, unlike in *Taracorp*, the unfair labor practice (an employer's failure to bargain prior to imposing discretionary discipline) is not "unrelated to" the discipline. Further, as we have explained above, 8(a)(1) violations under *Weingarten* raise issues that are materially different from those arising from the 8(a)(5) violations we address in this decision.

In *Anheuser-Busch, Inc.*,[37] the Board considered the relevance of Section 10(c) in a case involving a unilateral change in violation of Section 8(a)(5). The employer unilaterally installed and operated surveillance cameras, which revealed evidence of employee misconduct and criminal activity at the worksite, including sleeping on duty, urinating off of the facility's roof, and illegal drug use. Relying on *Taracorp*'s "insufficient nexus" analysis, the Board majority found that the employees who had been disciplined for that conduct, based on evidence obtained from the unlawfully installed cameras, were not entitled to make-whole relief.[38] Even accepting *Anheuser-Busch*'s application of Section 10(c)'s limitation to unilateral-change cases, we find a substantially stronger causal nexus here than in *Anheuser-Busch*. There, the unfair labor practice was the failure to negotiate about the video cameras; the unlawfully installed cameras were merely the tool by which subsequent misconduct was discovered. *Anheuser-Busch*, 351 NLRB at 646. Thus, the unfair labor practice in *Anheuser-Busch* was separate from the disciplinary actions both in time and in the chain of causation. Here, in contrast, the unfair labor practice is chronologically and causally inseparable from the discipline: the employer's unlawful failure to bargain over the imposition of discipline is itself what makes the discipline unlawful.[39] The *Anheuser-Busch* majority expressly distinguished the case before it from the kind of case at issue here, confirming that "a termination of employment that is accomplished without bargaining with the representative union is unlawful under Section

[35] It is noteworthy that the dissent discusses at length the question of the existence of "cause" (essentially equivalent to misconduct) but gives scant attention to the necessity of determining whether the discipline was "*for* cause." Assuming that an employee who was disciplined after engaging in misconduct was disciplined *because of* the misconduct is a common logical fallacy. Further, if the existence of cause alone were adequate to support a finding that subsequent discipline was "for cause," the Board would have had no need to consider the "causal nexus" in cases addressing Sec. 10(c), as it did in the cases discussed immediately below.

[36] We recently held that, notwithstanding *Taracorp*, make-whole relief was warranted when an employee was discharged for his conduct during an investigatory interview that was held without union representation in violation of *Weingarten*. *E.I. DuPont de Nemours & Co.*, 362 NLRB 843 (2015). In such a case, the causal nexus between the employer's unfair labor practice and the misconduct for which the employee was discharged was clear, and the employer's violation was not "incidental to" the discipline or discharge. Id., slip op. at 4 (citing *NLRB v. Potter Electric Signal Co.*, 600 F.2d 120 (8th Cir. 1979) and *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981)). Thus, *Taracorp* was "fundamentally distinguishable." Id.

[37] 351 NLRB 644 (2007), review denied sub nom. *Brewers and Maltsters Local 6 v. NLRB*, 303 Fed. Appx. 899 (D.C. Cir. 2008).

[38] The complaint in *Anheuser-Busch* alleged that the employer failed to bargain over the installation and use of the surveillance cameras, a violation that the Board found. There was no separate allegation that the employer violated Sec. 8(a)(5) by failing to bargain over the discharges (for conduct captured on the surveillance cameras) before implementing them.

[39] This case differs from *Anheuser-Busch* in a further respect. There, the majority perceived that the severity of the employees' misconduct would lead other employees to expect serious disciplinary action and thus not to fault the union for the consequences imposed on the employees. *Anheuser-Busch*, 351 NLRB at 649 fn. 19. Cases arising under today's decision will undoubtedly involve disciplinary action for a wide range of alleged misconduct, but we anticipate that cases of egregious or criminal misconduct will be the exception, rather than the rule. We note, as well, that extreme cases would likely be covered by the exigent-circumstances exception to pre-imposition bargaining. In any event, we have already explained that, especially where a union is newly certified and employees reasonably expect its presence to effect a change in their employer's ability to act unilaterally, the union's perceived stature and ability to effectively represent employees would be undermined by the employer's unilateral action.

8(a)(5) and is not 'for cause.'" 351 NLRB at 648 (citing *Fibreboard Papers Products Corp. v. NLRB*, supra).

The causal nexus here is more akin to the nexus that exists in cases in which an unlawful unilateral change in a work rule is a factor in an employee's discipline. In those cases, the Board routinely orders make-whole relief. *Alta Vista Regional Hospital*, 357 NLRB 326 (2011) (incorporating 355 NLRB 265, 267, 268 (2010)), enfd. 697 F.3d 1181 (D.C. Cir. 2012); *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001); *Great Western Produce*, 299 NLRB 1004, 1005 (1990), overruled on other grounds by *Anheuser-Busch*, supra.[40] See also *Uniserv*, 351 NLRB 1361, 1361 fn. 1 (2007) (employees discharged under unilaterally imposed stricter drug policy were entitled to full remedy; in contrast, employees discharged solely as result of unilateral increase in behavioral "triggers" that would lead to drug test could be denied full remedy if employer showed in compliance that they would have been discharged even if it had bargained over triggers).

As we have explained, Section 10(c) does not bar reinstatement or backpay in all cases; however, a respondent may raise an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause" within the meaning of Section 10(c), to be considered in light of the facts of the particular case. In that context, we will construe Section 10(c) to preclude reinstatement and backpay if the respondent establishes, consistent with the allocation of proof described below, that the employee's suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent's showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline. We emphasize that the respondent retains the burden of persuasion in this analytical framework.[41] The remedial guidance we provide today will be further developed in the course of future decisions applying the analysis we are adopting.

G. Conclusion

Having addressed, as needed, the dissent's numerous objections to today's decision, we conclude with some general observations about our decision and the dissent. In particular, we note that the dissent's overall approach disregards the fact that the case we address today is one in which employees have newly chosen to be represented by a union.[42] The dissent's blinders on this point create problems of both law and policy. First, as a matter of law, the dissent appears to reject the fundamental legal fact that an employer's obligations change when its employees choose to be represented. The dissent would seemingly allow an employer to continue as if no change had occurred, permitting an employer with a pre-union

[40] In *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 819 (2004), the Board majority suggested that a discharge should result "solely" from a unilateral change in order to be treated as a violation of Sec. 8(a)(5). The majority did not purport to change established precedent; rather, it cited *Boland Marine & Mfg. Co.*, 225 NLRB 824, 825 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977), which stated that a discharge is unlawful if it is "solely" the result of the unilateral change. The *Essex Valley* majority, however, acknowledged that *Boland* is in tension with *Great Western Produce*, supra, which applied the principle that a discharge is unlawful if a unilateral change was a "factor" in the discharge. Although *Great Western Produce* cited *Boland*, it did not address *Boland*'s narrower standard. The *Essex Valley* majority ultimately found the discharges lawful without relying on *Boland*'s language, and we do not view *Essex Valley* as having unequivocally adopted a standard requiring that a discipline or discharge be "solely" the result of a unilateral change to violate Sec. 8(a)(5). To the extent that *Essex Valley* and *Boland* can be read to suggest that that standard applies, however, they are outliers and we overrule them.

[41] Placing the burden of establishing the Sec. 10(c) defense on the respondent is consistent with our standard compliance procedures, which similarly impose the burden of proof on the party contending that an employee should be denied reinstatement or that the employee's backpay should be reduced or denied. This allocation of the burden is also consistent with the Board's established principle that the wrongdoer bears the burden of uncertainty created by its wrongful conduct. See, e.g., *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996) ("Once the General Counsel has shown the gross backpay due in the specification, the employer bears the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from any backpay award. *La Favorita, Inc.*, [313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995)]; *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Any uncertainties or ambiguities should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068, 1069 (1973)."); see also *Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1251 (D.C. Cir. 1970) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *Wellstream Corp.*, 321 NLRB 455, 461 (1996). Lastly, our allocation of the burden is also consistent with ordinary evidentiary principles that take into account which party has better access to the information that would prove or disprove an argument. The respondent is the party that would have investigated the misconduct that it asserts as a defense to reinstatement and backpay, and it is the party that made the disciplinary decision; thus, the respondent is far better situated to prove that misconduct occurred and was the reason for the discipline than is any other party to prove the reverse.

[42] The dissent contends that today's decision is not limited to first-contract bargaining situations, but will apply at any time that no agreement governing discipline is in place. The case before us, however, involves a first-contract bargaining situation, and that is all that we are deciding here.

practice of acting unilaterally—as almost inevitably will be the case—to continue doing so. But it should be self-evident that under a Federal statute intended to promote collective bargaining, the employees' choice of an exclusive representative requires an employer to bargain over issues that it has not previously been required to bargain over, and an existing discretionary practice of changing employees' terms and conditions of employment without bargaining may not continue unaltered after the statutory duty to bargain has attached.[43] Second, as a matter of policy, an employer's unilateral changes during first-contract bargaining have a demonstrable tendency to impede the bargaining process and undermine the union's stature in the eyes of the employees it represents.[44] As the dissent recognizes, contract bargaining is difficult, and first-contract bargaining even more so.[45] We would let the parties do that hard work without a plethora of unilateral changes undermining employees' newly selected bargaining representatives.

In addition, the dissent expounds, at great length and with great concern, about the uncertainty that will be created by today's decision. Of course, we do not dispute that we are changing the law—that is why we apply this decision prospectively—but, as we have explained, the changes are far more limited than the dissent portrays. Similarly, the uncertainty that may result is certain to be far more limited than the dissent contends.[46] As is typical after changes in the law, the cases to be decided will present widely varying fact situations raising unanticipated questions. But our expectation is that the guidelines set forth here will provide the framework in which the details of cases can be addressed, resulting in greater predictability over time.[47] Contrary to the dissent's claim, we do not disregard the lack of certainty that will exist in some forthcoming cases applying today's decision. But that temporary lack of certainty is a normal result of legal development—indeed, it is inherent in the process of legal development—and, as the Supreme Court stated in *Eastex*, entirely appropriate. As we have seen in other cases,[48] when faced with the question of whether employees have—or have the opportunity to exercise—certain rights under the Act, the dissent opts for the simplicity of "no" over the more difficult task of grappling with the nuances of "yes, but . . . ." Yet, to reflexively sacrifice employees' Section 7 rights in the interest of avoiding complexity would amount to abdication of our duty under the Act. Our answer may not be the easy one, but the Board's responsibility to "adapt the Act to the changing patterns of industrial life"[49] precludes us from permanently freezing in place a deficient understanding of the Act.

ORDER

The complaint is dismissed.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I disagree with my colleagues' decision in this case, which creates entirely new requirements and restrictions regarding discipline. These new requirements include a Board-imposed moratorium on discipline whenever employees are represented—which I refer to as a "discipline bar"—and my colleagues invent a new type of "discipline bargaining" governed by complicated rules, qualifications and exceptions.[1] There is no legal support for

[43] See *Adair Standish Corp.*, 292 NLRB 890, 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990); *Oneita Knitting Mills*, 205 NLRB 500, 500 (1973).

[44] See note 23, supra.

[45] See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 403 (2001).

[46] Contrary to the dissent's lamentations about this decision's supposed unworkability, we are more confident not only that employers and unions can figure out the process, but also that they and the employees they employ or represent may be better off as a result, as a recent case illustrates. In *Cellco Partnership d/b/a Verizon Wireless*, 29–CA–158754, JD(NY)–27–16 (judge's decision, August 1, 2016), the employer and union agreed to hold an "*Alan Ritchey* meeting" before the intended termination of an employee. One employee's *Alan Ritchey* meeting resulted in the reduction of her planned discharge to a final warning, expressly because of information that came to light in that meeting; the other *Alan Ritchey* meeting described did not avert the employee's termination. No 8(a)(5) violation was alleged as to either discipline or discharge; the only violations alleged involved ordinary 8(a)(1) and (3) discrimination.

[47] The Supreme Court has recognized that in adopting new legal rules, the Board need not immediately resolve every question that might conceivably arise:

> This is a new area for the Board and the courts which has not yet received mature consideration. It may be that the 'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.' *Local 761, Electrical Workers v. NLRB*, 366 U.S. 667, 674, 81 S.Ct. 1285, 1290, 6 L.Ed.2d 592 (1961). For this reason, we confine our holding to the facts of this case.

Eastex, Inc. v. NLRB, 437 U.S. 556, 574–575 (1978). See also *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 265–266 ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking"); *Iron Workers*, 434 U.S. 335, 351 (1978).

[48] See, e.g., *Miller & Anderson, Inc.*, 364 NLRB 428 (2016) (Member Miscimarra, dissenting) (bargaining units including both jointly employed and solely employed employees of same user employer); *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (Members Miscimarra and Johnson, dissenting) (test for joint employer status); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (Member Miscimarra, dissenting) (employees' Sec. 7 rights to use employer email).

[49] *Hudgens v. NLRB*, 424 U.S. 507, 523 (1976) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

[1] My colleagues do not use the terms *discipline bar* or *discipline bargaining*, but the use of these terms is necessary to avoid confusion about the specialized requirements created by my colleagues in today's

these requirements, with the sole exception of one short-lived decision, *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), which set forth, nearly verbatim, the same rationale my colleagues rely on here, and which the Supreme Court invalidated (for reasons unrelated to the merits) in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).[2]

Most troubling and disappointing is the fact that so many fundamental labor law principles—all well-established—are being cast aside by my colleagues. The new obligations take a wrecking ball to eight decades of NLRA case law. My problems with the new discipline bar and discipline bargaining requirements do not stem from their novelty. Rather, these new obligations cannot be squared with existing legal principles. Indeed, they are contradicted by the Board's own representations to the Supreme Court in *NLRB v. J. Weingarten, Inc.*,[3] where the Board clearly indicated that employers and unions have no obligation to engage in bargaining before imposing discipline.[4]

My colleagues resolve these contradictions by overhauling a broad range of existing principles as they pertain to a single subject: discipline imposed on represented employees. My colleagues grossly understate the extent to which their new requirements are contrary to existing law. These new requirements upend existing principles governing conventional decision and effects bargaining, they require bargaining over actions that effect no change in the manner in which the employer has disciplined employees in the past, they contradict existing law that disfavors single-issue negotiations, and they disregard the Board's longstanding position regarding the waiver of collective-bargaining rights. I also believe these new requirements are precluded by express provisions in the National Labor Relations Act (NLRA or Act)—specifically, Section 8(d), which prohibits the Board from imposing substantive terms on parties under the guise of enforcing Section 8(a)(5) bargaining requirements, and Section 10(c), which prohibits the Board from ordering backpay or reinstatement for any employee who was suspended or discharged for "cause," with the General Counsel bearing the burden of proving the absence of "cause"—and by Supreme Court decisions limiting the Board to "remedial" relief. The Supreme Court may very well have anticipated the instant case when it stated, in *Republic Steel Corp. v. NLRB*,[5] that Congress never intended to give the Board "virtually unlimited discretion" to impose "punitive measures," "penalties" or "fines" based on what "the Board may think would effectuate the policies of the Act."[6]

I am not a champion of an employer's right to impose discipline on employees, and I do not seek to minimize the role played by unions in relation to discipline. My concern here is that these new requirements are not faithful to existing legal principles, and I believe they disregard important constraints that our statute places on the Board. However, it is also relevant to point out that represented employees and unions have substantial protection in discipline cases, as reflected in Section 8(a)(1) (which prohibits discipline motivated by hostility towards protected concerted activities); Section 8(a)(3) (which prohibits discipline motivated by antiunion discrimination); Section 8(a)(5) (which makes disciplinary standards and procedures a mandatory subject of bargaining whenever bargaining is requested by the union, and which prohibits any unilateral "change" in disciplinary standards and procedures); the *Weingarten* right to request the presence of a union representative whenever an employee reasonably believes an investigative meeting may result in discipline;[7] and potential collective-bargaining agreement (CBA) provisions regarding discipline, grievances, and arbitration. It is noteworthy that the requirements announced by my colleagues substantially exceed what parties have typically included in their own CBAs, which rarely, if ever, require bargaining over discipline before it is imposed, and they nearly always treat discipline as a management prerogative, subject to the existence of "cause," and the union's right to pursue post-discipline challenges in grievance arbitration.[8]

decision. "Discipline bar" describes the new Board-imposed moratorium on discipline, which exists whenever employees are represented by a union (and the employer and union have not entered into an agreement regarding discipline), unless and until the employer has provided the union an opportunity for "discipline bargaining," including exchanges of information requests and responses to those requests.

