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Implementation of Drug and Alcohol Testing in the Unionized Workplace

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Implementation of Drug and Alcohol Testing in the Unionized Workplace

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Abstract

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KEYWORDS: testing, workplace, drug

Implementation of Drug and Alcohol Testing in the Unionized Workplace

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I. Introduction

Society has long been troubled by illegal drug and alcohol abuse. Nowhere is the problem more apparent than in the workplace. The effects of substance abuse at work are well-documented, ranging from tardiness and absenteeism; decreased productivity, quality control, and employee morale; increased medical costs, workers' compensation and retraining expenses; to on-premises drug use, drug trafficking, and the associated risk of injury to employees, property damage and theft.¹

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1. A study performed by North Carolina's Research Triangle Institute reported that the total cost of drug and alcohol abuse to the American economy is \$99 billion a year. This cost manifests itself in the form of lost productivity, absenteeism, sick leave,

There has been little debate in the past regarding whether an employer has the right to discipline and even terminate employees whose use of drugs and/or alcohol negatively affected their performance in the workplace. As employers increasingly recognize the costs associated with substance abuse in economic and human terms, however, many have turned to drug and alcohol testing as a method of controlling such abuse in the workplace. In March of 1986, the President's Commission on Organized Crime urged all public and private employers to "consider the appropriateness" of a drug testing program. According to the Commission's report, in a recent survey of Fortune 500 companies, two-thirds of those responding said they refused to hire job applicants who fail such tests; 25% said they fire drug-using employees; and 41% require treatment for employees who fail.²

The growing reliance of employers upon drug and alcohol testing has led to a widespread debate regarding the legality and reliability of such testing. Not surprisingly, among the leading opponents of testing has been organized labor. Unions have not only been outspoken critics of testing programs, but have also turned to the courts for relief, challenging the implementation of drug and alcohol testing programs on several grounds. They have argued that such programs are unconstitutional,³ infringe upon the privacy rights of employees,⁴ or are

drug-related injuries and deaths. The Institute further estimated that alcohol abuse alone caused \$65 billion in productivity losses in 1983. BUREAU OF NATIONAL AFFAIRS, ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES 8 (1986).

2. Daily Labor Rep. (BNA) No. 43, at A-12 (Mar. 5, 1986).

3. Most of these challenges have been based on the fourth amendment's prohibition against unreasonable searches and seizures or the right to due process. See, e.g., *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) (departmental order requiring police officers to submit urine samples if suspected of drug use did not violate officers' fourth amendment rights); *Railway Labor Executive Ass'n v. Dole*, No. C-85-7958-CAL (N.D. Cal. Nov. 26, 1985) (Department of Transportation regulations providing for blood or urine testing of railroad employees under certain circumstances do not violate fourth amendment); *Caruso v. Ward*, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986) (New York Police Department order requiring tenured police officers to undergo random drug testing violates fourteenth amendment); *Guiney v. Roache*, No. 86-1346-K (D. Mass., filed Apr. 29, 1986) (claiming Boston Police Department policy of conducting random urine testing of officers violates fourth, fifth, ninth and fourteenth amendments).

4. See, e.g., *Association of West Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986) (union's claim that urine testing violates employees' common law privacy rights is preempted by federal labor law); *International Ass'n of Machinists, District Lodge 120 v. General Dynamics Corp.*, No. 86-2244

mandatory subjects of bargaining which the employer may not implement unilaterally.⁵

The purpose of this article is to educate the unionized employer who is considering implementing a drug and alcohol testing program. The article is targeted chiefly to private sector employers and does not discuss the myriad of constitutional arguments upon which the public sector unions are relying in challenging drug and alcohol testing programs initiated by federal, state and local authorities. Nor does the article address the various statutes that may restrict an employer's right to implement testing in the workplace.⁶ Rather, the article examines the manner in which federal labor law may limit the employer's ability to unilaterally establish testing in the workplace and the strategies which unions are pursuing in opposing such policies.

