UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEFENSE DISTRIBUTION REGION WEST TRACY, CALIFORNIA Respondent	
and	Case No. 9-CA-10183
LABORERS' INTERNATIONAL UNION, LOCAL 1276, AFL-CIO Charging Party	

Gary L. Lieberman and R. Timothy Sheils, Esquires
For the General Counsel

Nancy C. Rusch, Esquire
For the Respondent

Marlin Tolbert, Business Manager
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

A condition of employment may be established through past practice if that practice is consistently exercised over a significant period of time. It may have been exercised by both parties or by one party with the other's acquiescence. In this case, the main issue is whether a consistent practice by employees of the Respondent of eating and drinking at their worksites had existed, unchallenged, for a sufficient time to establish it as a condition of employment. The General Counsel alleges that, by implementing a rule prohibiting such eating and drinking, without negotiating with the Charging Party (the Union), the Respondent made a unilateral change in a condition of employment in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).

A hearing was held in San Francisco, California, on July 15, 1991. Counsel for the General Counsel and for the Respondent filed post-hearing briefs. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

Findings of Fact

The Respondent, Defense Distribution Region West (DDRW) is an organizational entity within the Defense Logistics Agency (DLA). It was created in 1990 by consolidating several organizational units of DLA including the Defense Depot, Tracy, California. Before that consolidation, the Union had been recognized for many years as the exclusive representative of a unit of the Defense Depot's employees. Since the consolidation, DDRW has acknowledged the Union as continuing in its status as exclusive representative of the employees in the preexisting Defense Depot bargaining unit.

The Defense Depot has a number of warehouses where employees work. The General Counsel's case, in its broadest sweep, would have me credit the testimony of Marlin Tolbert that for the 20 years in which he has been the Union's business manager, there was never, until the unilateral change alleged here was implemented, any restriction on employees' right to eat and drink at any work area in the Depot. I am unable to accept Tolbert's broad assertion. Tolbert may well have testified truthfully to the extent of his knowledge, but not every restriction necessarily came to his attention. Based on credible and, in some cases, uncontroverted testimony of witnesses for DDRW, it appears that there were such restrictions at various relevant times in at least some of the work areas. On the other hand, as will be discussed more fully below, there is no credible evidence that during the relevant period there was a general policy restricting eating and drinking at work areas throughout the Depot. It will be necessary, therefore, to examine the evidence presented concerning each of the work areas about which the record provides any pertinent information.

The record refers to warehouses numbered 1, 29, and most but not all numbers in between. Warehouses numbered 1-22, 26, 28, and 29 are mentioned specifically. (No more than casual reference is made to any work area that is not a numbered warehouse.) The record does not reveal whether there are warehouses in operation numbered 23, 24, 25, 27, or higher than 29. In any event, having rejected the

General Counsel's broad assertion, my findings will be based on evidence concerning specific warehouses.

Having said that, it turns out that some of the best evidence concerning specific warehouses is indirect, derived from the larger picture. The events leading up to this case will make it easier to focus on the larger picture and thus set a suitable framework for delineating and analyzing the background details.

In May 1989 Colonel James Morris, Director of the Directorate of Distribution and evidently in some sort of commanding position with respect to the Depot, issued a memorandum to "All DOD Supervisors." The memorandum was entitled, "DOD Bullet #4-89, Depot Policy for Food and Beverages at Work Stations."1/ Excluding those parts least pertinent to this case, Bullet #4-89 reads as follows:

> 1. This . . . serves to reconfirm a long-standing Depot policy to not allow food and beverages at work stations in industrial areas. . . . We also have specified storage areas where food products are stored. Because of this, for security purposes, food and beverages have been restricted from work stations. . . .
>
> 2. For the reasons cited above, each supervisor should explain this policy to their [sic] subordinate employees. . . .

("Industrial areas" apparently included warehouses where various types of equipment were stored. The record refers to areas where food was stored as "subsistence warehouses.")

Some employees in work areas where the asserted policy evidently had not been in force at least for some period before the colonel's Bullet complained to Tolbert that a new policy had been implemented. Tolbert contacted Carol Shaffer, the Depot's Labor Relations Officer, to see if he could find out what was going on. Shaffer was not then aware of the policy, but she obtained a copy of the Bullet and gave it to Tolbert.

1/ The term, "bullet," for bulletin or memorandum, is apparently a neologism invented by someone in the Department of Defense.

Tolbert wrote a letter to Shaffer on June 7, 1989, asking for information about the statement in Bullet #4-89 that there was a longstanding policy not to allow food and beverages. This letter questioned the "common sense" of implementing such a policy and reminded Shaffer of a section in the parties' collective bargaining agreement calling for notification of the Union in writing prior to implementing changes.

