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ABF Freight System, Inc. and General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees and International Brotherhood of Teamsters (IBT), Local 957. Cases 09–CA–208379 and 09–CA–210267

June 19, 2020

DECISION AND ORDER

BY CHAIRMAN RING¹ AND MEMBERS KAPLAN AND EMANUEL

On August 20, 2018, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions with supporting arguments, and the Respondent filed an answering brief. Pursuant to a notice and invitation to file briefs issued on October 31, 2019, the General Counsel and the Respondent filed supplemental briefs addressing the application to this case of *MV Transportation, Inc.*, 368 NLRB No. 66 (2019).

The National Labor Relations Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge’s rulings, findings,³ and conclusions only to the extent consistent with this Decision and Order.⁴

BACKGROUND

The Respondent provides “less-than-truckload” freight transportation services throughout the United States. This case concerns its facility in Dayton, Ohio, and specifically

¹ Chairman Ring, who is recused, is a member of the panel for quorum purposes only, but he did not participate in the consideration of this case on the merits.

In *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board’s practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court’s reading of the Act, “the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.” *New Process Steel*, 130 S.Ct. at 2644. See also, e.g., *D.R. Horton*, 357 NLRB 2277, 2277 fn. 1 (2012), *enfd.* in relevant part, 737 F.3d 344, 353 (5th Cir. 2013); *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *1621 Route 22 West Operating Co.* 357 NLRB 1866, 1866 fn. 1 (2011), *enfd.* 725 Fed. Appx. 129, 136 fn. 7 (3d Cir. 2018).

² There are no exceptions to the judge’s findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to furnish information requested by the Charging Party.

³ The General Counsel implicitly excepted to the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

the installation of surveillance cameras in two of its break/locker rooms (Shacks A and B) used by its dock workers who are represented by General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees and International Brotherhood of Teamsters, Local 957 (the Union). The shacks are rooms that have tables and seats on one side and lockers on the other, and they are also connected to some of the managers’ offices. The employees change their boots and outer garments in the shacks, and there is nowhere else in the facility where employees regularly change clothes.⁵ The Respondent does not have a policy on where employees can change clothes.

The Respondent and the Union are covered by the National Master Freight Agreement (NMFA), and the events in this case occurred during the life of the April 1, 2013—March 31, 2018 agreement. The NMFA does not include a management-rights clause.

Article 26 of the NMFA states in part:

Section 2. Use of Video Cameras for Discipline and Discharge

The Employer shall not install or use video cameras in areas of the Employer’s premises that violate the employee’s right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens.

In 2013, the Respondent started to install cameras in its shacks but removed them after the employees and the Union objected, arguing that employees change clothes in the shacks.⁶ The Respondent has installed cameras in other

⁴ We have amended the judge’s conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge’s recommended Order consistent with our legal conclusions herein, to conform to the Board’s standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

⁵ The Union provided testimony that the employees sometimes change clothes by stripping down to their underwear in the shacks. The judge was skeptical of this evidence, however, and found that such significant clothing changes “were infrequent at most, and surreptitious.” In contrast, the judge found that employees regularly used the shacks to change clothes by donning or doffing outerwear, “such as cold weather gear and boots.”

⁶ The Respondent challenges the notion that “the Union, as opposed to the employees, confronted the Company on the issue,” though it does not cite to any testimony to counter the testimony that the Union was involved. Regardless, the record shows that the Respondent previously removed cameras from the shacks after receiving objections.

There is some testimony that these events occurred in 2014. It makes no difference to our analysis whether the events occurred in 2013 or 2014.

locations throughout the facility without objections from the Union.

On September 19 and 20, 2017, the Respondent installed cameras in Shacks A and B, without providing the Union notice or an opportunity to bargain. The Union asked why the Respondent was installing cameras there contrary to its earlier expressed intent to prioritize installing cameras on the dock. The Union further requested that the Respondent remove the cameras until the parties could discuss the issue. The Respondent refused, asserting that it did not notify or bargain with the Union because the employees had already ratified the NMFA. After the installations, the Union continued to request bargaining, and the Respondent continued to refuse due to its claimed compliance with Article 26 of the NMFA.

