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**King Soopers, Inc. and Paper, Allied Industrial, Chemical and Energy Workers International Union, Local 5-920.** Case 27-CA-16965

September 30, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On February 22, 2001, Administrative Law Judge Albert Metz issued the attached decision. On February 23, 2003, he issued an erratum. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union before implementing a policy regarding the use of new technology by employees in the Respondent's pharmacies. The Respondent contends that the judge's findings are inconsistent with Board precedent and should be reversed. As discussed below, we reject this contention and affirm the judge's finding of the violation.

The facts here are undisputed. In May 2000,<sup>2</sup> the Respondent installed in its pharmacies prescription accuracy scanners, which are used by pharmacists to prevent errors in filling prescriptions. Shortly after installing the scanners, the Respondent implemented a Prescription Accuracy Scanner Policy (Scanner Policy) requiring that all of its pharmacists and technicians use the scanners on all prescriptions filled. The Scanner Policy provided that "this is a zero tolerance policy and failure to comply will be grounds for discipline up to and including termination." The Respondent did not notify or bargain with the Union before implementing the policy.

On December 4, the Respondent informed the Union of its intent to implement a revised scanner policy, but it refused to bargain over the policy prior to its implementation. On December 11, the day of the hearing in this case, the Respondent unilaterally implemented the re-

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> All dates hereafter are in 2000 unless otherwise indicated.

vised Scanner Policy. Like the earlier policy, the revised policy required that employees use the scanners in filling all prescriptions; however, specific references to "zero tolerance" and discipline were eliminated. Instead, the revised policy stated that the use of scanners was a core job responsibility and that full compliance with the policy was critical. Although the disciplinary language was removed from the revised policy, it is undisputed that employees may be disciplined for failing to comply.

The judge found that the Respondent was required to bargain with the Union over both the original and revised scanner policies prior to their implementation. We agree. It is well established that work rules that can be grounds for discipline are mandatory subjects of bargaining. *Praxair, Inc.*, 317 NLRB 435, 436 (1995); *Womac Industries*, 238 NLRB 43 (1978); *Murphy Diesel Co.*, 184 NLRB 757, 762 (1970), *enfd.* 454 F.2d 303 (7th Cir. 1971). There is no dispute that employees may be disciplined for their failure to use the scanners under either the original or revised policy.<sup>3</sup> Thus, the Respondent's unilateral implementation of both policies without first bargaining with the Union violated Section 8(a)(5) and (1). See *Cotter & Co.*, 331 NLRB 787 (2000) (employer's unilateral implementation of work rules without bargaining to impasse found to be unlawful).

The Respondent argues that the Board's holding in *Peerless Publications*, 283 NLRB 334 (1987), compels us to reach a different result. We find no merit in the Respondent's position.

Initially, we reject the Respondent's argument that the judge's decision is inconsistent with the Board's holding in *Peerless Publications* that "as a general principle, rules and their constituent penalties should not be artificially severed from each other for purposes of collective bargaining under the Act." *Id.* at 334. The Respondent contends that the judge improperly severed the substance of the Scanner Policy from the disciplinary provision and found only the disciplinary provision to be subject to bargaining. This contention mischaracterizes the judge's findings.

The judge did not find that the disciplinary provision alone was subject to bargaining; rather, the judge appropriately found that the disciplinary aspect of the policy affected terms and conditions of employment, thus mak-

<sup>3</sup> In his separate opinion, Member Schaumber concludes that the original Scanner Policy was issued unlawfully because it "significantly deviated from" the existing disciplinary system, but that the revised policy followed that system and thus was lawful. In our contrasting view, what matters is that there were disciplinary consequences attached to both the original and the revised policies. That those consequences were not made explicit in the revised policy is immaterial: without the policy, there would have been no basis for discipline with respect to the use of scanners.

ing the policy a mandatory subject of bargaining. See, e.g., *Tenneco Chemicals*, 249 NLRB 1176, 1180 (1980) (performance standards that can be enforced by discipline have an effect on employees' job security and are therefore a mandatory subject of bargaining). Here, there was no "artificial severance" of rule and penalty. The installation of scanners, which was not challenged by the General Counsel, was not the "rule" at issue here.<sup>4</sup> Rather, the Scanner Policy itself comprised rule and penalty, and triggered the duty to bargain. Accordingly, *Peerless Publications* is inapposite.