Shaffer queried Col. Morris, probably sometime in June, and learned from him that he had "canceled the Bullet." Shaffer so informed Tolbert, but, according to her testimony, also told him that the restrictions set forth in the Bullet only reconfirmed longstanding policy. According to Tolbert, however, he met with both Shaffer and Morris, at least once, either in late June or early July. Morris told Tolbert that his Chief of the Distribution Management Division, Larry Plumb, had drafted the Bullet, and that Morris, who had been at the Depot for only a year, had accepted Plumb's representation as to the history of the policy. Since management could not provide any evidence to support the existence of a longstanding policy (still according to Tolbert), Morris "agreed to withdraw the policy" and to notify the supervisors. Tolbert and Morris discussed certain warehouses where implementation of a restriction might be appropriate. Morris said he would follow up with a proposal to the Union, through Shaffer.

Tolbert wrote to Shaffer again on August 16, 1989, listing three letters, including his June 7 letter about food and beverage restrictions, to which he had not received a response. Shaffer responded on August 21, stating the following with respect to the June 7 letter:

> After speaking with Colonel Morris, I informed you that DOD #4-89 had already been cancelled. Colonel Morris was considering composing a policy statement, and any such directive affecting your bargaining unit would be provided to you for comment prior to implementation in accordance with our Negotiated Agreement. As I have told you several times since that conversation, no such policy statement has been prepared.

Shaffer's August 21 letter seems to confirm the essentials of Tolbert's version of the previous conversations. At the same time, however, the fact that Tolbert found it necessary on August 16 to renew his request

for information about the May policy statement lends some credence to Shaffer's testimony that she consistently conveyed to him management's position that, despite the lack of any documentation, the restrictive policy was one of long standing. But notwithstanding what Shaffer testified she told Tolbert, I find that Tolbert legitimately emerged with the understanding that, with the cancellation of the Bullet, the restrictive policy it contained would not be enforced.

Strangely, however, the Bullet itself was not officially rescinded, and the record is less than clear as to what instructions Morris gave following its supposed cancellation. Emblematic of the confusion that resulted is an answer given at the hearing by Supervisor James Rinaldo. Asked what he understood after being told informally that the Bullet had been rescinded but that the restriction remained in effect, Rinaldo said:

> I got a message that it seems like no one knew which way they wanted to go with this, to me, that they didn't--they wouldn't tell us to go ahead and tell the people not to eat and drink, but no one wanted to put out something in writing say[ing] that we shouldn't. That's the message I got.

This state of affairs may help to explain the fact that the Union did not learn for a whole year after Shaffer's August 21, 1989, letter that the restriction was still, or was again, being enforced. That came about in September 1990, when a supervisor in Warehouse 14 read from the May 1989 Bullet to employees at a meeting and presented its contents as binding policy. Some employees informed Tolbert.

Tolbert inquired and was directed to Larry Plumb, the management official who had drafted the Bullet for Col. Morris. It was then that Plumb informed Tolbert that the Bullet was still "[on] the books." (Plumb himself was unaware that Morris had told Tolbert that he had canceled it.) Tolbert then sought clarification from Labor Relations Officer Carol Maier, nee Shaffer, with whom he had communicated in 1989. Maier talked to Warehouse 14 supervisors, who confirmed the meeting with employees but told her that the policy was a preexisting one. Maier so informed Tolbert. Tolbert complained to Maier that she had not informed him previously that there was such substantiation for the claim that the policy was one of long standing. Tolbert prepared an unfair labor practice (ULP) charge and presented it to Maier in advance of filing it.

On October 1, 1991, Tolbert met with Maier and Civilian Personnel Officer A. Brewer, who persuaded him to hold the ULP charge temporarily. Tolbert testified that he agreed to hold it because of Maier's confirmation that the policy embodied in the Bullet had been rescinded. However, I credit Maier's testimony that the hold was to give her the opportunity of putting a food and beverage policy into writing and providing Tolbert with it by October 31. This Maier did, and the letter she sent him on that date is central to the resolution of this case.

