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

Advice Memorandum

DATE: September 19, 2007

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6067-4055-6300
530-8045-0133
SUBJECT: Worksaver, Inc. 530-8045-3725
Case 14-CA-28903 530-8045-7000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by unilaterally implementing a drug and alcohol testing policy, or whether such action was privileged by the clause in the parties' collective-bargaining agreement giving the Employer the right to "establish and require employees to observe Company rules and regulations."

We conclude that, under the Board's "clear and unmistakable waiver" test, which it recently reaffirmed in Provena St. Joseph Medical Center,[1] the Employer violated Section 8(a)(5) by unilaterally implementing its drug and alcohol testing policy.

Facts

Worksaver, Inc. (the Employer) and Local 486, Boilermakers (the Union) have had a collective bargaining relationship for at least 15 years. The management rights clause in the parties' most recent collective-bargaining agreement, effective from October 2004 though October 2007, provides in relevant part:

> It is recognized and agreed that the management of the business and direction of the working force is vested exclusively in the Company, and this shall include but is not limited to the right to ... *establish and require employees to observe Company rules and regulations...* (emphasis added).

The parties' 2001-2004 contract contained a similar provision.

During negotiations for the 2001-2004 agreement, the Employer's initial proposal included a comprehensive

[1] 350 NLRB No. 64 (August 16, 2007).

provision regarding drug and alcohol testing. After the Union submitted a counterproposal on this issue, the Employer withdrew the drug and alcohol testing provision from its proposal. The Employer advised the Union at that time of its belief that it could later unilaterally implement a drug and alcohol testing policy pursuant to Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992), where the Court found that the employer was privileged to implement its drug and alcohol testing policy under the parties' management rights clause giving the employer the right to "establish and enforce reasonable rules relating to operation of its facilities and to employee conduct."[2] The Employer faxed a copy of Chicago Tribune to the Union and indicated that it intended to formulate a drug and alcohol testing policy limited to work-related accidents in the future. On January 21, 2002, the Union wrote to the Employer challenging the Employer's position on this issue, arguing that Chicago Tribune was "not relevant" to the current situation and that the Employer would be required to bargain with the Union over this matter. On January 22, 2002, the Employer reiterated that it would in the future implement a testing policy limited to work-related accidents and offered to further discuss the Chicago Tribune decision with the Union. The parties' final agreement, ratified in February 2002, did not contain a provision regarding drug and alcohol testing. During negotiations for the 2004 agreement, neither party raised the subject of drug and alcohol testing.

On January 2, 2007, the Employer implemented a drug and alcohol testing policy, limited to work-related accidents, without bargaining with the Union.

Action

We conclude that complaint is warranted, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over its drug and alcohol testing policy, as the Union did not "clearly and unmistakably" waive its right to bargain over the matter.

The Board recently reaffirmed its long held position that the purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable."[3] In Metropolitan Edison Co. v. NLRB,[4] the

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[2] 974 F.2d at 935.

[3] Provena St. Joseph, 350 NLRB No. 64, slip op. at 8. See also, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989)

Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." In particular, the Board has held that generally worded management rights or zipper clauses will not, in themselves, be construed as waivers of statutory bargaining rights.[5] Absent specific contract language, an employer must show that the issue was "fully discussed and consciously explored" and that the union "consciously yielded" its interest in the matter.[6] The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in the contract. As the Board noted in Provena St. Joseph, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question.[7]

("[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

[4] 460 U.S. 693, 708 (1983).

[5] See, e.g., Hi-Tech Cable Corp., 309 NLRB 3, 4 (1992) (unilateral no-tobacco rule), enfd. 25 F.3d 1044 (5th Cir. 1994); Johnson-Bateman, 295 NLRB at 184-88 (unilateral drug testing program).

[6] Charles S. Wilson Memorial Hospital, 331 NLRB 1529, 1530 (2000) (quotations omitted), citing Metropolitan Edison, 460 U.S. at 708; Georgia Power Co., 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

See also Johnson Bateman, 295 NLRB at 185-186 (Board found that union did not waive its right to bargain about a drug/alcohol testing policy by agreeing to a management rights clause authorizing the employer to unilaterally issue, enforce, and change company rules, noting that the clause was couched in general terms and made no reference to any particular subject areas, and that there was nothing in the bargaining history suggesting that the parties even discussed drug/alcohol testing during negotiations).

[7] 350 NLRB No. 64, slip op. at 5, n.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

The Board's analysis in Provena St. Joseph illustrates these principles. The Board first considered the employer's unilateral implementation of a monetary incentive policy to encourage nurses to volunteer to work extra shifts during a holiday period. The Board found that no contractual provision expressly addressed incentive pay, concluding that a contractual authorization to pay "extraordinary pay" for extra hours worked when the employer determined that extra hours were needed did not encompass the incentive policy. The latter, the Board noted, involved a plan to cover "ongoing, periodic and predictable" staffing requirements such as holiday staffing needs, not "extraordinary" conditions.[8] Further, in the absence of any evidence that the parties had consciously explored, or that the union intentionally relinquished its right to bargain over this topic, the Board concluded that the union had not waived bargaining over the policy.