Moreover, we find that *Peerless Publications* was decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case. The issue before the Board in *Peerless Publications* was whether a newspaper publisher was required to bargain with the union prior to implementing a code of conduct for its employees. The Board found that the code affected terms and conditions of employment and was presumptively a mandatory subject of bargaining.<sup>5</sup> However, it also determined that the respondent was not required to bargain over reasonable rules that were designed to prevent employees from engaging in activities that were likely to cast doubt on the editorial integrity of the paper because the "protection of the editorial integrity of a newspaper lies at the core of entrepreneurial control." *Peerless Publications*, 283 NLRB at 335 (internal quotations omitted). The Board concluded that the publisher could overcome its bargaining obligation by demonstrating that the provisions of its code of conduct were (1) narrowly tailored to meet with particularity the publisher's legitimate and necessary objectives, and (2) appropriately limited in applicability to affected employees to accomplish those objectives. *Id.* Because the code of conduct did not meet those criteria, the Board ordered that the code be rescinded.

In subsequent decisions, the Board has acknowledged the unique circumstances under which *Peerless Publications* was decided and has declined to broadly apply its

<sup>4</sup> The question of whether the Respondent was required to bargain over its decision to install the scanners is not before us; the complaint alleges only that the Respondent was required to bargain over the implementation of the Scanner Policy.

<sup>5</sup> The Board initially found that only the disciplinary provisions of the code constituted a mandatory subject of bargaining and that the respondent was not required to bargain over the code's substantive provisions. *Peerless Publications*, 231 NLRB 244 (1977). On appeal, the Court of Appeals refused to enforce the Board's order and remanded the case for further consideration. *Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980). On remand, the Board reversed its findings and concluded that the code as a whole affected terms and conditions of employment and was therefore presumptively a mandatory subject of bargaining.

rationale.<sup>6</sup> In *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750 (1996), which involved a package inspection rule designed to deter theft from nursing home patients, the Board rejected the respondent's argument that *Peerless Publications* stood for the general proposition that "protecting an employer's core purpose is an additional basis for finding that an employer's decision lies at the core of entrepreneurial control" and thus is exempt from bargaining. The Board reasoned that if the respondent's position was correct, "the exemption from bargaining about core entrepreneurial decisions would become the rule, rather than the exception," and concluded that "we do not believe *Peerless Publications* should be read so broadly." *Id.* at 752.

Relying on essentially the same general principle that the Board rejected in *Edgar P. Benjamin Healthcare*, the Respondent here argues that use of the scanners is designed to protect the core purpose of its business and that the Scanner Policy directing their use is therefore exempt from mandatory bargaining.<sup>7</sup> *Edgar P. Benjamin Healthcare* is controlling on this issue and forecloses the Respondent's argument.

The circumstances of this case are analogous to those in which the Board has found that an employer has an obligation to engage in effects bargaining over a managerial decision that has an impact on terms and conditions of employment, even if there is no obligation to engage in bargaining over the decision itself. Although the Respondent may not have been required to bargain over its decision to install the scanners, it is nevertheless obligated to bargain over a work rule that implements that decision. Cf. *KIRO Inc.*, 317 NLRB 1325, 1327 (1995) (employer required to bargain over effects of decision to produce additional weekday news program, where production of program resulted in increased workloads, split shifts, and greater productivity demands on employees). Because the Scanner Policy, which was promulgated pursuant to the Respondent's decision to install the scanners, authorizes the discipline of employees who fail to

<sup>6</sup> See, e.g., *WI Forest Products Co.*, 304 NLRB 957 (1991) (employer ban on smoking is not analogous to ethics code at issue in *Peerless Publications*).

<sup>7</sup> Member Schaumber echoes this position in arguing that the scanner policies here should not be treated as work rules "because an employer clearly has the right to unilaterally promulgate work instructions or directives for his employees that go to the essence of his product." He asserts, in turn, that the use of scanners "has very little impact on the daily work routine or work environment of the pharmacy employees." For present purposes, however, the question is whether the scanner policies, which established a new predicate for discipline, are germane to the working environment. Clearly, they are—just like the work rules the Board has addressed in other cases—because they could affect the continued employment of the employees who became subject to them. See *Edgar P. Benjamin Healthcare*, supra, 322 NLRB at 751.

use the scanners, the Respondent was required to bargain over the policy prior to its implementation.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, King Soopers, Inc., Denver Colorado, its officers, agents, successors, assigns, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C., September 30, 2003

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring and dissenting in part.

My colleagues adopt the judge's decision finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its Prescription Accuracy Scanner Policies without prior bargaining with the Union. For the following reasons, I agree that the Respondent violated the Act, when it implemented the scanner policy with a "zero tolerance" disciplinary standard on June 7, 2000,<sup>1</sup> but not when it implemented a revised policy on December 11.