The relevant part of the letter was drafted by Larry Plumb, the author of the May 1989 Bullet. He had actually drafted this language as part of a new bullet he had prepared for Col. Morris' signature after learning that Morris had, or thought he had, rescinded the May 1989 one. The new bullet was to be a modification of the other. Morris never signed it, but Plumb provided it to Maier for her use. Here is the pertinent section, as Maier presented it to Tolbert on October 31:

> As in the past, employees can eat/drink at their workstations with only a few exceptions, listed below:
>
> Warehouse 29 (DICOMSS)
> Warehouse 1 (Subsistence)
> Warehouse 4 (Subsistence)
> Warehouse 28 (Flammable Storage)
> Warehouse 26 (Recoop Area)
> Warehouse 19-3 (Vault)
> Warehouse 21 (Medical Storage)
> Bin Storage Areas (All)
>
> The above areas were excepted due to the commodities stored, sensitivity of material[,] or due to recoop work being performed.
>
> For definition purposes, a work station is defined as a stationary work area which does not include motor vehicle, MHE, or movable section/inspection carts. This policy also applies to lunch and break periods. For clarification, eating and drinking at workstations will only be permitted during lunch or break periods. . . .

Tolbert was not satisfied with the restated policy. He filed the ULP charge initiating this case. In his view, as

stated at the hearing, the October 31 policy statement was virtually the same as the one Col. Morris had issued earlier. As to the work stations listed as "exceptions," Tolbert testified that they included more than those he had discussed with Morris in June or July 1989. He objected to the limitation to lunch and break periods and to the prohibition of eating and drinking on MHE (material handling equipment)--that is--forklifts, which restrictions he claimed to be contrary to past practice.

The record evidence with respect to the past practice ranges all over the lot, so to speak. The October 31 letter, however, narrows the inquiry because, in my view and contrary to certain testimony of DDRW's witnesses, it acknowledges a past practice of permitting eating and drinking in most warehouses, at least at stationary work stations and during lunch and break periods. (I credit the testimony of those DDRW supervisors who said that they had occasion to stop employees from eating or drinking in those areas. But in light of the letter's acknowledgement of a practice to the contrary, and credited testimony of employees, I find that such instances do not establish a broad restrictive policy during the the pre-1989 period to which the letter refers in the phrase, "in the past.") Thus I disagree with Tolbert's assessment that the October 31 statement was no different from the May 1989 policy. In fact, the acknowledgement of a practice permitting food and drink within certain limits applies even to Warehouse 14, the birthplace of this case.

As stated earlier, I reject the testimony submitted by each side as to a uniform past practice. Using the partial admission in the October 31 letter as a starting point, an examination of the remaining areas of factual dispute is now somewhat more manageable. Aside from Tolbert's rejected broad assertion, there was no testimony to the effect that there was a permissive practice in any of the areas listed as "exceptions" in the October 31 letter. As to those areas, therefore, there is simply a failure of reliable proof on the General Counsel's part. In the remaining warehouse areas, a dispute remains as to the prohibition of eating and drinking on forklifts and the limitation of permission to lunch and break periods.

Warehouses 2, 3, 5-9

Employee Harold Atkins worked in a position where, at least on weekends, he was regularly in each of these warehouses during a period of between two and four years in the mid-1980s. Employee James Cuizon has worked in

Warehouse 6 since 1987 or 1988 and previously worked in Warehouse 8 for two years in the early 1980s. Earlier, he had worked in Warehouses 2 and 3 for four years.

Adkins and Cuizon testified that there were no time or space restrictions on eating or drinking in these warehouses when they worked there: that employees ate and drank freely in the presence of supervisors. Adkins' opportunity to observe the practices in most of these warehouses was limited. He apparently was assigned to Warehouse 6 and had occasion to be in the other warehouses on weekends. Cuizon provided strong and credible corroboration as to Warehouse 6. His corroboration as to Warehouse 8 was also credible but somewhat less probative because it related to a period several years removed from the most relevant period--the late 1980s. His credible testimony concerning Warehouses 2 and 3 goes to an even more remote earlier period.

Branch Chief Tony Vaca, with current responsibility for Warehouses 1-6 and 11, testified that he has never allowed food or drink in work areas. Aside from the fact that as to Warehouses 2, 3, 5, and 6, his general statement goes against the admission in the October 31 letter, Vaca had been in the branch chief position only since late 1990 and previously had been an assistant branch chief in another part of the Depot where he had no responsibility for these warehouses. Although Vaca had worked at the Depot for over 26 years, his contact with Warehouses 1-6 prior to late 1990 appears to have been limited to whatever contact arose from him having the secondary job of weekend coordinator for the entire depot. His principle work location was not on the warehouse floors. His opportunity to observe, therefore, was more limited than that of Atkins, who at least worked on the warehouse floors.

Supervisor James Rinaldo was a supervisor in Warehouse 2 for about a year and Warehouse 6 for about 2 years. He testified that in all his experience at the Depot, since 1971, eating and drinking at work stations were not permitted. The record does not show, however, when Rinaldo last had any contact with Warehouses 2 or 6.