II. Assessing the Need for Testing: "If It Ain't Broke, Don't Fix It"

In light of the recent surge in the popularity of drug and alcohol

(C.D. Cal., filed on Apr. 9, 1986) (claiming that mandatory drug testing program violates individual's right to privacy as set forth in California Constitution).

5. See, e.g., *Railway Labor Executives' Ass'n v. Consol. Rail Corp.*, No. 86-2698 (E.D. Pa., filed on May 7, 1986) (claiming that unilateral implementation of drug and alcohol testing program that is broader in scope than testing program required by Department of Transportation regulations violates Railway Labor Act's requirement that employer bargain with union regarding changes in working conditions); *Railway Labor Executives' Ass'n v. National R.R. Passenger Corp. (Amtrak)*, No. 86-1235 (D. D.C., filed May 2, 1986).

6. A patchwork of federal, state and local laws may limit both the unionized and non-unionized employer's ability to implement drug testing programs. The Rehabilitation Act of 1973, 29 U.S.C. § 793 (1983), precludes federal government contractors and sub-contractors from discriminating against employees or job applicants on the basis of their handicapped status. The 1978 amendments to the Act provide that although the term "handicap" encompasses drug addiction and alcoholism, an exception exists for those individuals whose "current use of alcohol or drugs prevents such individuals from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse would constitute a direct threat to the property or safety of others." 29 U.S.C. § 707(7)(B). Many states have similar statutes which prohibit discrimination against the handicapped and which have been found to apply to drug addiction and alcoholism. See e.g., *Haslett v. Martin Chevrolet, Inc.*, No. 85-1426, (Ohio, Aug. 13, 1986) (drug addiction and alcoholism are handicaps under Ohio anti-discrimination law); *Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n*, 366 N.W.2d 522 (Iowa 1985) (alcoholism is handicap within meaning of Iowa handicap statute).

testing, employers are feeling a significant amount of pressure to hop on the bandwagon and implement drug and alcohol testing programs. Many are doing so without evaluating whether such policies are truly necessary and without assessing the costs and benefits of testing.

Many employers have had a considerable amount of success controlling substance abuse in the workplace without utilizing testing. Through a combination of supervisory observation and Employee Assistance Programs ("EAPs"), these employers have eliminated or reduced drug/alcohol problems while providing assistance and rehabilitation to employees who needed it.⁷ In such cases, the employer should consider carefully whether implementation of a testing program is in its best interest.

For the employer who has not enjoyed such success, there is no doubt that drug and alcohol testing can be an effective weapon in the war against substance abuse in the workplace. Notwithstanding their effectiveness, however, testing programs do not come without costs. The expense of having blood or urine samples analyzed can be significant. While initial screening tests can cost as little as \$5.00,⁸ confirmatory tests, using gas chromatography/mass spectrometry, can run as much as \$80.⁹ Moreover, there are costs involved in the training of supervisors, an essential part of any testing program. Finally, the additional paperwork and recordkeeping that results from testing means increased administrative costs.

Thus, the decision to begin testing employees for drugs and alcohol should not be taken lightly. Only after carefully weighing the costs of testing and the effectiveness of current policies to control drug and alcohol abuse should an employer consider implementing a testing program.

III. Negotiating with the Union

A testing program promulgated by the employer, over the protestations of the union, is unlikely to have the same success as a program that enjoys union support. The advantages of a union-supported pro-

7. For a description of Employee Assistance Programs currently utilized by a variety of employers, see BUREAU OF NATIONAL AFFAIRS, *ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES* 39-50, 79-124 (1986).

8. Stille, *Drug Testing: The Scene is Set For a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1.

9. *Id.*

gram are obvious. Such a program is less likely to be welcomed with a host of grievances or lawsuits. Employees will generally be more cooperative when they know that testing has been endorsed by the union. In addition, employees with drug and/or alcohol problems may be more likely to seek rehabilitation through their union representatives than through management. Finally, when both management and the union speak out in a united voice against substance abuse in the workplace, they send a more persuasive message to employees that such conduct simply will not be tolerated. Consequently, there may be decided advantages to having the union play a role in the formulation of a testing program.

