UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424

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DEFENSE LOGISTICS AGENCY, .

DEFENSE DISTRIBUTION REGION .

WEST, LATHROP, CALIFORNIA .

.

Respondent .

.

and . Case No. SF-CA-20140

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LABORERS' INTERNATIONAL UNION,.

LOCAL 1276, AFL-CIO .

Charging Party .

.. . .

Stefanie Arthur, Esq.

For the General Counsel

Nancy C. Rusch, Esq.

For the Respondent

Before: ELI NASH, JR.

Administrative Law Judge

DECISION

Statement of Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute). Upon an unfair labor practice charge filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Region, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (5) of the Statute by changing conditions of employment while a question concerning representation (QCR) was pending. Additionally, the Complaint alleged that Respondent violated section 7116(a)(1) of the Statute when a supervisor threatened a union steward for his use of official time.

A hearing on the Complaint was conducted in Stockton, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

1. Respondent was established in June 1990 by the consolidation of several supply distribution functions in the San Francisco area. The Union is the certified exclusive representative of an appropriate unit of employees located at Defense Depot Tracy (herein called Tracy), who were transferred to Respondent's employment in the June 1990 consolidation or reorganization.

2. On March 9, 1991, Respondent filed a Representative Status (RA) petition in Case No. 9-RA-10001 with the San Francisco Regional Director. The QCR which was pending on the date of this hearing, raised a question concerning repre-sentation of Respondent's employees, including those formerly employed by Defense Depot Tracy.

3. John Lane, a forklift operator and warehouse worker has been employed at Tracy since 1983. Since 1983, Lane has been a steward for the Union. At the time of the hearing, Lane worked in Warehouse 17.

4. Prior to December 1991, Lane followed a practice of going to the Union's office at Tracy on a regular basis. He started this practice while working in Warehouse 16 under Supervisor Manual Cabrera and continued to do so after he was transferred to Warehouse 17, sometime in 1990. When he transferred to Warehouse 17, Lane informed his new supervisor, Ron Cook of the practice of going to the union office. Cook allowed Lane to continue his practice of reporting to the union office each day at 11:00 a.m. until the

end of his workday at 2:30 p.m. with certain exceptions. Thus, the steward's logs maintained by Lane and approved by his super-visor reflect that with the exception of one or two days a month or when Lane himself was not at work, he would go to the union office on a daily basis. The occasions when he did not go to the union office daily happened when there was work to be performed or if one of the other employees was on leave.

5. During his daily trips to the union office, Lane performed different representational functions such as answering the telephone, scheduling, interviewing grievants, research and preparing grievance packages for other stewards.

6. Sometime in November 1991, Cabrera became the acting supervisor in Warehouse 17. Lane continued to go to the union office for several weeks after Cabrera's appointment until around December 2, 1991. During the morning of December 2, 1991, sometime after the employee's morning meeting, Cabrera told Lane that his practice of going to the union office each day was going to have to stop. Lane reminded Cabrera that he had been going to the union office regularly for the last two years. Cabrera told him, "If you're not here doing your work . . . that you're hired for, then you're a minimal employee. That's how I'll rate you." Cabrera added, "I don't know how you were appraised but I'm going to look into it." I credit Lane in finding that the conversation occurred as set out above.

7. Several days after their December 2, 1991 conver-sation, Cabrera informed Lane that he would not be able to obtain official time unless he had an appointment. Since that time, Lane had been released only where he had a prior appointment or, on a few occasions, for a short time at the end of the day. Cabrera acknowledged that Lane was allowed to go the union office when the workload allowed or when Lane told him the reason he was going to the union office. This condition differs for the method by which Lane was released prior to December 1991. Although Cabrera was no longer the acting supervisor in Warehouse 17, the change implemented by him was extant at the time of the hearing.

Conclusions

The initial question in this case is whether Respondent violated section 7116(a)(1) and (5) of the Statute by changing conditions of employment during the pendency of a QCR that was not necessary for the functioning of the agency. U.S. Depart-ment of Justice, Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir. 1984).

