

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

# Advice Memorandum

DATE: October 31, 2005

TO : Rosemary Pye, Regional Director  
Region 1

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

SUBJECT: Cardi Corp.

Case 1-CA-42494

177-2414-0100

460-5067-0700

530-6067-4001

530-6067-4055-6300

This case was submitted for advice as to whether the Employer violated Section 8(a)(5)/8(d) by unilaterally implementing, without bargaining, pre-employment drug and alcohol testing of referrals from the Charging Party Union's non-exclusive hiring hall.

We conclude that the Employer violated the Act by implementing without bargaining pre-employment drug testing for all hiring hall registrants. Thus, the evidence establishes that, in practice, many registrants remain unit employees while on the hiring hall register and the Respondent and other signatory employers treat registrants substantially similarly to registrants of exclusive hiring halls. Accordingly, for the same reasons a bargaining obligation attaches to issues concerning referral rules in an exclusive hall, the Employer violated Section 8(a)(5) by unilaterally implementing drug testing of the Union's hiring hall registrants without bargaining.

### **FACTS**

Cardi Corp. is a member of the Construction Industries of Rhode Island, a multi-employer bargaining group that is signatory to a collective-bargaining agreement with the Charging Party Union, Carpenters Local 94. Cardi employs individuals in various trades, including carpenters represented by the Union.

The collective bargaining agreement (Article V, Section 2) provides that, "[t]he Union shall furnish upon request of the Employer ... all Foremen and Carpenters." Article V, Section 8a, however allows member-employers "full freedom" either to hire off-the-street or through the Union's non-exclusive hiring hall.

Should an employer elect to hire from the Union hall, the Union responds to employer requests for carpenters according to its established referral procedures. The Union keeps a log of out-of-work carpenters who request the hall's services. Union business agents refer registrants on the list to requesting employers, recording the name of the employer and date of referral on the log beside the registrant's name. Business agents also note on the log whether the registrant has not responded to a call from the Union or is unavailable for work. On any given month, approximately 11-13% of the registrants are unavailable for work due to illness, injury, family illness, incarceration, active military duty, lack of transportation or vacation. Based on its review of the referral logs going back to September 2003, the Region has concluded that the majority of registrants available for work are regularly referred to various signatory employers.<sup>1</sup>

Union records further indicate that, in the overwhelming majority of cases, soliciting employers

---

<sup>1</sup> Many of the registrants repeatedly appear on successive hiring hall registers throughout this 21-month time period. Thus, many registrants use the hall to acquire a position with a member-employer and, when laid off, place their name back on the referral log. However, other members never appear on the hiring hall register, as they are free to obtain work on their own.

Referral rates for any given month vary with no discernable pattern. The following table demonstrates a sampling:

**registrants referred  
from list**

June 2005	40 of 93, or 43%
March 2005	42 of 148, or 28%
January 2005	45 of 151, or 30%
November 2004	29 of 117, or 25%
August 2004	20 of 67, or 30%
February 2004	31 of 167, or 19%
October 2003	28 of 44, or 64%
September 2003	28 of 53, or 53%

actually hire Union referrals.<sup>2</sup> Union business agent David Palmisciano stated that rejections are uncommon and fall generally into two categories. A company may reject a referral in connection with equal employment opportunity concerns or because it believes an individual does not possess the specific skills required by the job. According to Palmisciano, the latter is a very rare occurrence, as employers usually specify the skill requirements when they call for a referral.<sup>3</sup>

Once referred, the carpenter generally is put to work without any additional processing on an Employer's part. For example, there is no formal interview or application process.

Respondent Cardi Corp. seeks infrequent referrals. A review of 20 months of Union records revealed only 20 referrals to Cardi. According to the Union, it is not unusual for Cardi to have direct contact with individuals it has employed in the past. Thus, former Cardi employees frequently contact the company for future work, without involving the Union's hiring hall.

In about January 2005, Cardi implemented a drug testing policy for all individuals seeking employment with Cardi who have not worked for Cardi for one year, including individuals the Union referred from its hiring hall to bargaining unit positions. The collective-bargaining agreement does not refer to drug testing of applicants or employees. However, the contract provides that "Carpenters shall not be required to fill out any pre-hire forms except those required by Federal and State law."

---

<sup>2</sup> Although the out-of-work log does not specifically record whether a carpenter is actually hired upon referral, the Union's Funds Department maintains records showing the number of hours every individual works for a given employer each month. Thus, a comparison of the out-of-work log and Funds records indicates whether a referral actually worked for a particular employer during any one-month period.

<sup>3</sup> In addition, an employer occasionally may specifically request that a particular individual not be referred, for instance if an employer has had a negative experience with a carpenter in the past. The Union, however, generally would not refer such an individual to that employer.

