

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 87-5

8 September 1987

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Guideline Memorandum Concerning Drug or Alcohol
Testing of Employees

In the year since I issued General Counsel Memorandum 86-6 (26 June 1986), directing that all cases involving drug or alcohol testing be submitted to the Division of Advice, major issues presented by such cases have been addressed and resolved administratively. 1/ This guideline memorandum sets forth my position on those issues, and is intended to assist the Regional Offices in the disposition of pending and future cases involving drug testing. 2/

In brief, it is my position that: 1) drug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the Act; 2) in general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and even if established work rules preclude the use or possession of drugs in the plant; 3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing; 4) normal Board deferral policies under Dubo and Collyer 3/ will apply to these cases; however, if Section 10(j) relief is otherwise warranted, deferral will not be appropriate.

We anticipate that this memorandum will provide sufficient guidance for the Regions to resolve the merits of most, if not all, of their pending or future drug testing cases.

1/ Such mandatory submissions are no longer required. See General Counsel Memorandum 87-4 (2 July 1987).

2/ The principles concerning "drug testing", as set forth herein, apply equally to alcohol testing programs. Hence, the term "drug testing", as used herein, refers to both.

3/ Dubo Mfg. Corp., 142 NLRB 431 (1963); Collyer Insulated Wire, 192 NLRB 837 (1971). See also United Technologies Corp., 268 NLRB 557 (1984).

Accordingly, with the limited exceptions noted below, future submission of the merits of these cases to Washington will be at the discretion of the Regional Director.

I. Drug Testing as a Section 8(d) Subject of Bargaining

A. Current Unit Employees

As noted above, we have concluded that drug testing of current unit employees is a mandatory subject of bargaining within the meaning of Section 8(d) of the Act. Generally, an employment requirement is a mandatory subject of bargaining under the Act if it is "germane to the 'working environment'" of the employees and if its establishment "is not among those 'managerial decisions [] which lie at the core of entrepreneurial control.'" ^{4/} We conclude that drug testing meets this critical test.

In response to a growing national concern over drug abuse and drugs in the workplace, some employers have decided to implement drug tests for their employees. In many drug testing programs, employees who refuse to submit to a test may be subject to discipline, including discharge, while employees who submit to the test and have positive results may be suspended and/or required to participate in rehabilitation programs, forced to accept a change in job duties, or subjected to discipline up to and including discharge. Thus, mandatory drug testing literally is a "condition of employment." It is a "fitness-for-duty" type requirement that may ultimately affect employment status. In our view, any such obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employees' working conditions and, therefore, are presumptively mandatory subjects of bargaining within the ambit of Section 8(d) of the Act. In addition to the "fitness-for-duty" implications of testing, the test procedures, including the methods for assuring the security of the test samples and the accuracy of the test, are matters of vital concern to employees and their representatives.

^{4/} Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979), quoting from Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 222-23 (1964)(Stewart, J., concurring). Compare First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)(employer decision to close part of its business for economic reasons is entrepreneurial and not a mandatory subject of bargaining).

In analogous cases, the Board has found that physical examinations, 5/ polygraph testing, 6/ and safety rules 7/ are mandatory subjects of bargaining. Indeed, with respect to physical examinations and polygraphs, the bargaining obligation extends not only to whether there will be a "testing" requirement but also, if so, to the particulars of any such testing. Thus, an employer is also obligated to bargain over the content of a physical examination, the purpose for which the examination is to be used, and how test results, or the refusal to submit to a test, will affect employment. 8/ And respecting polygraph tests, the Board has held that "[t]he required bargaining . . . does not comprehend merely the magnitude or propriety of the penalty, but, as well, the content and incidents of the rule giving rise to the penalty." 9/ As physical examinations and polygraph tests are

5/ Lockheed Shipbuilding Co., 273 NLRB 171, 177 (1984); LeRoy Machine Co., 147 NLRB 1431, 1432 (1964).