My colleagues have also created new and unusual standards regarding discipline bargaining, including complex qualifications and exceptions, so I use the term *discipline bargaining* to avoid confusion with the more familiar terms *decision bargaining* and *effects bargaining*, which are governed by very different principles. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674–688 (1981) (generally describing decision bargaining and effects bargaining); *IMI South, LLC d/b/a Irving Materials*, 364 NLRB 1373 (2016) (same); *Columbia College Chicago*, 363 NLRB 1434, 1440–1443 (2016) (Member Miscimarra, dissenting) (describing effects bargaining).

[2] The Board's decision in *Alan Ritchey* was issued by three members, two of whom held recess appointments determined to be unconstitutional in the Supreme Court's *Noel Canning* decision. This rendered *Alan Ritchey* invalid under Sec. 3(b) of the Act.

[3] 420 U.S. 251 (1975).

[4] See text accompanying fns. 95–100, infra.

[5] 311 U.S. 7 (1940).

[6] Id. at 11; see also *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938).

[7] *Weingarten*, 420 U.S. at 251.

[8] See discussion in fns. 20 and 46, infra and accompanying text.

How does one explain everybody's failure to realize, until now, that the NLRA imposes an obligation to have bargaining between employers and unions regarding every decision to impose discipline on represented employees? Employee discipline is hardly a new development in our statute's 80-year history.[9] In my view, it is not plausible to believe these new requirements have support in our statute but somehow escaped the attention of Congress, the Supreme Court, other courts, and previous Boards for the past 80 years.

Accordingly, as explained more fully below, I respectfully dissent from my colleagues' adoption of these new requirements and from the remedial principles they announce for application in future cases, and I concur with my colleagues' decision not to apply these new requirements retroactively in the instant case.

DISCUSSION

A. The Discipline Bar and Discipline Bargaining Requirements, Generally

Based on today's decision, an employer may not lawfully discipline represented employees based on preexisting disciplinary standards and procedures, even if the employer makes no changes in those standards and procedures, even if the employer has always imposed the same discipline in similar circumstances, and even if the employer does not discriminate on the basis of union membership or other protected activity when it imposes discipline. Thus, my colleagues create a discipline bar, which prohibits discipline for an open-ended period until the employer gives the union the opportunity to engage in a new, specialized type of discipline bargaining.

In general terms, discipline bargaining requires the suspension or deferral of discipline decisions until the employer has provided notice to the union and an opportunity for bargaining, including exchanges of information requests and responses to those requests. This summary merely scratches the surface, however. These new obligations are subject to an array of complex exceptions and qualifications that make matters worse by requiring parties to meticulously evaluate *all* aspects of *every* disciplinary decision, and nobody can possibly know when disciplinary actions can be taken. Only one thing is certain: nearly everyone is likely to disagree over what may or must be done and when, and in far too many cases, this process will end only with the conclusion of Board and court litigation that will take years to complete.

[9] See Sec. 10(c) (stating that the Board may not award reinstatement or backpay to any individual whose suspension or discharge resulted from "cause").

B. Existing Legal Principles are Irreconcilable with the New Requirements

The majority's decision runs roughshod over existing principles involving many of the most fundamental principles embodied in the Act:

- *Discipline Is Unlawful Even Though No "Change" Has Occurred*. The Board and the courts have long held that an employer violates the Act if it unilaterally decides to change employment terms. However, a change does not occur, and bargaining is not required, if the employer's actions are similar in kind and degree to its past actions.[10] These principles are completely upended by today's decision. As noted previously, solely in relation to discipline, the Board will now require bargaining when there concededly has been no change from the handling of similar disciplinary matters in the past.
- *Discipline Is Unlawful Even Though Nondiscriminatory*. Today's decision invalidates *nondiscriminatory* discipline decisions unless the employer satisfies the majority's newly created requirements. Discipline will be deemed unlawful even though the employer's actions are consistent with what the employer has done in the past, *and* even though the employer's motives have nothing to do with the disciplined employee's union support or other protected activities.
- *Discipline Bargaining Is a One-Sided Obligation Because Employers Cannot Deviate From Existing Disciplinary Rules and Procedures*. My colleagues have formulated these new disciplinary requirements as a "heads-I-win, tails-you-lose" obligation, where employers violate the Act if they fail to honor the discipline bar—a moratorium on discipline—or fail to engage in pre-implementation discipline bargaining. However, employers also violate the Act if they deviate from any preexisting disciplinary rules and procedures.
- *Single-Issue Discipline Bargaining Contradicts the Board's "Overall Impasse" Doc-*

[10] See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962) (wage increases); *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1576–1577 (1965) (subcontracting decisions); *Arc Bridges, Inc*., 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011) (wage increases).

trine. The Board and the courts have long held that parties are prohibited from making changes absent an "*overall* impasse" in bargaining regarding all mandatory subjects.[11] However, my colleagues require *single-issue* bargaining over discipline decisions (and over the *implementation* of the decision following the completion of single-issue discipline bargaining) when parties have *not* reached an "overall impasse," and indeed, where the parties remain *actively engaged* in other discipline-related bargaining.

- *Discipline Bar and Discipline Bargaining NOT Limited to Initial Contract Negotiations*. The Board's newly created discipline-bar and discipline-bargaining requirements exist across the board at all times when the employer and union do not have an agreement governing discipline in place, not merely while initial contract negotiations remain incomplete.[12]

- *Repudiating "Waiver" Principles*. My colleagues announce a "safe harbor" where, ostensibly, employers have no "duty to bargain before imposing discipline" if the employer and union have entered into "an interim agreement" that, in addition to waiving the union's right to pre-imposition bargaining, provides for "some mutually satisfactory alternative, such as a grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective bargaining agreements." This bears little resemblance to the "clear and unmistakable waiver" the Board requires in other contexts where contract provisions might obviate the need for bargaining.[13]

- *Repudiating Decision- and Effects-Bargaining Principles*. The Board and the courts have long held that, in conventional bargaining, decision bargaining is required *before* an employer makes the relevant decision, and effects bargaining (addressing the impact of the decision) is required prior to the decision's implementation. See, e.g., *First National Maintenance*, supra fn. 1. These principles are turned upside down because the duty to engage in discipline bargaining arises *after* the employer has *decided* to impose discipline, although discipline bargaining clearly encompasses the discipline decision itself (i.e., whether discipline will be imposed); and bargaining over the discipline decision must occur before *implementation* of the disciplinary decision (at a time when only effects bargaining is typically required).

- *The New Obligations Exceed the Board's Authority, Under Section 10(c), When "Cause" Exists for an Employee's Suspension or Discharge*. Section 10(c) of the Act prohibits the Board from ordering reinstatement or backpay in any case where an employee "was suspended or discharged for cause,"[14] with the General Counsel bearing the burden of proving the absence of "cause."[15] However, the Board majority's new requirements apply to all cases involving discharges and suspensions, including those supported by "cause"; the majority improperly defines "cause"; and based on an assumption that the employer is a wrongdoer, the majority places the burden of

[11] *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Under *RBE Electronics* and *Bottom Line*, the requirement of bargaining to an overall impasse is subject to certain exceptions, none of which apply here. See also fn. 39 infra.

[12] My colleagues do not disclaim the application of these new discipline-bargaining obligations at all times, and merely state that the "case before us . . . involves a first-contract bargaining situation, and that is all that we are deciding here." Majority opinion, slip op. at 15 fn. 42. As noted in the text, however, the majority defines the obligation to bargain over discipline as an obligation to bargain over all aspects of discipline that involve "discretion." Existing Board law establishes that the Board will require employers and unions to satisfy all bargaining obligations in such cases except in circumstances when there is a "clear and unmistakable waiver." See fn. 13, infra.

[13] See, e.g., *Graymont PA, Inc.*, 364 NLRB 356 (2016) (divided Board decision, applying "clear and unmistakable waiver" standard, regarding whether collective-bargaining agreement language permitted employer to make changes in progressive discipline policy). See generally *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Cf. *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (describing "contract coverage" standard applied by some courts when evaluating whether unilateral action is permitted); *NLRB v. Postal Service*, 8 F.3d 832, 836–837 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992) (same).

[14] Sec. 10(c) ("No order of the Board shall require the reinstatement of any individual as an employee . . . or the payment to him of any backpay, if such individual was suspended or discharged for cause."); see *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1141–1145 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[15] See fns. 141 & 143, infra and accompanying text; see also *Babcock*, 361 NLRB 1127, at 1141–1145 (Member Miscimarra, concurring in part and dissenting in part).

proving "cause" on employers, contrary to Section 10(c).

- *The New Obligations Improperly Impose Substantive Contract Terms, Contrary to Section 8(d), and Exceed the Board's Remedial Authority.* The Board is prohibited from imposing substantive terms on parties using the guise of enforcing Section 8(a)(5) bargaining requirements, and discipline is one of the most commonly negotiated subjects of bargaining.[16] I believe the majority's new obligations exceed the Board's Section 8(a)(5) authority, as limited by Section 8(d) of the Act,[17] and they exceed the Board's remedial authority because the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act."[18]

- *Exceptions and Qualifications.* The new requirements are replete with qualifications and exceptions that make it impossible for parties to achieve any reasonable measure of certainty and predictability. If parties engage in discipline bargaining, the likely outcome will be widespread disagreement and more discipline-related Board litigation than has ever occurred in the past.

Moreover, several additional considerations trouble me regarding these new discipline-bar and discipline-bargaining requirements.

First, I have stated that "when changing existing law, the Board should first endeavor to *do no harm*: we should be vigilant to avoid doing violence to undisputed, decades-old principles that are clear, widely understood, and easy to apply."[19] I believe the majority's new discipline-bar and discipline-bargaining obligations flout this principle. The discipline bar precludes the continued application of unchanged disciplinary standards, when the union may not have requested bargaining, and when bargaining may not have commenced regarding *any* subject. The discipline bar may apply when no contract obligations even exist, and is more restrictive than what will likely result from collective bargaining itself. (Most collective-bargaining agreements recognize the employer's right to impose discipline or discharge, usually for "cause," *without* notice to the union, with a *post-implementation* right to discuss relevant issues, which may potentially culminate in arbitration.)[20] Moreover, the rules governing discipline bargaining are completely unlike the standards applicable to every other type of bargaining that occurs under the Act.

Second, like the 50 words Eskimos have for "snow,"[21] new words must be invented for "discipline" because the word *discipline* no longer suffices when describing these

[16] See Sec. 8(d) (the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 102, 108 (1970) ("[W]hile the Board does have power under the National Labor Relations Act . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement. . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."); *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). See also *Babcock*, 361 NLRB 1127, at 1142 (Member Miscimarra, concurring in part and dissenting in part) (the requirement of "cause" for discipline has been called "the most important principle of labor relations in the unionized firm") (citing Robert I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594) (footnotes omitted).

[17] Sec. 8(d) (the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession"); *H.K. Porter*, 397 U.S. at 102; *American National Insurance*, 343 U.S. at 404.

[18] *Republic Steel v. NLRB*, 311 U.S. at 12. Likewise, the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison v. NLRB*, 305 U.S. at 235–236. As the Supreme Court stated in *Republic Steel*: "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." 311 U.S. at 11.

[19] *Purple Communications, Inc.*, 361 NLRB 1050, 1167 (2014) (Member Miscimarra, dissenting) (emphasis added).

[20] In most collective-bargaining agreements, "discipline and discharge" are "regarded as an inherent management right," and "[t]ypical grievance and arbitration provisions subject discipline and discharge actions to a 'just cause' standard, and culminate in final and binding arbitration." BNA, *Collective Bargaining Negotiations and Contracts*, Collective Bargaining and Contract Clauses (Analysis), at 9:501 (http://laborandemploymentlaw.bna.com/lerc/2445/split_display.adp?fedfid=1480578&vname=lecbnana&fcn=1&wsn=500784000&fn=1480578&split=0) (last viewed August 7, 2016). Significantly, in *First National Maintenance*, the Supreme Court attached significance to "evidence of current labor practice," which prompted the Court to find that Sec. 8(a)(5) imposed no duty to bargain over partial closing decisions because "provisions giving unions a right to participate in the decisionmaking process" were "relatively rare," in comparison to the much more common contract provisions regarding "notice" and bargaining over "effects." 452 U.S. at 684 (citations omitted). See also fn. 45, infra and accompanying text.

[21] David Robson, *There really are 50 Eskimo words for "snow,"* The Washington Post, Jan. 14, 2013 (https://www.washingtonpost.com/national/health-science/there-really-are-50-eskimo-words-for-snow/2013/01/14/e0e3f4e0-59a0-11e2-beee-6e38f5215402_story.html) (last visited August 11, 2016).

new obligations. My colleagues make a layer cake of differentiations that no reasonable person can digest:

> *(a) More Serious vs. Less Serious Discipline*. The new requirements ostensibly apply to more serious discipline, i.e., discipline that has an "inevitable and immediate impact on an employee's tenure, status, or earnings, such as suspension, demotion, or discharge."[22] However, my colleagues state that "most warnings, corrective actions, counselings, and the like will not require preimposition bargaining, assuming they do not automatically result in more serious discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining."[23]
>
> The above reference to "an employer's progressive disciplinary system" opens up an array of additional potential disputes, since our existing cases reveal substantial uncertainty about what constitutes "progressive discipline."[24]
>
> *(b) Discretionary vs. Fixed Aspects of Discipline*. The new requirements ostensibly do not apply to *fixed* aspects of discipline (e.g., if the employer automatically suspends employees for absenteeism, although the length of the suspension varies), although my colleagues say that the "fixed" aspect of the discipline will be binding on the employer (the employer "must maintain the fixed aspects of the discipline system"), and bargaining will only be required "over the discretionary aspects." However, my colleagues' opinion contains a thinly veiled concession that nearly all discipline is discretionary.[25]
>
> *(c) Pre-Implementation vs. Post-Implementation Bargaining.* The new discipline bargaining requirement makes it nearly impossible to determine *when* discipline can actually be imposed. The majority states the discipline-bargaining duty arises only "*after* the employer has *preliminarily decided* (with or without an investigatory interview) to impose serious discipline."[26] In such "serious discipline" cases, the discipline-bargaining duty—regarding "discretionary" aspects of the discipline (see subpart "b" above)— must be satisfied "*before* proceeding to *impose* the discipline."[27] The more lenient treatment for "lesser sanctions" (permitting discipline bargaining *after* discipline is imposed) does *not* apply when the oral or written warnings "automatically result in more serious discipline, based on an employer's progressive disciplinary system." See subpart "a" above. Therefore, even in such "lesser" discipline cases—where the "lesser" types of discipline combined with a "progressive disciplinary system" will "automatically result in more serious discipline"—the discipline-bargaining duty arises *before* discipline is imposed. See subpart "a" above.
>
> The above rules only govern when discipline bargaining must *begin*. After the *commencement* of discipline bargaining, different rules govern when discipline may actually occur. Here again, my colleagues have invented new principles:
>
> - *"Lesser" discipline (with no "progressive disciplinary system"): discipline bargaining required AFTER discipline is imposed*. When dealing with "lesser sanctions" (e.g., oral or written warnings, with no progressive disciplinary system resulting "automatically" in "more serious discipline"), the discipline can be imposed *before* discipline bargaining commences, as described above. However, discipline bargaining must still take place afterwards, and continue until there is an agreement or impasse.
> - *More "serious" discipline (and "lesser" discipline with a "progressive disciplinary system"): discipline bargaining must commence BEFORE discipline is imposed*. When dealing with more "serious" discipline (suspensions, demotions, or discharges), *and* "lesser" discipline resulting "automatically" in more serious discipline (based on a "progressive disciplinary system"), an opportunity for discipline bargaining must be provided *before* discipline is implemented. This means, *before* imposing the discipline, the employer must (i) provide "*sufficient advance notice* to

[22] Majority opinion, slip op. at 4.