The Union learned about the new policy in about March 2005, when it heard that Cardi required one of its members to submit to a drug and alcohol test, which he failed. The Union immediately demanded bargaining; the Employer has refused, maintaining its right to unilaterally establish policies for job applicants.<sup>4</sup> The Union has subsequently refused to refer individuals to Cardi in protest over its testing policy.

### **ACTION**

We conclude that the Employer violated the Act by implementing without bargaining pre-employment drug testing for hiring hall registrants. Thus, the evidence establishes that, in practice, many registrants remain unit employees while on the hiring hall register and the Respondent and other signatory employers treat registrants substantially similarly to registrants of exclusive hiring halls. Accordingly, for the same reasons a bargaining obligation attaches to issues concerning referral rules in an exclusive hall, the Employer violated Section 8(a)(5) by unilaterally implementing drug testing of the Union's hiring hall registrants without bargaining.

Sections 8(a)(5) and 8(d) together mandate a duty to bargain only over a subject that "settles [a] term or condition of employment" and "regulates the relations between" an employer and unit employees.<sup>5</sup> In determining whether drug and alcohol testing constitutes a mandatory subject of bargaining, the Board has distinguished between such programs as applied to current employees and as applied to applicants.

It is clear that alcohol and drug testing of current employees constitutes a mandatory subject of bargaining under Section 8(d).<sup>6</sup> In general, however, employers owe no duty to bargain about issues, including pre-employment drug

---

<sup>4</sup> The Company has not pointed to contract language to support this general claim. The Region provided the signatory multi-employer bargaining group an opportunity to take a position on the matters at issue here; they adopted the Employer's position.

<sup>5</sup> NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349-50 (1958).

<sup>6</sup> Johnson-Bateman Co., 295 NLRB 180 (1989).

and alcohol testing, relating solely to job applicants.<sup>7</sup> Applicants are not employees in a bargaining unit for whom a bargaining obligation exclusively attaches.<sup>8</sup> In Star Tribune, the Board noted that an existing (or even a speculative) economic relationship between the newspaper and applicants for jobs in its editorial and circulation departments did not exist. The Board further noted that applicants are not permitted to vote in Board elections or to join in a bargaining unit for representational purposes.<sup>9</sup> Issues concerning applicants excluded from a bargaining unit generally fail to regulate relations between an employer and its employees, a required element of a mandatory subject of bargaining under Sections 8(a)(5) and 8(d).

The Board recognized, however, that hiring hall registrants are in a fundamentally different posture from applicants in general. As opposed to applicants who are strangers with a nonexistent or minimal relationship to a signatory employer, registrants may remain bargaining unit members with representational rights while out of work and on the union's hiring register.<sup>10</sup> Hiring hall registrants dispatched to construction industry jobs have "intermittent, temporary, transitory"<sup>11</sup> employment interspersed with periods as unemployed hiring hall registrants. Thus, their status as hiring hall registrants often precede and follow periodic employment within the

---

<sup>7</sup> Star Tribune, 295 NLRB 543 (1989).

<sup>8</sup> Id. at 546, in reliance on Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co. (Pittsburgh Plate Glass), 404 U.S. 157, 171-75 (1971) (health insurance benefits of retired employees not a mandatory subject; no bargaining obligation is owed to retirees, who are not members of bargaining unit of active employees).

<sup>9</sup> 295 NLRB at 546, n.12.

<sup>10</sup> Hiring hall registrants, like other out-of-work construction employees, may be eligible to vote under Board rules. See Steiny & Co., 308 NLRB 1323 (1992); Daniel Construction Co., 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

<sup>11</sup> Star Tribune, 295 NLRB at 545.

industry. In Houston AGC,<sup>12</sup> the Board relied on this distinction to conclude that a bargaining proposal pertaining to this sort of job applicant -- referral rules at an exclusive construction industry hiring hall -- constitutes a mandatory subject of bargaining. Thus, unit employees who had been dispatched from and will return to a hiring hall register "are clearly and directly affected by the job priority standards established by the hiring hall."<sup>13</sup> The bargained-for establishment of hiring hall referral standards or preferences thus "creates a present 'term or condition of employment' for those now in the bargaining unit, even though the use of the preference may be deferred to a time when they are no longer in the Company's employ."<sup>14</sup> In Pittsburgh Plate Glass, the Court found it significant that retirees, over whom no duty to bargain exists, are distinguishable from unemployed hiring hall registrants because the latter, in contrast to retirees, have an "expectation of further employment."<sup>15</sup> It is this expectation that may afford registrants, as opposed to applicants in general, the eligibility to vote in Board representational elections.<sup>16</sup>

This analysis is consistent with the doctrine that bargaining over an issue pertaining to individuals outside a bargaining unit is mandatory when it "vitally affects" the working conditions of current unit employees.<sup>17</sup> In Tom Joyce Floors, the Board noted that, in the construction industry, hiring hall preferences "clearly and directly"

---

<sup>12</sup> Houston Chapter, Associated General Contractors (Houston AGC), 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5<sup>th</sup> Cir. 1965), cert. den. 382 U.S. 1026 (1966).

