United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 11, 2005

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: BP Exploration of Alaska, Inc. 530-6050-0120
Case 19-CA-29566 530-6050-3385
530-6067-4055-0100
530-6067-4055-8000
530-6067-4055-8200

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when, without bargaining with the Union, it began installing vehicle data recorders (VDRs) for the purpose of monitoring employee compliance with its driving safety rules.[1] We conclude that complaint should issue, absent settlement, because the use of the VDRs is a mandatory subject of bargaining and the Employer's unilateral installation of the system significantly affected terms and conditions of employment.

FACTS

The Employer is engaged in oil and gas exploration, development and production on Alaska's "North Slope," where it owns or operates 20 oil fields, employs over 900 employees and maintains a fleet of over 700 trucks and other motor vehicles for business-related transportation. The Employer's North Slope oil fields are spread out over a vast area and are divided into two organizational units known as "operations areas." This case involves only the Western Operations Area (WOA). Within the WOA are three main gathering centers, which are large multi-building processing complexes covering several square miles each. A mixture of oil, natural gas and water from several hundred wells is piped into the gathering centers, where the crude oil is separated for transport through the Trans Alaska Pipeline.

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[1] The Employer's claim of contractual privilege to implement the VDR program was not submitted for advice.

The Employer has long maintained written safety policies and rules for motor vehicle operation by all personnel on the North Slope, including the WOA. These safe driving rules require drivers, inter alia, to use seatbelts and headlights at all times and to obey posted speed limits as weather and road conditions permit. The driving rules also mandate that drivers must yield to emergency vehicles and wildlife, slow to 15 miles per hour when meeting or passing heavy equipment and to 5 miles per hour when meeting or passing pedestrians. Further, the rules provide that drivers may not pass operating snow blowers and must stop completely if necessary to avoid passing through the "plume" of ejected snow.

The Employer has two security officers on duty at all times to monitor driving activity throughout the WOA. These officers check driving speed with hand held radar units, assess compliance with other driving requirements through personal observation, and are authorized to issue warnings or citations when they determine a rules infraction has occurred.[2] Depending upon the seriousness of the infraction and the employee's driving history, warnings and citations can trigger discipline ranging from remedial counseling to termination. Supervisors also periodically ride along with employees, particularly those who have received driving citations, to observe their driving behavior, identify problems and suggest corrective action. Driving safety statistics are reported to and monitored by management at local and corporate levels.

For about 10 years, Paper, Allied-Industrial, Chemicals and Energy Workers International (PACE) Local 8-0369 (the Union) has represented a unit of about 200 hourly maintenance and production employees in the WOA under a series of collective-bargaining agreements.[3] With the exception of 70 gathering center technicians, whose work does not involve any driving, unit employees spend from 25 to 100% of their work time behind the wheel of Employer vehicles. Maintenance employees drive approximately 5-10 miles a day between the various buildings in the gathering center complexes, while technicians may drive a hundred or more miles going from well to well. Some employees are assigned to the same vehicle throughout their work shifts

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[2] Security officers also investigate vehicular accidents and have the authority to issue warnings or citations when they conclude that an accident resulted from unsafe driving behavior.

[3] The current agreement is effective until January 31, 2006.

while other vehicles are assigned to specific functional areas and may be driven by several different employees on the same day. Prior to the events at issue here, unit employees would only occasionally see either of the two security officers on duty and thus concluded that their driving was being monitored only a very small percentage of the time they were driving.

In mid-October 2004,[4] the PACE unit chairman, Kristjan Dye, learned that the Employer planned to install vehicle data recorders (VDRs) in all Company vehicles to electronically monitor driving behavior. On October 26, Dye wrote to the Employer demanding decision and effects bargaining. Dye also demanded that the Employer stop installing VDRs, and remove any that had already been installed, pending bargaining. He further asked the Employer to propose dates for bargaining and requested information regarding the basis for the Employer's desire to electronically monitor employee driving behavior. The Employer did not respond to this letter until late December.