6/ Medicenter, Mid-South Hospital, 221 NLRB 670, 675 (1975). The Board majority in Medicenter, adopting the ALJ's analysis, noted that "the mandatory across-the-board use of a controversial mechanical device for testing . . . employees . . . [gave] rise to a number of salient considerations and questions (apart from the severity of the punishment for refusing to submit to it) which suggest the 'amenability of such subjects to the collective bargaining process.'" 221 NLRB at 676 (citing Fibreboard, 379 U.S. at 211, footnote omitted).

7/ Gulf Power Co., 156 NLRB 622, 625 (1966), enfd. 384 F.2d 822, 825 (5th Cir. 1967); Boland Marine & Mfg. Co., 225 NLRB 824, 829 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977). Cf. Womac Industries, Inc., 238 NLRB 43 (1978) (absenteeism).

8/ See Lockheed Shipbuilding, 273 NLRB at 171, 177; LeRoy Machine Co., 147 NLRB at 1432, 1438-39.

9/ Medicenter, 221 NLRB at 677-78. The Board majority also adopted the Administrative Law Judge's delineation of other salient questions, such as "the validity and integrity of the testing procedure; the breadth of the test questions; the qualifications of the persons who devise and administer the test; the weight to be attached to 'failing' the test, and the consequences of failure; and the right of union representatives or friends to be present during the administration of a potentially frightening procedure alien to the experience of most employees." *Id.*, at 676 n. 23.

analogous to drug testing, we believe the scope of the bargaining obligation regarding the latter is as extensive as that respecting the former.

We do not believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from Section 8(d) of the Act. In Gulf Power Co., ante n. 7, the Board considered and flatly rejected this argument with respect to safety regulations. In enforcing the Board's order in that case, the Fifth Circuit concluded that "the Company's contention that . . . safety was a prerogative of management was without merit." 384 F.2d at 825. Even more to the point, the Board majority in Medicenter, ante, n. 6, rejected the employer's argument that instituting a polygraph test fell within its inherent right to conduct its business. To the contrary, the Board concluded,

[t]he institution of a polygraph test is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and does not impinge only indirectly upon employment security. It is, rather, a change in an important facet of the workaday life of employees, a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary "core of entrepreneurial control." 221 NLRB at 676.

Similarly, drug testing is not a prerogative of management exempt from Section 8(d). 10/

B. Employee Applicants

The issue of whether drug testing of applicants for employment is also a mandatory subject of bargaining is more difficult. However, since the issue is an important one and since a reasonable argument can be made that the subject is mandatory, I have authorized complaints on this issue in order to place the question before the Board. Arguably, a pre-hire drug test not only establishes a condition precedent to employment for job applicants, it also settles a term and condition of

10/ See also Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company, 620 F. Supp. 163, 169 (D. Mont. 1985), appeal pending No. 85-4138 (9th Cir.) (employee drug testing under Railway Labor Act not entrepreneurial).

employment of current employees by vitally affecting their working environment. 11/

Regarding the first point, the Board has held that conditions of becoming employed can constitute a mandatory subject. With court affirmance, the Board held that both the agreement to use, and the internal operation of, a hiring hall are mandatory subjects of bargaining. Houston Chapter, Associated General Contractors, 143 NLRB 409, 413 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966) (agreement to utilize hiring hall). Pattern Makers' Assn. of Detroit (Michigan Pattern Mfrs. Assn.), 233 NLRB 430, 435-36 (1977), enfd. on this point 622 F.2d 267 (6th Cir. 1980) (internal operational processes of hiring hall). The Board in Houston Chapter, A.G.C., 143 NLRB at 412, said that "[i]t can scarcely be denied, since 'employment' connotes the initial act of employing as well as the consequent state of being employed, that the hiring hall relates to the conditions of employment." Most significantly, the Board's 1984 decision in Lockheed Shipbuilding, ante, n. 5, 273 NLRB at 171, specifically dealt with the applicant issue and held that an employer violated Section 8(a)(5) of the Act by unilaterally implementing new medical screening tests "for the purpose of denying employment to new employees" (emphasis added).