Supervisor Ronald Beatty had supervised employee Cuizon when Beatty was a supervisor in Warehouses 7 and 8 in the early 1980's. He contradicted Cuizon to the extent of testifying that he never "allow[ed]" Cuizon to eat or drink and that he "told everybody [in Warehouses 7 and 8] no food in the warehouse."

I find that the credible evidence that there were no restrictions outweighs the evidence that there were as to each of these warehouses except Warehouse 7. As to Warehouse 6, the testimony of Adkins and Cuizon overwhelms that of Vaca, who had little if any firsthand knowledge concerning the relevant period, and of Rinaldo, who was not shown to have any knowledge concerning the relevant period. Vaca's and Rinaldo's assertions encompass all eating and drinking in the warehouse. To the extent that they are able to address the relevant period they are partly at odds with the October 31 letter.

As to Warehouses 2 and 3, Atkins' ability to report accurately about the mid-1980's was limited, but his testimony receives a little support, at least through the inference of a continuing pattern of behavior, from Cuizon's observations concerning a four-year period that was even earlier. The combined probative weight of their testimony overbalances the testimony of Vaca and Rinaldo, which suffers from the same problems as their testimony about Warehouse 6.

The evidence concerning Warehouse 5 pits Atkins against Vaca, one-on-one. Here, again, Atkins seems in a slightly better position to know what actually occurred, and is credited. Atkins' testimony covered Warehouse 9 also. In the absence of any evidence controverting his testimony about that warehouse specifically, I credit him and find that there were no food or drink restrictions there.

Warehouse 8 presents a slightly different but essentially similar situation. Atkins' testimony, which goes to the practice in Warehouse 8 in the mid-1980s, is not directly contradicted. (Testimony by employee Cuizon and conflicting testimony by Supervisor Beatty describes their respective versions of the situation that obtained in Warehouse 8 in the early 1980s.) I continue to find Atkins to be credible and to have at least some opportunity to observe the practices during an extended period reasonably close to the time with which this case concerns itself. In the absence of credible evidence that the practices in these warehouses changed after the period that Atkins describes but before the alleged unilateral change, I find it proper to presume a continuation of these restriction-free practices throughout the relevant period.

As to Warehouse 7, there is no evidence, save Tolbert's rejected blanket assertion, to support the General Counsel's position that the practice was to allow food and drink

without the restrictions set forth in the October 31 letter. The only record evidence addressing Warehouse 7 specifically is Supervisor Beatty's testimony, contradicted only obliquely if at all by Cuizon, that he told everybody in Warehouses 7 and 8, about eight years previously, not to have food in the warehouse. There is no basis for finding that Warehouse 7 was restriction free.

Warehouses 10-15

Employee Reggie Bickford worked in Warehouse 10 for about three years in the mid-1980s and, since then, has worked in Warehouse 12. Harold Atkins moved from the position described above to one in Warehouse 11 sometime between 1986 and 1988 and has worked there since then. Employee Ricky Boswell worked in Warehouse 12 for about a year and a half in the mid-1980s. He moved to Warehouse 13, where he worked until August 1990 and then transferred to Warehouse 14. James Cuizon also worked in Warehouse 13 for about three years in the mid-1980s before moving to Warehouse 6. Employee Robert Tankersley worked in Warehouse 14 for about seven years ending in 1986. No employee witnesses had worked in Warehouse 15.

Supervisory witnesses Vaca, Beatty, and Rinaldo also testified about one or more of these warehouses. Vaca, before becoming a branch chief in late 1990, had been an assistant branch chief with jurisdiction that included Warehouses 12-14 for about a year. Rinaldo was once a supervisor in Warehouse 11 for about six months, in Warehouse 15 for about a month an a half, and had been a supervisor in Warehouse 14 for about three years at the date of the hearing--July 1991. Beatty had been a supervisor in Warehouse 13 during approximately the same period. Before that he supervised in Warehouse 14 for a period that may have been interrupted but extended backward for a year or more.

Bickford testified without contradiction that when he worked in Warehouse 10, there were no time or space restrictions on eating or drinking. This testimony was credible. It covered a substantial period of time, ending no earlier than the middle of 1987. In the absence of evidence that the practice changed before the time of the unilateral change alleged here, I find that during the relevant period there were, similarly, no restrictions. Atkins, having been assigned exclusively to Warehouse 11 a year or more before the alleged unilateral change, was eminently qualified to testify about the practice there. He

testified unequivocally that the practice was to permit food and drink at any time and anywhere in the warehouse, including forklifts. Vaca and Rinaldo testified that in Warehouse 11, as in other warehouses they were familiar with, no eating or drinking was permitted. Just as was the case with respect to Warehouses 2, 3, and 6, however, their opportunity to observe within the relevant period was not proved. Moreover, to the extent that their testimony relates to the relevant period, it asserts a broader restriction than that set forth in the October 31 letter. I credit Atkins.