In February 2018, the General Counsel issued a complaint alleging, in part, that the Respondent violated Section 8(a)(5) and (1) by installing the cameras in the shacks “without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.”⁷

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it installed cameras in the shacks because it acted pursuant to an established past practice, not contested by the Union, of installing cameras anywhere on its premises except personal privacy spaces. For the reasons set forth below, we reverse the judge’s decision and find that the Respondent violated the Act when it installed cameras in the shacks.

DISCUSSION

“An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense.” *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 3 (2019). One possible defense to a charge of an unlawful unilateral change is that there was no *change* because the employer’s actions did not materially vary in kind or degree from the parties’ past practice. See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 16 (2017). Another defense is that the change was “covered by” the collective-bargaining agreement because “it falls within the compass or scope of contract language that grants the employer the right to act unilaterally.” *MV Transportation*, 368 NLRB No. 66, slip op. at 11. The General Counsel excepts to the judge’s finding that the camera installations were lawful due to an established past practice, and he also disagrees with the

Respondent’s argument, submitted in its supplemental briefs, that the installations were “covered by” the parties’ NMFA. We consider each of these defenses in turn.

1. Past Practice

We reverse the judge’s finding that the installation of the cameras in the shacks was lawful pursuant to an established past practice. When determining whether there was an established past practice, the Board will make a commonsense determination by comparing the challenged action to the employer’s past actions. See *Raytheon*, 365 NLRB No. 161, slip op. at 12–13. As the party asserting a past practice, the Respondent must prove that the employees would reasonably consider the action at issue to be consistent with what the Respondent has done in the past. See *Mike-Sell’s Potato Chip Co.*, 368 NLRB No. 145, slip op. at 3 (2019). Here, as noted above, the judge found that the Respondent had an “established past practice, not contested by the Union, of installing cameras anywhere on its premises except the personal privacy spaces.” The judge framed the issue closely following the prohibition in the NMFA on the installation of cameras in areas that would “violate the employees’ right to privacy.” However, a past practice finding does not depend on the language of a collective-bargaining agreement. See *Raytheon*, 365 NLRB No. 161, slip op. at 6–7. Rather, a past practice analysis simply evaluates whether the employer’s action varied in kind and degree from what had been customary in the past.

Here, the record shows that the installation of the cameras in the shacks was materially different from the Respondent’s past unilateral camera installations in other parts of its facility. By installing the cameras in the shacks, the Respondent was now focusing its lenses on employees’ recreational and changing areas as opposed to merely surveilling their dock work, which had been the prior custom. We believe employees would reasonably consider such a change to be a departure from Respondent’s past practice. The Respondent’s employees’ immediate objections to the installation in both in 2013 and in 2017 supports our view.

Indeed, in 2013, the Respondent started to install cameras in the shacks, but removed them in response to objections from the employees and the Union. The judge’s bench decision did not mention the uncontroverted and corroborated testimony regarding these attempted installations, which necessarily undermine the judge’s past practice finding. Therefore, based on the specific facts of this case, we reject the judge’s finding that the Respondent

⁷ The General Counsel is not alleging that the Respondent unlawfully modified the contract.

was authorized to unilaterally install cameras in the shacks pursuant to an established past practice.

2. Contract Coverage

We also reject the Respondent’s argument that its actions were “covered by” the parties’ collective-bargaining agreement. In determining whether a contract authorizes an employer to make a disputed change without bargaining with a union, the Board will conduct a limited review and “examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.” *MV Transportation*, 368 NLRB No. 66, slip op. at 2, 11. See also *ADT, LLC, d/b/a ADT Security Services*, 369 NLRB No. 31, slip op. at 3 (2020); *Huber Specialty Hydrates*, 369 NLRB No. 32, slip op. at 3 (2020).