VDR installation began in November. The VDRs activate automatically when a vehicle is started. They track vehicle location through a global positioning system (GPS) and collect and transmit data about how the vehicle is being operated by satellite to a central location. Supervisors and managers can access this data by computer. The system also sends the Employer a specific notice and produces an audible warning in the vehicle whenever a VDR detects certain driving events. These events include some that are expressly covered by the Employer's driving rules, i.e., seatbelt and headlight use and vehicle speed, and some that are not enumerated in the existing driving rules, i.e., engine speeds over 4500 rpm, hard acceleration and hard braking over 12 mph per second, hard turns over 8 mph per second and hard vertical movement over 20 mph per second. The VDR system can also detect collisions and accidents and sends immediate notification to Employer security by telephone.

The Employer and the Union briefly discussed the VDR issue at a scheduled safety meeting in November. The Employer said it was not obligated to bargain over the installation of the VDRs, but indicated that it might be willing to meet informally to discuss how it intended to use the information collected. The Union asked the Employer to put its position in writing.

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[4] All dates are in 2004 unless otherwise indicated.

On December 14, the Union filed the instant charge, alleging that the installation of the VDRs violated Section 8(a)(5).

On December 26, the Employer responded to unit chairman Dye's October 26 letter. It reiterated that it did not have an obligation to bargain over the installation of the VDRs, but was prepared to discuss the VDR program, the types of information to be collected and how that information would be used. The Employer also proposed meeting on December 30. Dye was unable to meet that day and asked the Employer to contact the Union's attorney.

In January 2005, the Employer issued guidelines for its supervisors' use of the data generated by the VDRs. The guidelines state that the purpose for collecting data by VDR is to allow problem behaviors to be identified and addressed, in accordance with the Employer's existing disciplinary and driving safety policies, and to also allow for correction before an accident occurs or a citation issues. The guidelines note that the initial focus of the VDR program will be on excessive speed and failure to use seatbelts, and that the Employer needs time to collect data on other events, such as hard braking and hard turns. In addition, the guidelines suggest that supervisors might choose to monitor employees more closely if an employee were to deny responsibility for a driving event reported by VDR. By the end of the month, VDRs were installed and operating in 200 Employer vehicles.[5]

On March 18, the Employer raised the VDR topic at a regularly scheduled labor-management meeting. It noted that it was continuing to install VDRs, and, for the first time, told the Union what data the VDRs collected and explained how the data was transmitted to the Employer. The Employer also gave the Union a copy of its VDR guidelines. The Employer asserts that it satisfied any bargaining obligation it may have at this meeting. It claims that the parties discussed the entire VDR program in detail, that the Union agreed that the program was beneficial and that the parties exchanged and agreed to proposals about changing certain aspects of the system.[6]

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[5] It is unclear how many of these vehicles were in the WOA or used by unit employees.

[6] Thus, the Employer claims the Union proposed adding an additional warning when vehicle speed reached 35 mph and that it agreed to revisit the issue if collected data should indicate that an additional speed warning was

While the Union acknowledges that there was some discussion of the VDRs at the March 18 meeting, it maintains that the Employer is still obligated to bargain over the installation decision and its effects.

The Employer is continuing to install VDRs. It appears that no unit employees have yet been disciplined pursuant to data collected by the VDRs.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally installing and implementing the VDR monitoring system, because the use of the VDRs is a mandatory subject of bargaining and the Employer's unilateral installation of the system significantly affected employee terms and conditions of employment. [*FOIA Exemption 5*

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Determining whether the Employer was obliged to bargain over the installation and use of the VDRs turns on (1) whether use of the VDRs is a mandatory subject of bargaining and (2) whether their use constitutes a "material, substantial, and a significant" change affecting the employees' terms and conditions of employment.[7] Regarding the former, we note that the Board has found a number of similar employer techniques for investigating and monitoring employee misconduct, such as drug/alcohol testing requirements,[8] polygraph testing[9] and the use of surveillance cameras,[10] to be mandatory subjects of

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needed. The Employer also claims that the Union recommended and it agreed to discuss the VDR program and guidelines with employees at health and safety committee meetings.

[7] See, e.g., Golden Stevedoring Co., 335 NLRB 410, 415 (2001) (quoting Millard Processing Services, 310 NLRB 421, 425 (1993)).

[8] Johnson-Bateman Co., 295 NLRB 180, 182-184 (1989).