[23] Id. The union's right to information in discipline bargaining applies to all levels of discipline, according to my colleagues. Id. at 4 fn. 10.

[24] See, e.g., *Veolia Transportation Services*, 363 NLRB 902, 914 (2016) (*Veolia I*) (Member Miscimarra, dissenting); *Veolia Transportation Services*, 363 NLRB 1879, 1890–1891 (2016) (*Veolia II*) (Member Miscimarra, dissenting). See also *Republican Co.*, 361 NLRB 93, 99–100 (2014); *Lucky Cab Co*., 360 NLRB 271, 273 (2014).

[25] The majority acknowledges that "discretion is *inherent—in fact, unavoidable*—in most kinds of discipline," but they hold that this "confirms that a bargaining obligation attaches to the exercise of such discretion." Majority opinion, slip op. at 11 (emphasis added). Likewise, the majority states: "The *inevitability of discretion in most decisions to discipline* does not support treating it differently from other forms of unilateral change; indeed, it makes bargaining over disciplinary actions that much more critical." Id. (emphasis added).

[26] Majority opinion, slip op. at 8 (emphasis added).

[27] Id. (emphasis added). See also id., slip op at 5 (the discipline-bargaining duty "is triggered *before* a suspension, demotion, discharge, or analogous sanction is *imposed*") (emphasis added).

the union";[28] (ii) provide enough time for "*meaningful discussion concerning the grounds for imposing discipline*" and "*the form of discipline chosen"* (assuming this involves "discretion"), along with "providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests";[29] and (iii) permit the union to "effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action."[30]

- *WHEN Can Discipline Be Imposed After "Discipline Bargaining" Commences?* If the employer satisfies the above requirements *before* imposing discipline, the employer may complete the discipline-bargaining process *after* the discipline is imposed, provided that bargaining thereafter to an impasse or agreement occurs "promptly."[31] However, precisely *when* can discipline be imposed *during* the discipline-bargaining process? The Board majority provides no answer to this question.
- *After Imposing Discipline, Employers Must Bargain in Good Faith about "Rescinding" the Discipline*. Even after the employer has lawfully *implemented* a discipline decision before discipline bargaining has proceeded to an impasse or agreement, the employer must "promptly"[32] or "immediately" engage in further good-faith bargaining over "the possibility of rescinding" the discipline.[33]

(d) "Exigent" Circumstances Where Immediate Discipline Is Permitted. The majority creates a category of discipline warranted by "exigent" circumstances, defined as a "reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel."[34] Examples include "unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace." Even in such circumstances, the employer must engage in after-the-fact discipline bargaining, an obligation that must be satisfied "immediately afterward."[35]

(e) Discipline Where "Cause" Exists vs. Where It Does Not. As noted above, Section 10(c) of the Act states: "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 backpay, if such individual was suspended or discharged for cause." According to the Board majority, employers must satisfy the new discipline-bar and discipline-bargaining requirements, even when "cause" exists for an employee's suspension or discharge, except my colleagues permit an employer in Board compliance proceedings (which may not occur until after years of litigation) to establish the existence of "cause," with the employer bearing the burden of proof.[36]

Everybody who seeks to comply with the new obligations will have difficulty with these distinctions. In addition to disputing the need for discipline, the majority's standards create additional intractable questions, such as (i) what constitutes a sufficient opportunity for pre-implementation discipline bargaining; (ii) what constitutes a "fixed" versus "discretionary" aspect of discipline; (iii) whether a "progressive disciplinary system" exists, in situations involving "lesser" discipline, that requires pre-implementation discipline bargaining rather than post-implementation discipline bargaining; (iv) in what circumstances does an employee's continued presence involve "a serious, imminent danger to the employer's business or personnel" (permitting post-implementation discipline bargaining); and (v) where, for example, an employee has killed, assaulted, or raped a coworker, resulting in the employee's immediate discharge, in what way does the Board majority contemplate the employer can "immediately"[37] engage in post-implementation

[28] Id., slip op. at 8.
[29] Id.
[30] Id., slip op. at 9.
[31] Id., slip op. at 8. Thus, the majority states that, after discipline bargaining commences, "the employer is *not* required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer *may impose the selected disciplinary action* and then *continue bargaining [subsequently] to agreement or impasse*." Id., slip op. at 9 (emphasis added). Again, the employer's right to impose discipline without first bargaining to an impasse or agreement is conditioned on the employer doing so "promptly" afterward. Id., slip op. at 8.
[32] Id., slip op. at 8.
[33] Id., slip op. at 9.
[34] Id. See also id., slip op. at 8 ("In exigent circumstances, as defined, the employer may act prior to bargaining provided that, immediately afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects.").
[35] Id., slip op. at 8.
[36] Id., slip op. at 13–15. As noted below, my colleagues' treatment of Sec. 10(c), and making the employer bear the burden of proving "cause," is opposite what is required by Sec. 10(c), which imposes the burden of proof on the General Counsel to prove all violations based on the "preponderance of the testimony taken," which includes the burden of proving the absence of "cause." See fn. 141, infra and accompanying text.
[37] Majority opinion, slip op. at 8 (quoted in fn. 34, supra).

bargaining in good faith about "the possibility of rescinding" the discipline?[38]

Third, the new disciplinary obligations reflect a disregard for the manner in which parties conduct collective bargaining. Unions and employers face enormous challenges in contract negotiations: prioritizing issues, reconciling divergent positions, preparing and responding to information requests, and managing the bargaining process. Contract negotiations encompass *all* mandatory subjects of bargaining, including the union's right, under existing law, to request bargaining over discipline standards and procedures. The interplay among multiple issues provides the opportunity for parties to reach an overall agreement. Today's decision will encumber contract negotiations by producing, in every case involving discipline, a new separate duty to engage in *single-issue* discipline bargaining,[39] where the absence of multiple issues makes the prospect of reaching agreement extremely remote. It is especially objectionable for the Board to single out employers who fail to enter into up-front agreements resolving discipline, grievances, and arbitration—which are three of the most important issues addressed in any set of contract negotiations—while stating these new obligations do not apply to any employer who enters into such an agreement. This is more than a finger on the scale: it places the entire weight of the Board's regulatory authority on those unlucky employers who exercise their right to negotiate discipline, grievances, and arbitration together with all other mandatory bargaining subjects.[40]

Fourth, the problems associated with discipline bargaining are strikingly similar to the considerations that prompted the Supreme Court to conclude, in *First National Maintenance*,[41] that the Act imposes no duty to bargain over partial closing decisions. In *First National Maintenance*, the Court observed that unions were already protected by Section 8(a)(3)'s prohibition against decisions "motivated by antiunion animus."[42] The Court held that a union's "practical purpose" in having bargaining over partial closing decisions would be "largely uniform: it will seek to delay or halt the closing."[43] The Court indicated that bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."[44] Attaching significance to "current labor practice," the Court found that Section 8(a)(5) imposes no duty to bargain over partial closing decisions in part because contract provisions imposing such a requirement were "relatively rare," in comparison to contract provisions providing for notice and effects bargaining, which were "more prevalent."[45] Similarly, in most collective-

[38] Id., slip op. at 9. I disagree with my colleagues' suggestion that references to potential workplace homicides, assaults, or rapes are merely "provocative" efforts to "gin up fear of a falling sky" (Majority opinion, slip op at 9 fn. 21). In this regard, my colleagues fail to acknowledge that these new obligations will apply to all serious forms of discipline, which may well be imposed for extremely serious workplace misconduct, including felony. Even more significant is the fact that, even in cases involving felonious conduct, employers remain bound by the duty to bargain over discipline for such criminal misconduct, even though bargaining may occur after the fact. Although my colleagues state they "have no doubt that such bargaining would reach agreement or impasse in exceedingly short order," they fail to recognize that the employer in such cases must take action before criminal proceedings have been completed, and often before criminal proceedings have commenced. To impose a duty to bargain over discipline in such cases, when one would think the appropriateness of discipline cannot be disputed, represents a significant obligation; and the Board's ill-defined standards remain likely to produce extensive litigation, especially because the majority does not even permit the issue of "cause" to be raised until compliance proceedings.

[39] The Board and the courts have disfavored a party's insistence that single issues be addressed separately in bargaining, in isolation, as a precondition to the discussion of other mandatory bargaining subjects. See, e.g., *Eastern Maine Medical Center*, 253 NLRB 224 (1980) (unlawful refusal to bargain in good faith where, among other things, employer refused to negotiate seriously on economic issues until noneconomic issues were resolved to its satisfaction), enfd. 658 F.2d 1 (1st Cir. 1981); *Lustrelon, Inc.*, 289 NLRB 378 (1988) (unlawful refusal to bargain in good faith where, among other things, employer conditioned further bargaining on withdrawal of union demands), affd. 869 F.2d 590 (3d Cir. 1989). See generally *Bottom Line Enterprises*, 302 NLRB at 374 ("[A]n employer's obligation . . . 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."); *RBE Electronics of S.D.*, 320 NLRB at 80 (same). Although *Bottom Line* and *RBE Electronics* are well established, I do not pass on whether these decisions were correctly decided.

Although my colleagues maintain that individual discipline actions can be addressed by employers and unions as "stand-alone issues" that would be "separate and distinct from the issue to be resolved in contract bargaining" (Majority opinion, slip op. at 10 fn. 22), this represents a clear departure from existing Board law, because *Bottom Line* and *RBE Electronics* (and their progeny) clearly hold that parties cannot satisfy bargaining obligations on a single-issue basis during periods when there is no contract in effect. Rather, the duty is a duty to bargain to an overall impasse or agreement, subject to extremely limited exceptions that would be inapplicable in most situations.

[40] Most assuredly, I am not arguing that my colleagues should eliminate the "safe harbor" they have created for all employers who enter into the type of up-front "interim" agreement described by my colleagues, which would make these new obligations apply to even more employers and unions. Rather, I believe these new obligations are objectionable in their entirety. Yet, the need for a "safe harbor," and the fact that my colleagues apply the new obligations *only* to those employers who fail to enter into a particular type of agreement favored by the Board majority, reinforce my view that this arrangement does not reflect legitimate rights and obligations that exist under our statute.

[41] 452 U.S. 666 (1981).

[42] Id. at 682.

[43] Id. at 681.

[44] Id. at 683.

[45] Id. at 684. See also *Weingarten*, 420 U.S. at 267 ("The statutory right confirmed today is in full harmony with actual industrial practice.

bargaining agreements, "discipline and discharge" are "regarded as an inherent management right," subject to a contractual "cause" requirement and the union's post-implementation right to challenge discipline in grievance arbitration.[46] My colleagues concede it is "typical in most complete collective-bargaining agreements" to have contract clauses "that . . . permit the employer to act first followed by a grievance and, potentially, arbitration."[47] One would never know, from reading the majority's opinion, that these arrangements have been celebrated as among the most remarkable achievements in the Act's history.[48] Most significant is the Supreme Court's rejection in *First National Maintenance* of a "presumption" approach that required bargaining over partial closing decisions with complicated exceptions that had been devised by the court of appeals.[49] The Supreme Court's rejection of the "presumption" approach is especially instructive because my colleagues' discipline-bargaining commitments are riddled with exceptions and qualifications that are even more convoluted, and because the Supreme Court in *First National Maintenance* rejected the ill-fated "presumption" approach based on problems that are stunningly similar to the weaknesses inherent in discipline bargaining:

> An employer would have *difficulty determining beforehand* whether it was faced with a situation *requiring* bargaining or one that [was] . . . sufficiently compelling to *obviate* the duty to bargain. If it should decide to *risk not bargaining*, it might be faced ultimately with harsh remedies forcing it to pay *large amounts of backpay to employees who likely would have been discharged regardless of bargaining*. . . . If the employer intended to try to fulfill a court's direction to bargain, it would have *difficulty determining exactly at what stage of its deliberations the duty to bargain would arise* and *what amount of bargaining would suffice before it could implement its decision*. . . . If an employer engaged in some discussion, but did not yield to the union's demands, *the Board might conclude that the employer had engaged in "surface bargaining,"* a violation of its good faith. . . . *A union, too, would have difficulty determining the limits of its prerogatives*, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board.[50]

Fifth, the Board majority's decision today will produce two outcomes: (1) it will prevent or delay discipline of represented employees unless agreed to by the union; and (2) it will treat all employers more harshly who fail to reach an "interim" agreement governing discipline, grievances and arbitration. Again, it makes no difference that the discipline may be nondiscriminatory and consistent with what the employer has always done in the past. And my colleagues even require after-the-fact good-faith bargaining over "rescinding" discipline when a discharged employee has committed an assault, rape, or murder.

I fear that too many people will conclude from today's decision that the Board majority simply wants what it wants. Especially in this respect, the Agency pays a heavy price for inventing the obligations being rolled out today. I believe these new obligations detract mightily from the fact that our statute "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these

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Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.") (footnote and citation omitted); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("The conclusion that 'contracting out' is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.") (footnote and citations omitted).

[46] BNA, *Collective Bargaining Negotiations and Contracts*, Collective Bargaining and Contract Clauses (Analysis), at 9:501 (http://laborandemploymentlaw.bna.com/lerc/2445/split_display.adp?fedfid=1480578&vname=lecbnana&fcn=1&wsn=500784000&fn=1480578&split=0) (last viewed August 7, 2016) ("Typical grievance and arbitration provisions subject discipline and discharge actions to a 'just cause' standard, and culminate in final and binding arbitration.").

[47] Majority opinion, slip op at 9 fn. 22. Significantly, the Board in *Alan Ritchey* stated: "We are not aware of any evidence that a practice of preimposition bargaining over discipline has ever been common in workplaces governed by the Act. In contrast, postimposition bargaining, in the form of a grievance-arbitration system, is commonplace." 359 NLRB at 406. This is one of only a handful of passages in *Alan Ritchey* that my colleagues have omitted from today's decision.

[48] According to my colleagues, to "permit employers to exercise unilateral discretion over discipline . . . would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union . . . impotent." Majority opinion, slip op. at 10. To the contrary, the concept of discipline based on "cause" has been referred to as "the most important principle of labor relations in the unionized firm." Robert I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594. The strong Federal policies favoring arbitration are reflected in Sec. 203(d) of the Labor Management Relations Act (LMRA), and were celebrated by the Supreme Court in the *Steelworkers Trilogy* cases: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Indeed, the Supreme Court has described grievance arbitration as "the very heart of the system of industrial self-government." *Warrior & Gulf*, 363 U.S. at 581.

[49] 452 U.S. at 672 (citation omitted).

