UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ALAN RITCHEY, INC.

and **Cases 32-CA-18149**
32-CA-18459
WAREHOUSE UNION LOCAL 6, **32-CA-18526**
INTERNATIONAL LONGSHORE AND **32-CA-18601**
WAREHOUSE UNION, AFL-CIO **32-CA-18693**

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SUPPLEMENTAL DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

The Regional Director of Region 32 of the National Labor Relations Board, herein called the Board, issued the consolidated complaint in the above-captioned matters, alleging that Alan Ritchey, Inc., herein called the Respondent, had engaged in, and continued to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act, including an allegation that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally changing its disciplinary policy for inspectors, who failed to meet its minimum worker efficiency standard, subsequent to an April 13, 2000 representation election during which Respondent's bargaining unit employees selected Warehouse Union Local 6, International Longshore And Warehouse Union, AFL-CIO, herein called the Union, as their representative for purposes of collective bargaining. I presided over the trial on the allegations of the consolidated complaint on February 20 through 23 and 26 through 28 and March 19, 2001 in Oakland, California and, on April 19, 2002, issued my decision on the merits of said allegations, including a recommendation that the Board dismiss the above unlawful unilateral change allegation inasmuch as, while, subsequent to the election, Respondent no longer permitted inspectors to gradually, over time, raise their efficiency levels to the required level, thereby reflecting more stringent enforcement of its minimum efficiency requirement, its "practice" of disciplining inspectors remained essentially unchanged.-- Respondent's minimum efficiency level of 80-percent for its processing department inspectors remained the same and it continued to discipline said inspectors for low efficiency as it had done prior to the election. On September 25, 2009, reported at 354 NLRB No. 79, the Board issued its decision and order, affirming several but reversing other portions of my decision and

order. With regard to the above-described unilateral change allegation, while agreeing with me that Respondent's 80-percent minimum efficiency standard for processing department inspectors and the sanctions for failing to meet the standard remained "essentially" unchanged subsequent to the election, noting that ". . . there was at least a question as to whether the Respondent's enforcement of the efficiency standard became more stringent," the Board remanded the unfair labor practice issue to me ". . . to give further consideration to evidence of the degree of post-election change in Respondent's enforcement of its efficiency standard and . . . to make further findings and conclusions whether the threat of enforcement and actual enforcement of any changes to the existing disciplinary system triggered a bargaining obligation." In determining that a remand was required, the Board noted that the elements necessary to establish the existence of an unlawful unilateral change were (1) whether Respondent had a pre-election past practice of permitting inspectors, who had been disciplined for not working at the minimum efficiency level, to avoid additional discipline by gradually improving their performance over time; (2) whether, subsequent to the election, Respondent changed its practice by no longer giving inspectors the opportunity to avoid additional discipline by gradually improving their performance over time; and (3) whether, by changing from its past practice, Respondent implemented "a material and substantial change in the inspectors' terms and conditions of employment." In footnote 16, while stating it had not reached a conclusion on the issue, the Board intimated that the salient issue was whether the record evidence established that Respondent had an actual past practice of permitting inspectors to gradually improve their job performance over time to avoid further discipline.

Findings of Fact

Respondent commenced operations at its Richmond, California service center in August 1999, and David Williams was hired as the plant manager, the highest ranking management position at the facility, on December 5 of that year. Amongst the bargaining unit job classifications is an inspector position; employees performing this job function in Respondent's processing department are responsible either for scrutinizing the various types of mailbags for tears or rips in the fabric or for examining the plastic mail trays, lids, and sleeves for holes or cracks. Processing department inspectors may be assigned to either product. In order to ascertain the productivity of the foregoing employees, the United States Postal Service (USPS) devised formulas for determining the "normal amount" of inspections said inspectors should perform over a given time period while examining the above products-- the efficiency standards. While its inspectors were nominally expected to work at a rate equal to 100 percent of the USPS efficiency standards, I found that, since it opened its facility, Respondent actually tolerated processing department inspectors working at a lesser or minimum efficiency level. On this point, I further found that, prior to Williams assuming his position, Respondent variously held inspectors to 75, 80, or 85-percent efficiency levels and that, subsequent to becoming plant manager, on January 18, 2000, Williams announced that, no matter the product, all processing department inspectors would be expected to be working at a minimum efficiency level of 80-percent of the USPS efficiency standard.