The Respondent argues that the NMFA privileged it to install the cameras in the shacks without bargaining with the Union. But the NMFA only contains a prohibition on camera installation, stating in relevant part that “[t]he Employer shall not install or use video cameras in areas of the Employer’s premises that violate the employee’s right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens.” There is no management-rights clause or other provision ostensibly authorizing the installations.

Though the shacks may not be intended as places for employees to strip down to their underwear, the record is clear that the shacks contain lockers, in part, to store employee clothing, and that, at a minimum, employees change clothing such as footwear and outer garments there. The NMFA clearly prohibits the installation of cameras where employees “change clothing,” and there is nowhere else—at least in the Dayton facility—where employees regularly change clothes. So, it would be

plausible to interpret the NMFA as prohibiting the installation of surveillance cameras in the shacks.

However, we need not and do not determine whether installing cameras in the shacks is prohibited by the contract because the General Counsel is not arguing that the installations modified the contract; rather, he is making the lesser allegation that the Respondent made a unilateral change without bargaining with the Union.⁸ Therefore, we must only consider whether the installations came within the compass or scope of contractual language granting the employer the right to act unilaterally. Although a collective-bargaining agreement need not specifically address the employer decision at issue to be “covered by” the contract, here, looking at the plain language of the NMFA, all we find is a contractual prohibition, which the Respondent may well have breached. Accordingly, we cannot say that the installations came within the compass or scope of any contract language that granted the Respondent the right to install the cameras in the shacks.⁹

Finding that this contract does not cover the installations also furthers our policy objective of promoting more thorough collective-bargaining agreements and the amicable resolution of labor disputes. See *MV Transportation*, 368 NLRB No. 66, slip op. at 15 (explaining that contract coverage “better supports labor relation stability by encouraging employers and unions to foresee potential issues and resolve them through comprehensive collective-bargaining agreements”). Here, if the parties had more clearly set forth their rights in the NMFA—either through affirmative language specific to camera installation or a broad management-rights clause that encompassed such camera installation—this labor dispute may well have been avoided. However, as written, the language is insufficient to obviate continued bargaining on the subject.¹⁰

⁸ See *Bath Iron Works Corp.*, 345 NLRB 499, 502–503 (2005) (explaining that contract modification cases require greater proof because the remedy—requiring adherence to the contract for its terms—is more severe), affd. sub nom. *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

⁹ Our holding is consistent with the circuit courts’ contract coverage cases, and we are unaware of a case where the courts have found a unilateral action to be covered based on contract language with as muddled an application to the case’s facts as here. Cf. *Department of Justice v. FLRA*, 875 F.3d 667, 676 (D.C. Cir. 2017) (change in work assignments clearly within scope of contract language identifying procedures for assigning work); *Columbia College Chicago v. NLRB*, 847 F.3d 547, 553–554 (7th Cir. 2017) (reducing credit hours covered by contract where employer had the right to “modify . . . all aspects of educational policies and practices,” including the “modification [or] alteration . . . of any course”); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 66–67, 71–72 (1st Cir. 2012) (finding that a transfer of work was not covered by a contract’s management-rights clause giving the employer discretion over routine

employment decisions as to individual employees, such as promotion and discipline, despite both the employer and the union making contract-based arguments regarding the lawfulness of the transfers); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312–313 (D.C. Cir. 2003) (finding that management-rights clause providing right to change or introduce new or improved work methods, processes, and procedures of work did not cover converting facilities into management-operated theaters).

¹⁰ Having found that the Respondent’s actions were not covered by the contract, we must then consider whether the Union clearly and unmistakably waived bargaining over the change by looking at bargaining history, past practice, and provisions of a collective-bargaining agreement. See *MV Transportation*, 368 NLRB No. 66, slip op. at 2 & fn. 7. There are no exceptions to the judge’s findings that neither the bargaining history nor the language of the collective-bargaining agreement supports finding a waiver. And because the Union was consistently opposed to the installation of the cameras in the shacks, we do not find a waiver based on past practice.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, ABF Freight System, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees and International Brotherhood of Teamsters, Local 957 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since April 1, 2008, the Union has been the exclusive collective bargaining representative, within the meaning of Section 9(a) of the Act, of a unit of the Respondent's employees which is an appropriate unit within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(5) and (1) by unilaterally installing cameras in break/locker rooms in the Respondent's facility in Dayton, Ohio without first notifying the Union and giving it an opportunity to bargain.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

6. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of its unit employees by installing cameras in the break/locker rooms in its facility in Dayton, Ohio, we shall order the Respondent to rescind the changes and restore the status quo ante until it negotiates in good faith with the Union to agreement or impasse. Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent to

provide the Union with the information it requested on September 23, 2017.

ORDER

The National Labor Relations Board orders that the Respondent, ABF Freight System, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees in the classifications of work covered by the ABF National Master Freight Agreement (NMFA), as referred to in article 3, section 1 of the NMFA, effective April 1, 2013 through March 31, 2018.

(b) Rescind the changes in terms and conditions of employment for its unit employees that were implemented on September 19 and 20, 2017.

(c) Furnish to the Union in a timely manner the information requested by the Union on September 23, 2017.

(d) Post at its Dayton, Ohio facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or

¹¹ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical

posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 19, 2020

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees and International Brotherhood of Teamsters, Local 957 (the Union) and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees in the classifications of work covered by the ABF National Master Freight Agreement (NMFA), as referred to in article 3, section 1 of the NMFA, effective April 1, 2013 through March 31, 2018.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on September 19 and 20, 2017.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 23, 2017.

ABF FREIGHT SYSTEM, INC.

The Board’s decision can be found at www.nlrb.gov/case/09-CA-208379 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Zuzana Murarova, Esq., for the General Counsel.
Mark Theodore, Esq. and *Sophia Alonso, Esq.* (*Proskauer Rose, LLP*), of New York, New York, for the Respondent.
John R. Doll, Esq. (*Doll, Jansen & Fort*), of Dayton, Ohio, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on June 13, 2018, in Cincinnati, Ohio. After the parties rested, I heard oral argument, and on July 27, 2018, issued a

bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A", the portion of the transcript containing this decision.¹²¹ The Remedy, Order, and notice provisions are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. The Respondent must also furnish to the Union, without further delay, the information which the Union requested on about September 23, 2017.

CONCLUSIONS OF LAW

1. The Respondent, ABF Freight System, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Teamsters and its constituent local union, General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Local 957 (the Charging Party), are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times since April 1, 2008, the International Brotherhood of Teamsters has been the exclusive collective bargaining representative, within the meaning of Section 9(a) of the Act, of a unit of the Respondent's employees which is an appropriate unit within the meaning of Section 9(b) of the Act, and has discharged its duties as exclusive bargaining representative through its constituent local union, General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Local 957.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish information which the Charging Party requested, and which was relevant to the Charging Party's performance of its duties as exclusive bargaining representative of an appropriate unit of the Respondent's employees, and which was necessary for that purpose.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in any unfair labor practices alleged in the consolidated complaint not specifically found.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended²

¹ The bench decision appears in uncorrected form at pp. 369 through 386 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these 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.

ORDER

The Respondent, ABF Freight System, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Charging Party with information it has requested which is relevant to the performance of its duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, and which is necessary for that purpose.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in, copies of the attached notice marked "Appendix B."¹³³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2017. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C., August 20, 2018

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the Respondent did not make an unlawful unilateral change when it installed video cameras in employees' break rooms, but that it did violate section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested relevant information necessary for

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Union to perform its duties as exclusive bargaining representative.

Procedural History

This case began on October 23, 2016, when the Charging Party, General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Local 957, a local of the International Brotherhood of Teamsters, filed an unfair labor practice charge alleging that the Respondent, ABF Freight Systems, Inc., had made unlawful unilateral changes in the terms and conditions of employment of bargaining unit employees by installing cameras in the break room/locker room of the Respondent's facility in Dayton, Ohio. The Board's Cincinnati office docketed this charge as Case 09-CA-208379. For brevity, I will refer to the local Union as the Local Union or Local 957 and will refer to the International Brotherhood of Teamsters as the International Union. The Local Union and International Union together will be referred to simply as the Union.

