

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 4, 2009

TO : James J. McDermott
Regional Director, Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rite Aid 530-6050-2575
Case 31-CA-28862 530-6067-4055-8500
530-8049

This case was initially submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) of the Act by failing to provide notice and an opportunity to bargain before disciplining and discharging employees when the Union made a request that the Employer bargain prior to the imposition of discretionary discipline. In a prior memorandum,¹ Advice returned the case to the Region to seek additional evidence regarding the Employer's disciplinary policy, and directed the Region to resubmit its recommendation regarding liability to Advice. By memorandum of October 15, 2009, the Region resubmitted the case to Advice with the recommendation that the charge be dismissed.

We conclude, in agreement with the Region, that the Employer did not unlawfully refuse to provide notice and an opportunity to bargain before disciplining and discharging employees because the Employer had an established disciplinary practice and any discretion retained was based on objective standards applied consistently with that past practice.

FACTS

Briefly, on March 26, 2008, the Board certified the Union² as the exclusive representative of the Employer's warehouse employees at its Lancaster, California facility. On April 21, the Union requested that the Employer provide the Union notice and opportunity to bargain prior to the

¹ Rite Aid, Case 31-CA-28862, Advice Memorandum dated January 21, 2009.

² ILWU Local 26.

imposition of any acts of discretionary discipline. The Union reiterated its request in four subsequent letters.

Following the Union's requests, the Employer discharged about 39 employees and disciplined several hundred employees. The Employer did not provide notice or opportunity to bargain prior to implementation of any of these acts of discipline or discharge. The Union does not allege that the disciplines or discharges have deviated from the Employer's past practice.

The Region, in its supplemental investigation, obtained copies of all written Employer policies upon which its disciplines and discharges were based and a list of all disciplines and discharges from the date of certification. The Region also obtained Employer testimony regarding its written and unwritten disciplinary policies, and how those policies are applied. The Region then analyzed the disciplines and discharges to determine whether the Employer's actions conformed to its own written and unwritten policies.

The Region's investigation revealed that the Employer maintains a comprehensive disciplinary policy setting out both the rules of conduct that employees are required to follow, and the types of discipline the Employer administers for violating those rules of conduct. The Employer's disciplinary policy falls into two main categories:³

- 1) written work rules where the Employer has established a *written* disciplinary procedure for violation of the rule;⁴ and

³ Novel disciplinary issues may arise that do not fall in either category. In those cases, the Employer meets with other managers to determine whether it has ever addressed a similar situation and, if so, applies the same discipline as it did in that situation. None of the disciplines here involve novel disciplinary issues.

⁴ For example, the Employer maintains a written policy requiring employees to wear their badges. The written policy also provides for a five-step progressive disciplinary policy for failure to wear a badge (verbal warning; written notice; written notice with 90-day probation; final written notice; and termination).

2) written⁵ or unwritten⁶ work rules where the Employer has established an *unwritten* disciplinary procedure for violation of the rule. The unwritten procedure is either the Employer's catch-all "General Progressive Discipline Policy" (GPDP),⁷ or another procedure that the Employer has established for that particular violation.⁸

The evidence further revealed that the Employer consistently followed its above-described disciplinary policy, and that it exercised only limited discretion, consistent with past practice, in administering the policy. For example, one of the Employer's unwritten disciplinary procedures is to give employees a verbal warning for a routine "quality error," and a written warning for a grossly negligent quality error. In applying this practice, two employees received verbal warnings for quality errors (incompletely completing a store credit sheet and incorrectly tagging a case), and a third employee received a written warning for a grossly negligent quality error (receiving a pallet load as a single case). Although a degree of discretion was involved in determining whether a quality error amounted to gross negligence, the Employer applied its established procedure in administering the discipline.

ACTION

We conclude that the Region should dismiss this allegation, absent withdrawal, because the Employer did not unlawfully refuse to provide notice and an opportunity to bargain before disciplining and discharging employees.