There was no dispute, and I found, that both prior to the bargaining unit employees' selection of the Union as their bargaining representative on April 13, 2000 and thereafter, Respondent subjected processing department inspectors, who were not performing at satisfactory and/or minimum efficiency levels and who failed to respond to the prodding of their supervisors by improving their job performance, to progressive discipline including termination. Thus, during the time period August 1999 through April 12, 2000, Respondent subjected 50

different inspectors,[1] to a total of 88 verbal warnings, 20 written warnings, four suspensions, and one termination for failure to achieve acceptable efficiency rates,[2] and, during the period April 13 through September 2000, Respondent subjected 41 different inspectors to a total of 22 verbal warnings, 29 written warnings, 22 suspensions, and 14 terminations for failure to perform at minimum efficiency levels. In these regards, I found that Respondent exercised its discretion in determining whether inspectors should be disciplined for failing to work at the required minimum efficiency level, with plant manager Williams conceding that "absolutely" circumstances were taken into consideration before initially disciplining for low efficiency-- "nothing in life is ever straight numbers."

The crux of the Board's remand concerns my analysis of the "corrective actions" specified for inspectors, who received initial verbal or written disciplinary notices, in order to avoid further discipline and the time frames accorded to them for such improvement. In this regard, I found that, during December 1999 subsequent to Williams becoming the plant manager, after initial discipline for not working at the minimum efficiency level, Respondent permitted many, but not all, inspectors to increase their efficiency levels gradually and to different final levels in order to avoid further discipline. Thus, one inspector was required to reach a 75-percent efficiency level by increasing his efficiency five percent each week; another inspector was required to be at a 50-percent level the following week and, thereafter, to increase his efficiency five percent each week until he reached an 80-percent efficiency standard; with no ultimate efficiency goal set forth, eight other inspectors were expected to be at a 50-percent efficiency level the following week and to raise their efficiency levels by five percent each subsequent week; another inspector was expected to be at a 55-percent efficiency level and to raise his efficiency five percent each week thereafter; several inspectors were expected to raise their efficiency levels 10 percent each week until they reached a 100-percent efficiency level; one inspector was expected to be at a 50 percent efficiency level by the next week and, thereafter, show "steady" improvement until she reached a 75 to 85-percent efficiency level; and another inspector was required to be at a 60-percent efficiency level the following week and "needs to improve" each week to a 75 or 85-percent efficiency level. Likewise, I found that, during the period January 18 to April 12, 2000, subsequent to Williams' announcement of the mandatory 80-percent efficiency standard, one inspector received a verbal warning for low efficiency but was required to raise his efficiency level to only 70-percent in order to avoid further discipline and two other inspectors received suspensions for continued low efficiency but then were required to raise their respective efficiency levels to only 70-percent. Similarly, on the day before the representation election, an inspector received a warning notice for low efficiency and was given two weeks to increase her efficiency level to 80-percent. In my underlying decision, I contrasted the foregoing forbearance of additional discipline with the corrective actions and time periods accorded for such, which Respondent mandated for processing department inspectors, who received discipline for failing to work at its minimum efficiency standard subsequent to the April 13 representation election. As to this,

[1] Prior to December 5, 1999, the day Williams was hired as plant manager, only five inspectors had been disciplined for not working at Respondent's minimum efficiency level.

[2] Both the Board and, in my underlying decision, I noted that, if one concentrates only on the time period between January 18, the day Williams announced to the inspectors that they were expected to maintain, at a minimum, an 80-percent efficiency level, and April 12, 2000, Respondent subjected just six inspectors to a total of seven verbal warnings, three written warnings, three suspensions, and one termination for failing to work at the above minimum efficiency level. Apparently, these six inspectors were the only employees, in said job classification, who had been disciplined for failure to meet Respondent's minimum efficiency standard during those three months.

except for a verbal warning given to one employee, each act of discipline, given by Respondent to inspectors subsequent to the election, required the inspector to achieve an immediate, or no later than the next week, 80-percent efficiency level, without permitting the inspector to incrementally increase his or her efficiency percentage, or face further discipline.

