



NLRB Continues To Turn Back The Clock, Restoring Pre-Obama Disciplinary Rule

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The National Labor Relations Board issued a decision this week that overturned an Obama-era decision regarding an employer's duty to bargain over employee discipline with a newly certified union.

Once a union is certified as the bargaining representative for a unit of employees, the parties begin negotiating a first contract. During that negotiation period, a question might arise as to whether an employer can terminate or otherwise discipline employees without giving the new union notice and an opportunity to bargain.

In [800 River Road Operating Company, LLC d/b/a Care One at New Milford](#), the Board reverted to what had been an 80-year old rule that employers have no duty to bargain over disciplinary decisions in the period after a union certification but prior to reaching any collective bargaining agreement with the newly installed union. That is, provided the discipline is materially consistent with the employer's established policy or practice.

This new case overturns a 2016 decision of the Obama Board in *Total Security Management*, which had required employers provide a new union with notice and opportunity to bargain over serious disciplinary actions like termination, suspension or demotion, even if no contract or grievance procedure was yet in place. The Board's decision in *800 River Road*

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eliminates that obligation as long as the employer is maintaining the practice or policy that was in effect prior to the unionization, in essence maintaining the status quo. The Board opined in *800 River Road* that the 2016 case was “irreconcilable with the general body of law governing statutory bargaining practices” and therefore wrongly decided.

Interestingly, the union that filed charges against 800 River Road attempted to dismiss the case last year, but the Board refused to dismiss, signaling that it wished to take the opportunity to revisit *Total Security Management*. The return to longstanding precedent is welcome news for employers, who can now continue to discipline as they normally would, even when negotiating that first contract.