#### I. FACTS

The Respondent is in the business of safely and accurately dispensing drug prescriptions. The Union represents licensed pharmacists and pharmacy interns working at the Respondent's retail grocery stores in Colorado. These employees are responsible for making sure that the Respondent's customers receive correctly filled prescriptions.<sup>2</sup> To aid in fulfilling that important responsibility, the Respondent decided to install new equipment, prescription accuracy scanners, in its pharmacies in May. The pharmacy employees operate the scanners for a quick verification that the bar code for the requested prescription medication matches the bar code for the stock

medication used to fill the prescriptions. Scanners require little manual effort on the part of the employees, but they can reduce prescription errors and help maintain the integrity of the Respondent's product.

Shortly after its installation of the scanners, the Respondent directed its pharmacy employees to use the scanners or be subject to discipline. The Respondent issued its Prescription Accuracy Scanner Policy by memorandum dated June 7. According to the memorandum, the scanner "is designed with the goal of eliminating dispensing errors involving the selection of the wrong drug or strength when filling a prescription." The memorandum directs that "pharmacists, interns and certified technicians [are to] use the prescription scanners on 100% of all prescriptions." The memorandum further provides that "this is a zero tolerance policy and failure to comply will be grounds for discipline up to and including termination." The "zero tolerance" statement exceeded the normal disciplinary system followed by the Respondent. Before issuing this memorandum, the Respondent did not notify or bargain with the Union about this matter.

On December 4, the Respondent informed the Union that it intended to rescind and revise the June 7 scanner policy. The Union requested bargaining over the revised scanner policy. The Respondent took the position that it had no duty to bargain with the Union over this subject because the revised scanner policy "is simply an embodiment of an instruction that the scanners be used."<sup>3</sup>

On December 11, the day of the hearing in this case, the Respondent issued a Revised Prescription Accuracy Scanner Policy by memorandum. Like the earlier scanner policy, the revised scanner policy instructed employees to use the scanners in filling all prescriptions. But, the revised policy no longer included a specific reference to discipline and it also deleted the "zero tolerance" language set forth in the earlier policy. Instead, the revised scanner policy stated that the use of scanners was "a core job responsibility and it is critical that all pharmacy team members comply fully with this policy." Although the December 11 memorandum does not set forth any specific disciplinary penalties, it is undisputed that employees may be disciplined for failing to comply with the revised scanner policy.<sup>4</sup>

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

<sup>2</sup> In the preamble section of the current collective-bargaining agreement applicable to these employees, this responsibility is prominently highlighted as follows:

Section 1. *PRINCIPLES*. The foremost obligation of the Employer and the pharmacist is to assure that prescriptions and related matters are handled in accordance with the highest professional standards of pharmacy. The Employer and the pharmacist pledge full cooperation in such mutual undertaking.

<sup>3</sup> See December 7 letter from Stephen J. DiCroce, the Respondent's director of HR/Labor Relations, to Mary E. Newell, the Union's president.

<sup>4</sup> See December 11 letter from DiCroce to Newell. In response to Newell's inquiries, DiCroce clarified the "potential discipline" that may be issued under the revised scanner policy as follows:

Discipline may result in any instance where employees fail or refuse to follow instructions given to them by management . . . . As with any instance where King Soopers deter-

The management rights clause of the most recent collective-bargaining agreement between the Respondent and the Union states, in pertinent part:

Any of the rights, powers and authority the Employer had prior to entering into this collective bargaining agreement are retained by the Employer, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

Throughout this period, the Respondent has maintained a handbook for its employees, which is entitled “Personnel Policies and Special Procedures Manual,” to supplement established work rules and general conditions of employment. The manual contains a broad disciplinary provision that applies to the enforcement of company policies implemented by the Respondent. Specifically, the “General Policies and Procedures” section of the manual provides:

All King Soopers’ policies and procedures—as well as any directives from management—must be followed at all times. Employees will be held accountable for these policies and procedures while on company premises, whether working or not. Failure to follow these policies and procedures may result in disciplinary action up to and including termination. Management reserves the right to review each offense on its own merits and determine whether the company policy, procedure, work rule, posting, or management directive was violated, and what action—if any—is appropriate.