The General Counsel argues that a longstanding practice concerning the manner in which the steward was released on official time existed. U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 36 FLRA 567, 571 (1990). The record in this case clearly shows that over several years steward Lane went to the union office from 11:00 a.m. to 2:30 p.m. each day to perform general representational functions on approved official time. Even if no QCR existed, a change in this practice, which was done with the knowledge and approval of Lane's supervisor and, therefore may have ripened into a condition of employment, which would require bargaining before the change. Since a QCR did exist, Respondent could make this change only if it could show that the change was necessary for the effective functioning of the agency. In my view, Respondent failed to make that showing.

Respondent claims that "Desert Storm" increased its workload requiring adjustments in the manner in which steward Lane was released. Thus, Respondent does not deny that a new condition was placed on Lane's ability to be released to perform representational functions which he had been performing for almost two years. The General Counsel believes that even if there was an increase in workload, Respondent did not provide a basis for finding that the steward's release for a few hours each day was essential to the agency's performance of its mission. Therefore, permitting Lane to go on official time only when he had a prescheduled appointment certainly constituted a change from the manner in which he received official time in the past.

Respondent insists that no change occurred in the matter and that the steward in question had been permitted release for representational activities, if the workload allowed. This position does not address the total change in procedure, for here Lane was not only prevented from going to the union office when the workload warranted, but in addition he could receive official time only when he had a prescheduled appointment. No such restriction existed prior to Cabrera's becoming Lane's supervisor. According to Respondent, an increased workload since "Desert Storm" required the steward's presence to perform his stowing and rewarehousing functions. Thus, the manner in which the steward was released was not changed, only the workload. It is found that Lane, in his tenure as a steward in Warehouse 17 was never required prior to November 1991 to have a prescheduled appointment in order to be released by his supervisor on official time. While it is true that there were some situations when the workload or other reasons required Lane to forego his daily visits to the union office, he was never required to show any particular reason or to explain why he was going to the union office. The condition for release placed on Lane in early December 1991, despite Respondent's argument to the contrary constituted a change in conditions of employment.

Notwithstanding the alleged increased workload due to "Desert Storm" the undersigned agrees with the General Counsel that the change in the steward's official time procedures during the pendency of a QCR violated the Statute. Since the Authority has a duty to preserve the integrity of elections, the theory behind a freeze on unessential changes makes sense. Permitting unnecessary changes in conditions of employment during the pendency of agency sought elections provides an open invitation for the agency to then interfere with its employees' rights to a free and untrammeled election, which after all, is the objective of the RA petition. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, 489, FLRC No. 74A-52 (1976). For this reason, there is a requirement that an agency maintain conditions of employment to the maximum extent possible during necessary functioning of the agency.

In this case, Respondent failed to prove by a preponderance of the evidence that changing the manner in which steward Lane was permitted to use official time prior to the QCR was consistent with the necessary functioning of the agency. As the General Counsel astutely points out, "Desert Storm" commenced in January 1991 and the buildup for the conflict started sometime around August 1990. During that entire period, until Cabrera began acting as Lane's supervisor in Warehouse 17, in late 1991, Lane continued to going to the union office on a daily basis to perform a variety of repre-sentational functions. In these circumstances, Respondent is hard pressed to answer, why if during the build up period for "Desert Storm" and for the months during which the conflict lasted, Lane was permitted to continue to go to the union office on a daily basis to perform assorted tasks without being considered necessary to the functioning of the agency. Then, suddenly when he has a new supervisor, there is an increase in workload making his presence for the entire day necessary. Additionally, Respondent neglected to show by documentation or corroboration that an actual increase in workload requiring Lane's continued presence in the work area, in fact did exist. Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891 (1990). A generalized concern by Cabrera, that Lane could not be released unless he had some-thing specific to attend to, does not replace Respondent's

responsibility to establish that Lane's presence was necessary for the functioning of the agency. Nor is it a substitute for its responsibility to accommodate the representational role of this steward. See, Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 761 (1985), 806 F.2d 283 (D.C. Cir. 1986). Cabrera's anxiety has less effect when it was revealed that there were approximately 18 other employees able to perform the work for which Lane was employed. Furthermore, there is no showing that Lane had any particular skill which could not be performed by any of these other employees. Finally, Respondent failed to show that Lane's presence for the few hours a day he spent in the union office was essential to the agency's performance of its mission. It is found, therefore, that permitting Lane to leave on union business only when he had a prescheduled appointment constitutes a change in the practice he had engaged in for several years. In making such a change in conditions of employment while it had an RA petition which raised a QCR, Respondent violated the Statute.