However, this is not to suggest that management efforts to implement a drug program should be forestalled by a recalcitrant union. To the contrary, once management perceives that there is a need for drug and alcohol testing, it should act with or without the union's support, subject to the bargaining obligations it has under federal labor laws.

A. *The Duty to Bargain*

1. *Under the Labor Management Relations Act*

The Labor Management Relations Act¹⁰ compels the parties to undertake collective bargaining with respect to *mandatory* subjects of bargaining, those being defined generally as "wages, hours, and other terms and conditions of employment."¹¹ An employer commits a *per se* violation of the Act if it changes mandatory subjects unilaterally, unless the union has waived its right to bargain over them.¹² Alternatively, if the change does not amount to a "material, substantial and significant" change from the employer's existing policy or practice, unilateral promulgation will not be a violation of the Act.¹³

The National Labor Relations Board ("NLRB" or "Board") has not yet addressed the issue of whether a drug and alcohol testing program is a "term" or "condition" of employment. In what some regard as an analogous situation, however, the Board has held that requiring employees to submit to polygraph testing as a condition of continued employment is a mandatory subject of bargaining. In *Medicenter, Mid-*

10. 29 U.S.C. § 141 (1985).

11. 29 U.S.C. § 158(d) (1985).

12. *See* N.L.R.B. v. Katz, 369 U.S. 736 (1962).

13. *Peerless Food Products, Inc.*, 236 N.L.R.B. 161 (1978).

South Hospital,¹⁴ the Board agreed with the administrative law judge's ("ALJ") conclusion that the use of the polygraph test to determine which employees had been responsible for a wave of vandalism that had plagued a hospital "substantially altered the existing terms and conditions of employment and constituted a subject of mandatory bargaining."¹⁵ The ALJ reasoned:

[I]t may fairly be said that this sort of change in an employer's investigatory method, substantially varying both the mode of investigation and the character of proof on which an employee's continued job security might hinge, is a bargainable change in the terms and conditions of his employment. The existing technique for investigating and determining guilt of misconduct involved the application of human skill, judgment, and experience. Onto this scale, and perhaps in lieu of naked human assessment, Respondent was introducing a chart based on variations in bodily functions, which, as indicated, has never been considered sufficiently trustworthy to be deemed probative in criminal proceedings. The employees' jobs are on the other scale.¹⁶

The ALJ rejected the employer's argument that in using the polygraph test, the employer was simply exercising its inherent right to investigate misconduct. The ALJ noted that even an employer's "inherent right to discharge employees is subject to bargaining about the manner in which he does so and the causes on which the discharge may be premised, as well as the procedures enabling the employee to challenge the employer's justification for meting out, in a given case, this industrial equivalent of capital punishment."¹⁷

Similarly, in *LeRoy Machine Co.*,¹⁸ the Board once again adopted an ALJ's conclusion that requiring employees with poor attendance records to submit to a physical examination by a physician of their choice at the employer's expense, subject to disciplinary action if they refused, was a mandatory subject of bargaining. The ALJ reasoned that because the job security of the employees was placed in jeopardy

14. 221 N.L.R.B. 670 (1975); see *Fraternal Order of Police v. Miami*, 12 F.P.E.R. ¶ 17029 (Fla. Pub. Employees Relations Comm. 1985), *appeal pending sub nom.* *City of Miami v. Fraternal Order of Police, Lodge 20*, No. 85-2863 (Fla. 3d Dist. Ct. App. 1985).

15. 221 N.L.R.B. at 675.

16. *Id.*

17. *Id.* at 676.

18. 147 N.L.R.B. 1431 (1964).

as a result of the employer's request, it "clearly involved a term and condition of their employment with respect to which the collective bargaining representative is entitled to be consulted."¹⁹

Finally, in *Laney v. Duke Storage Warehouse Co.*,²⁰ an employer unilaterally changed the contents of its employment application form to require job applicants to agree, on the application, to take either mental examinations or polygraph tests at the employer's expense or to resign immediately upon refusing to take such tests. The ALJ, affirmed by the Board, held that the employer had an obligation to bargain with the union regarding such a change in its hiring practices.