## II. THE JUDGE’S DECISION

The judge viewed the potential for discipline encompassed within the scanner policies as having a direct effect on the working conditions of employees. He found that there was “an insufficient record showing that the threat of discipline contained in the June 7 policy was an entrepreneurial decision or went to the basic direction of the enterprise which only indirectly impacted employees.” Therefore, he found that the scanner policies were

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mines that an employee has failed or refused to perform his/her job, I expect that instances involving the accuracy scanners will be quite fact specific. There is no way to prospectively anticipate (1) the ways in which employees might demonstrate their failure or refusal; (2) the ways in which employee actions might be mitigated or aggravated; (3) the specific circumstances of the employee’s conduct; and (4) any other matters that might be considered by King Soopers at such time or concern is brought to our attention. As I have stated repeatedly before, these instances will be investigated and to the extent that King Soopers determines that the employee has failed or refused to use the scanners as instructed, discipline for insubordination, poor job performance or any other misconduct identified by King Soopers may result.

not core entrepreneurial decisions but rather mandatory subjects of bargaining. Thus, the judge found that the implementation of both scanner policies without first bargaining with the Union violated Section 8(a)(5) and (1) of the Act.

## III. ANALYSIS

In my view, the judge erred when he primarily focused on the disciplinary component of the scanner policies without adequately explaining why the subject matter of the scanner policies do not reflect a managerial decision that lay at the core of entrepreneurial control. Then, he erroneously analogized the scanner policies to work rules that generally are considered subjects of mandatory bargaining. Unlike my colleagues, I consider this analogy to be out of place because an employer clearly has the right to unilaterally promulgate work instructions or directives for his employees that go to the essence of his product.

Sections 8(a)(5) and 8(d) of the Act impose a duty on employers to bargain with their employees’ representative regarding the employees’ “wages, hours, and other terms and conditions of employment.” The phrase “other terms and conditions of employment” was not intended to make all management decisions mandatory subjects of bargaining. This principle is consistent with observations made by Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223, 225 (1964), that bargaining has never been required concerning managerial decisions that “lie at the core of entrepreneurial control.” Specifically, Justice Stewart stated, in pertinent part:

Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting Justice Stewart’s *Fibreboard* concurrence, the Supreme Court described mandatory subjects as those subjects that are “plainly germane to the ‘working environment’” and are “not among those ‘managerial decisions, which lie at the core of entrepreneurial control.’”

The Respondent’s scanner policies are among that class of managerial decisions that lie at the core of entre-

preneurial control. The core purpose of the Respondent's pharmacies is to safely and accurately dispense drug prescriptions to customers. The scanners merely represent the most recent technological advance to achieve that goal.<sup>5</sup> While having very little impact on the daily work routine or work environment of the pharmacy employees, the use of the scanners significantly improved Respondent's ability to safely provide drug prescriptions for its customers.

Unlike my colleagues, I view the facts presented here as distinguishable from those in *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750 (1996). In that case, the employer was engaged in the operation of a nursing home and unilaterally implemented a new rule allowing it to inspect packages carried by employees when leaving the facility. The nursing home employees could be subject to discipline for violations of this package inspection rule. The Board found that the package inspection rule was not among the class of managerial decisions that lie at the core of entrepreneurial control because "it did not change how the [employer] provide[d] care for patients in any way." *Id.* at 752. In other words, the package inspection rule's laudable goal to reduce property thefts was simply too tangential to the employer's core business purpose to provide long-term nursing care to elderly and infirm patients. In contrast, the Respondent's use of the accuracy scanners in the instant situation directly impacts its core business purpose to safely and accurately dispense drug prescriptions to its customers.

As noted above, the manual, which applies to the pharmacy employees, provides that all policies and work directives must be followed by employees and a failure to do so will subject employees to discipline up to and including termination. The December 11 scanner policy follows the manual's disciplinary scheme. However, the "zero tolerance" disciplinary scheme announced for the June 7 scanner policy significantly deviated from the manual's progressive disciplinary system. It provided a harsher discipline for violation of the work instruction or directive to use the scanners. As a result, while I agree that the Respondent violated Section 8(a)(5) and (1) of the Act when it adopted the harsher "zero tolerance" discipline for a violation of its June 7 scanner policy, I would find no violation for the scanner policy as revised on December 11. See *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995) (employer unlawfully failed to afford

<sup>5</sup> The judge recognized this critical linkage between the scanners and the Respondent's core business purpose. In the third paragraph of sec. VI, A, of his decision, the judge stated: "The Respondent's prescription accuracy scanner policy was an extension of [the Respondent's] understandable desire to provide flawless prescriptions to the public" and "the Respondent had always sought to achieve that end."

the union an opportunity to bargain over the proposed implementation of changes in terms and conditions of employment).