[50] Id. at 684–686 (emphasis added; citations omitted).

interests may be resolved."[51] These new obligations are likely to hurt, not help, the great majority of employees, unions, and employers who stand to benefit from successful overall contract negotiations. And these new requirements, including their cumbersome qualifications and exceptions, will hinder the Board's disposition of other discipline cases, where it is already hard enough to ensure employees have not experienced unlawful anti-union discrimination in violation of Section 8(a)(3) or unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

C. Specific Problems with the Discipline-Bar and Discipline-Bargaining Requirements

1. An employer has no 8(a)(5) obligation to bargain over discipline, when there is no change in existing discipline standards and procedures

There is no dispute in this case about one thing: an employer's disciplinary standards and procedures are mandatory subjects of bargaining.[52] Under the Act, designation of a subject as a mandatory subject of bargaining has two consequences. First, employers and unions are required under Sections 8(a)(5) and 8(b)(3) of the Act to bargain over that subject if bargaining over the subject is requested. See *Borg-Warner*, 356 U.S. at 349 (regarding mandatory subjects, the employer and union have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield").[53] Second, an employer or union violates the Act by making a "unilateral change" in a mandatory bargaining subject, i.e., by making the change without giving the other party notice and the opportunity for bargaining to an impasse or agreement.[54] See *NLRB v. Katz*, 369 U.S. at 743 (holding that a "unilateral change in conditions of employment under negotiation . . . is a circumvention of the

[51] *First National Maintenance*, 452 U.S. at 680–681. Similarly, in *H.K. Porter Co., Inc. v. NLRB*, the Supreme Court stressed that the Act imposes limits on the Board's authority to impose its own views regarding substantive terms that have not been agreed to by the parties in collective bargaining:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that, through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might, in some cases, be impossible, and *it was never intended that the Government would, in such cases, step in, become a party to the negotiations, and impose its own views of a desirable settlement.*
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> * * *
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> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties.* It would be anomalous indeed to hold that, while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining *under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.*

397 U.S. at 103–104, 107–108 (emphasis added; footnotes omitted). See also *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 497 (1960). (It is not a proper function of the Board to act "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965) (The Board is not vested with "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.").

[52] See, e.g., *Dazzo Products, Inc.*, 149 NLRB 182, 188 (1964), enfd. 358 F.2d 136 (2d Cir. 1966); *Toledo Blade Co.*, 343 NLRB 385 (2004); *BHP Coal New Mexico*, 341 NLRB 1316 (2004); *Electri-Flex Co.*, 228 NLRB 847 (1977), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978). A subject is considered a "mandatory" subject of bargaining when it is among the subjects described in Sec. 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

[53] See also *NLRB v. 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) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end."); *Dazzo Products, Inc.*, 149 NLRB 182, 188 (1964), enfd. 358 F.2d 136 (2d Cir. 1966) (same).

There are some exceptions to the requirement to bargain upon request over a mandatory subject, including, for example, where the parties have entered into a collective-bargaining agreement that suspends the obligation to bargain for the agreement's term, or that constitutes a waiver of the obligation to bargain or covers the subject matter at issue. See fn. 13, supra.

[54] The Board has long distinguished between (i) the duty to bargain over any or all mandatory subjects when asked by the union to do so, and (ii) the duty to refrain making changes in mandatory subjects unless the changes are preceded by giving the union notice and the opportunity for bargaining to an impasse or agreement. See, e.g., *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB at 1576–1577 (finding that the employer did not change its established subcontracting practice and thus was not obligated to provide the union notice and an opportunity to bargain before engaging in subcontracting pursuant to that practice, but clarifying that the employer is under no less of "an obligation to bargain on request at an appropriate time with respect to such restrictions or other changes in current subcontracting practices as the union may wish to negotiate").

duty to negotiate"). When employees are represented, it violates Section 8(a)(5) if the employer implements a change in disciplinary standards or procedures without giving the union notice and the opportunity for bargaining to impasse or an agreement. See, e.g., *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 354–356 (2000), enfd. 297 F.3d 468 (6th Cir. 2002).

Conversely, an employer does not violate the Act by taking actions *consistent* with what has occurred in the past. Therefore, to the extent an employer imposes discipline using the same disciplinary standards and procedures that have existed in the past, this *maintains* the status quo and is *not* a "change" that requires bargaining. This is sometimes referred to as the "dynamic status quo," which has been explained by Professors Gorman and Finkin as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change*. An employer modification consistent with such a pattern is not a "change" in working conditions at all.[55]

This principle has been applied across the board to all mandatory bargaining subjects. For example, in *Westinghouse Electric (Mansfield Plant)*, 150 NLRB at 1576, which involved subcontracting, the employer had no obligation to bargain when it did "not appear that the subcontracting . . . *materially varied in kind or degree from that which had been customary in the past*" (emphasis added).[56] Even when dealing with something as central to the Act as wages, the Board has likewise found that, when an employer has a past practice of providing certain wage increases, an employer does not violate Section 8(a)(5) when it provides new wage increases in keeping with that practice without bargaining. See, e.g., *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). The Board has also found that Section 8(a)(5) *requires* the employer to provide new wage increases without bargaining, even when past increases have varied in amount based on the employer's exercise of discretion. See, e.g., *Mission Foods*, 350 NLRB 336, 337 (2007); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).[57]

When an employer has taken similar actions in the past, the Board does not require bargaining over minor variations. Therefore, "[w]hen changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice," it is lawful to continue applying the same rules without bargaining because the changes are not sufficiently "material, substantial, and significant" to require notice and the opportunity to bargain. *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); see *Trading Port, Inc.*, 224 NLRB 980, 983–984 (1976) (employer implemented no change that required bargaining when the employer applied its preexisting productivity standards, including penalties for failing to satisfy those standards, but "devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers than in the preceding 18 months or so").

These principles contradict the Board majority's new discipline-bar and discipline-bargaining requirements, which make it *unlawful* for the employer to take disciplinary action consistent with what it has done in the past, even though there has been no "change" within the meaning of *Katz*, and even though the employer has not refused to bargain over disciplinary standards and procedures in contract negotiations. Indeed, in relation to wages, the Board has found that when a past practice exists, Section 8(a)(5) *requires* the employer to take the same actions prospectively without bargaining, notwithstanding the exercise of discretion regarding various aspects of the wage increases provided in the past. *Mission Foods*, 350 NLRB at 337; *Central Maine Morning Sentinel*, 295 NLRB at 376.

There is no merit in my colleagues' contention that existing case law prohibits actions consistent with past practice whenever the employer's actions involve some degree of discretion. For starters, nearly every decision taken by an employer involves discretion, regardless of whether the subject is discipline, subcontracting, or wage increases (to mention three examples). In every case,

[55] Robert A. Gorman, Matthew W. Finkin, Labor Law Analysis and Advocacy, at 720 (Juris 2013) (emphasis added) (hereinafter "Gorman & Finkin").

[56] To the same effect, the Board likewise held that unilateral subcontracting was lawful in *Shell Oil Co.*, 149 NLRB 283, 288 (1964), where the subcontracting at issue had not "materially varied in kind or degree from that which had been customary in the past." Cf. *Shell Oil Co.*, 166 NLRB 1064 (1967).

[57] In my view, the Board must exercise considerable care when interpreting *Katz*—where the Supreme Court described a *defense* against an allegation that an employer's unilateral changes violated Sec. 8(a)(5)—to mean that Sec. 8(a)(5) imposes an obligation on employers to *make* unilateral changes in wages, particularly since the Act explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." Sec. 8(d); see also *H.K. Porter Co. v. NLRB*, 397 U.S. at 102. I do not here reach or pass on the validity of cases that apply this reverse version of the *Katz* exception.

someone must decide whether business considerations warrant taking a particular action, when such actions should be taken, and whether new developments might warrant a different course of action (which, if it involves a substantial and material "change," at that point would require notice and the opportunity for bargaining). My colleagues concede, reluctantly, that decisions to impose discipline unavoidably involve an element of discretion. Thus, the Board majority acknowledges that "discretion is *inherent—in fact, unavoidable*—in most kinds of discipline," but they conclude this "confirms that a bargaining obligation attaches to the exercise of such discretion."[58] Likewise, the majority states: "The *inevitability of discretion in most decisions to discipline* does not support treating it differently from other forms of unilateral change."[59]

Today's decision is also directly contradicted by the Board's decision in *Fresno Bee*.[60] There, the Board squarely rejected claims that the employer violated Section 8(a)(5) based on a failure to engage in pre-discipline bargaining. In *Fresno Bee* the employer exercised discretion regarding the imposition of discipline, but it adhered to "detailed and thorough written discipline policies and procedures" that existed before the union became the employees' representative.[61] For this reason, the Board upheld the judge's finding (relying on *Bath Iron Works* and *Trading Port*, discussed above) that the employer "made no unilateral change in lawful terms or conditions of employment."[62] Since *Fresno Bee* cannot be reconciled with the new discipline-bar and discipline-bargaining requirements, my colleagues overrule it.[63] However, *Fresno Bee* accurately reflects what the Act requires—and what it does not—and correctly interprets the Supreme Court's "unilateral change" holding in *Katz*, which remains controlling as to the issue presented in this case.

As to other case law, my colleagues rely on four cases—*Washoe Medical Center*,[64] *Oneita Knitting Mills*,[65] *Adair Standish Corp.*,[66] and *Eugene Iovine, Inc.*[67]—for the proposition that discretion triggers an obligation to provide notice and the opportunity for bargaining before an employer implements a decision to impose discipline. In my view, none of these cases supports the proposition urged by my colleagues.

Preliminarily, *Washoe* is the only case cited by my colleagues that involves discipline. In *Washoe*, the administrative law judge stated that "it is not sufficient that the General Counsel show only some exercise of discretion to prove the alleged violation; the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures."[68] The judge's statement correctly summarizes applicable law (as the above discussion demonstrates). However, in a footnote, the Board expressed disagreement with the judge's statement "[i]n light of the Board's holding in *Oneita Knitting Mills*." However, *Oneita* involved disputed merit wage increases—not discipline—and the Board addressed whether the merit increases were sufficiently irregular in amount to require bargaining. More generally, the Board's reference in *Washoe* to the judge's "discretion" comment was dicta (i.e., not part of the Board's holding) because (i) the Board in *Washoe* upheld the *dismissal* of the claim that the employer unlawfully failed to bargain over discipline, and (ii) the Board's dismissal was based on a reason unrelated to whether or not the discipline constituted a change or involved discretion. As to the latter, the judge found that the union "never requested bargaining over any of the employee discipline," but she failed to pass on whether this failure to request bargaining warranted dismissal of the refusal-to-bargain claim.[69] However, the Board upheld the dismissal of the refusal-to-bargain claim on this very ground. The Board stated: "We affirm the judge's recommended dismissal of the allegation that the Respondent unlawfully failed to bargain before-the-fact, i.e., before the planned imposition of specific discipline on particular employees. *The record does not establish that the Union at any time sought to engage in . . . bargaining*."[70] In short, *Washoe* does not constitute relevant precedent for the proposition for which my colleagues rely upon it because the Board found the employer did not violate the Act, and the Board reached this conclusion for reasons unrelated to whether the discipline constituted a "change" under *Katz*. And even if the Board held in *Washoe* that the duty to bargain over discipline turns on discretion (which was *not* part of the Board's holding in *Washoe*), this proposition was directly rejected by the Board in *Fresno Bee*, described previously.

None of the three remaining cases relied upon by the majority supports their conclusion that employers must refrain from implementing discipline until after they

[58] Majority opinion, slip op. at 11 (emphasis added).
[59] Id. (emphasis added).
[60] 337 NLRB 1161 (2002).
[61] Id. at 1186.
[62] Id. at 1186–1187.
[63] Majority opinion, slip op. at 7.
[64] 337 NLRB 202 (2001).
[65] 205 NLRB 500 (1973).
[66] 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).
[67] 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).
[68] 337 NLRB at 202 fn. 1.
[69] Id. at 206.
[70] Id. at 202 fn. 1 (emphasis added).

have given the union notice and the opportunity for bargaining. As noted previously, none of the three remaining cases deal with discipline, and in each case, the Board found that the employer lacked an established practice, which meant the employer was required to engage in bargaining before taking new actions. In *Oneita*, the employer had an established practice of granting wage increases at the same time each year, but the amount of each employee's increase was entirely discretionary. 205 NLRB at 502. In *Adair Standish*, although the employer had previously laid off employees for lack of work, the selection of employees for layoff was based on the plant manager's unconstrained discretion. 292 NLRB at 891. And in *Eugene Iovine*, where the Board found the employer violated Section 8(a)(5) by reducing employee hours unilaterally, the majority adopted the judge's finding that the employer "failed to establish a past practice" of reducing hours. 328 NLRB at 294. In doing so, the majority relied on the judge's findings that "there was no 'reasonable certainty' as to the timing" of those reductions or "the criteria" the employer relied on in making them, and that "the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'" Id.[71] These three cases, which did not present the issue presented here, and in which the employer's discretion to act was substantially unconstrained, do not persuasively support the majority's decision to subject individual disciplinary decisions to the rule of *Katz*, even when such decisions are substantially constrained by preexisting standards and/or past practice.

Nor is there merit in my colleagues' contention that I find fault in the majority's discipline-bargaining obligations based on a rejection of the "fundamental legal fact that an employer's obligations change when its employees choose to be represented."[72] As explained above, the Supreme Court in *Katz* clearly held—and I just as clearly recognize—that when employees become represented, the employer must bargain upon request regarding all "mandatory" bargaining subjects; the employer must negotiate over any "change" from the status quo; and the employer is permitted to continue taking actions, without bargaining, that maintain the status quo. The problem here is not anyone's disagreement with the proposition that "the employees' choice of an exclusive representative requires an employer to bargain over issues that it has not previously been required to bargain over."[73] The problem is that my colleagues have created new bargaining obligations that are contrary to the Act, contrary to *Katz*, contrary to Board case law, and contrary to other well-established NLRA principles.

2. *Weingarten* establishes there is no obligation to bargain over discipline

The absence of a discipline bargaining obligation was reaffirmed by the Board and the Supreme Court in *Weingarten* and related cases. Discipline was the central focus of *Weingarten*. The Supreme Court upheld the right of a represented employee to request the presence of a union representative when the employee reasonably believes a meeting could result in discipline.[74] In *Weingarten*, the Supreme Court agreed with two earlier Board cases, *Quality Manufacturing Co.*[75] and *Mobil Oil Corp.*,[76] which the Court quoted extensively with approval. Most significant are the "contours and limits" of the right of an employee to request a union representative's presence in a disciplinary interview, which are directly relevant here.[77] Among other things, the Supreme Court indicated that "the employer has *no duty to bargain* with any union representative who may be permitted to attend the investigatory interview,"[78] and the Court stated that it was "'*not giving the Union any particular rights with respect to predisciplinary* discussions which it otherwise *was not able to secure during collective-bargaining negotiations*.'"[79] Additionally, the Supreme Court indicated that the imposition of discipline was among the "legitimate *employer prerogatives*," and the Court held that an employer—when faced with an employee's request to have a union representative attend a disciplinary interview—could cancel the meeting, refuse to meet with the union representative and the employee, and *impose the discipline* "'*on the basis of information obtained from other sources*.'"[80]

Most instructive here is the *Weingarten* Court's quotation, taken from the Board decision in *Quality Manufacturing*, explaining *why* an employer could *refuse to meet* with the union representative and employee and *proceed on its own with discipline* based on whatever other information the employer previously obtained:

[71] I agree with the views expressed by former Member Hurtgen, who dissented in *Eugene Iovine*. As Member Hurtgen explained, the employer had a settled past practice of reducing employees' hours when work was down, regardless of the reason for a downturn in work. The employer did not change that practice, and therefore it had no duty to give the union notice and opportunity to bargain before reducing employees' hours due to a downturn in work. 328 NLRB at 295.

[72] Majority's opinion, slip op. at 15.

[73] Majority's opinion, slip op. at 16.