Thus, the Board has taken the position that the testing or examining of some bodily functions is a term or condition of employment within the meaning of the Act. While the Board has not specifically addressed this issue as it applies to drug and alcohol testing, given its position in the above cited cases, it might find that the imposition of such testing programs would be a mandatory subject of bargaining, at least with regard to some job classifications.²¹

2. *Under the Railway Labor Act*

Labor relations in the railroad and airline industries is governed by the Railway Labor Act.²² Section 152 prohibits an employer from changing "rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."²³ Section 156 of the Act sets forth procedures for changing rates of pay, rules and working conditions.²⁴ These procedures are analogous to the bargaining obligations that an employer has with respect to a mandatory subject of bargaining under the Labor Management Relations Act.

Disputes over changes in the terms of an existing collective bargaining agreement or over the terms of a new agreement are known as

19. *Id.* at 1439.

20. 151 N.L.R.B. 248, *enforced in part*, 369 F.2d 859 (5th Cir. 1966).

21. Although the Florida Commission has held that to require urinalysis of a police officer, who has been positively identified as having recently ingested cocaine, without prior bargaining, violates the duty to bargain in FLA. STAT. § 447.309 (1985), other jurisdictions have held to the contrary. See *Local 346 Int'l Bhd. of Police Officers v. Labor Rel. Comm'n*, 462 N.E.2d 96 (Mass. 1984).

22. 45 U.S.C. § 151 (1983).

23. 45 U.S.C. § 152.

24. 45 U.S.C. § 156.

"major" disputes.²⁵ At least one court has suggested that a dispute over the implementation of a policy which requires employees to randomly submit urine samples to be analyzed for the presence of drugs is a major dispute and that, therefore, the employer cannot unilaterally implement the policy without bargaining with the union.²⁶ Consequently, employers covered by the Railway Labor Act, like those covered by the Labor Management Relations Act, would be well-advised to negotiate with their unions before implementing a drug/alcohol testing policy, absent some evidence of waiver by their unions.

B. Union Waiver

The National Labor Relations Board has long recognized that a union may waive its statutory rights to bargain over changes in the terms and conditions of employment. The union may waive its right to bargain in one of two ways: 1) by failing to promptly request bargaining in response to receiving timely notice of an employer's plan to change a term or condition of employment; 2) by agreeing to a contractual provision or practice which arguably gives management the unilateral right to take the action in question.

A "waiver by inaction" is unlikely to arise when an employer uni-

25. The terms "major" and "minor" disputes were first used by the United States Supreme Court in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), to describe disputes arising under the Railway Labor Act. A "major" dispute is a disagreement "over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one. . . ." *Id.* at 723. These disputes must be settled by the procedures set forth in Section 6 of the Act, and the employer cannot unilaterally implement major changes before these procedures are completed. "Minor" disputes, on the other hand, are those which "relate either to the meaning or proper application of a particular provision" of the collective bargaining agreement. *Id.* Minor changes in working conditions may be instituted unilaterally by the employer while settlement is pursued through arbitration before the National Railroad Adjustment Board.

26. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.* (BLE I), 620 F. Supp. 173, 175 (D. Mont. 1985). See also *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.* (BLE II), 620 F. Supp. 163, 171-73 (D. Mont. 1985) (dispute over unilateral implementation of policy providing for random searching of employees for drugs was not justified by collective bargaining agreement and was "major" dispute); *Brotherhood of Maintenance of Way Employees v. Burlington N. R.R. Co.*, 802 F.2d 1016, 1024-25 (8th Cir. 1986) (Arnold, J., dissenting in part) (unilateral addition of drug screen to standard urinalysis which is part of required medical examination periodically given to employees is a major change requiring bargaining under Railway Labor Act).