Finally, I reject the Respondent's argument that a finding of an 8(a)(5) violation for the June 7 policy would be inconsistent with the Board's holding in *Peerless Publications* that "as a general principle, rules and their constituent penalties should not be artificially severed from each other for purposes of collective bargaining under the Act." 283 NLRB 334 (1987). *Peerless* is inapposite because this case does not involve *artificially* severing rule from penalty. The violation in this case is the unilateral imposition of a harsher penalty than that provided in the manual for an employee's failure to follow instructions given by management. However, I agree with my colleagues' observation that a lumber company's ban on smoking in *W-I Forest Products Co.*, 304 NLRB 957 (1991), is not analogous to the ethics code at issue in *Peerless*. In that case, the smoking ban "[did] not go to the heart of the [employer's] business" and therefore did not relate to the core entrepreneurial concerns of a lumber mill. *Id.* at 958.

But, unlike my colleagues, I find no reason to declare that *Peerless* has limited applicability outside of the particular set of circumstances under which it was decided. My colleagues suggest that the Board's decisions in *Edgar P. Benjamin Healthcare*, *supra*, and *W-I Forest Products Co.*, *supra*, cast doubt about the broader viability of *Peerless*. I disagree. The Board found that those two cases were not comparable or analogous to the situation presented in *Peerless*. The Board never foreclosed the possibility that *Peerless* can be extended to other more analogous factual scenarios.

Dated, Washington, D.C., September 30, 2003

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Peter C. Schaumber, 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 any 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 refuse to bargain in good faith with Paper, Allied Industrial, Chemical and Energy Workers (PACE) International Union, Local 5-920, as the exclusive collective-bargaining agent of our employees in the unit defined below:

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries and supervisors, as defined in the Act, and all other employees.

WE WILL NOT unilaterally and without consultation with the Union institute or implement a prescription accuracy scanner policy.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL rescind the original June 7 and revised December 11 Prescription Accuracy Scanner Policies and return to the status quo ante with respect to the unit employees' terms and conditions of employment as they existed prior to June 7.

WE WILL upon request, bargain with the Union as the exclusive collective bargaining representative of the employees of the appropriate unit described above, concerning the Prescription Accuracy Scanner Policy.

WE WILL remove from the personnel files of any employees who are represented by the Union all signed acknowledgment forms concerning a prescription accuracy scanner policy.

KING SOOPERS, INC.

*Angie Berens, Esq.*, for the General Counsel.

*Emily F. Keimig, Esq.*, for the Respondent.

*Stanley M. Gosch, Esq.*, for the Charging Party Union.

#### DECISION<sup>1</sup>

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent's promulgation of its prescription accuracy scanner policy violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).<sup>2</sup> On the entire

<sup>1</sup> This case was heard at Denver, Colorado on December 11, 2000. All dates refer to 2000 unless otherwise stated.

<sup>2</sup> 29 U.S.C. § 158 (a)(1) and (5).

record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

#### I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union (Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### II. BACKGROUND

The Government's complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union when it unilaterally implemented a prescription accuracy scanner policy on June 7, 2000.

The Respondent is a corporation with various places of business in the State of Colorado, where it is engaged in the retail grocery business. The Respondent's grocery stores also typically contain a pharmacy. The Union is the collective-bargaining representative of Respondent's employees in the following unit:

All full-time, regular part-time, and intern pharmacists hired with five years education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries and supervisors as defined in the Act, and all other employees.

The Respondent and the Union have successfully negotiated several collective-bargaining agreements. The current agreement has an effective term of March 29, 1999, through January 25, 2003. The management-rights clause of the current agreement states:

Any of the rights, powers and authority the Employer had prior to entering into this collective bargaining agreement are retained by the Employer, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

#### III. PRESCRIPTION ACCURACY SCANNERS

In approximately May 2000, the Respondent installed prescription accuracy scanners in its pharmacies. The scanners are used in an effort to eliminate errors in filling prescriptions. A pharmacist will input the prescription request into a computer. The computer then prints out a prescription label that contains a bar code for the medication requested. The pharmacist then obtains the appropriate stock bottle of medicine that also contains a bar code. Before a pharmacist fills a prescription bottle with medication he scans the two bar codes. The scanner detects whether the requested prescription medication matches the medication used to fill the bottle. If the two codes agree, the scanner confirms the match and an audible beep verifies the accuracy to the pharmacist. A negative beep is signaled to the pharmacist if the two product codes fail to correspond.