On November 21, 2017, the Union filed an additional unfair labor practice charge against the Respondent. The Board docketed this charge as Case 09-CA-210267. It alleged that the Respondent had failed and refused to furnish the Union with information the Union had requested which was relevant to the performance of the Union's duties as exclusive bargaining representative.

On February 27, 2018, the Regional Director for Region 9 of the Board, acting on behalf of the Board's General Counsel, issued an Order consolidating cases, consolidated complaint and notice of hearing. The Respondent filed a timely answer.

On June 13, 2018, a hearing opened before me in Cincinnati, Ohio. The parties finished presenting evidence on that day and I adjourned the hearing until July 25, 2018, when it resumed by telephone conference call so that counsel could present oral argument. I then adjourned the hearing until today, July 27, 2018, when it resumed again by telephone for issuance of this bench decision.

Admitted Allegations

In its answer, the Respondent admitted many of the allegations raised in the complaint. Based on those admissions, I find that the General Counsel has proven the allegations set forth in Complaint paragraphs 1(a), (b), 2(a), (b), (c), 3, 4, 5, 6(a), (b), 7(a) and (b).

More specifically, I find that the two unfair labor practice charges were filed and served as alleged in the complaint. Additionally, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is appropriate for the Board to exercise its jurisdiction in this matter.

Further, I find that the following individuals are supervisors of the Respondent within the meaning of Section 2(11) of the Act, and agents of the Respondent within the meaning of Section 2(13) of the Act: Terminal Manager Matthew Godfrey; Operations Manager Rick West; Regional Manager of Employee Relations Steve Dusko, and Assistant Terminal Manager Rusty Staab.

Based on the admissions in the Respondent's answer, I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act and that since about April 1, 2008, the

Respondent has recognized the Union as the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of Respondent's employees in a bargaining unit which is an appropriate unit within the meaning of Section 9(b) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from April 1, 2013, through March 31, 2018.

The Respondent has admitted, and I find, that this appropriate bargaining unit consists of "All employees in the classifications of work covered by the ABF National Master Freight Agreement (NMFA), as referred to in article 3, section 1 of the NMFA, effective April 1, 2013, through March 31, 2018."

The complaint alleges, the Respondent has admitted, and I find that between about September 19 and 23, 2017, the Respondent installed video surveillance cameras in the break room/locker room areas of the A, B and C shacks at Respondent's facility

At hearing, the parties stipulated that on September 19, 2017, the Respondent installed a surveillance camera in the Shack B break room, and that on September 20, 2017, it installed surveillance cameras in the Shack A and Shack C break rooms at its Dayton facility. I so find.

The Respondent also has admitted, and I find, that the installation of these video surveillance cameras relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining.

In its answer, the Respondent also has admitted, and I find, that since about September 23, 2017, the Union has requested, in writing, that Respondent furnish the Union with the following information:

A detailed description of when the Company determined to install the cameras and the decision making process in this regard;

Copies of all directives, instructions, guidelines, or rules pertaining to the use of the cameras by security and/or management personnel;

A description of the type of cameras and the fields of view covered by the cameras; and

A description of specific events/activities necessitating the installation of the cameras.

The complaint also alleges, the Respondent has admitted, and I find, that since about September 28, 2017, Respondent, by Steve Dusko, has failed and refused to furnish the Union with this requested information.

Contested Issues

The disputed issues are matters of law rather than of fact. The Respondent has admitted that it installed surveillance cameras in three break rooms at its Dayton facility. It has also admitted that the installation of these cameras was a mandatory subject of bargaining. However, it denies that it thereby violated the Act.

The Respondent likewise has admitted that the Union

requested certain information and that it has not provided this information, but denies it thereby violated the Act. In deciding whether the Respondent acted unlawfully, I first must determine whether the requested information was relevant and necessary for the Union to perform its duties as exclusive bargaining representative.