laterally promulgates a drug and alcohol testing program. The appropriateness of these programs is a very emotional issue and the implementation will undoubtedly draw immediate protest from the union. Should the union fail, however, to promptly request bargaining in response to receiving timely notice of an employer's plans to implement a testing program, the union's lack of diligence may very well be found to constitute a waiver of its right to bargain.²⁷

For example, in *Medicenter, Mid-South Hospital*,²⁸ the employer gave the union notice of its intention to require employees to submit to polygraph examinations. The ALJ concluded that because the employer "stood ready — indeed, in a meaningful sense, eager — to bargain about the polygraph examination. . ." the union's willingness to "do nothing but protest" this decision was sufficient to constitute a waiver of its right to bargain over the decision.²⁹ Such a protest, the ALJ found, is not sufficient to satisfy the union's obligation to request bargaining. The ALJ's decision offers some hints as to what would have been sufficient to constitute a request for bargaining:

[The union representative] chose, however, to solicit no information about Respondent's planned testing, to advance no reasoned arguments against its implementation, and to proffer no suggestions or comments about the manner in which the program would be executed. He did not ask to meet again later that day so that he might, in the interim, collect his thoughts or formulate a counterproposal, nor did he ask to meet the following morning or afternoon for further discussions which might better inform the Union about the program or lead to a compromise. [The union representative] simply voiced his complete hostility to the program and left [the employer's] office.³⁰

Similarly, in *Kansas National Educational Association*,³¹ the Board concluded that a union waived its right to bargain regarding an employee job transfer when it was notified of the transfer one month before it took place, but failed to request bargaining on the issue until one month after implementation. In *City Hospital of East Liverpool*,

27. See *Clarkwood Corp.*, 233 N.L.R.B. 1172 (1977).

28. 221 N.L.R.B. 670 (1975).

29. *Id.*

30. *Id.*

31. 275 N.L.R.B. No. 92 (1985).

Ohio,³² the Board found a waiver where the union failed to request bargaining prior to the implementation of the employer's plans to discontinue a position, despite having three weeks' notice of the employer's intentions. Finally, in *Meharry Medical College*,³³ waiver was found where the union received notice of changes in the hours of work of day-shift employees only three days before these changes were implemented, but did not request bargaining until some five months later.

A more likely scenario involving the implementation of a drug and alcohol testing program is one in which the union waives its right to bargain over implementation by contract or past practice. Obviously, a contractual clause which reads, "Management reserves the right to test employees for the presence of drugs or alcohol in their systems" will be sufficient to defeat any attempt by the union to challenge the imposition of a testing program. However, the waiver need not be explicit. A broad management's rights clause that retains in management the right to promulgate work rules or disciplinary procedures might also arguably encompass introduction of drug and alcohol testing procedures.

Perhaps the best example of this type of waiver is set forth in *LeRoy Machine Co.*³⁴ As stated previously, in that case, the Board found that requiring employees to submit to a physical examination or polygraph testing constituted a mandatory subject of bargaining. Notwithstanding this finding, however, the Board also found that the union had waived its right to bargain over the implementation of this policy by agreeing to a broadly-worded management rights clause. The management rights clause provided that, "The Company retains the sole right to . . . hire, layoff, assign, transfer, promote and *determine the qualifications of employees*; subject only to such regulations governing the exercise of these rights as are expressly provided in this Agreement."³⁵ Based on this language, the Board concluded that the language reserving to the employer the right to determine the "qualifications of employees" gave the employer the authority unilaterally to require employees to submit to physical examinations.

Waivers have also been found in similar circumstances under the Railway Labor Act. In *Brotherhood of Maintenance of Way Employees v. Burlington National R.R. Co.*,³⁶ the court found that a dispute

32. See 234 N.L.R.B. 58 (1978).

33. 236 N.L.R.B. 1396, 1408 (1978).

34. 147 N.L.R.B. 1431 (1964).

35. 236 N.L.R.B. at 1432 (emphasis in original).