#### IV. JUNE 7 PRESCRIPTION ACCURACY SCANNER POLICY

On June 7 the Respondent implemented a "Prescription Accuracy Scanner Policy." Kenneth Chao, Respondent's director

of pharmacy sent a memorandum to all pharmacy employees describing the policy. Employees were required to sign an acknowledgement of receipt of the policy and this was placed in their personnel files. Chao's memo read, in pertinent part:

[E]ffective immediately, it is King Soopers' Pharmacy Department policy that pharmacists, interns and certified technicians use the prescription accuracy scanner on 100% of all prescriptions. This is a zero tolerance policy and failure to comply will be grounds for discipline up to and including termination. (GC Exh. 2 at 1).

It is undisputed that the Respondent did not notify or bargain with the Union before issuing the policy. On June 21, 2000, the Union filed the charge in this case, alleging that the Respondent violated the Act by its failure to notify or bargain with the Union about the policy. The complaint issued on September 29 and the hearing was ultimately scheduled for December 11.

#### V. REVISED SCANNER POLICY

On December 4 Stephen DiCroce, Respondent's director of HR and labor relations, wrote to Mary Newell, president of the Union, announcing that a revised prescription accuracy scanner policy would be promulgated on December 11. The letter stated that the new policy would replace the June 7 policy on the same subject. The Respondent distributed the amended prescription accuracy scanner policy to the unit employees by memorandum dated December 11—the day of the hearing in this matter. DiCroce's cover letter also informed Newell that:

With regard to discipline, this job responsibility, like any other job responsibility, must be fulfilled. If employees fail to perform this responsibility, those instances will be investigated and addressed by King Soopers. Moreover, to the extent that King Soopers determines that the failure to fulfill the job responsibility warrants discipline, such discipline will be administered. Thus, this repromulgated policy does not diminish or eliminate the possibility of discipline of an employee who fails to properly and responsibly perform his job through use of the accuracy scanners. (R. Exh. 2).

The revised policy stated, "effective immediately, it is King Soopers' Pharmacy Department policy that pharmacists, interns and certified technicians use the prescription accuracy scanner on 100% of all prescriptions." The revised policy did not mention the discipline of employees, but rather substituted a clause that stated scanning "is a core job responsibility and it is critical that all pharmacy team members comply fully with this policy." Kenneth Chao, Respondent's director of pharmacy and the author of both policies, testified that a "core job responsibility" is something that is defined by the Respondent or community standards.

After Newell received DiCroce's December 4 letter they exchanged further letters about the subject. In sum, Newell requested clarification about discipline and bargaining about the subject. DiCroce explained in detail the Respondent's position on the matter, i.e., "the policy is simply an embodiment of an instruction the scanner be used. Obviously . . . this is simply management exercising its right to direct the working forces." He also told Newell, "While I remain willing to continue explaining these matters to you, I am concerned that your

plaining these matters to you, I am concerned that your requests are veiled attempts to 'bargain' over management instruction to employees. For obvious reasons, King Soopers cannot and will not compromise this most fundamental management right."

#### VI. ANALYSIS

##### A. Mandatory Subject of Bargaining

The parties disagree as to whether the promulgation of the June 7, 2000, prescription accuracy policy is a mandatory subject of bargaining. The Government does not argue that the Respondent's decision to use the accuracy scanner violated the Act. Rather, it has a narrow theory that the Respondent's failure to notify and bargain with the Union regarding the potential imposition of discipline against employees was a violation of the Act. The Respondent argues that it has made a managerial decision that public safety and company liability concerns dictated that accuracy scanners be used. The Respondent asserts that this is a matter essentially unrelated to the employment relationship and has only an indirect impact on employment.

In *Ford Motor Co. v. NLRB*, the Supreme Court described mandatory subjects of bargaining as matters that are "plainly germane to the 'working environment' " and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" 441 U.S. 488, 498 (1979). In discussing managerial decisions in *Ford Motor Co.* the Court relied on Justice Stewart's concurring opinion in *Fibreboard Corp.*, in which he states that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment . . . those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area." 379 U.S. at 223.

There is an insufficient record showing that the threat of discipline contained in the June 7 policy was an entrepreneurial decision or went to the basic direction of the enterprise which only indirectly impacted employees. The Respondent's prescription accuracy scanner policy was an extension of its understandable desire to provide flawless prescriptions to the public. There is no doubt that the Respondent had always sought to achieve that end. For example, as stated in section 1 of the Parties' collective-bargaining agreement:

The foremost obligation of the Employer and the pharmacist is to assure the public that prescriptions and related matters are handled in accordance with the highest professional standards of pharmacy. The Employer and the pharmacist pledge full cooperation in such mutual undertaking. (GC Exh. 3, p. 3)

In *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750, 751 (1996), the Board noted the following in regard to conditions of employment:

The element that is critical to finding an employer's policy to be a condition of employment is not whether the subject of the policy is related to job performance, but whether the policy has the potential to affect continued employment of the employees who become subject to it.