Bickford, who was in a position to know, testified that in Warehouse 12 employees ate and drank freely, in the presence of supervisors, at least from the time he arrived there (three or four years before the July 1991 hearing) until a year and a half to two years before the hearing. This practice applied to Warehouse 12 forklifts. Boswell testified similarly about his one and a half year stint in the mid-1980s, except that he did not mention forklifts specifically. He also testified that no restrictions were placed on snacking even when higher lever supervisors came into the warehouse. Vaca's previously noted testimony about never permitting food or drink included Warehouses 12-14. His pre-1990 exposure to these warehouses, however, appears to have been limited to his responsibilities as weekend coordinator for the entire depot. In that role, he had less opportunity to observe Warehouse 12 than the Bickford and Boswell, whom I credit.

Concerning Warehouse 13, Boswell testified that in the six years he worked there as a packer there were no restrictions until 1989 (presumably when Col. Morris' Bullet was issued). Cuizon testified similarly as to his three years there in the mid-1980s and specifically noted the use of masking tape to prevent mugs from falling from forklifts. Supervisor Beatty arguably contradicted Boswell, stating that he caught Boswell eating or drinking several times and made him stop. I credit Beatty as to these incidents, but since they were not placed in any time-frame, they could just as well have occurred after the May 1989 Bullet as before and thus are not necessarily inconsistent with Boswell's testimony. Beatty also testified that he prohibited food and drink generally, except water. Eating and drinking while operating a forklift was "an absolute no-no."

Beatty may not have been the only supervisor in Warehouse 13 during his tenure there, which appears to have

begun no later than some time in 1988. I find that during his tenure there was not a consistent practice of either permitting or prohibiting food and drink on forklifts, the sense of his testimony being that he prohibited even water there. In addition, I credit Beatty at least to the extent that he, as an individual supervisor (though perhaps without great consistency), prohibited non-breaktime snacking even before the Morris Bullet. I credit him to this extent despite the fact that the broader sense of his testimony places it partly in conflict with the October 31 letter--a discrepancy which I am unable to reconcile to my own satisfaction--and despite Boswell's credited testimony that no restrictions were placed even when higher level supervisors came in, as they did regularly in Warehouse 13.

The evidence concerning Warehouse 14 is just as complex. Employee Tankersley testified convincingly that during his seven years there, which ended in 1986, food and drink was permitted on forklifts, at any time, even when the the forklift was moving, but only when the forklift driver had a free hand--that is--was not holding "tickets" for selecting material in one hand. All other unit employees were also permitted to eat and drink without restriction as to place or time. Boswell, who began working in Warehouse 14 only in August 1990, was able to give only hearsay testimony to the effect that employees told him that "they used to have food and drink out there any time they wanted." Boswell was able to testify firsthand, and through the reports of supervisors, that the practice in late 1990 was mixed. (Bullet author Larry Plumb also so testified.)

Supervisor Beatty left Warehouse 14 when he moved to 13, presumably in 1988 as noted above. His testimony, consistent with what he said about 13, was that he had prohibited food and drink generally. He believed that he might have "caught" Tankersley once, but he was not sure. (Tankersley was a forklift driver, and might, consistent with his own testimony, have been "caught" eating or drinking while the forklift was moving and he was holding a "ticket" in one hand). Branch Chief Vaca's broad assertions about pre-1990 restrictions in warehouses and on forklifts generally applied to Warehouse 14 but has limited probative value as discussed under Warehouse 12.

Lacking <u>any</u> reliable guide to the practice in Warehouse 14 between Beatty's 1988 departure and Boswell's arrival in August 1990, I credit Beatty in relevant part as to his own practice in 1988 and perhaps somewhat earlier. He overlapped with Tankersley for some period, but was able to

testify about a substantial stretch of time after Tankersley left that warehouse. Moreover, the consensus of evidence is that even after the alleged unilateral change the practice among different supervisors was mixed, thus suggesting that Warehouse 14 may be large enough to accommodate such diversity. I find that at least from sometime in 1988 forward, there was no consistent pattern of permitting food and drink during throughout the work shift and on forklifts.

Warehouse 15 presents another situation where, as with Warehouse 7, there was no specific affirmative evidence about a broad permissive policy. Lacking that, I make no such finding. In summary of this subsection, I find that a practice of permitting food and drink without restriction existed in Warehouses 10-12 but did not in 13-15.