[9] Austin-Berryhill, Inc., 246 NLRB 1139, 1141 (1979); Medicenter, Mid-South Hospital, 221 NLRB 670, 670 (1975).

bargaining. For example, in Colgate-Palmolive,[11] the employer placed hidden surveillance cameras in a restroom and exercise facility, to catch suspected thieves. The Board applied Ford Motor Co. v. NLRB,[12] and concluded that Colgate-Palmolive's use of surveillance cameras was "plainly germane to the working environment," since their use to detect employee misconduct could result in discipline and, potentially, affect employees' continued employment.[13] Further, the use of the cameras was not entrepreneurial in character or fundamental to the basic direction of Colgate Palmolive's manufacturing business, and, hence, was not a managerial decision lying "at the core of entrepreneurial control."[14]

In order to find an unlawful unilateral change, the General Counsel must also demonstrate that a change involving a mandatory subject of bargaining was a material, substantial, and significant change in terms and conditions of employment so as to trigger the employer's statutory bargaining obligation.[15] Thus, in Vincent Industrial

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[10] Colgate-Palmolive Co., 323 NLRB 515, 515-516 (1977); Anheuser-Busch, Inc., 342 NLRB No. 49, slip op. at 1 (2004), enfd. and remanded regarding appropriate remedial order sub nom. Brewers and Maltsters, Local Union No. 6 v. NLRB, ---F.3d ---, 2005 WL 1560399 (D.C. Cir. July 5, 2005).

[11] 323 NLRB at 515.

[12] 441 U.S. 488, 498 (1979), quoting Fibreboard Corp. v. NLRB, 379 U.S. 203, 222-223 (1964) (unilateral increase in vending machine prices a mandatory subject of bargaining).

[13] Colgate-Palmolive, 323 NLRB at 515.

[14] Id. at 515-516.

[15] See, e.g., Golden Stevedoring Co., 335 NLRB 410, 415 (2001) (formalization of disciplinary procedure constituted a significant change; "for a statutory bargaining obligation to arise with respect to a particular change unilaterally implemented by an employer, such change must be a material, substantial, and a significant one affecting the terms and conditions of employment of bargaining unit employees"); Rust Craft Broadcasting of New York, 225 NLRB 327, 327 (1976) (unilateral change to a mechanical procedure for recording employee working time did not

Plastics,[16] the employer unilaterally eliminated time clocks and made supervisors responsible for maintaining employee time records, noting their lateness, absence and overtime. The Board found that the new procedures represented a significant and substantial change in working conditions inasmuch as the employees were not in a position to check the accuracy of the records of their time, which could lead to the need for more corrections of or disputes over supervisory errors.[17] The Board distinguished Rust Craft,[18]

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represent a "material, substantial, and a significant change" in working conditions); Murphy Diesel Company, 184 NLB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971) (unilateral implementation of new and more stringent rules requiring employees to submit signed. written explanations within 2 days of returning to work represented a "material, substantial, and a significant change" from prior practice in violation of 8(a)(5)). See generally Westinghouse Electric, 150 NLRB 1574, 1576 (1965), quoting NLRB v. Katz, 369 U.S., 736, 748 (unilateral subcontracting that did not vary significantly in kind or degree from employer's established subcontracting practice did not violate Section 8(a)(5); even where a subject of mandatory bargaining is involved, there may be "circumstances which the Board could or should accept as excusing or justifying unilateral action").

[16] 328 NLRB 300, 300, n. 1 (1999).

[17] See Golden Stevedoring, 335 NLRB at 416 (employer had duty to bargain with union about unilateral switch from oral to written warning system because written discipline more formal and permanent and more likely to lead to more severe discipline and affect employee job security); Garney Morris, Inc., 313 NLRB 101, 119-120 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995) (employer violated Section 8(a)(5) by unilaterally implementing new, more detailed disciplinary warning form since the new form was a material change in employee working conditions); Amoco Chemicals Corp., 211 NLRB 618, 618 n.2 (1974), enfd. in relevant part 529 F.2d 427 (5th Cir. 1976) (notwithstanding that harsher discipline did not ensue, employer's unilateral change from an oral to a written warning system significantly affected working conditions, because formal written warnings "tend to become a permanent part of an employee's personnel file"); Migali Industries, 285 NLRB 820, 821 (1987) (same).

in which the unilateral substitution of time clocks for manual employee notations to record their work time did not violate the Act because the underlying attendance rule remained intact and the new, mechanical procedure had an inconsequential impact on employees who had conscientiously complied with the rules.[19]