It is evident that the threat of employee discipline in the Respondent's prescription scanner accuracy policy has a direct effect on the working conditions of employees. I find that the subject of discipline in that policy was germane to the pharmacists' working environment and was not a decision taken with a view toward changing the basic direction, scope, or nature of the Respondent's enterprise. I, therefore, find that the potential discipline of the unit employees was a mandatory subject of bargaining. *Cotter & Co.*, 331 NLRB 787, 796 (2000) ("work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining, and Respondent's unilateral implementation of such rules without bargaining to impasse . . . violated Section 8(a)(5) of the Act."); *Murphy Diesel Co.*, 184 NLRB 757, 762 (1970), enf. 454 F.2d 303 (6th Cir. 1971) ("Plant rules, particularly where penalties are prescribed for their violation, clearly affect conditions of employment and are mandatory subjects of collective bargaining.")

#### B. Waiver

The Respondent argues that, regardless of its duty to bargain about its June 7 prescription scanner accuracy policy, the Union waived any rights it had in this regard. The Respondent cites as support for this conclusion the fact that the Union has previously not requested bargaining about the Respondent's implementation of some other company policies. See, e.g. *Allied-Signal, Inc.*, 307 NLRB 752 (1992); *Emery Industries, Inc.*, 268 NLRB 824 (1984). The Government contends the Union never waived the right to bargain regarding the disciplinary implications of the prescription scanner accuracy policy.

There were occasions when the Respondent introduced new work policies and the Union did not seek to bargain about these matters, e.g., directing employees to use certain colored bags for pharmacy sales and a policy concerning giving cash back to customers who used a credit card in making a purchase. The Respondent also points out that the company Policies and Procedures Manual states that its work directives must be followed or the offending employee will be subject to discipline up to and including termination (R. Exh. 1.) It further asserts that its right to so direct is not limited by the management-rights clause of its collective-bargaining agreement with the Union.

It is axiomatic that the Board will not infer a waiver of a statutory right to bargain unless the waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board will assess such alleged waivers by looking at a variety of factors, including the contract language and the parties' bargaining history. *Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enf. 702 F.2d 624 (6th Cir. 1983).

The management-rights clause in the parties' agreement consists of the most general language. No mention is made regarding prescriptions, the accuracy in filling them or discipline. Additionally, no evidence was introduced that the parties ever bargained about the subject of discipline in relation to accurately filling prescriptions. Absent such evidence, I find that the record does not support the conclusion that the Union ever intended to waive its statutory right to bargain about discipline regarding the use of prescription accuracy scanners. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989) ("the Board requires the matter at issue to have been fully discussed and consciously

explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.").

The same conclusion follows with respect to other work rules unilaterally implemented by the Respondent about which no demand for bargaining was made. Board precedent makes clear that a "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993) (quoting *Owens-Corning Fiberglass*, 282 NLRB 609 (1987)). I find that the Union did not waive its right to bargain about discipline regarding the prescription scanner accuracy policy because of its past acquiescence concerning other policies.<sup>3</sup> I find, therefore, that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to notify and bargain with the Union regarding the June 7, 2000 prescription accuracy scanner policy.

#### C. December 11 Policy Revision

The subject of the December 11 policy was first broached at the hearing when the Respondent cross-examined the Government's witness, Mary Newell, about that revision. The Respondent also questioned its own witnesses, Ken Chao and Steve DiCroce, about the same subject during the presentation of its case in chief.

DiCroce testified that the December 11 policy revision was promulgated because of the Union's charges concerning the June 7 policy. The Government moved at the conclusion of the hearing that the December 11 policy be found to be an additional violation of Section (8)(a)(1) and (5) of the Act. The Respondent opposed the granting of the motion. Ruling on the motion was reserved.

The revised rule removed the "zero tolerance" language stated in the June 7 policy. The exchange of correspondence between the Respondent and the Union concerning the issuance of the revised rule makes clear that failure to follow the revised policy can result in discipline to an employee: "this repromulgated policy does not diminish or eliminate the possibility of discipline of an employee who fails to properly and responsibly perform his job through use of the accuracy scanners." (R. Exh. 2) The Respondent also refers to the use of scanners as "core job function."