[74] *Weingarten*, 420 U.S. at 256–260.

[75] 195 NLRB 197 (1972).

[76] 196 NLRB 1052 (1972).

[77] 420 U.S. at 256.

[78] Id. at 259 (emphasis added).

[79] Id. (quoting *Mobil Oil*, 196 NLRB at 1052 fn. 3) (emphasis added).

[80] Id. at 258–259 (quoting *Mobil Oil*, 196 NLRB at 1052) (emphasis added).

> "This seems to us to be the only course *consistent with all of the provisions of our Act.* It permits the employer to *reject a collective course* in situations such as investigative interviews *where a collective course is not required* but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary. . . . *And . . . the employer would, of course, be free to act* on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview."[81]

In summary, the Supreme Court in *Weingarten*—and the Board in *Mobil Oil* and *Quality Manufacturing*—directly addressed *when* and *how* an employer could impose discipline on unionized employees. These decisions make clear that (i) the union's involvement is limited to attendance at a pre-disciplinary investigative meeting with the employee, which the employer has the right to cancel without explanation;[82] (ii) the employer has "*no duty to bargain*" with the union representative who attends any such meeting, and (iii) the employer is otherwise "of course, *free to act*," which means free to impose discipline.[83] Moreover, the Supreme Court stated that imposing discipline is among "legitimate employer prerogatives" (consistent with industrial practice),[84] that the Board has not afforded a union "'any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations,'"[85] and that possible unilateral action by the employer is "'consistent with *all of the provisions of [the] Act*'" and "'a collective course *is not required*.'"[86] Indeed, the Board was equally direct in its *Weingarten* Supreme Court brief, which stated that "the duty to bargain does not arise prior to the employer's decision to impose discipline."[87]

All of this renders unreasonable my colleagues' statement that the discipline-bargaining obligations being announced today are "in harmony" with *Weingarten*. My colleagues contend that the Supreme Court in *Weingarten* only addressed whether a "duty to bargain" exists with a union representative who attends a disciplinary interview, which left open the possibility that—when *Weingarten* was decided—a yet-to-be discovered statutory duty to bargain existed that prohibits employers from imposing any discipline without first giving the union notice and the opportunity for bargaining. In particular, my colleagues attach significance to the words "prior to" and "decision" in the NLRB's *Weingarten* brief, which (as noted above) stated that "the duty to bargain does not arise *prior to* the employer's decision to impose discipline."[88] Here, they get points for their efforts to thread the needle in the following explanation: "the right that we adopt today does not conflict with the representations in the Board's *Weingarten* brief. . . . As explained elsewhere in this decision, the obligation to provide the union with notice and an opportunity to bargain arises *after* the employer has *decided*, at least preliminarily, that discipline is warranted, but *before* the employer has actually *imposed* discipline."[89] I believe the Board majority's interpretation of *Weingarten* is incorrect for several reasons.

The most obvious problem is that the Supreme Court decision in *Weingarten* engaged in a comprehensive examination of the entire disciplinary process. *Weingarten* directly addressed participation by union representatives in disciplinary meetings, but it obviously dealt specifically with the subject of discipline and held there was no duty to bargain in disciplinary interviews. This makes it implausible to believe the Supreme Court or the Board contemplated that, apart from disciplinary interviews, the Act imposed a blanket obligation, after the employer decided to impose discipline, for notice to the union and bargaining over the disciplinary decision before it could be imposed. If a general obligation existed for employers and unions to engage in discipline bargaining before any disciplinary decision could be implemented, the Supreme Court would not have used the phrase "legitimate employer prerogatives" when referring to discipline,[90] the Court would never have stated (quoting the Board) that "'a *collective course is not required*,'"[91] and the Court would have never stated that potential unilateral action by the employer was "'consistent with *all of the provisions of [the] Act*.'"[92]

Additionally, the Supreme Court decided *Weingarten* in 1975. If the Board and the Supreme Court believed our statute requires notice and the opportunity for bar-

[81] Id. at 259 (quoting *Quality Manufacturing*, 195 NLRB at 198–199) (emphasis added).

[82] Id. at 258 ("The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee.").

[83] Id. at 259 (emphasis added).

[84] Id. at 258; see fns. 20 & 46, supra and accompanying text.

[85] Id. at 259 (quoting *Mobil Oil*, 196 NLRB at 1052 fn. 3) (emphasis added).

[86] Id. (quoting *Quality Manufacturing*, 195 NLRB at 198–199) (emphasis added).

[87] *NLRB v. J. Weingarten, Inc.*, Brief for the Board, 1974 WL 186290 (U.S.).

[88] Id. (emphasis added).

[89] Majority opinion, slip op. at 7 fn. 17 (emphasis added).

[90] 420 U.S. at 258; see fns. 20 & 46, supra and accompanying text.

[91] Id. at 259 (quoting *Quality Manufacturing*, 195 NLRB at 198–199) (emphasis added).

[92] Id. (quoting *Quality Manufacturing*, 195 NLRB at 198–199) (emphasis added).

gaining over disciplinary decisions before they are implemented, what explains the 37 years that passed following *Weingarten*—until the Board issued *Alan Ritchey*—during which *nobody* made reference to such an important bargaining obligation?[93] The answer is obvious: when *Weingarten* was decided, and throughout the nearly 4 decades that elapsed between *Weingarten* and *Alan Ritchey*, everybody conceded—including the Board—that the Act imposes no pre-imposition bargaining obligation in regard to discipline except for each party's right to request bargaining over disciplinary standards and procedures.[94]

This point was also explicitly made in the Board's *Weingarten* brief, which is apparent when one reads the entire passage from which my colleagues only quote a single sentence. The entire passage from the Board's brief reads as follows:

> The Board's position does not infringe upon any legitimate interest of the employer. *The employer has the option of foregoing the interview* if he prefers not to examine the employee in the presence of his representative. The employee under investigation would then have the choice of either proceeding without representation, *or allowing the investigation to take its course* without his participation and then *attempting to defend himself at the subsequent grievance stage with the benefit of representation*. Moreover, even if the employer allows the employee to be accompanied by a union representative, he is free to insist on obtaining the employee's, and not the representative's, account of the matter under investigation.
>
> *Precedents dealing with the employer's bargaining obligation in relation to the disciplinary process are not controlling here. The Board acknowledges that the duty to bargain does not arise prior to the employer's decision to impose discipline.* However, an employer may not restrain his employees in their exercise of a right protected by Section 7 simply because the employer is not under an additional statutory obligation to bargain with the employee's union representative.[95]

The above passage demonstrates that even the Board in *Weingarten* was describing "the employer's bargaining obligation in relation to the disciplinary process."[96] Therefore, when the Board acknowledged that "the duty to bargain does not arise prior to the employer's decision to impose discipline,"[97] the Board also meant there was no bargaining duty regarding the discipline's *implementation*. This is made even clearer when the Board described the employee's options if the employer exercised its right not to conduct a disciplinary meeting attended by the union representative and the employee. In this situation, according to the Board, the employee's options included "*either* proceeding without representation, *or allowing the investigation to take its course* without his participation and then *attempting to defend himself at the subsequent grievance stage with the benefit of representation*."[98] Again, this demonstrates that the Supreme Court and the Board in *Weingarten* evaluated the entire "disciplinary process," which involved two options—and only two—in relation to the union's role: (i) union representation during a disciplinary interview (during which there is clearly no duty to bargain),[99] or (ii) addressing any discipline at a "subsequent grievance stage with the benefit of representation."[100] In relation to this last option, *Weingarten* also makes clear that whether there would be a subsequent "grievance stage" depended on whether grievance-processing concerning discipline had been agreed upon by the parties in collective bargaining. As noted previously, the Court stated: "[W]e are not giving the Union any particular rights with respect to predisciplinary discussions *which it otherwise was not able to secure during collective-bargaining negotiations*."[101]

3. The majority's new "discipline-bargaining" standards are fundamentally inconsistent with existing rules governing decision and effects bargaining

The above discussion highlights another fundamental contradiction between the rules governing discipline bargaining and existing law. The duty to engage in discipline bargaining created by my colleagues arises, they say, "*after* the employer has decided, at least preliminarily, that discipline is warranted, but *before* the employer

[93] As noted previously, *Alan Ritchey* was rendered invalid by the Supreme Court's decision in *Noel Canning*.

[94] My colleagues state that the 80-year delay in creating these bargaining obligations is "easily explained" by the fact that no "private party" ever filed a charge permitting the Board to pass on the potential existence of bargaining obligations relating to discipline. Majority opinion, slip op. at 5 fn. 14. Given the plethora of discipline disputes that have been addressed by the Board in the course of 8 decades, it is difficult to believe that the NLRB never previously had occasion to pass on the potential existence of an obligation to bargain regarding discipline. Moreover, as noted in the text, the Board and the Supreme Court in *Weingarten* made clear that employers do not have an obligation to engage in bargaining prior to a decision to impose discipline.

[95] *NLRB v. J. Weingarten, Inc.*, Brief for the Board, 1974 WL 186290 (U.S.).

[96] Id.

[97] Id.

[98] Id. (emphasis added).

[99] Id.; see also *Weingarten*, 420 U.S. at 259.

[100] *NLRB v. J. Weingarten, Inc.*, Brief for the Board, 1974 WL 186290 (U.S.).

[101] 420 U.S. at 259 (quoting *Mobil Oil*, 196 NLRB at 1052 fn. 3) (emphasis added).

has actually imposed discipline."[102] Yet it is also clear that discipline bargaining pertains to *the discipline decision itself* because my colleagues state there must be "meaningful discussion concerning the *grounds for imposing discipline* in the particular case, as well as . . . the *form of discipline chosen*,"[103] and bargaining over the discipline must encompass "the *possibility of rescinding it*."[104] According to the majority, discipline bargaining likewise involves efforts to change the decision: in discipline bargaining, the union's representation of the employee includes "providing *exculpatory or mitigating information* . . . . , pointing out *disparate treatment*, or suggesting *alternative courses of action*."[105] The fact that discipline bargaining relates to the disciplinary decision is also clear from the majority's statement that it will now require bargaining over the discretionary aspect of disciplinary decisions "just as we do in cases involving *discretionary layoffs*, *wage changes*, and *other changes in core terms or conditions of employment*, where bargaining is required before an employer's decision is implemented."[106] In these other situations, the Board clearly requires bargaining over the decision. That is why it is called "decision bargaining."[107]

The most important aspect of decision bargaining—which the majority gets wrong here—relates to *when* bargaining must occur. Throughout the Act's 80-year history, when decision bargaining is required, the Board generally requires it *before the decision is made*. For example, in *National Family Opinion, Inc*.,[108] the employer violated its decision-bargaining obligation regarding the decision to subcontract printing operations, even though it gave nearly 4 weeks' advance notice before the decision's implementation, because "the Union was told of a *completed decision* rather than a decision yet to be finalized."[109]

By contrast, only in *effects*-bargaining cases is the employer permitted to provide notice to the union *after* making a final decision, but *before* the decision's implementation.[110] There are two common sense reasons for this structure, which uniquely relate to effects bargaining and *not* decision bargaining. First, when an employer is only required to engage in effects bargaining, notice is permitted *after* the employer has already made the decision because bargaining regarding the effects of the decision does not require bargaining over potential alternatives to the decision itself. Second, in effects-bargaining cases, notice must still be provided prior to the decision's *implementation* because the purpose of effects bargaining is to permit bargaining over the decision's impact on unit employees (i.e., its "effects"). Therefore, even though effects bargaining is more limited than decision bargaining, employers must provide sufficient notice prior to a decision's implementation so effects bargaining can occur "in a meaningful manner and at a meaningful time."[111]

The discipline-bargaining requirements announced today substitute mayhem for these longstanding and well-reasoned principles. My colleagues create a *decision*-bargaining obligation regarding discipline, except they cannot require discipline bargaining *before* the employer makes the disciplinary decision because the Board in *Weingarten* conceded that a "duty to bargain does *not* arise *prior to* the employer's decision to impose discipline."[112] Consequently, the Board majority requires discipline bargaining *after* the employer has made the "decision" to impose discipline, and they even permit the employer to *implement* the discipline after some unde-

[102] Majority opinion, slip op. at 7 fn. 12 (emphasis in original).

[103] Id., slip op. at 8 (emphasis added).

[104] Id., slip op. at 9 (emphasis added).

[105] Id. (emphasis added).

[106] Id., slip op. at 5 (emphasis added).

[107] See, e.g., *Lapeer Foundry & Machine, Inc*., 289 NLRB 952, 954 (1988) ("[T]he decision to lay off employees for economic reasons is a mandatory subject of bargaining."); *Holmes & Narver*, 309 NLRB 146 (1992) (same); *NLRB v. Katz*, 369 U.S. at 736 (requiring bargaining over the decision to implement merit increases). See generally *First National Maintenance Corp. v. NLRB*, 452 U.S. at 674–688 (generally describing decision bargaining and effects bargaining). See also *IMI South, LLC d/b/a Irving Materials*, 364 NLRB 1373 (same); *Columbia College Chicago*, 363 NLRB 1434, 1440–1442 (Member Miscimarra, dissenting) (describing effects bargaining). See supra fn. 1.

[108] 246 NLRB 521 (1979).

[109] Id. at 530 (emphasis added). See also *P.B. Mutrie Motor Transportation*, 226 NLRB 1325, 1330 (1976) (employer violated its decision-bargaining obligation where, by the time the union received notice, the employer's "decision had hardened into an irrevocable position"). Cf. *American President Lines*, 229 NLRB 443, 453 (1977) (employer lawfully engaged in subcontracting arrangement where, at the time the union received notice, the subcontracting agreement remained executory, pending union negotiations).

[110] See, e.g., *Chippewa Motor Freight*, 261 NLRB 455, 460 (1982), where the judge reasoned that since the employer "was not required to bargain about the decision to close, it was not required to give notice before the decision was made," and the employer was found to have satisfied its effects-bargaining obligation by giving the union notice prior to implementation. See also *Willamette Tug & Barge Co*., 300 NLRB 282, 282–283 (1990) ("[T]he employer's duty [is] to give preimplementation notice to the union to allow time for effects bargaining."); *Compact Video Services*, 319 NLRB 131, 142 (1995) (effects-bargaining violation where employer "failed to give the Union preimplementation notice and an opportunity to conduct meaningful preimplementation bargaining over the effects"), enfd. 121 F.3d 478 (9th Cir. 1997); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 27 (1st Cir. 1983) ("[N]otice to the unions . . . of the decision to terminate . . . operations that very same day did not afford the unions an adequate opportunity to bargain over the effects of that decision upon the employees."), enfg. 263 NLRB 264 (1982).

[111] *First National Maintenance*, 452 U.S. at 682.

[112] *NLRB v. J. Weingarten, Inc.*, Brief for the Board, 1974 WL 186290 (U.S.) (emphasis added).

fined period of discipline bargaining, provided that discipline bargaining continues thereafter.[113] Yet the employer—after *deciding* to impose discipline and after *implementing* the discipline—must still bargain in good faith about "alternative courses of action" and the "possibility of rescinding" the discipline.