The Alleged Unilateral Change

When a union is the exclusive bargaining representative of an appropriate unit of employees, their employer has a duty to notify the union and give it a reasonable opportunity to negotiate before making a material, substantial, and significant change in working conditions. The Board has held that installing and using surveillance cameras in the workplace is such a change and, accordingly, an employer violates the Act when it installs such cameras in the workplace without first giving the union the required notice and opportunity to bargain. *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004).

However, under certain limited circumstances, an employer does not violate the Act if it makes a material, substantial and significant change in working conditions even though it did not afford the union advance notice and an opportunity to bargain.

For instance, a union may waive its right to advance notice and bargaining by agreeing to sufficiently specific language in a collective-bargaining agreement. However, the Board will not lightly infer waivers of statutory rights. *Gannett Co.*, 333 NLRB 355 (2001).

An employer also lawfully may make a unilateral change if the employer is following an established past practice and does not alter the status quo. *The Post Tribune Co.*, 337 NLRB 1279 (2002).

In the present case, on September 19 and 20, 2017, the Respondent installed video cameras in three break rooms at its Dayton facility. These break rooms were located in buildings designated Shack A, Shack B, and Shack C. The break rooms in Shack A and Shack B have lockers in which employees can store lunches and various types of clothing, such as boots and cold weather gear. The Union maintains that the break rooms in Shacks A and B also serve as locker rooms where employees change clothes, sometimes taking off everything except underwear. Therefore, it objects to the presence of cameras in those areas. It does not object to the camera in the break room in Shack C because there are no lockers there and employees do not change clothes there.

The Respondent installed the security cameras in September 2017, while the parties' 2013–2018 collective-bargaining agreement was in effect. This agreement doesn't have a management-rights clause, but it does include a provision relating to the use of video cameras. Article 26 of that agreement includes the following provisions:

Section 2. Use of Video Cameras for Discipline and Discharge

The Employer shall not install or use video cameras in areas of the Employer's premises that violate the employee's right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens.

Section 3. Audio, Video and Computer. Tracking Devices

The Employer may use video, still photos derived from video, electronic tracking devices and/or audio evidence to discipline an employee without corroboration by observers if the employee engages in conduct such as dishonesty, theft of time or property, vandalism, or physical violence for which an employee could be discharged without a warning letter. If the information on the video, still photos, electronic tracking devices and/or audio recording is to be utilized for any purpose in support of a disciplinary or discharge action, the Employer must provide the Local Union, prior to the hearing, an opportunity to review the evidence used by the Employer.

This contractual language does not specifically authorize the Respondent to install video cameras, but only states where the Respondent may not do so. It might seem reasonable to infer from the prohibition of cameras in this limited category of locations that the Union has agreed that the Respondent may install them at any other locations on its property. However, the Board will not lightly infer waivers of statutory rights. In *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982), the Board stated:

Where, as here, an employer relies on a purported waiver to establish its freedom unilaterally to change terms and conditions of employment not contained in the contract, the matter at issue must have been fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.

The present record does not establish that the parties fully discussed and consciously explored the issue of placing cameras in break rooms. Therefore, I conclude that a defense based solely on the theory of waiver would fall short.

However, the Respondent does have a past practice of installing video cameras on its property in any places except in bathrooms, or where employees change clothes or give specimens for drug testing. For brevity, I will refer to these locations as "personal privacy spaces." The record leaves no doubt that the Respondent has installed cameras at other places where employees are not expected to be in a state of dishabille, and the Union has not objected. The Local Union's secretary-treasurer and business agent, Dan Webb, testified as follows:

Q. Okay. And so we're all clear here, I just want to make sure I understand it. The Union is not objecting to the installation of cameras in other areas of the facility, correct?

A. No, sir.

Q. Okay. The company wants to focus a camera on where the trucks back into the dock, no problem with that?

A. They have them currently. It's not a problem.

Q. No problem in the exterior areas, right?

A. Other—no—

Q. No problem in any hallways that might exist in the—

A. Just so long as they're not pointed at the locker rooms, it's

not a problem.