Warehouses 16-22, 26, 28, 29

Employee Lorenzo Andrade worked in Warehouse 16 for about three or four years, until January 1989, and in Warehouse 22 since then. He testified that in neither of these warehouses were there any restrictions until, in the fall of 1989, a broad restriction was put into effect in Warehouse 22. Previously he had eaten and drunk in front of supervisors in both warehouses. Employee Tankersley has worked in Warehouse 16 since 1986. He was not asked directly what the practice was between 1986 and 1990, but he testified that a new supervisor came on board around January 1991 and, within a week or so, announced that "he no longer wanted anybody to eat or drink on the forklift." However, later the same day, the supervisor rescinded that rule "until such time as something is worked out." Since then, Tankersley has been allowed to snack outside of break times in Warehouse 16, but was unable to testify specifically about forklifts. I take his testimony as a whole as generally supporting Andrade's.

There was no testimony to the contrary regarding Warehouses 16 or, except from Supervisor Rinaldo, regarding Warehouse 22. Rinaldo left Warehouse 22 around 1987 after being there "on and off" for two years. He was in general a highly credible witness. However, even taking his testimony at face value, I credit Andrade concerning the more recent period in Warehouse 22 and with respect to Warehouse 16.

Concerning the remaining warehouses in this subsection, which exhausts those that the record mentions at all, there is affirmative evidence only with respect to Warehouse 18. It is of limited value because its source, employee Boswell,

last worked in Warehouse 18 about six years before the hearing, or approximately in 1985. However, the practice in 1985 may reasonably be presumed to have continued into the late 1980s in the absence of reliable evidence that it changed. Boswell was generally a credible witness, and I have no reason to fail to credit his testimony, undisputed with regard specifically to Warehouse 18, that there were no restrictions on snacking during work hours. No mention was made of forklifts, and I can only infer that the absence of restrictions applied to forklifts in Warehouse 18 if there were any.

This leaves Warehouses 17, 19-21, 26, 28, and 29. As noted earlier, there is no evidence that warehouses 23-25, 27, or any warehouses numbered higher than 29 were in operation at any time mentioned in the record. The same must be said of any part of Warehouse 19 except for section 3 of that warehouse, sometimes called the vault. As for Warehouses 17 and 20, there was no specific affirmative evidence of a nonrestrictive policy. Warehouses 19 (section 3), 21, 26, 28, and 29, are specifically excepted in the October 31 letter from the areas in which there was a practice of permitting eating and drinking during lunch and break periods but not on forklifts. There is, thus, no evidence of a change with respect to any of the warehouses mentioned in this paragraph.

Summary

I have found that before Col. Morris issued the May 1989 Bullet, a practice had existed in Warehouses 2, 3, 5, 6, 8, 9-12, 16, and 18, in which food and drink were permitted without restriction as to time and place. This practice existed for upwards of a year in each of these warehouses and in some cases continued for some time after the Bullet was issued. In each of the other operating warehouses not among the "few exceptions" listed in the October 31 letter, there had been a practice of permitting food and drink at stationary work stations during lunch and break periods. I find that the October 31 letter constitutes some evidence of this. To the extent that the contents of the letter support DDRW's position, it is hearsay, but it has not been effectively contradicted except with respect to the warehouses specified earlier in this paragraph. It remains the most reliable evidence regarding the practice that existed, for any extended period immediately preceding the May 1989 Bullet, in Warehouses 7, 15, 17, and 20. Concerning Warehouses 13 and 14, the October 31 letter remains the most reliable evidence with respect to

stationary work stations during lunch and break periods. With respect to other times and places in Warehouses 13 and 14, I have found that there was no consistent practice. Finally, the October 31 letter stands uncontradicted (except by the Tolbert's unreliable broad assertion) concerning the preexisting total prohibition of food in drink in Warehouses 1, 4, 19 (section 3), 21, 28, 29, and all bin storage areas.

Analysis and Conclusions

A. Section 7118(a)(4) Defense

DDRW contends that the complaint is barred by Section 7118(a)(4) of the Statute, which prohibits the issuance of any complaint based on an alleged unfair labor practice which occurred more than six months before the filing of the charge with the Authority. The basis of this contention is that the change in policy, if any (which DDRW denies), occurred in May 1989 when Col. Morris issued the Bullet. The ULP charge was filed on January 22, 1991, following Maier's October 31, 1990, letter and the discussions that surrounded it.