Accordingly, it is found that Respondent, by changing a condition of employment during the pendency of a question concerning representation, violated section 7116(a)(1) and (5) of the Statute.

Regarding the conversation of December 2, 1991, when Cabrera told Lane that his practice of going to the union office was going to have to stop. After Lane reminded him that he had been regularly going to the union office for the last two years, Cabrera rejoined, "if you're not here doing your work . . . that you're hired for, then you're a minimal employee. That's how I'll rate you." Cabrera added. "I don't know how you were appraised but I'm going to look into it."

The test applied to statements such as the above, is whether under the circumstances, the statement tends to coerce or intimidate employees in the exercise of section 7102 rights under the Statute, or whether employees could reasonably draw a coercive inference therefrom. U.S. Department of Agricul-ture, Forest Service, Chattahoochee-Oconee National Forest, Gainesville, Georgia, 45 FLRA 1310 (1992); Ogden, supra.

No reasonable employee would ignore Cabrera's message to Lane. Being told that one is a minimal employee because one has engaged in representational activities on approved official time is not a typical message one would expect from his or her supervisor. Such a message would intimidate the average employee, in my view, since it carries with it the clear implication that the employee is being perceived differently because he is away from work, albeit in an approved status. Besides, the employee must now think twice about making requests for official time since the supervisor has indicated that these approved absences might go into his evaluation of the employee and result in a lowered performance appraisal.

In finding that the above statement was violative of section 7116(a)(1) of the Statute, the undersigned rejects Respondent's claims that the statement was made in a "less formal setting" or that the statement did not influence the favorable rating later given to Lane by Cabrera. Finally, Respondent's argument that Cabrera "was only attempting to inform [Lane] that he was not able to perform two critical elements and to ask him to stay at his work site if possible", is also rejected. Ogden, supra, teaches that where threats such as alleged in this case are considered, not only is it unnecessary to find union animus, but also the intent of the employer is not a controlling factor. If intent was the dominant influence here, Respondent's continued refusal to allow Lane official time other than for prescheduled appointments, certainly, in my opinion, runs counter to its argument that Cabrera's action was done out of concern for Lane's not meeting his critical elements.

Accordingly, it is found that the statement made to Lane because of his use of approved official time is

found to interfere with, restrain and coerce Lane in the exercise of rights guaranteed by section 7102 and in violation of section 7116(a)(1) of the Statute.

Having found that Respondent violated section 7116(a)(1) and (5) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Defense Distribution Region West, Lathrop, California, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions of employees in the unit represented by Laborers' International Union, Local 1276 while a question concerning representation exists by establishing a rule whereby a Laborers' International Union steward is no longer allowed to report to the union office in the afternoon on a regular basis and is only permitted to report to the union office in connection with scheduled appointments.

(b) Making statements to employees which interfere with, coerce or discourage any employee from exercising rights guaranteed by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely without fear of penalty or reprisal.

(c) In any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute.

(a) Rescind the rule whereby Laborers' Interna-tional Union steward John Lane is permitted to report to the union office only in connection with scheduled appointments and reinstate the previous practice whereby Lane was allowed to report on a daily basis to the union office from 11:00 a.m. to 2:30 p.m.

(b) Post at its facilities at Defense Distribution Region West, Lathrop, California copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Directorate of Distribution and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, June 11, 1993.

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in working conditions of employees in the unit represented by Laborers' International Union, Local 1276 while a question concerning representation exists by establishing a rule whereby a Laborers' International Union steward is no longer permitted to report to the union office in the afternoon on a regular basis and is only allowed to report to the union office in connection with scheduled appointments.

WE WILL NOT make statements to employees which interfere with, coerce or discourage any employee from exercising rights guaranteed by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely without fear of penalty or reprisal.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the rule whereby Laborers' International Union steward John Lane is permitted to report to the union office only in connection with scheduled appointments and reinstate the previous practice whereby Lane was permitted to report on a daily basis to the union office from 11:00 a.m. to 2:30 p.m.

_____

(Activity)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.