36. 802 F.2d 1016 (8th Cir. 1986). See also *Brotherhood of Locomotive Eng'rs*

over a railroad's unilateral implementation of a urine testing policy did not amount to a "major" dispute under the Railway Labor Act and that, consequently, the employer was not required to bargain with the union prior to implementation. The policy required all employees who are involved in accidents or other incidents in which human error may have been a factor to undergo urinalysis. In addition, a drug screen was added to the standard urinalysis required of all employees during their periodic medical examinations. In reaching its decision, the court relied on the fact that employees had, for many years, been governed by a safety rule known as Rule G, which provided:

The use of alcoholic beverages, intoxicants, and narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited. Employees must not report for duty under the influence of any alcoholic beverage. . . or other controlled substance, or medication, including those prescribed by a Doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.³⁷

The court concluded from the existence of Rule G that the parties had acquiesced in certain detective and investigative methods, and that requiring employees involved in accidents or similar incidents to undergo urine testing amounted to nothing more than a refinement of these methods. The court similarly found that since the railroad had long required employees to undergo periodical medical examinations to ensure fitness for duty, without opposition from the union, the addition of a drug screen to the examination was arguably justified by past practice.³⁸

v. Burlington N. R.R. Co. (BLE I), 620 F. Supp. 173, 175 (D. Mont. 1985).

37. *Brotherhood of Maintenance of Way Employees* 802 F.2d at 1016.

38. By contrast, in *Fraternal Order of Police*, the agreement contained a provision reserving to the City the right to act unilaterally to "implement and maintain an effective internal security program," and the officer whose urinalysis was requested had been identified as having ingested cocaine. Nevertheless, Florida PERC had held, over the sharp dissent of member Louis Shelley, that there was no waiver. 12 F.P.E.R. at 41-48. See also *Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach College*, 7 F.P.E.R. ¶ 12300 (Fla. PERC 1981), *aff'd*, 425 So. 2d 133 (Fla. 1st Dist. Ct. App. 1983), *aff'd in relevant part*, 475 So. 2d 1221 (Fla. 1985).

C. Summary

Although the NLRB and the courts may find the implementation of a drug and alcohol testing program, particularly on a random basis, to be a mandatory subject of bargaining (or "major" dispute under the Railway Labor Act), an employer may still be able to unilaterally require employees to undergo testing. If the collective bargaining agreement contains a broad management rights clause or the employer has rules against substance abuse, or can demonstrate that it had a practice of requiring employees to undergo physical examinations to determine fitness for duty or a practice of using certain investigative techniques to detect substance abuse, a compelling argument can be made that the union waived its right to bargain over implementation of the testing program.

IV. Post Implementation

Once an employer has implemented a drug and alcohol testing program, the union may react in one of several ways. The union can challenge the implementation of the program in a variety of forms: in arbitration; before the National Labor Relations Board; or in the courts. Alternatively, the union may decide to accept the program, particularly if it has been given the opportunity to play a role in program development. Even if the union has agreed to a program, however, the manner in which the program is applied can always be attacked in arbitration.

A. Arbitration

Upon implementation of a drug and alcohol testing program, a union may file a grievance and ultimately arbitrate the issue of whether such a program is permissible under the collective bargaining agreement. The issue in such cases generally will be whether a management rights clause or a work rule prohibiting drug and alcohol abuse gives management the right to engage in drug and alcohol testing.³⁹

39. See, e.g., Capital Area Transit Auth., 69 Lab. Arb. (BNA) 811 (1977) (Ellmann, Arb.) (provision in collective bargaining agreement giving employer right to promulgate work rules encompasses blood testing policy); Southern Pac. Transp. Co., 79 Lab. Arb. (BNA) 618 (1982) (O'Brien, Arb.) (employer did not have right to unilaterally require employees to undergo blood test); Potomac Elec. Power Co., No. 16-30-0110-8414 (unpublished opinion) (Zumas, 1986) (employer did not violate collec-