Never, in the history of our statute, has the Board interpreted Section 8(a)(5) to impose such self-contradictory obligations on any party. This is precisely what the Supreme Court in *First National Maintenance* denounced as unreasonable: "If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in 'surface bargaining,' a violation of its good faith."[114]

4. The majority's new discipline-bargaining standards are fundamentally inconsistent with the Board's "clear and unmistakable waiver" standard

Another fundamental inconsistency between the majority's discipline-bar and discipline-bargaining obligations and settled law springs from the fact that these new requirements become inapplicable whenever the employer has entered into "an agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes."[115] Indeed, my colleagues refer to this as a "safe harbor"[116] that extinguishes the employer's discipline-bargaining duty, which Section 8(a)(5) supposedly imposes just like the duty to bargain over "layoffs, wage changes, and other changes in core terms or conditions of employment."[117]

In every other context, the Board has applied a demanding "clear and unmistakable waiver" standard when evaluating whether contract provisions obviate the statutory duty to bargain imposed by Section 8(a)(5).[118] The Board has stated that such a waiver "'requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply,'"[119] with additional requirements that contract language must be "'sufficiently specific'"[120] and a waiver will not be "lightly inferred."[121]

For the reasons noted above, I do not believe the Board can appropriately interpret Section 8(a)(5) to impose my colleagues' new discipline-bar and discipline-bargaining obligations on employers.[122] However, the Board has consistently rejected arguments that Section 8(a)(5) obligations are automatically extinguished based on the existence, applicability, or non-applicability of a "grievance-arbitration system" that resolves "disputes."[123] Moreover, in *Babcock & Wilcox Construction Co.*,[124] the Board majority announced we will not defer to arbitration awards that merely resolve the issue of "cause" unless the arbitrators also decide "statutory" issues.[125]

In other words, the Board has traditionally maintained that grievance arbitration is *not* a "clear and unmistakable" waiver of statutory rights. Yet, in today's decision, the Board majority states that an "interim" agreement providing for grievance arbitration creates a "safe harbor" that extinguishes the new duty to engage in "disci-

[113] I do not contend that the problem here is that my colleagues should be requiring discipline bargaining at an earlier point in time, *before* an employer decides to impose discipline. The Board correctly recognized in *Weingarten* that the Act does *not* impose any "duty to bargain . . . prior to the employer's decision to impose discipline." *NLRB v. J. Weingarten, Inc.*, Brief for the Board, 1974 WL 186290 (U.S.). Rather, I believe the timing of the employer's discipline-bargaining duty as constructed by my colleagues adds to the considerations that render unreasonable their interpretation of Sec. 8(a)(5) in this case.

[114] 452 U.S. at 685.

[115] Majority opinion, slip op. at 1.

[116] Id., slip op. at 9 fn. 22.

[117] Id., slip op. at 5.

[118] See fn. 13, supra. The Board has insisted on its "clear and unmistakable waiver" standard, even though some courts of appeals have expressed disagreement with this standard in favor of a "contract coverage" standard where the language of the collective-bargaining agreement demonstrates that the parties have already bargained and reached agreement regarding a subject covered by the agreement.

[119] *Graymont PA, Inc*., 364 NLRB 356, 357 (2016) (quoting *Provena St. Joseph Medical Center*, 350 NLRB at 811).

[120] Id. (quoting *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989)).

[121] Id., slip op. at 25 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

[122] Therefore, I do not contend these requirements would be appropriate if the majority applied a stricter "waiver" standard.

[123] See, e.g., *Unit Drop Forge Division Eaton, Yale & Towne Inc.*, 171 NLRB 600, 601 (1968) ("[T]he mere existence of contractual grievance and arbitration procedures will not by itself warrant a finding that the union waived its right to bargain on changes planned by the employer."), enfd. 412 F.2d 108 (7th Cir. 1969); *Dresser Industrial Valve & Instrument Division*, 178 NLRB 317, 322 (1969) (same); *Omaha World-Herald*, 357 NLRB 1870, 1871 (2011) ("[T]he mere exclusion of a subject from a contractual grievance/arbitration system does not constitute a clear and unmistakable waiver of a union's right to bargain concerning the subject.") (footnote omitted); *Fawcett Printing Corp*., 201 NLRB 964, 972 (1973) ("[B]argaining representative's agreement to an arbitration clause does not constitute a waiver of its statutory right to information."); *Bonnell/Tredegar Industries, Inc.*, 313 NLRB 789, 791 (1994) (no clear and unmistakable waiver based on "exclusion of certain benefit provisions from the grievance-arbitration procedure"), enfd. 46 F.3d 339 (4th Cir. 1995); *New York University*, 363 NLRB 470, 475 fn. 4 (2015) ("[C]ontract provision stating that the Union may not file a grievance or arbitrate with respect to job descriptions does not establish a waiver of its right to bargain the effects of a job description's change.").

[124] 361 NLRB 1127 (2014).

[125] Id., slip op. at 2. I dissented in relevant part from the majority's decision in *Babcock*, as did former Member Johnson. See *Babcock*, at 1140–1150 (Member Miscimarra, concurring in part and dissenting in part); id., slip op. at 24–36 (Member Johnson, concurring in part and dissenting in part).

pline-bargaining."[126] Furthermore, if one examines what happens *after* grievance-arbitration occurs pursuant to an "interim" agreement that requires "cause" for discipline, *Babcock* holds that the Board will not defer to arbitration awards that merely address the issue of "cause," because the Board in *Babcock* held that "cause" determinations involve "excessive risk that . . . an arbitrator has not adequately considered the statutory issue."[127] This means one of two things: (a) employers who engage in grievance arbitration under the "interim" agreement must also explicitly authorize the arbitrator to decide "statutory" issues (which, seemingly, would defeat the purpose of having a "safe harbor"); or (b) this is another area where discipline bargaining will be different from other statutory obligations.

In these respects as well, the new requirements announced today are inconsistent with existing legal standards.

5. Section 10(c) prohibits the Board majority's new requirements when "cause" exists for an employee's suspension or discharge

Section 10(c) of the Act states, in relevant part: "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 backpay, if such individual was suspended or discharged for cause."

My colleagues impose the new discipline-bar and discipline-bargaining requirements on employers, even when "cause" exists for an employee's suspension or discharge. However, if an employer violates these new requirements, the employer in Board compliance proceedings (which generally occur only after years of litigation) may attempt to establish the existence of "cause," which, if proven, will reduce or eliminate the employer's backpay liability and/or preclude reinstatement.

Significantly, the concept of "cause" has been given a common sense meaning by arbitrators and practitioners throughout the Act's 80-year history.[128] However, my colleagues create their own complex, multiple-stage definition, which has no basis in the Act or its legislative history, and my colleagues deem the employer a "wrongdoer" who, therefore, will bear the burden of proof.[129] Here is how the new, multiple-stage "cause" definition works:

- *Cause Stage 1.* The employer must first show that (1) "the employee engaged in misconduct" and (2) "the misconduct was the reason for the suspension or discharge."[130]
- *Cause Stage 2.* The General Counsel and the charging party may each "contest the respondent's showing" and may also seek to show "there are mitigating circumstances" or "the respondent has not imposed similar discipline on other employees for similar misconduct."[131]

[126] The majority's opinion is, astonishingly, devoid of detail regarding the precise type of "interim" agreement that would extinguish discipline-bargaining obligations. The majority merely states that the "interim" agreement must involve discipline and permit "grievance[s] and, potentially, arbitration," and this would waive the union's bargaining rights. This sharply contrasts with the type of scrutiny the Board applies in every other situation involving the waiver of bargaining rights. I strongly suspect the majority is requiring more onerous concessions than their opinion might suggest at first glance. Most revealing is the majority's requirement that the agreement involve a "process, such as a grievance-arbitration system" that would "*resolve*" disputes regarding discipline. Majority opinion, slip op. at 1 (emphasis added). To "resolve" disputes, the majority may require more than a "process" for challenging discipline, it appears they would require some type of final and binding resolution, such as arbitration. Cf. LMRA Sec. 203(d) (quoted in fn. 48 supra). Moreover, it is difficult to envision how final and binding arbitration could "resolve" a discipline dispute unless a contractual *standard* existed against which the propriety of discipline should be measured, such as "cause." See fn. 128 infra. Finally, under the Board's *Babcock* decision, supra fn. 124, the Board will not defer to an arbitration award, after it issues, even if the CBA states it is "final and binding," unless the parties have also explicitly authorized the arbitrator to resolve "statutory" issues. Id.

[127] Babcock, supra fn. 124, at 1128.

[128] The requirement of "cause" has nearly universal acceptance in most collective-bargaining agreements as a fundamental limitation on an employer's authority to discipline or discharge employees. Over ninety percent of all collective-bargaining agreements include an explicit "just cause" provision for discipline. See Bureau of National Affairs, *Basic Patterns in Union Contracts* (BNA, 14th ed. 1995). Just cause provisions have been called "an obvious illustration" of the fact that many provisions in collective-bargaining agreements "must be expressed in general and flexible terms." Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959).

The meaning of "cause" in collective-bargaining agreements was explained nearly 60 years ago in *Worthington Corp.*, 24 Lab. Arb. (BNA) 1, 6–7 (McGoldrick, 1955):

> [I]t is common to include the right to suspend and discharge for "just cause," "proper cause," "obvious cause," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. . . . Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

Numerous other cases confirm that different formulations of "cause" requirements are generally regarded as identical. See, e.g., Alan Miles Ruben, ed., Elkouri & Elkouri, How Arbitration Works 932 fn. 37 (6th ed. 2003) (collecting decisions "finding no significant difference between these terms").

[129] Majority opinion, slip op. at 15 fn. 41.

[130] Id., slip op. at 15.

[131] Id.

- *Cause Stage 3.* If the General Counsel or charging party "make such a showing" (see above), the employer "must show that it would nevertheless have imposed the same discipline."[132]
- *All Stages.* My colleagues "emphasize" that the employer "bears the burden of persuasion in this analytical framework" because (i) the Board's "standard compliance procedures . . . impose the burden of proof on the party contending that an employee should be denied reinstatement or that the employee's backpay should be reduced or denied"; and (ii) it is an "established principle" that "the wrongdoer bears the burden of uncertainty created by its wrongful conduct."[133]

The "cause" language in Section 10(c) was added as part of the Labor Management Relations Act (LMRA) amendments to the NLRA that were adopted in 1947.[134] During the Senate debates on the LMRA, Senator Taft—the legislation's principal sponsor in the Senate—commented on the "cause" language set forth in Section 10(c) and stated: "If a man is *discharged for cause*, he cannot be reinstated. If he is *discharged for union activity*, he must be reinstated."[135]

The legislative history indicates that the Board was constrained to accept and apply a "cause" standard in all discharge and suspension cases. Thus, the Conference Report, commenting on House changes adopted by the Conference Committee, stated:

> [I]n section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that *no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause*, and *this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity*. . . . Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. *The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c)*.[136]

The report accompanying the House bill—H.R. 3020, 80th Cong. (1947)—likewise indicated that the "cause" standard would be binding on the Board in all suspension and discharge cases:

> A third change forbids the Board to reinstate an individual *unless the weight of the evidence shows that the individual was not suspended or discharged for cause*. In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, "inferring" that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge. *Matter of Wyman-Gordon Company*, 62 N.L.R.B. 561 (1945), is typical of the Board's attitude in such cases. . . . The Board may not "infer" an improper motive *when the evidence shows cause for discipline or discharge*.[137]

The "cause" language in Section 10(c) was not a minor technical amendment of the Act. Rather, the Section 10(c) language was specifically referenced by President Truman when he vetoed the LMRA,[138] and by Senator Taft in opposition to President Truman's veto.[139] Senator Taft reiterated that the "cause" standard—which the Board would be constrained to accept and apply—involved a simple common sense inquiry, which was whether an employee's suspension or discharge resulted from his or her misconduct:

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[132] Id.

[133] Id., slip op. at 15 fn. 41.

[134] See, e.g., Labor Management Relations Act (Taft-Hartley Act or LMRA), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 et seq.

[135] 93 Cong. Rec. 6677 (daily ed. June 6, 1947) (statement of Sen. Taft), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 (hereinafter LMRA Hist.) at 1593.

[136] H.R. Rep. 80-510 at 39, 59 (1947), reprinted in 1 LMRA Hist. 543 (emphasis added).

[137] H.R. Rep. 80-245 at 42 (1947), reprinted in 1 LMRA Hist. 333 (emphasis added).

[138] President Truman's veto message received in House argued that the "cause" language would be controlling (therefore precluding reinstatement or backpay) even if the evidence established that a suspension or discharge resulted from antiunion discrimination. Thus, President Truman's veto message stated: "The bill would make it easier for an employer to get rid of employees whom he wanted to discharge because they exercised their right of self-organization guaranteed by the act. It would permit an employer to dismiss a man on the pretext of a slight infraction of shop rules, even though his real motive was to discriminate against this employee for union activity." 93 Cong. Rec. 7501, reprinted in 1 LMRA Hist. 916 (veto message received in the House).

[139] The LMRA was enacted over President Truman's veto when two-thirds majorities in the House and Senate voted to override the President's veto. 93 Cong. Rec. 7504 (June 20, 1947), reprinted in 2 LMRA Hist. 922–923 (reflecting two-thirds majority vote in the House); 93 Cong. Rec. 7692 (June 23, 1947), reprinted in 2 LMRA Hist. 1656–1657 (reflecting two-thirds majority vote in the Senate).

> The President says an employer can discharge a man on the pretext of a slight infraction, even though his real motive is to discriminate against the employee for union activity. This is not so. The Board decides under the new law, as under the former law, whether the man was really discharged for union activity *or for good cause*.[140]

Contrary to the majority's decision, which imposes the burden on the employer to prove the existence of "cause," Congress *prohibited* the Board from imposing the burden of proof on any respondent to establish "cause" for a suspension or discharge. Rather, Congress placed the burden of proof on the Board's General Counsel to establish, by a preponderance of the evidence, that an alleged unlawful suspension or discharge was *not* "for cause."[141] To this effect, the legislation expressly stated that the Board could not order reinstatement or backpay "unless the *weight of the evidence* shows that the individual was not suspended or discharged for cause."[142] This "weight of the evidence" language was eventually deleted, but only because other language added to Section 10(c) independently required that *all* Board determinations be supported by a "preponderance" of the evidence. See H.R. Rep. 80-510 at 55 (1947), reprinted in 1 LMRA Hist. 559 ("The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence . . .").[143]

The "cause" language set forth in Section 10(c), combined with the Act's legislative history as described above, reveals the existence of several additional problems with my colleagues' new requirements.

First, Section 10(c) imposes an unyielding constraint on the Board's authority to prevent or reverse any suspension or discharge for which "cause" exists.[144] Therefore, the Act's plain language shows that when "cause" exists, the Board has no authority—none—to invalidate a suspension or discharge merely because the employer failed to satisfy some Board-created discipline-bar or discipline-bargaining requirement.[145]

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[140] 93 Cong. Rec. S A3233 (daily ed. June 21, 1947) (statement of Sen. Taft).

[141] The Supreme Court has reaffirmed the settled principle, stated explicitly in Sec. 10(c), that the General Counsel has the burden of proving, "upon the preponderance of the testimony," the elements of an unfair labor practice. See, e.g., *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983). In a mixed-motive case, where there is evidence of both discrimination and "cause," the General Counsel bears the burden of showing by a preponderance of the evidence that a suspension or discharge was motivated by animus against the employee's union or other protected concerted activity. Although the Board allocates to the employer the burden of proving its affirmative defense, *Wright Line*, 251 NLRB 1083, 1088–1089 (1980) (subsequent history omitted), the ultimate burden of proving a violation remains with the General Counsel, id. at 1088 fn. 11. Regardless of intermediate burdens, the General Counsel must satisfy his ultimate burden to prove a violation of the Act. In such cases, it necessarily follows that the employee was not suspended or discharged for "cause." See also fn. 143 below.

[142] H.R. Rep. 80-245 at 42 (1947), reprinted in 1 LMRA Hist. 333.