Q. And they can install those cameras without talking to you at all, correct? That's your—

A. To your knowledge, yes.

Q. And that would be pursuant to the language, correct?

A. Yes, sir.

Based on this testimony and the record as a whole, I find that the Respondent did have an established past practice, not contested by the Union, of installing cameras anywhere on its premises except the personal privacy spaces. Therefore, whether the Respondent acted lawfully turns on whether the break rooms are personal privacy spaces—where the Respondent specifically has promised not to install cameras. If they are not personal privacy spaces, the Respondent did not deviate from its past practice of installing cameras at its discretion.

The General Counsel's witnesses offered testimony that people do change clothes in the break rooms. However, I am skeptical of that evidence. It is possible that employees sometimes did undress in the break rooms when no one else was around. They did not like to use the restrooms because of the condition of those facilities. The Union had complained to management about the sanitary condition of the restrooms and leaking sinks.

However, employees cannot simply convert an area intended for public use into a personal privacy space without the Respondent's knowledge or approval. The law of adverse possession does not apply, and in any event, I find that instances in which people changed clothes in the break room were infrequent at most, and surreptitious.

Additionally, the break rooms included not merely lockers but also tables where employees ate. People of both sexes often used the break rooms. Windows also allowed people in adjoining offices to view at least some parts of the break rooms.

Moreover, unlike a locker room used by students or athletes to change in and out of uniform, the break rooms had only lockers but no benches on which to sit. Anyone stripping down to underwear would find it quite awkward.

Rather, I conclude that the Respondent intended the break rooms to be used by employees to eat lunch, and to store their possessions in lockers while they worked. Employees certainly would don or doff outerwear, such as cold weather gear and boots, but continued to wear their street clothes. The break rooms did not constitute personal privacy spaces and Respondent's installation of cameras there was consistent with its past practice.

The Information Request

On September 23, 2017, the Union sent the Respondent the information request alleged in the complaint and set forth earlier in this decision. The Respondent's answer admits that it failed and refused to furnish the Union with the requested information. However, it denies the information's relevance.

The Board has held that the installation of security cameras in the workplace constitutes a material, significant, and substantial change in terms and conditions of employment. *Anheuser-Busch, Inc.*, above. It follows that information related to an

employer's decision to install such cameras, and to the operation of those cameras, is relevant to, and necessary for the Union to discharge its duties as exclusive bargaining representative. I so find.

Regional Manager Steve Dusko denied the information request in a letter to Business Agent Webb dated September 28, 2017. It stated, in part, "The company is unable to comply with this request as we believe the information requested is not proper under Article 7, Section 2 of the ABFNMFA."

That portion of the collective-bargaining agreement states that requested information must relate to the specific issues and general time periods involved in the grievance. However, I conclude that the information requested by the Union satisfies this requirement.

Moreover, the duty to furnish information is a statutory duty, not a creation of the collective-bargaining agreement. A union certainly can waive the right to receive such information by an appropriate provision in the contract. However, the Board's rules concerning the waiver of a statutory right apply. The record does not establish that the Union made a clear and unequivocal waiver in this case.

In sum, I conclude that the Respondent did not violate the Act by the unilateral change alleged in complaint paragraph 7, but that it did violate Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested relevant information.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order, and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

During this proceeding, counsel demonstrated the highest standards of professionalism and civility, which are truly appreciated. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to furnish the Union, the International Brotherhood of Teamsters and its constituent local union, General Truck Drivers, Warehousemen, Helpers, Sales and

Service, and Casino Employees, Local 957, International Brotherhood of Teamsters, with information it requests which is relevant to and necessary for the performance of its duties as the exclusive bargaining representative of a unit of our employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with the information it requested pertaining to our installation of video surveillance cameras in certain break rooms in our facilities.

ABF FREIGHT SYSTEM, INC.

The Administrative Law Judge's decision can be found at

www.nlr.gov/case/09-CA-208379 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

