The National Labor Relations Board (NLRB) has explained the “past practice” analysis it applies in determining whether a unionized employer’s unilateral actions constitute an unlawful change under the NLRB’s decision in Raytheon Network Centric Systems, 365 NLRB No. 161 (2017). ABF Freight System, Inc., 369 NLRB No. 107 (June 19, 2020).

An employer violates the National Labor Relations Act (NLRA), the NLRB explains, “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.” An employer can defend itself by showing the change was not material, substantial, and significant; that its “actions did not materially vary in kind or degree from the parties’ past practice.”

In ABF, the collective-bargaining agreement between the employer and the union...
that represented the employees contained the following Article 26:

**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.

The employer previously had installed cameras throughout the facility without objection. However, in 2013, the union objected to the employer installing cameras in the break/locker rooms, and the employer removed them.

In 2017, the employer installed cameras in its break/locker rooms without giving the union an opportunity to bargain. In response, the union filed an unfair labor practice charge alleging the failure to bargain on this violated the NLRA. The NLRB’s General Counsel issued an unfair labor practice complaint. After a trial, an Administrative Law Judge (ALJ), focusing on Article 26, Section 2, decided the employer did not violate the NLRA because it had acted in accordance with an established past practice of installing cameras anywhere on its premises, except personal privacy spaces. (The ALJ decided the break/locker rooms were not personal privacy spaces, despite record evidence showing employees changed clothes there.)

The General Counsel appealed to the NLRB and the NLRB reversed the ALJ’s decision. The ALJ relied primarily on Raytheon, and, to a lesser degree, a subsequent decision, Mike-Sell’s Potato Chip Co., 368 NLRB No. 145 (2019). Those decisions provide:

- To determine whether there was an established past practice, the Board will compare the challenged action to the employer’s past actions.

- The party asserting the past practice has the burden of proving employees would reasonably consider the action at issue to be consistent with what it has done in the past.

- A past practice finding does not depend on the language of a collective-bargaining agreement.

- Instead, a past practice analysis simply evaluates whether the employer’s action varied in kind and degree from what had been customary in the past.

Applying those principles, the NLRB rejected the ALJ’s reliance on the contract language to make a past practice determination. It found the installation of the cameras in the break/locker rooms was materially different from the employer’s installations in other parts of its facility. The earlier installations focused on the employees’ work on the employer’s dock, whereas the break/locker rooms installations focused on “the recreational and changing areas.” The NLRB concluded that employees would reasonably consider the change departed from the employer’s past practice. (The NLRB also noted the employer’s aborted 2013 attempt to install cameras in the break/locker rooms.)

Raytheon created leeway for unionized employers to make certain changes without
offering to bargain with the union. ABF provides a guide for employers to determine what changes are sanctioned by Raytheon.

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