

From: (b) (6), (b) (7)(C)
To: [Hooks, Ronald K.](#); [Pomerantz, Anne](#); [Kobe, James](#); [Little, Janet C.](#); [Morrison, Adam D.](#); [SM-Region 19, Seattle](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#)
Subject: American Medical Response, 19-CA-254983 (case closing email)
Date: Monday, June 29, 2020 9:06:39 AM

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by making unilateral changes to its outside employment policy, contained in its expired contract with the Union, and subsequently discharging an employee under that policy. We concluded initially in a June 11, 2020 email that the Employer's actions were privileged by *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019) based on our understanding that the parties' successor contract containing the policy had been backdated upon ratification and was thus effective on the dates on which the Employer's actions had occurred. However, it is now evident that only the wage provision of that successor agreement was backdated. Therefore, because the Employer's actions occurred after the contract had expired, they could not be contractually privileged by *MV*. See *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 (Apr. 21, 2020).

Nevertheless, upon closer examination, we conclude the Employer's actions were permitted for the following reasons.

Regardless of any asserted contractual right to revoke earlier permission granted to the subject employee to concurrently hold two positions—one for the Employer and one for (b) (6), (b) (7)(C) —the evidence is insufficient to establish application of a past practice that would obligate the Employer to continue to permit it here. The absence of a breach of such a past practice by the Employer is dispositive of the case, compelling dismissal.

Indeed, there is no contractual provision that grants employees the right to work for other employers while holding employment with the Employer. The contractual provision cited by the Employer permitted it to prohibit an employee from *working for a competitor* without written approval and to revoke such approval if the outside employment placed the employee in a conflict of interest.

Significantly, (b) does not provide medical transport services and thus is not a competitor of the Employer, making the contractual provision inapposite. To the extent the Employer has had a practice of permitting employees to hold dual employment, where the other position is for a *non-competitor* as here, such does not serve as the foundation for a violation in this case, where the Employer had a reasonable basis to refuse to continue to allow it based on its own investigation, which revealed a pattern of abusive and inappropriate misconduct. The Employer did not need a practice of revoking such authorizations in order to do so free of liability under Section 8(a)(5); rather, the Union would need to show a practice of continuing to allow dual employment despite the presence of a pattern of serious misconduct. There is no evidence of that kind of practice. As such, the Employer cannot be shown to have breached a past practice by refusing to allow the subject employee to continue to work for the (b)

Thus, *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), where the Board explained that employers may take unilateral action where it is similar in kind and degree to an

established past practice, is inapplicable here. *See Raytheon*, 365 NLR No. 161, slip op. at 1-2, 16. *See also Mike Sell's*, 368 NLRB No. 145, slip op. at 3-5 (December 16, 2019) (employer's unilateral sale of four sales routes to nonemployee independent distributors was consistent with long-standing past practice and did not change status quo). Because the Employer's actions here did not alter the status quo concerning whether and when to authorize outside work for non-competitors, or allow it to continue, it did not violate Section 8(a)(5). The Region should therefore dismiss the charge, absent withdrawal.

This email closes this case in Advice. Please let us know if you have any questions.

Thanks,

(b) (6), (b) (7)(C)

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