Part (B) of Section 7118(a)(4) provides that the General Counsel may issue a complaint based on a charge filed within six months of the discovery of an alleged unfair practice, upon a finding that an earlier filing was prevented by the respondent's failure to perform a duty owed to the person filing the charge or by any concealment which prevented discovery during the 6-month period. I find that, to the extent that Section 7118(a)(4) might otherwise bar this complaint, there was, in effect, such a concealment.

Tolbert left his June-July 1989 meeting(s) with Morris and Shaffer with the legitimate impression that the May 1989 Bullet had been canceled. There is no dispute that Morris had intended to cancel it and that he and Shaffer so informed Tolbert. Tolbert was therefore led to believe that the practice would remain what he believed it had been before the Bullet was issued, notwithstanding Shaffer-Maier's belief that he should have understood that the policy behind the Bullet remained in effect.

What actually occurred after the "cancellation" is, as described above, not very clear. Credited testimony from employees employed in several of the warehouses in 1989 establishes, however, that in at least some of the warehouses the policy stated in the Bullet was either not put into effect when issued or was retracted. In other

warehouses, it appears that restrictions that were new as far as the testifying employees were concerned were implemented in 1989. Supervisors in Warehouse 14 implemented the 1989 Bullet in September 1990. A modified policy statement covering the entire Depot was sent to Tolbert on October 31, 1991. Thus, as to Warehouse 14 and other warehouses where a change occurred, if at all, in the latter part of 1990 (after July 22), the charge was timely without invoking part (B) of Section 7118(a)(4). As to any warehouses where the May 1989 Bullet was implemented when issued and never retracted, the Union was misled into thinking that the change it thought the Bullet represented had been retracted. The complaint is valid under Section 7118(a)(4).

B. The Merits

The answer to the complaint denies that the Union is "entitled to exclusive recognition or is an appropriate unit [sic] under 5 U.S.C. §7111 or §7112." The answer alleges that the appropriateness of the unit is "currently the subject of an RA petition before the Authority." DDRW did not raise any argument over its duty to recognize the Union in its brief. The established collective bargaining relationship between the parties requires the continuing recognition of the Union until it is shown that the Union is no longer the exclusive representative of the employees of the Depot. No such showing has been made here.

The main issue, of course, is whether any condition of employment was changed in the warehouses of the Depot when the broad restriction set forth in the May 1989 Bullet was implemented, when the modified restriction set forth in the October 31, 1991, letter, was implemented, or both. (DDRW does not dispute the proposition that rules concerning the permitting of food and drink in the workplace affect conditions of employment.) I conclude that with respect to at least some warehouses, each of these implementations represented some change in a condition of employment.

In order for a condition of employment to be established through past practice, that practice must be consistently exercised over a significant period and followed by both parties, or followed by one party and not challenged by the other. U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 908 (1990). In this context, employees as a group may be considered as equivalent to a "party." Thus, it is sufficient that employees consistently exercised a practice for an extended period of time, with the agency's knowledge

and express or implied consent. See Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987); Internal Revenue Service, 27 FLRA 322 (1987). Management knowledge may be imputed in the light of convincing circumstantial evidence. See Lowry Air Force Base, Denver, Colorado, 29 FLRA 566, 570 (1987). The absence of a significant challenge, given such knowledge, implies consent.

To the extent that DDRW implemented, within the Section 7118(a)(4) period or concealed as discussed above, the broad restriction set forth in the May 1989 Bullet, it changed a practice that existed as admitted in the October 31, 1990, letter: permitting food and drink at stationary work stations in most warehouses. In explaining the background of his drafting of the relevant part of the October letter, Larry Plumb attempted to characterize the situation he was describing there as a case of lax enforcement of a more restrictive rule. However, as found above, the record does not support his implication that there was in effect, before the May 1989 Bullet was issued, a Depot-wide restriction as described in the Bullet.2/ Plumb conceded that the policy he was describing there had begun to erode as early as 1980 and that at least in some warehouses eating and drinking had been permitted since then. The record as a whole has persuaded me that, aside from the occasional action by individual supervisors to restrict eating or drinking, the practice within a year or more before May 1989 had been at least as permissive as one would conclude from accepting the October 31 letter on its face: "As in the past, employees can eat/drink at their workstations with only a few exceptions. . . ."