The Respondent did not bargain with the Union regarding the promulgation of the December 11 scanner policy. The revised policy was raised by the Respondent at the hearing as an affirmative defense, particularly aimed at arguing a status quo ante remedy was not needed to rectify any unfair labor practice found regarding the June 7 policy. The matter is clearly related to the refusal to bargain allegations of the complaint. The facts surrounding the Respondent's issuance of the revised policy are not disputed. I find that the matter was fully litigated. *Metro-care Home Services, Inc.*, 332 NLRB 1570 (2000) ("It is well

<sup>3</sup> As noted, it is undisputed that the Respondent did not provide the Union with notice of the June 7 policy prior to its implementation. Upon learning of the unilaterally implemented policy, the Union exercised its right to file charges with the Board rather than request bargaining over the policy which was a fait accompli. See, *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982).

settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses."); *Metro Toyota*, 318 NLRB 168, 178 (1995); *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990); *Facet Enterprises v. NLRB*, 907 F.2d 963 (10th Cir. 1990). I grant the Government's motion to amend the complaint to allege the revised policy as an additional violation of Section 8(a)(1) and (5) of the Act. I find that the unilateral repromulgation of the revised scanner policy, effective as of December 11, does present a separate violation of the Act. The vice in that promulgation is that the Respondent once again refused to bargain about the matter, specifically the disciplinary implications of the policy. I find that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally promulgating the revised prescription accuracy scanner policy effective December 11, 2000, and refusing to bargain with the Union concerning the matter. *Tiidee Products, Inc.*, 176 NLRB 969, 976 (1969).<sup>4</sup>

#### CONCLUSIONS OF LAW

1. King Soopers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Paper, Allied Industrial, Chemical and Energy Workers International Union, Local 5-920, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally promulgating the prescription accuracy scanner policy effective June 7, 2000, without notice to, or bargaining with, the Union.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally promulgating the prescription accuracy scanner policy effective December 11, 2000, without notice to, or bargaining with, the Union.

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

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>5</sup>

<sup>4</sup> The Respondent does not specifically raise its revised policy as a defense under *Passavant Memorial Area Hosp.*, 237 NLRB 138, 138 (1978). To the extent that its argument implies that the revised policy may create such a defense, I find that that the new policy does not meet the requirements set forth in *Passavant* (repudiation of prior unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed illegal conduct, disavow the prior unlawful conduct, be adequately published to the employees, and set forth assurances that the respondent will not in the future interfere with the employees' Section 7 rights.)

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing and failing to bargain in good faith with the Union by unilaterally implementing a prescription accuracy scanner policy without proper notice to, or bargaining with, the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Rescind the prescription accuracy scanner policy issued June 7, 2000, and return to the status quo ante with respect to terms and conditions of employment as they existed prior to the policy's issuance. *Cotter & Co.*, 331 NLRB 787 (2000); *Detroit News*, 319 NLRB 262 fn.1 (1995).

(b) Rescind the revised prescription accuracy scanner policy implemented on December 11, 2000.

(c) Bargain collectively, upon request, with the Union as the exclusive representative of the employees of the following appropriate unit concerning a prescription accuracy scanner policy.

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries and supervisors, as defined in the Act, and all other employees.

(d) Remove from the personnel files of any employees who are represented by the Union all signed acknowledgment forms concerning the prescription accuracy scanner policy.

(e) Within 14 days after service by the Region, post at its pharmacies within the State of Colorado, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, 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 the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 unit employees employed by the Respondent at any time since June 7, 2000, *Excel Container, Inc.*, 325 NLRB 17 (1997).

<sup>6</sup> 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."

(f) Within 21 days after service by the Region, file with the Regional Director 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, February 22, 2001

#### 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 the National Labor Relations Act and has ordered us to post and obey this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Paper, Allied Industrial, Chemical and Energy Workers (PACE) Interna-

tional Union, Local 5-920, as the exclusive collective-bargaining agent of our employees in the unit defined below:

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries and supervisors, as defined in the Act, and all other employees.

WE WILL NOT unilaterally and without consultation with the Union institute or implement a prescription accuracy scanner policy.

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

WE WILL rescind the original June 7 and revised December 11 prescription accuracy scanner policies and return to the status quo ante with respect to the unit employees' terms and conditions of employment as they existed prior to June 7.

WE WILL upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees of the appropriate unit described above, concerning the prescription accuracy scanner policy.

WE WILL remove from the personnel files of any employees who are represented by the Union all signed acknowledgment forms concerning a prescription accuracy scanner policy.

KING SOOPERS, INC.