

# 80 Years of Precedent Restored: Discretionary Discipline and an Employer's Duty to Bargain in Advance of a First Contract

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This week, in *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, the National Labor Relations Board overruled a 2016 decision, and held that an employer **does not have a duty to bargain** over employee discipline with a union prior to reaching a first collective bargaining agreement.

Under *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), an employer, with limited exceptions, was required to provide a union with notice and opportunity to bargain about discretionary elements of an existing disciplinary policy before imposing "serious discipline" on any union-represented employee who was not yet covered by a collective bargaining agreement. An employer's failure to engage in such bargaining would violate Section 8(a)(5) of the National Labor Relations Act even when the employer did not change a preexisting disciplinary policy or practice but, instead, merely continued to exercise discretion consistent with that policy or practice when determining whether and how to discipline employees. The usual remedy for this violation would include reinstatement and backpay for disciplined employees, unless the employer could prove that the discipline was imposed "for cause."

The issue presented in *800 River Road* was whether to follow to the holding of *Total Security*, and to thus affirm the judge's finding that the employer violated the Act by disciplining four employees without first providing the Union with notice and an opportunity to bargain. *River Road* overruled *Total Security* and reinstated the law as it existed for 80 years prior to *Total Security*, holding that an employer does not have a duty to bargain over discipline with a union prior to reaching a first contract. The Board applied this decision retroactively to all pending cases.

The decision can be found [here](#).