Moreover, even if the union recognizes the right of the employer to implement the program, it may always challenge the manner in which the provisions of the program are applied. For example, if the employer has a rule that provides that employees may not be "under the influence" of drugs and alcohol while at work, the union may challenge whether the test performed adequately demonstrated that the employee was indeed under the influence.⁴⁰ Alternatively, the union may claim that employees were not given adequate notice of the existence of the testing program.⁴¹ Finally, the union may assert that testing cannot be undertaken randomly, but only when the employer has some reason to believe a particular employee is under the influence.⁴²

B. *The National Labor Relations Board*

As previously discussed, should the employer unilaterally implement a drug and alcohol testing program, the union may assert that the employer committed an unfair labor practice under the Labor Management Relations Act by refusing to bargain over a term and condition of employment. The Board has a longstanding policy of deferring cases to arbitration, however, when the issue involved may be submitted to the grievance procedure set forth in the collective bargaining agreement. In *Collyer Insulated Wire*,⁴³ the Board held that a union's refusal to bargain change, alleging unilateral changes in conditions of employment,

tive bargaining agreement when it required employees to provide urine specimens for drug and alcohol testing).

40. See, e.g., *Georgia-Pacific Corp.*, 323-4 Am. Arb. Awards (1985) (Clarke, Arb.) (urine test results which showed presence of marijuana were insufficient to establish that employee was under the influence of marijuana while at work); *Weirton Steel Div.*, 81-1 Lab. Arb. Awards (CCH) ¶ 8215 (1981) (Kates, Arb.) (urine samples showing traces of marijuana and cocaine were by themselves insufficient to establish that employee was under the influence while working).

41. See, e.g., *Capital Area Transit Auth.*, 69 Lab. Arb. (BNA) 811 (1977) (Ellmann, Arb.) (although employer had right to unilaterally promulgate drug policy, failure to adequately notify employee who was terminated for refusal to submit to test warranted reinstatement); *Faygo Beverage, Inc.*, 86-1 Lab. Arb. Award (CCH) ¶ 8302 (1986) (Ellmann, Arb.) (employee unjustly terminated for refusing to undergo alcohol test where employer failed to notify employees of unilaterally-imposed policy).

42. See, e.g., *Potomac Elec. Power Co.*, No. 16-30-0110-8414 (unpublished opinion) (Zumas, 1986) (urine testing can only be conducted where there is "a valid reason to believe that drugs were being used; random or indiscriminate testing is impermissible").

43. 192 N.L.R.B. 837 (1971).

would be deferred to arbitration. The Board ruled that it would defer as a matter of policy to existing grievance-arbitration procedures, prior to the invocation of those procedures,⁴⁴ under the following circumstances:

- (1) Where the dispute arose within the confines of a long and productive collective bargaining agreement and there is no claim of enmity by [the employer] to employees exercise of protected rights;
- (2) Where the employer is willing to proceed to arbitration; and
- (3) Where the dispute in question is arbitrable under the collective bargaining agreement.⁴⁵

Thus, there is a possibility that an arbitrator may decide a dispute over whether the employer was authorized by the collective bargaining agreement or past practice to unilaterally require employees to undergo drug and alcohol testing, notwithstanding the fact that the union filed an unfair labor practice charge with the NLRB challenging implementation of the testing program.

C. The Courts

Unions have increasingly turned to the courts in response to an employer's implementation of a drug and alcohol policy. In such cases, unions have generally sought injunctive relief, requesting that the employer be barred from requiring employees to undergo testing, based on one of two grounds.

First, a union may seek to enjoin unilateral implementation of a drug and alcohol testing program pending arbitration. The enforceability of such a program pending an arbitrator's ruling on its validity under the collective bargaining agreement has turned on the court's assessment of the danger to employees or public safety in delaying enforcement relative to the injury employees would suffer if subjected to the policy prior to arbitral decision. Thus, in *International Brotherhood of Electrical Workers, Local 1900 v. Potomac Electrical Power Co.*,⁴⁶ a federal judge refused to issue a preliminary injunction against the Potomac Electric Power Company, following the issuance of a tempo-

44. The Board also has a similar policy of deferring to arbitration in cases where the employee has already submitted the dispute to the grievance-arbitration procedure. See *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963).