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As stated above, in its decision, the Board determined that the essence of Respondent's alleged unilateral change was the latter's seemingly "more stringent" enforcement of its efficiency standard subsequent to the April 13, 2000 representation election and set forth a legal template for ascertaining whether such a change was violative of Section 8(a)(1) and (5) of the Act. In this regard, there must be probative record evidence of the existence of an established condition of employment-- a so-called "past practice." *Regency Heritage Nursing and Rehabilitation Center*, 353 NLRB No. 103, slip op. at 2 (2009). Next, the evidence must show that the employer implemented a change from this established past employment practice. *UNC Nuclear Industries*, 268 NLRB 841, 847 (1984). Moreover, the employer's act must have constituted a substantial and material change in its employees' terms and conditions of employment." *Furgeson Enterprises, Inc.*, 349 NLRB 617, 618 (2007); *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992). Finally, of course, the employer must have implemented the change without first providing its employees' bargaining representative with notice and a meaningful opportunity to bargain over the proposed employment change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996). Given the Board's language in footnote 16 of its decision, the principle issue herein is apparently the existence of an established past practice, and, in order to constitute such a term or condition of employment, the employer's acts "… must occur with such regularity and frequency that employees could reasonably expect the `practice' to continue to occur on a regular and consistent basis." *Regency Heritage Nursing and Rehabilitation Center*, *supra*; *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). Further, implicit in establishing a past practice is that the party, which is being held to honoring it, must be aware of its existence. *Regency Heritage Nursing and Rehabilitation Center*, *supra*; *BSAF Wyandotte Corp.*, 278 NLRB 173, 180 (1986).

Bluntly stated, I do not believe that, prior to the April 13, 2000 representation election, an established past practice, as defined by the Board, existed regarding Respondent's forbearance in permitting its processing department inspectors, who had been disciplined for failing to work at the minimum efficiency level, incrementally over time, to increase their efficiency so as to avoid further discipline. To be sure, prior to the election, Respondent did permit numerous inspectors, who had received discipline for not working at the requisite minimum efficiency level, to avoid further discipline in the above manner. However, subsequent to the April 13 representation election, whether Respondent's actions had occurred with such regularity and frequency so as to permit its processing department inspectors to reasonably believe Respondent would continue to act with similar forbearance is doubtful. Thus, as of April 13, 2000, Respondent's facility had been open and functioning for a scant seven months and, over said time period, the minimum efficiency standard for the above employees had been in a constant state of flux. In this regard, the warning notices, which Respondent gave to inspectors for failing to work at the required minimum efficiency level, mandated said employees to work at efficiency levels of 75-percent, 80-percent, and 85-percent, and even after plant manager Williams announced the 80-perdent efficiency standard for all inspectors, warning notices required disciplined inspectors to increase their work efficiency to only a 70-percent level. Moreover, prior to the election, Respondent's processing department supervisors exercised discretion in deciding whether inspectors should be disciplined for low efficiency, and not all inspectors, who received such discipline, were permitted to incrementally raise their work efficiency over time in order to avoid additional discipline. Further, I find it significant that Respondent dispensed almost the entirety of its pre-election discipline of inspectors for low efficiency-- the acts which are relied upon by the General Counsel as establishing the putative

past practice-- essentially over a mere six-week period and that, from January 18 through April 12, 2000, Respondent disciplined only six inspectors for low efficiency. In these circumstances, noting, in particular, the short period of time during which Respondent assertedly established a past practice of exercising forbearance regarding the further disciplining of inspectors for not working at the established minimum efficiency level and the lack of similar treatment for all inspectors, I am unable to conclude that, prior to April 13, 2000, Respondent's disciplinary mode occurred with sufficient frequency and regularity so that inspectors could have reasonably expected such to ineluctably continue on a regular and consistent basis subsequent to the April 13 representation election. Accordingly, assuming Respondent more stringently enforced its minimum efficiency standard for inspectors subsequent to the said representation election, I find that such did not constitute a unilateral change in violation of Section 8(a)(1) and (5) of the Act. Cf. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005) (respondent's cell phone practice had been in existence for, at least, a year); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989) (respondent's "lax" enforcement of its sign-in/sign-out rules had existed for in excess of six years).

Conclusions of Law

Respondent's more stringent enforcement of its efficiency standard for processing department inspectors subsequent to the April 13 representation election did not constitute a unilateral change in violation of Section 8(a)(1) and (5) of the Act.

ORDER[3]

IT IS RECOMMENDED that the unfair labor practice allegation, that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its efficiency policy after the April 13, 2000 election by more stringently enforcing its efficiency standard for inspectors, be dismissed

Dated, Washington, D.C. February 4, 2010

Burton Litvack
Administrative Law Judge

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