This acknowledgement, together with credited testimony about individual warehouses, persuades me that, the limitations on this practice aside, it was exercised for upwards of a year before the Bullet was issued, in the warehouses not on the "exceptions" list of the October 31 letter. Despite the objection of some supervisors, the open exercise of this practice over an extended period, in the presence of first-level and in some cases of higher level

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2/ Plumb drafted a memorandum in 1987 rejecting a request by certain employees for permission to eat and drink at work stations. That memorandum tracks in significant measure the May 1989 Bullet. However, it was addressed to employees in Warehouse 19, section 3, where, as I have found, a broad restrictive policy was consistently in effect.

supervisors appears to have been sufficiently consistent that it had become a condition of employment. The occasional challenge by individual supervisors does not negate the overall pattern of behavior in this respect. No description of a challenge, as testified to in the record, indicates specifically that it was directed at eating or drinking permitted within the guidelines set forth in the October 31 letter (at a stationary work station during a lunch or break period). The apparent blatancy of the practice requires the inference that many supervisors, as well as employees, assumed the acquiescence of management.

Beyond the limited permission reflected in the October 31 letter, a broader practice of permitted eating and drinking had existed in Warehouses 2, 3, 5, 6, 8, 9-12, 16, and 18. I have found that employees had eaten and drunk openly for an extended period anywhere within these warehouses and any time during their work shifts. Although there is no acknowledgement by management (as in the October 31 letter) that the more permissive practice existed in these warehouses, there is ample evidence to support the inference that supervisors permitted it and acted as if there were no contrary management policy. The open exercise of this practice, in locations where representatives of higher management might appear at any time, supports the inference of acquiescence. For example, eating and drinking on forklifts, in those warehouses where, as I have found, it was permitted, was a practice so likely to attract attention if it had been prohibited that I conclude there was a general if not universal understanding that it was permitted.

Based on these findings and analysis, I conclude that DDRW changed conditions of employment when it introduced a broad restriction on eating and drinking in some warehouses and a modified restriction in other warehouses where there were no restrictions previously. As DDRW had a duty to give the Union the opportunity to negotiate over such changes before implementing them, and as DDRW does not contend that the imposition of such restrictions is within any of the management rights set forth in section 7106 of the Statute, I further conclude that its implementation of these restrictions without bargaining over their substance violated sections 7116(a)(1) and (5) of the Statute.

The Remedy

Counsel for the General Counsel requests a status quo ante remedy: rescission of the unilaterally implemented

restrictions. Such a remedy is normally appropriate for this kind of unfair labor practice in the absence of special circumstances. U.S. Department of Labor, 37 FLRA 25, 39-40 (1990). Contrary to the arguments of both the General Counsel and DDRW, a status quo ante remedy tailored to fit this case involves neither the imposition of a Depot-wide permissive policy nor a vague or piecemeal approach. I have found, by the preponderance of the reliable evidence as to each warehouse, what restrictions, if any, were in effect before the unilateral changes at issue here. As to certain warehouses--those listed as "exceptions" in the October 31 letter--I found no change at all. A status quo ante remedy would require restoration of a restriction-free policy in Warehouses 2, 3, 5, 6, 8, 9 through 12, 16, and 18. In all other warehouses, the limited restriction set forth in the October 31 letter would be restored. DDRW has shown no special circumstances that would make such a remedy inappropriate, and I shall recommend it.3/ I therefore recommend that the Authority issue the following order.

ORDER

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

1. Cease and desist from:

(a) Unilaterally changing conditions of employment of bargaining unit employees by changing its practices regarding the use of food and drink in its warehouses without first notifying the Laborers' International Union, Local 1276, (Laborers'), the exclusive representative of certain of its employees, and affording it an opportunity to bargain about the decision to change such conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured them by the Statute.

3/ This does not mean, however, that employees must necessarily be immune to discipline or other appropriate measures if they negligently damage equipment by spilling or improperly disposing of food or drink.

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

(a) Restore the past practice in warehouses where food and drink were permitted either without restriction or with such limited restrictions as were in effect before May 1989.

(b) Notify the Laborers' in advance of any intended changes concerning eating and drinking at workstations, and on forklifts, and, upon request, negotiate to the extent consonant with law and regulations on the proposed change.

(c) Post at its facilities in Tracy, California, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer 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.

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

Issued, Washington, DC, December 12, 1991

JESSE ETELSON
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 HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change conditions of employment of bargaining unit employees by changing our practices regarding the use of food and drink in warehouses without first notifying the Laborers' International Union, Locl 1276, (Laborers'), the exclusive representative of certain of our employees, and affording it an opportunity to bargain about the decision to change such conditions of employment.

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

WE WILL restore the past practices in warehouses where food and drink were permitted either without restriction or with such limited restrictions as were in effect before May 1989.

WE WILL notify the Laborers' in advance of any intended changes concerning eating and drinking at workstations, and on forklifts, and, upon request, negotiate to the extent consonant with law and regulations on the proposed changes.

_____
(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, Region IX, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103, and whose telephone number is: (415) 744-4000; FTS 484-4000.