45. *Collyer Insulated Wire*, 192 N.L.R.B. at 842.

46. 634 F. Supp. 642 (D. D.C. 1986).

rary restraining order compelling the company to delay implementing a drug and alcohol testing program pending arbitration. The court reasoned that the testing program would not expose employees to any "new" injuries that they were not already subject to under the previous drug and alcohol rules and that injunctive relief was therefore inappropriate. However, in *International Brotherhood of Electrical Workers Local System Council U-9 v. Metropolitan Edison*,⁴⁷ a temporary restraining order was issued, blocking random drug and alcohol testing of 1600 employees at the Three Mile Island Nuclear Station pending arbitration.

Alternatively, the union may claim that the drug and alcohol testing policy is contrary to state or federal law and, for that reason, should be enjoined. For example, in *International Association of Machinists, District Lodge 120 v. General Dynamics Corp.*,⁴⁸ the union sued to enjoin the implementation of a drug testing program which it claims violates the employees' privacy rights as guaranteed by the California Constitution.⁴⁹

Similarly, in *Railway Labor Executives' Association v. Consolidated Rail Corp.* and *Railway Labor Executives' Association v. National R.R. Passenger Corp. (Amtrak)*,⁵⁰ the Railway Labor Executives' Association and several member unions are seeking to enjoin the implementation of a drug and alcohol testing policy which, the unions allege, goes beyond the testing procedures provided for in the regulations recently promulgated by the Department of Transportation.⁵¹ The unions claim that the companies' unilateral implementation of this policy violates the Railway Labor Act's requirement that an employer bargain with the union regarding changes in working conditions. Moreover, the unions assert that the testing program violates the fourth amendment because it is conducted without probable cause or reasonable suspicion.⁵²

Finally, in *Association of West Pulp and Paper Workers v. Boise Cascade Corp.*,⁵³ the union attempted to enjoin the unilateral implementation of a drug testing policy by the employer, claiming that the

47. No. 86-4426 (E.D. Pa. Aug. 6, 1986).

48. No. 86-2244 (C.D. Cal., filed Apr. 9, 1986).

49. *Daily Labor Rep.*, No. 71, at A-6 (Apr. 14, 1986).

50. No. 86-1235 (D. D.C., filed May 2, 1986).

51. See *supra* note 3 and accompanying text.

52. *Daily Labor Rep.* (BNA) No. 87, at A-11 (May 6, 1986).

53. See, e.g., *Association of West Pulp and Paper Workers*, No. 86-873-PA; *International Ass'n of Machinists*, No. 86-2244.

policy violated the common law privacy rights of employees and an Oregon law forbidding employers from requiring breathalyzer tests without an employee's consent or without reasonable care. The court rejected the union's arguments, concluding that the privacy claims were preempted by federal labor law and that the policy complied with the requirements of the Oregon breathalyzer statute. The judge also noted that the collective bargaining agreement allows the company to institute reasonable work rules and that the union may challenge these rules through the grievance procedure.⁵⁴

V. Conclusion

The pervasiveness of illegal drug use in American society, and the tacit admission by governmental authorities that they are unable to cope with this escalating problem, make it incumbent upon unionized employers to confront the issue in the workplace. There is no pre-packaged set of rules and procedures that can effectively address all situations. While drug and alcohol testing can play an effective role in reducing employee substance abuse, it is not a panacea. Thus, the decision to rely on drug and alcohol testing must not be an impulsive one. Employers must carefully examine their working conditions, evidence of employee or community drug use, the nature of their business, their corporate philosophy, and their current labor relations climate in assessing whether or not to require their employees to undergo such testing in the workplace.

54. *Daily Labor Rep.* (BNA) No. 185, at A-11 (Sept. 24, 1986).