⁵ These are generally contained in the Employer's list of "General Rules and Safety Rules" or the "Standard of Conduct" section of the employee handbook. They include prohibitions against sleeping on duty, falsifying documents, drug and alcohol use, and reckless behavior on equipment.

⁶ These include rules requiring employees to complete their Material Handling Equipment (MHE) checklist, clock in and out, and obey break times.

⁷ The GPDP four-step progressive disciplinary process provides for a written verbal warning; a written warning; a final written notice; and discharge.

⁸ For example, employees who fail to complete their MHE checklist receive a written warning on the first violation and a final written notice and suspension on the second violation.

In determining whether an employer has undertaken unlawful discretionary unilateral action, the Board considers whether the discretion exercised was so broad as to amount to unilateral conduct, or whether any discretion retained was based on objective standards applied consistently with past practice. In Eugene Iovine, Inc.,⁹ the Board held that an employer violated Section 8(a)(5) and (1) when it unilaterally reduced employees' hours of work, despite the employer's argument that it had a past practice of reducing employees' hours during business slowdowns. The Board found that this was "precisely the type of action over which an employer must bargain with a newly-certified Union," as there was no "'reasonable certainty' as to the timing and criteria for [the] reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'"¹⁰ Similarly, in Adair Standish Corp.,¹¹ the Board held that an employer could no longer continue to unilaterally exercise its discretion with respect to layoffs after the union was certified, despite a past practice of instituting economic layoffs.

By contrast, in Fresno Bee, the employer did not violate Section 8(a)(5) by unilaterally imposing discipline on employees where there was no evidence that the employer failed to follow its established, written, disciplinary policies. The ALJ, affirmed on this point without comment by the Board, noted that while the discipline administered to unit employees was in part discretionary, the employer "maintains detailed and thorough written discipline policies and procedures that long antedate the Union's advent. The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy."¹² More recently, in Alan Ritchey, Inc.,¹³ the Board held that the Employer had not violated Section 8(a)(5) by unilaterally imposing discipline on employees where the employer's discipline

⁹ 328 NLRB 294, 294-295, 297 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001).

¹⁰ Id. at 294.

¹¹ 292 NLRB 890 n.1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

¹² Id. at 1186.

¹³ 354 NLRB No. 79 (September 25, 2009).

"was meted out in the context of a five-step progressive discipline system, which predated the Union's selection as bargaining representative."¹⁴ Further, the discretion that the employer exercised in applying those policies "operated within the parameters" of that progressive discipline procedure."¹⁵ However, the Board specifically noted that in rejecting the General Counsel's argument that the employer had effectively unlimited discretion, it did not need to decide how much discretion was required before a duty to bargain attached.¹⁶

Here, the evidence clearly establishes that the Employer's unilateral disciplines and discharges of employees is the type of employer conduct found lawful in Fresno Bee¹⁷ and Alan Ritchie,¹⁸ Thus, the Employer had a clearly established disciplinary practice, covering a comprehensive range of work rules, both with respect to identifying the conduct upon which the discipline was based and the disciplinary process itself. Further, the evidence indicated that despite the exercise of some limited discretion, the Employer applied the discipline consistently with past practice. Thus, the employer's discipline "was meted out in the context of a clearly established progressive discipline system, which predated the Union's selection as bargaining representative."¹⁹ Further, the discretion that the employer exercised in applying those policies "operated within the parameters" of that progressive discipline procedure."²⁰

Accordingly, the Region should dismiss the complaint, absent withdrawal.

B.J.K.

¹⁴ Id., slip op. at 4.

¹⁵ Id., slip op. at 4.

¹⁶ Id., slip op at 4, n. 12

¹⁷ 337 NLRB 1161 (2002).

¹⁸ 354 NLRB No. 79.

¹⁹ Id., slip op. at 4.

²⁰ Ibid.