[143] As noted in the text, Sec. 10(c) and its legislative history show that the General Counsel bears the burden of proof that disputed discipline violates the Act, which also entails establishing there was no "cause" for the discipline in question. The decision in *Transportation Management* does not dictate otherwise. Indeed, the Supreme Court in *Transportation Management* held that Sec. 10(c)'s "preponderance of the testimony" language meant the General Counsel has the burden "throughout the proceedings" of proving "the elements of an unfair labor practice," 462 U.S. at 401, and the Court stated that the "preponderance of the testimony" requirement was "*closely related*" to Sec. 10(c)'s provision "that no order of the Board reinstate or compensate any employee who was fired for cause," id. at 401 fn. 6 (emphasis added). *Transportation Management* dealt with the employer's intermediate burden in *Wright Line* "mixed-motive" cases, where the employer asserts an "affirmative defense" by "showing what his actions would have been regardless of his forbidden motivation." Id. at 401; see also *Wright Line*, 251 NLRB at 1088 fn. 11 ("The shifting burden merely requires the employer to make out what is actually an affirmative defense."). Not only did the Supreme Court hold that the *Wright Line* mixed-motive standard "does *not* change or add to the elements of the unfair labor practice *that the General Counsel has the burden of proving* under § 10(c)," 462 U.S. at 401 (emphasis added; footnote omitted), the Court held that this mixed-motive issue was *unrelated* to the "cause" language set forth in Sec. 10(c), id. at 401 fn. 6 ("the drafters of § 10(c) were not thinking of the mixed-motive case"). Therefore, Sec. 10(c) and its legislative history indicate that Congress intended the General Counsel would bear the burden of proving any alleged violation, *including* the statutory requirement that the employee in question was *not* disciplined for "cause," and the Supreme Court regarded this as separate and distinct from whatever burdens the Board devised or applied in mixed-motive cases. Id.; see also id. at 399 fn. 4 ("[N]owhere in the legislative history is reference made to any of the mixed-motive cases decided by the Board or by the Courts.").

[144] The Supreme Court has long recognized that the rights set forth in the Act are not absolute, and the Board must consider the right of employers to maintain production and discipline:

> These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–798 (1945). The Board has likewise long respected employers' right to discipline its work force: "The Act's grant of rights to employees to engage in organizing activities, to belong to a union, and to engage in collective bargaining was not intended to deprive management of its right to manage its business and to maintain production and discipline." *Star-News Newspapers, Inc.*, 183 NLRB 1003, 1004 (1970).

[145] See *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007) (Sec. 10(c) precluded the Board from ordering reinstatement of or backpay to employees suspended or discharged for misconduct, even though the employer violated Sec. 8(a)(5) by failing to bargain over the installation of hidden

Second, the Act's legislative history reveals that nobody believed the Board had any role to play in discipline cases, *except* where discipline allegedly involved *unlawful motivation*:

- As noted previously, Senator Taft stated that, based on the "cause" language added to Section 10(c), an employee could not be reinstated if he was "discharged for cause," but if he was "discharged *for union activity*, he must be reinstated."[146]
- The Conference Report stated that the "cause" language added to Section 10(c) precluded backpay and reinstatement "whether or not the acts constituting the cause for discharge were committed *in connection with a concerted activity*."[147]
- The House report expressed disagreement with a decision in which the Board ordered reinstatement based on antiunion discrimination,[148] described as one where the Board inferred that the employee's union affiliation "was the *reason* for his discharge," and the report stated that the "cause" language would prevent the Board from similarly inferring "an *improper motive*" in cases where cause existed.[149]
- President Truman's veto message complained about the "cause" language added to Section 10(c), which he stated would permit an employer to discharge an employee using a "pretext" when, in fact, the "*real motive* was to *discriminate against [the] employee for union activity*."[150]
- In opposition to President Truman's veto, Senator Taft disagreed that the "cause" language would permit employers to discharge employees where the "*real motive*" was "to *discriminate against the employee for union activity*."[151]

Nothing in the Act's legislative history suggests that Congress intended to require bargaining over disciplinary decisions before they could be imposed. The Board had never required bargaining over disciplinary decisions before they could be implemented. Indeed, the Board did not create such an obligation until roughly 80 years after the Act's adoption, 70 years following enactment of the Taft-Hartley amendments, and 40 years after the Supreme Court and the Board addressed discipline-related bargaining issues in *Weingarten*.

Third, I strongly disagree with the manner in which my colleagues have allocated the burden of proof on the issue of "cause," which is directly contrary to what the Act requires, as reflected in Section 10(c) and its legislative history. As noted previously, Section 10(c) squarely places the burden of proof on the General Counsel regarding all elements of each violation, including remedial issues, which includes the burden to prove the absence of "cause" in every suspension and discharge case where backpay or reinstatement is sought. See supra fns. 141–143 and accompanying text. Given that our statute expressly states the Board cannot order backpay or reinstatement whenever "cause" supports an employee's discharge or suspension, it hardly instills confidence in the Agency's objectivity when (i) the Board creates new obligations that *especially* focus on discharge and suspension decisions; (ii) the new obligations are deemed applicable *even when* "cause" exists; (iii) employers are denied the right to litigate the "cause" issue until the compliance stage, which is the very last stop of the Board's lengthy, multiple-year litigation train; and (iv) my colleagues make the employer bear the burden of proof regarding "cause," contrary to Section 10(c) and its legislative history, because the employer in compliance proceedings is considered a "wrongdoer."

surveillance cameras that revealed the employees' misconduct), review denied sub nom. *Brewers & Maltsters Local 6 v. NLRB*, 303 Fed. Appx. 899 (D.C. Cir. 2008); *Taracorp Industries*, 273 NLRB 221 (1984) (Sec. 10(c) precluded the Board from ordering reinstatement of or backpay to employee discharged for insubordination, even though the employer unlawfully denied the employee *Weingarten* representation during a disciplinary interview that led to the employee's discharge).

I believe there is no merit in the majority's suggestion that *Anheuser-Busch* and *Taracorp* are distinguishable here, and the Board has authority to order reinstatement or backpay based on a failure to satisfy the majority's discipline-bargaining requirement, even if employees were discharged for cause. My colleagues reason that, in *Anheuser-Busch* and *Taracorp*, the Board found there was an insufficient nexus between the unfair labor practice and the reason for the discharge (meaning the reason for discharge could be regarded as relatively distinct from the employer's unfair labor practice), and the majority maintains that "a much stronger nexus" exists when an employer fails to engage in discipline bargaining regarding an employee's discharge or suspension for cause. In all of these cases—including the situation where an employer fails to engage in discipline bargaining when cause exists for an employee's discharge or suspension—there may be an independent reason for the discipline imposed by the employer that constitutes "cause." If so, as stated in Sec. 10(c), the Board is divested of authority to order reinstatement or backpay.

[146] Supra fn. 135 (emphasis added).

[147] Supra fn. 136 (emphasis added).

[148] *Wyman-Gordon Co.*, 62 NLRB 561 (1945).

[149] Supra fn. 137 (emphasis added).

[150] Supra fn. 138 (emphasis added).

[151] Supra fn. 140 (emphasis added).

Fourth, nothing about these new obligations is simple, but the majority's multiple-stage formula for defining and adjudicating the issue of "cause" is a gross distortion of the "cause" concept. As noted previously, "cause" has been universally praised, in large part, because it is "an obvious illustration" of the fact that many labor relations concepts "must be expressed in general and flexible terms."[152] It has been called "the most important principle of labor relations in the unionized firm."[153] Nobody would reasonably believe that my colleagues' new multiple-stage "cause" definition improves the "cause" standard, which is one of the most widely applied terms in the history of our statute. Indeed, the "cause" language in Section 10(c) was enacted by Congress to *prevent* the Board from attempting to "infer" some type of impropriety when "cause" exists.[154] If an employer suspends or discharges an employee based on his or her actions or inaction, separate from union activities or other protected conduct, then "cause" exists, and this should end the Board's inquiry. This was the Board's holding in *Anheuser-Busch* and *Taracorp*, where the Board stated:

> Cause, in the context of Sec. 10(c), effectively means *the absence of a prohibited reason*. For under our Act: "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids."[155]

Fifth, I believe it is improper and unfair to impose the new discipline-bar and discipline-bargaining requirements in all cases, including those where "cause" exists for a discharge or suspension, with my colleagues relegating inquiries regarding the existence of "cause" to compliance proceedings. As a practical matter, this means my colleagues completely disregard the "cause" limitation in the sense that they require *all* employers to satisfy these new requirements in *all* discipline cases (subject to the complicated qualifications and exceptions formulated by the Board majority and discussed above). And even in cases where "cause" exists, the employer will face many years of NLRB litigation, possibly including court appeals regarding the issue of liability, with the employer being unable even to raise the issue of "cause" until the very last stage of the NLRB litigation process, when details regarding backpay and other remedial issues are litigated.

My colleagues apparently consign the issue of "cause" to compliance proceedings, rather than having "cause" addressed as a threshold issue during the liability stage, because they view the "cause" language in Section 10(c) as dealing with what the Board may "order," which prompts my colleagues not to permit this to be addressed in earlier liability proceedings. For several reasons, I respectfully disagree, and I believe the issue of "cause" should be resolved at the liability stage.

For one thing, *every* sentence in Section 10(c), including the "cause" language, addresses matters relevant to the Board's case-handling in *liability* proceedings, which also happens to be when the Board formulates its remedial orders (including those ordering reinstatement and/or backpay).[156] For example, sentence 3 states: "If upon the

[152] Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959).

[153] Robert I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594, 594; see also *Babcock*, 361 NLRB 1127, at 1142 (Member Miscimarra, concurring in part and dissenting in part).

[154] See text accompanying fn. 136 supra.

[155] *Anheuser-Busch*, 351 NLRB at 647; *Taracorp*, 273 NLRB at 222 fn. 8 (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

[156] Sec. 10(c) in its entirety, with bracketed numbers added to each sentence for ease of reference, states as follows:

> [1] *The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board*. [2] Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. [3] *If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice*, then the Board shall state its findings of fact and shall issue and *cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act*: [4] Provided, That *where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him*: [5] And provided further, That *in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope*. Such order *may further require such person to make reports from time to time showing the extent to which it has complied with the order*. [6] *If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.* [7] *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 backpay, if such individual was suspended or discharged for cause*. [8] In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, *shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or*

preponderance of the testimony taken the Board shall be of the opinion *that any person named in the complaint has engaged in or is engaging in any such unfair labor practice*, then the Board shall state its findings of fact and *shall issue and cause to be served on such person an order requiring such person to cease and desist* from such unfair labor practice, *and to take such affirmative action including reinstatement of employees with or without backpay*, as will effectuate the policies of this Act." Everything contained in the foregoing sentence describes what the Board does *at the liability or merits stage of an unfair labor practice case*, which is when the Board issues its "cease and desist" order including any requirement of "reinstatement . . . with or without backpay." Similarly, sentence 6 (which immediately precedes the "cause" language in Section 10(c)) provides for the Board to issue orders dismissing complaints found to lack merit, which the Board would *only* address at the liability stage. Together, sentences 3, 6 and 7 state:

> [3] If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint *has engaged in or is engaging in any such unfair labor practice*, then the Board shall state its findings of fact and shall issue and cause to be served on such person *an order requiring such person to cease and desist from such unfair labor practice*, and to take such affirmative action *including reinstatement of employees with or without backpay*. . . . [6] If upon the preponderance of the testimony taken the Board *shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice*, then the Board shall state its findings of fact and shall issue *an order dismissing the said complaint.* [7] *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 backpay, if such individual was suspended or discharged for cause*.[157]

Each one of the above-quoted sentences, along with the rest of Section 10(c), is relevant to what the Board addresses at the liability stage. In fact, no sentence or clause within Section 10(c) deals only with Board compliance proceedings.

The Supreme Court has also rejected the suggestion that the Act draws a sharp distinction between liability and remedial issues. For example, Section 8(d) states that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." In *H.K. Porter Co. v. NLRB*,[158] the Board had imposed a dues-checkoff clause on an employer, which the court of appeals upheld because, in the court's view, Section 8(d) related only to liability (i.e., "a determination of whether a . . . violation has occurred"), and it did not limit the Board's remedial power (i.e., "the scope of the remedy which may be necessary to cure violations which have already occurred").[159] The Supreme Court rejected this analysis, stating: "We may agree . . . that as a matter of strict, literal interpretation that section [8(d)] refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board *are not also limited by the same considerations*. . . ."[160]

In short, the "cause" language in Section 10(c) limits what may be contained in a Board *order* regarding reinstatement and backpay, which the Board formulates and issues *at the liability stage*. Moreover, even if one regards Section 10(c) as relating only to the Board's remedial authority, rather than liability, *H. K. Porter* teaches that "the same considerations" may relate to both. This is reinforced, as noted above, by Section 10(c)'s legislative history, which shows that Congress enacted the "cause" language in Section 10(c) to constrain the Board's liability determinations *and* the Board's remedial authority. In this regard, my colleagues themselves refer to Section 10(c) as requiring the Board to determine "whether the discipline was '*for* cause'" (which, according to my colleagues, involves the question of whether a suspension or discharge occurred "*because* of the misconduct").[161] This underscores the need for the Board to

within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(Emphasis added; bracketed sentence numbers added for ease of reference.) As the above quotation makes clear, sentence 1 starts by discussing the "testimony taken," which applies to liability proceedings. Sentence 3 sets forth the "preponderance of the testimony" standard, which places the burden of proof on the General Counsel, and addresses those cases where the Board finds that an "unfair labor practice" has occurred, in which case the Board shall order affirmative action "including reinstatement of employees with or without backpay." Everything addressed in sentence 3—including the Board's order requiring reinstatement and/or backpay—is likewise addressed *when the Board decides liability at the merits stage of the unfair labor practice case*. In fact, no sentence in Section 10(c) deals only with Board compliance proceedings.

[157] Sec. 10(c) (emphasis added; bracketed sentence numbers added for ease of reference).

[158] 397 U.S. at 99.

[159] Id. at 107.

[160] Id. at 107 (emphasis added).

[161] Majority opinion, slip op. at 14 fn. 35 (emphasis in original).

address the "cause" issue at the liability stage where such questions are addressed.[162]

Finally, keep in mind that my colleagues' discipline-bar and discipline-bargaining requirements apply to suspensions and discharges even if they are nondiscriminatory and consistent with what the employer has done in the past. For this reason, it is predictable that some significant number of the suspensions and discharges affected by today's decision will, in fact, be supported by "cause." I believe it is contrary to the intention of Congress, as reflected in the "cause" language in Section 10(c), for the majority to make their new requirements applicable to *all* discharges and suspensions, while leaving the issue of "cause" unaddressed until the very end of the Board's lengthy litigation process. In my view, the majority needlessly imposes onerous burdens on large numbers of employers, unions and employees, and on the Board itself, by applying the new bargaining requirements to all discharges and suspensions, even where "cause" exists, resulting in many years of litigation in hundreds or thousands of cases, where parties will learn only at the very end that the most important types of relief—reinstatement and backpay—are unavailable.