The Board then considered the employer's unilateral implementation of an attendance and tardiness policy. In contrast to the incentive policy, the Board concluded that the contract did "explicitly authorize[]" the employer's implementation of a disciplinary policy on attendance and tardiness even though it did not include the words "time and attendance," or "tardiness." The Board found that several provisions of the management rights clause — granting the employer the right to "change reporting practices and procedures and/or introduce new or improved ones," "make and enforce rules of conduct," and " suspend, discipline, and discharge employees" — when taken together, amounted to an explicit authorization of the employer's unilateral action,[9] notwithstanding the absence of the words "time and attendance" in the contract.

As Provena St. Joseph illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed

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[8] Id., slip op. at 8, n.34.

[9] Id., slip op. at 8-9.

light on the parties' intent concerning bargaining over the change at issue.[10]

Applying those factors here to interpret the parties' agreement, we conclude that the Union did not clearly and unmistakably waive its right to bargain over the implementation of a drug and alcohol testing policy. First, although the management rights clause grants the employer the right to unilaterally establish and enforce rules and regulations, it does not expressly authorize, nor specifically address drug or alcohol testing. The contract authorizes the Employer to establish workplace rules, but a drug or alcohol testing policy is different from a work rule. Rather than a rule regulating employee conduct, such as a drug-free workplace rule, a testing policy is an investigative program to determine whether rules have been violated. In addition to governing workplace conduct, testing programs involve important employee concerns about the validity and reliability of the testing itself, as well as privacy concerns such as the invasive nature of the testing and the potential for improper scrutiny of existing medical conditions or a genetic predisposition towards such conditions.[11]

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[10] The first three of these factors are generally considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson Bateman, 295 NLRB at 184-187; American Diamond Tool, 306 NLRB 570, 570 (1992). It would also be appropriate to consider any other relevant contract provisions or bilateral arrangements that shed light on the contractual intent of the parties in this regard.

[11] Some arbitrators have relied on this analysis to conclude that contract language granting employers the right to establish reasonable work rules does not privilege an employer's unilateral implementation of drug and alcohol testing policies. See, e.g., Laidlaw Transit, 89 LA 1001 (Allen, 1987) (alcohol and drug testing policy not within scope of contractual provision authorizing employer to issue reasonable work rules; drug-testing policy goes beyond the scope of a mere "work rule"). Others, however, found that a "rules" provision authorizes testing. See Albuquerque Publishing Co., 89 LA 333 (Fogelberg, 1987) (upholding unilateral implementation of testing policy because of contract language authorizing employer to establish and enforce reasonable rules and regulations to assure orderly operations).

Second, the evidence regarding the past practice of the parties reflects this distinction. Although the Union has never objected to the Employer's unilateral implementation of various work rules, including "drug-free workplace" rules, the Union clearly objected when in the 2001 negotiations the Employer suggested that it could unilaterally implement a testing policy.

Third, the parties' bargaining history indicates that the Union clearly did not waive its interest in the matter. Rather than "consciously yielding" its interest in the issue when the Employer took the position in the 2001 negotiations that it would be privileged to unilaterally implement a testing policy under the management rights clause, the Union disagreed and affirmatively asserted that the Employer would have to bargain about such a policy. We also note that the Employer's action in proposing a testing policy during the 2001 negotiations, coupled with the parties' apparent initial negotiations on that proposal, suggest that the Employer itself did not presume that it could implement this type of rule unilaterally under the management rights clause. Neither party raised the subject of drug and alcohol testing in the 2004 negotiations.

Fourth, no additional provisions in the contract shed any light on whether the parties intended to allow the Employer to unilaterally implement a drug and alcohol testing policy.

Thus, as there is nothing in the contractual language, past practice, or bargaining history showing clear and unmistakable waiver, we agree with the Region that the Employer violated Section 8(a)(5) by unilaterally implementing its testing policy.

We are not constrained by the Seventh Circuit's decision in Chicago Tribune. First, Judge Posner's categorical assertion, in *dicta*, that the management rights clause in that case, permitting the unilateral imposition of reasonable rules and regulations relating to employee conduct, would "unquestionably" be a clear and unmistakable waiver of the union's right to bargain about the portion of the employer's drug testing policy regulating on-the-job conduct, is unexplained.[12] The suggestion that a general management rights clause "unquestionably" covers drug testing is contradicted by legal authority. For example,

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[12] 974 F.2d at 936.

one labor arbitration treatise states that "some arbitrators have refused to recognize a right to adopt [drug and alcohol testing] policies unilaterally even where the contract reserves management's right to adopt reasonable work rules."[13] Another treatise explained that while some arbitrators have found such management rights language to support the unilateral implementation of drug testing, arbitrators have "more frequently" held that such policies are "not contemplated in that general language."[14]

In any event, despite Judge Posner's categorical assumption, this case is also distinguishable from Chicago Tribune. In that case, there was "no express indication" in the parties' bargaining history as to whether the management rights clause would extend to conduct away from the job.[15] Here, however, there is express bargaining history that shows that the Union took the position that drug and alcohol testing was *not* covered by the management rights clause. Having been put on notice of the Union's position on this issue, the Employer was not entitled to assume that the Union was agreeing to waive its right to bargain about a testing policy when it agreed to the management rights language in the 2001 and 2004 contracts.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally implementing its drug and alcohol testing policy.

B.J.K.

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[13] Elkouri & Elkouri, How Arbitration Works (5th ed. 1997), pp. 799-800.

[14] Vaughn, Shore & Paulson, "Drugs and Alcohol Issues," Labor and Employment Arbitration (2002), Chapter 22, §22.02[3][a].

[15] See Chicago Tribune, 304 NLRB 495, 498 (1991).