Advice has previously applied these principles to unilateral changes in employer practices for monitoring their employees and concluded the changes were not actionable because even though they affected mandatory subjects of bargaining, the changes in question did not significantly affect terms and conditions of employment.[20] Thus, in PPG, the employer unilaterally began videotaping employees suspected of engaging in workers compensation fraud. It previously had relied on the personal observations of private investigators. We concluded that because it could lead to employee discipline, videotaping employees away from the workplace was a mandatory subject of bargaining, but found no unilateral change violation because the substitution of another method for collecting the same information had an inconsequential impact on employee working conditions. Similarly, in Roadway Express, the employer unilaterally installed computer tracking devices on its vehicles to monitor driver locations. Previously, drivers had been required to radio their locations to their dispatchers from destination to destination. The only difference between the new and old systems was whether the report was initiated by the employees or the computer system. We concluded that the

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[18] 225 NLRB at 327 (1976).

[19] See also Goren Printing Co., 280 NLRB 1120 (1986), affd. 843 F.2d 1385 (1st Cir. 1988) (employer did not violate Section 8(a)(5) by unilaterally requiring employees to submit written notes to leave work early instead of merely giving oral notice as previously required); Litton Systems, 300 NLRB 324, 331-332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (installation of central clock and buzzer system to signify the beginning and ending of breaks did not have any meaningful effect on terms and conditions of employment because employers simply chose more efficient and dependable methods of enforcing existing workplace rules).

[20] See PPG, Inc., Case 6-CA-33492 Advice Memorandum dated November 3, 2003; Roadway Express, 13-CA-39940-1, Advice Memorandum dated April 15, 2002.

unilateral change allegation should be dismissed, absent withdrawal, because the impact on employee working conditions was not substantial.

In the instant case, we initially agree with the Region that the Employer's use of the VDRs is a mandatory subject of bargaining. Specifically, the Employer concedes that it intends to use the data collected by the VDRs to improve enforcement and monitoring of its safe driving rules and to take corrective action against improper driving behaviors. Violations of the driving rules can result in discipline, up to and including discharge, so the VDR system plainly has the potential to affect the continued employment of employees whose driving habits are being monitored. Moreover, the use of the VDRs is not a "core entrepreneurial" concern. Thus, observing employee driving behaviors is no more entrepreneurial or relevant to the Employer's oil exploration and processing business than the surveillance cameras were to the manufacturing operation in Colgate-Palmolive. Accordingly, the Employer's use of VDRs to monitor employee driving behavior and compliance with Company safety rules is a mandatory subject of bargaining.[21]

We also agree that the Employer was not free to unilaterally install the VDRs to monitor employee driving behavior, since doing so was a significant change in the Employer's monitoring and disciplinary practices. Thus, the installation and use of the VDRs involves more than the mere substitution of a mechanical method of monitoring employee driving behavior and rules compliance. Rather, the VDRs collect far more information about employee driving behaviors than the Employer could possibly have collected before through the personal observations and radar readings of the 2-member security force, including some information that cannot be measured at all from outside a vehicle, e.g., engine rpms and rates of acceleration and deceleration.[22] By substituting constant

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[21] The Employer does not contend that that the installation and use of the VDRs was outside the scope of mandatory bargaining, but rather maintains that it was privileged under the contractual management rights clause. As noted above, the Region has not sought advice regarding the merits of the Employer's contractual defense.

[22] The Employer acknowledges (in the VDR guidelines) that this information was unavailable without the VDRs and indicates that it intends to study how to use this new information in the future.

electronic observation for the security officers' intermittent, occasional, personal observations and radar readings, the use of the VDRs increases greatly the chances of being disciplined.[23] Moreover, without the ability to discuss a potential infraction with security personnel at a time close to the driving "event" in issue, employees will be disadvantaged in providing an explanation for the events in question. All of these factors demonstrate that the installation and use of the VDRs here has a "material, substantial, and significant" impact on employee working conditions. Accordingly, the Region should issue complaint, absent settlement, alleging that the unilateral installation and use of the VDRs violates Section 8(a)(5), and that the Employer must bargain, [*FOIA Exemption 5*

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FOIA Exemption 5 Continued .][25]

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[23] See, e.g., cases cited in n. 17, above.

[24] [*FOIA Exemption 5*

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[25] [*FOIA Exemption 5*

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B.J.K