<sup>13</sup> Houston AGC, 143 NLRB at 412, cited in Star Tribune, 295 NLRB at 545.

<sup>14</sup> Tom Joyce Floors, Inc., 149 NLRB 896, 905 (1964), enfd. 353 F.2d 768 (9<sup>th</sup> Cir. 1965) (employer violated Section 8(a)(5) by refusing to bargain about hiring hall proposal).

<sup>15</sup> Pittsburgh Plate Glass, 404 U.S. at 168.

<sup>16</sup> Steiny & Co., 308 NLRB at 1325 (voting eligibility formula accurately determines registrants' reasonable expectancy of future employment).

<sup>17</sup> Pittsburgh Plate Glass, 404 U.S. at 179.

affect both individuals who are seeking employment, "as well as those who are currently employed."<sup>18</sup>

Under the rationale of Star Tribune, Houston AGC, and Pittsburgh Plate Glass, we conclude that drug testing of registrants of an exclusive hiring hall - some of whom may still be unit employees while on the hall's register - constitutes a mandatory subject of bargaining. However, the intermittent employment environment in this case differs from the exclusive hiring halls previously discussed by the Board and Court in that Cardi is privileged under the collective bargaining agreement to either hire off the street or utilize the Union's non-exclusive hiring hall. The Board has yet to speak directly to whether the rationale for finding hiring hall referral rules mandatory should be narrowly confined to registrants of exclusive halls.

Under the facts of this case, we conclude that Cardi may not unilaterally impose drug testing on hiring hall registrants<sup>19</sup> because there is no significant distinction between registrants at the Charging Party Union's non-exclusive hiring hall and registrants of an exclusive hall. As in a typical exclusive hiring hall arrangement, the Union here is not free under the contract to refuse an employer's request for employees, even though an employer has the ability to hire off-the-street. In other words, although the arrangement here is non-exclusive as to the employer, it is not non-exclusive as to the Union. Similarly, as in an exclusive hall, the Union's registrants have a history of employment within the employer group and

---

<sup>18</sup> 143 NLRB at 412 and n.10.

<sup>19</sup> We interpret Cardi's unilaterally implemented rule as envisioning drug testing of hiring hall registrants who remain unit employees, even though it explicitly limits pre-employment testing only for individuals who have not worked for the company for more than one year. Thus, registrants may remain bargaining unit employees even if they did not work for Cardi within the past year, so long as they satisfied the Board's Steiny/Daniel formula by working for another signatory employer in this multi-employer bargaining unit during that time period. Steiny & Co., 308 NLRB at 1326 (inclusion in bargaining unit if individual has some employment with employer in last year and at least 45 days total employment within last two years).

an expectation of future employment with these same employers. Rather than being strangers to the signatory employers, the Union's out-of-work list consists of a regular group of employees who routinely use the hiring hall's services. Thus, many registrants satisfy the Steiny/Daniel formula for inclusion in the unit. Moreover, they are subsequently regularly referred out to various employers. The hall placed between 19 and 64% of its registrants with signatory employers each month over a twenty-one month period.<sup>20</sup> Thus, in most months, the Union found jobs for about 25%-40% of the total number of registrants. These figures admittedly vary from month to month, but consistency is not necessary. The touchstone is that registrants can expect to be placed with an employer within a reasonable amount of time once they put their name on the hiring hall's list.

Once referred by the hall, registrants are routinely hired by an employer. According to a Union business agent, employers rarely reject an applicant. And until Cardi's recent change, referrals went straight to work, without any further application process.

Accordingly, we conclude that under the facts of this case, the Union's hiring hall registrants, as past and future employees of signatory employers, may remain within the bargaining unit, as set forth above, while on the hall's out-of-work list. And like hiring hall registrants generally, they are employed on an intermittent basis and rely on the job priority standards established by the hall. Imposition of a drug testing requirement clearly and directly conditions the future employment opportunities and expectations of unit employees. The origin of this expectation, by contract in the case of many exclusive halls, or by practice here, is not determinative; it is sufficient that Cardi and other signatory employers have created it.

Thus, under both the theory that registrants here likely have an expectancy of re-employment and thus retain their status as bargaining unit employees after the completion of a specific job and the theory that drug testing vitally affects the employment opportunities of current employees who are likely to return to the hiring hall rolls, we conclude that Cardi violated Section 8(d) and Section 8(a)(5) by unilaterally requiring registrants

---

<sup>20</sup> This percentage increases if you deduct from the candidate pool the 11-13% of registrants who are unavailable for work during any given month.

to undergo drug and alcohol testing prior to starting work. The Region should issue an appropriate complaint, absent settlement.

B.J.K.