6. The Board majority's new requirements exceed the Board's 8(a)(5) authority as limited by section 8(d), as well as the Board's remedial authority

One of the cornerstone principles of the NLRA in relation to collective bargaining is that the Board is to act as a neutral overseer of the bargaining process, without dictating the terms that should be agreed to by the parties. This is set forth in Section 8(d) of the Act, which states that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[163] It is also clear that the Board's authority when fashioning relief, though broad, is strictly limited to measures that are remedial and not punitive. The Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act."[164] Likewise, the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."[165] As the Supreme Court stated in *Republic Steel*: "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."[166]

We do not write from a clean slate when it comes to limitations on the Board's remedial authority. As discussed above, the Supreme Court made one such limit clear in *H.K. Porter Co. v. NLRB*,[167] where the employer was found to have violated Section 8(a)(5) by refusing to bargain in good faith regarding a dues checkoff provision. The *H.K. Porter* case did not involve an ordinary refusal to bargain. Rather, over a period exceeding 8 years, resulting in large part from "the skill of the company's negotiators in taking advantage of every opportunity for delay," the employer continually objected to dues-checkoff "solely to frustrate the making of any collective-bargaining agreement."[168] Ultimately, the Board —with the approval of the court of appeals—issued a remedial order "requiring the petitioner to '[g]rant to the Union a contract clause providing for the checkoff of union dues.'"[169]

The court of appeals in *H.K. Porter* upheld the Board-imposed contract provision based on a policy concern "that workers' rights to collective bargaining are to be secured."[170] However, the Supreme Court disagreed, and held that the Board exceeded its authority. The Supreme Court stated that "the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is

[162] I disagree with any suggestion by my colleagues that the "cause" language in Sec. 10(c) is nothing more than a restatement that discharges or suspensions supported by "cause" are lawful when the Board determines that they were motivated by "cause." As noted in the text, Sec. 10(c) and its legislative history clearly establish that Congress regarded the existence of "cause" as an affirmative constraint on the Board's authority. If Sec. 10(c) merely means the Board should not award backpay or reinstatement whenever it determines that discharges and suspensions are lawful, there would have been no need for Congress to add the "cause" language to Sec. 10(c), nor would the "cause" language have given rise to the substantial controversy that resulted from its inclusion in the Taft-Hartley amendments. See text accompanying fns. 138–140, supra.

[163] See also *American National Insurance*, supra fn. 16, 343 U.S. at 401–402 (the Act "is designed to promote industrial peace by encouraging the making of voluntary agreements," and it does not "regulate the substantive terms . . . which are incorporated in an agreement."); *H.K. Porter Co.*, supra fn. 16 (described in the text accompanying fns. 167–175 infra).

[164] *Republic Steel Corp. v. NLRB*, 311 U.S. at 12 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. at 235–236); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. at 267–268).

[165] *Consolidated Edison*, 305 U.S. at 235–236.

[166] 311 U.S. at 11.

[167] 397 U.S. at 99.

[168] Id. at 101.

[169] Id. at 102 (citations omitted).

[170] Id. at 108. Similarly, my colleagues in today's decision state they are imposing a discipline-bargaining obligation on employers because permitting employers to impose discipline without bargaining "would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union . . . that represents the employees impotent." Majority opinion, slip op. at 10.

weak."[171] The Court explained that "[t]he object of this Act was not to allow governmental regulation of the terms and conditions of employment," and "it was never intended that the Government would in such cases step in, become a party to the negotiations *and impose its own views of a desirable settlement*."[172] The Court quoted a House report that explained the addition of Section 8(d) as part of the Taft-Hartley amendments as follows:

> Notwithstanding this language of the Court, *the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith*, in setting itself up as the judge of *what concessions an employer must make and of the proposals and counterproposals that he may or may not make*. . . .
>
> [U]nless Congress writes into the law guides for the Board to follow, *the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements*.[173]

Regarding the effect of Section 8(d), the Supreme Court held that "'the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.'"[174] The Court concluded:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*. . . . While the parties' freedom of contract is not absolute under the Act, *allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based*—private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract*.[175]

The requirements created by my colleagues today have troubling aspects that, in my view, appear to exceed the Board's authority when measured against the above standards. In *H.K. Porter*, the employer had been found to have persistently violated the Act, which prompted the Board—with approval from the court of appeals—to impose a contractual dues-checkoff provision on the employer. In various respects, the majority's actions today are more troubling.

- The employers affected by today's decision have *not* been found to have violated the Act in any respect. And the majority creates new discipline-bargaining requirements that have never previously existed, that have no support in the text of the Act, and that are contradicted by existing precedent.
- The new requirements contradict a broad array of existing doctrines, requiring discipline bargaining when there has been no "change" (within the meaning of *Katz*), and where the duty to bargain over the discipline decision is triggered *after* the employer makes the decision, which is unlike decision bargaining in every other context (where decision bargaining is required *before* the employer has made the decision). Also, according to the majority, discipline bargaining must commence prior to the implementation of discipline, and in every other context such timing is associated with effects bargaining, not decision bargaining.
- The majority sets forth complex standards regarding when discipline bargaining must commence, but provides no guidance whatsoever regarding when discipline may actually be imposed because the majority dispenses with the conventional requirement that parties negotiate to overall impasse or agreement before taking action.
- Contrary to Section 10(c)—which precludes reinstatement and backpay whenever a suspension or discharge resulted from "cause," and where the General Counsel bears the burden of proving the *absence* of "cause"—the new discipline-bargaining requirements apply to *all* suspensions and discharges, including those that resulted from "cause," and the majority creates a multiple-stage "cause" definition that employers cannot even address until compliance proceedings following years of Board litigation.
- The new requirements apply *only* to those employers who exercise their right *not* to enter into an "interim" agreement that, according to the majority, must give unions a right to challenge discipline in grievance arbitration.

My colleagues here construct statutory obligations in a way that, literally, constitutes an offer that employers

[171] 397 U.S. at 109.
[172] Id. at 103–104 (emphasis added).
[173] Id. at 105–106 (emphasis added) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 19–20 (1947)).
[174] Id. at 106 (quoting *NLRB v. American National Insurance Co.*, 343 U.S. at 404).
[175] Id. at 107–108 (emphasis added).

cannot refuse: employers must adopt an up-front agreement giving away three of the most important issues addressed in any set of contract negotiations (discipline, grievances, and arbitration), or employers lose their right to impose immediate discipline (except in very few cases involving "exigent" circumstances, as defined by my colleagues). Literally, the quid pro quo for such important concessions are the newly created "statutory" obligations created by my colleagues.[176] This leaves little doubt that the Board is going "very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make."[177] It appears equally clear that the Board, at least "indirectly," is sitting "'in judgment upon the substantive terms of collective bargaining agreements.'"[178] Unquestionably, my colleagues view an up-front "interim" agreement—permitting "grievance and, potentially, arbitration" challenges over discipline—as a "desirable settlement."[179] In fact, as noted previously, these particular substantive issues (discipline, grievances, and arbitration) are typically only resolved in negotiations when parties finally enter into "complete collective bargaining agreements."[180]

My colleagues obviously maintain "the opinion that the policies of the Act might be effectuated" by the new requirements being announced today.[181] However, I believe we are undermining what the Supreme Court called the "fundamental premise on which the Act is based," which is supposed to involve "private bargaining . . . without any official compulsion over the actual terms of the contract."[182]

CONCLUSION

One cannot reasonably suggest that the duty to bargain, and an employer's right to impose discipline, were minor or insignificant issues in 1935, when Congress first adopted the NLRA; in 1947, when Congress adopted the Taft-Hartley amendments (including new limitations on the Board's authority, as expressed in Section 8(d) and Section 10(c) of the Act); in 1960, when the Supreme Court addressed the importance of "cause" and grievance arbitration in the *Steelworkers Trilogy* cases; and in 1975, when the Board and the Supreme Court in *Weingarten* reaffirmed that employers have no duty to bargain before implementing discipline. Yet, my colleagues would have everyone believe that our statute has always imposed an obligation to bargain before discipline could be imposed, and Congress, the Supreme Court, and the Board never had occasion to "clearly and adequately" describe the existence of this obligation.[183] I believe this proposition is contrary to reason, logic, and just about everything else associated with the Act. As the Supreme Court stated in *First National Maintenance*, "in establishing what issues must be submitted to the process of bargaining, *Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed*."[184]

For these reasons, I respectfully dissent from my colleagues' adoption of these new requirements and from the remedial principles they announce for application in future cases, and I concur with my colleagues' decision not to apply these new requirements retroactively in the instant case.

Lisa Friedheim-Weis and *Brigid Garrity, Esqs*., for the General Counsel.
Eugene Boyle, Esq. (Neal, Gerber and Eisenberg), of Chicago, Illinois, for the Respondent.
Guy Thomas, SPFPA, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN Administrative Law Judge. This case was submitted to me on a stipulated record on April 2, 2014. The General Counsel and Respondent, Total Security Manage-

[176] Although my colleagues disclaim any intention to impose up-front "interim" agreements on employers encompassing discipline, grievances, and arbitration, they concede that even if today's decision "were to have the effect of motivating employers to reach [such] interim agreements, such motivation would be entirely consistent with the policies of the Act." The key difference here is that my colleagues selectively impose a complicated array of never-previously-existing obligations *only* on those employers who fail to enter into up-front agreements over three subjects—discipline, grievances, and arbitration—contrary to the bargaining obligations imposed by the Act, which encompass *all* mandatory subjects, and which disfavor single-issue bargaining. There is no resemblance between such "interim" agreements and conventional "management-rights" clauses that parties may voluntarily enter into.

[177] Id. at 105 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 19–20 (1947).

[178] Id. at 106 (quoting *NLRB v. American National Insurance Co.*, 343 U.S. at 404).

[179] Id. at 104.

[180] Majority opinion, slip op. at 9 fn. 22.

[181] *Consolidated Edison*, 305 U.S. at 236. As noted previously, my colleagues maintain that even if the new discipline-bargaining obligations "have the effect of motivating employers to reach interim agreements" governing discipline, grievances and arbitration—separate and apart from all other mandatory subjects of bargaining—this "would be entirely consistent with the policies of the Act." I respectfully disagree for the reasons set forth in the text.

[182] *H.K. Porter*, 397 U.S. at 108.

[183] Majority's opinion, slip op. at 1. My colleagues similarly state that today's decision is necessary to avoid "permanently freezing in place a *deficient understanding* of the Act," which somehow prevailed for 8 decades among everyone familiar with our statute. Id., slip op. at 16.

[184] 452 U.S. at 676 (emphasis added).

ment Illinois 1, LLC, filed briefs upon this record on May 7, 2014.

The Charging Party Union, the International Union Security Police Fire Professionals of America (SPFPA), filed the charge on June 28, 2013. The General Counsel issued the complaint on August 19, 2013. The issue in this matter is whether Respondent violated Section 8(a)(5) and (1) in failing to provide the Union with prior notice and an opportunity to bargain prior to discharging bargaining unit employees Winston Jennings, Jason Mack, and Nequan Smith.

FINDINGS OF FACT

I find as fact all the matters to which the parties stipulated on April 2, 2014. The essential facts are as follows. Respondent, which is based on Oakbrook Terrace, Illinois, provides security planning and security services. The company receives materials and services at its Oakbrook facility valued in excess of $50,000 directly from locations outside of Illinois. Thus, Respondent admits to being an employer within the meaning of the Act.

The Union, SPFPA, was certified as the exclusive collective-bargaining agent of a unit of Respondent's employees on August 21, 2012. The Union represents a bargaining unit consisting of all full time and regular part time armed and unarmed security officers performing guard duties at Marshfield Plaza, 1700 W. 119th St. in Chicago.

Since August 21, 2012, the Union and Respondent have been in negotiations over an initial collective-bargaining agreement. So far as this record shows, as of April 2, 2014, the parties had not reached agreement on a collective-bargaining agreement or other binding agreement regarding discipline.

On March 12, 2013, Respondent discharged three employees without giving prior notice and an opportunity to bargain to the Union. It discharged Winston Jennings for allegedly refusing to cooperate with Respondent's internal investigation of coworker Jason Mack, making misrepresentations to a supervisor, being insubordinate and failing to report a violation of company policy.

Respondent discharged Jason Mack on March 12 for allegedly abandoning his post prior to completing his shift and falsifying company documents. That day Respondent also discharged Nequan Smith for allegedly using profane and indecent language towards a supervisor and causing a disturbance at a client site.

In discharging the three employees, Respondent exercised discretion in applying its Security Officer's Personnel Policy Manual, Guidelines and Rules, and/or any other written or verbal policies and practices. Respondent did not adhere to any uniform policy or practice with respect to issuing discipline regarding the alleged transgressions of the three employees.

With regard to Jennings, Mack, and Smith, Respondent did not have a reasonable good faith belief that the presence of any one of them presented a serious, imminent danger to Respondent's business or personnel, or that any of them engaged in unlawful conduct, posed a significant risk of exposing Respondent to legal liability for his conduct, or threatened safety, health or security in or outside the workplace.

Analysis

The parties have stipulated that the issues presented in this matter include the validity of the Board's decision in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). That decision, if valid, leads to the conclusion that Respondent violated the Act as alleged. However, that decision was issued by three members, only one of whom, Chairman Pearce, had been confirmed by the Senate. Thus, Respondent challenges the validity of the recess appointments of the other two, Richard Griffin and Sharon Block.

Respondent also challenges the validity of then Acting General Counsel Lafe Solomon's appointment and thus the authority of anyone at the Board to issue the complaint in this matter. Richard Griffin was sworn in as the General Counsel of the Board in November 2013, after the complaint in this matter issued.

Finally, Respondent challenges the validity of the Board's appointment of Regional Director Peter Ohr and thus Mr. Ohr's authority to issue the complaint in this matter. This challenge is based on the fact that Mr. Ohr was appointed to the position of Regional Director by a three member Board which had only two members whose appointments were allegedly valid. The Board that appointed Mr. Ohr to his current position consisted of two members confirmed by the Senate, Chairman Pearce and Brian Hayes, and Craig Becker, a recess appointment. Respondent argues that Mr. Becker's appointment to the Board was invalid; thus any actions by this three-member Board were also invalid.

The Board has held that until the issue of the recess appointments is definitively resolved, it will continue to fulfill its responsibilities under the Act, *Belgrove Post Acute Care Center*, 359 NLRB 633 fn. 1 (2013). Therefore, I am bound by existing Board precedent, *Waco, Inc.*, 273 NLRB 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F. 2d 176 (8th Cir. 1964). As to the alleged infirmity of the complaint based on the alleged lack of authority of the Acting General Counsel, I am also bound by the Board's rejection of this defense in *Belgrove.* Pursuant to *Belgrove* I further conclude that the Board had authority to appoint Peter Ohr as Regional Director and that Mr. Ohr had authority to issue the complaint in this matter. Thus, the only issue before me is whether Respondent violated the Act as alleged, applying the Board's *Alan Ritchey* decision.

The *Alan Ritchey* decision concerns an employer's statutory obligations between the time unit employees have selected an exclusive bargaining representative and that when the union and employer have effectuated a first contract. The Board held that with regard to more serious forms of discipline: suspensions, demotions and discharges, such an employer must generally provide its employees' representative notice and an opportunity to bargain before disciplining a unit employee. An exception to this rule is a situation in which the employer is not exercising discretion. I take the absence of discretion to mean that the employer is automatically executing an established policy. For example, suppose an employer which has an established, uniformly enforced policy of automatically discharging an employee for three consecutive no call/no shows. This employer would not have to provide a union notice and an oppor-

tunity to bargain over the discharge of an employee who violated that policy.

Also, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel, the employer may impose discipline immediately and unilaterally. Such a situation might be where the employee assaults another employee or supervisor. However, even in this case, the employer would be required to bargain after the discipline was imposed.[1]

The employer's obligation to bargain over serious types of discipline does not require the employer to bargain to impasse prior to imposing discipline. However, after imposing discipline the employer must continue to bargain until reaching agreement or impasse.

CONCLUSION OF LAW

In the instant case Respondent has admitted to facts which constitute a violation of Section 8(a) (5) and (1) of the Act pursuant to the *Alan Ritchey* decision. The disciplines were serious, i.e., discharges; Respondent exercised discretion in discharging the three employees; it did not provide prior notice and opportunity to bargain before doing so and concedes that none of the employees' continued presence at work presented an imminent danger to its business or employees.

REMEDY

The Respondent, having discharged employees in violation of the Act, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]

[1] The Board noted, at fn. 19 of the *Alan Ritchey* decision, that in such circumstances, the employer could suspend an employee pending investigation, notify the Union and bargain over the suspension after the fact, as well as any discipline imposed resulting from the employer's investigation.