As to the second point, the Board has held that information regarding the race and sex of applicants is presumptively relevant to a union's performance of its representative duties toward current employees, because "'an employer's hiring practices inherently affect terms and conditions of employment.'" White Farm Equipment Co., 242 NLRB 1373, 1375 (1979), enfd. per curiam 650 F.2d 334 (D.C. Cir. 1980), citing Tanner Motor Livery, Ltd., 148 NLRB 1402, 1404 (1964), enforcement denied on other grounds 419 F.2d 216 (9th Cir. 1969). Based on these cases, we have argued that, just as existing unit employees have a legitimate interest in working in a racially and sexually integrated workplace, so too do they have a legitimate interest in the issue of whether steps should be taken to screen out drug users from employment, and what those steps should be.

11/ The Supreme Court has held that a proposal may be a mandatory subject of bargaining even though it relates to parties outside the bargaining unit if it "vitally affects the 'terms and conditions' of . . . employment" of bargaining unit employees. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971).

II. Drug Testing As A Substantial Change In Working Conditions.

In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform the work. In addition, it is our view that a drug test is not simply a work rule -- rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested ^{12/} or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is "a material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally." ^{13/}

^{12/} See, e.g., IBEW Local 1900 v. PEPCO, 121 LRRM 3071, 3072 (D. D.C. 1986) (TRO granted under Section 301 LMRA pending arbitration against extensive drug testing program involving "invasions of privacy which are almost unheard of in a free society. . ."). Cf. O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1072 (1st Cir. 1986) (use of mandatory polygraph examination to investigate employee off-duty drug use found "highly offensive" and invasion of plaintiff's privacy).

^{13/} Murphy Diesel Co., 184 NLRB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971). See also Miller Brewing Co., 166 NLRB 831, 832 (1967), enfd. 408 F.2d 12, 15 (9th Cir. 1969) (employer obligated to bargain before changing work rules, even though changes allegedly mere codification of past practice, where new rules subject employees to different procedures or impose more serious penalties for their

There can be no quarrel with an employer's desire to ensure a drug-free work force or a drug-free working environment. We simply conclude that, upon request, an employer must bargain in good faith with its employees' Section 9(a) representative about a decision to institute drug testing and the content, procedures and effects of such a program. See generally NLRB v. Katz, 369 U.S. 736 (1962); Womac Industries, Inc., ante, n. 7, 238 NLRB at 43. Thus, assuming that the issue is an open one for bargaining -- e.g., during contract hiatus or during the term of a labor agreement if the agreement does not mention drug testing and if the parties never discussed the issue in contract negotiations ^{14/} -- the employer would be required to notify the union of its intention to initiate drug testing and, upon request, to bargain to an agreement or a good faith impasse before implementing any such program. The notice must be sufficient to provide the union a meaningful opportunity for bargaining. ^{15/}

breach). Compare Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976) (change from sign-in sheet to time clock not a substantial change in past practice).

^{14/} See Jacobs Mfg. Co., 94 NLRB 1214 (1951), enfd. 196 F.2d 680 (2d Cir. 1952). If a current labor contract already contains a specific clause dealing with drug testing that the employer wants to change mid-term, or if the subject was fully explored during contract negotiations or the contract has a "zipper clause," see Jacobs Mfg. Co., 94 NLRB at 1220, n. 13, the union may have a right under Section 8(d) not to bargain over the subject during the term of the agreement. The employer would then be barred from implementing any proposal during the term of the contract even after notice to the union. See C & S Industries, Inc., 158 NLRB 454 (1966); St. Marys Hospital, 260 NLRB 1237, 1245-46 (1982). Cf. GTE Automatic Electric Inc., 261 NLRB 1491, 1492 n. 3 (1982). Such 8(d) contract modification cases should be submitted to Advice.

^{15/} See, e.g., J.P. Stevens & Co., Inc., 239 NLRB 738, 743 (1978), enfd. on this point 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981). Accord: ILGWU v. NLRB (McLaughlin Mfg. Corp.), 463 F.2d 907, 919 (D.C. Cir. 1972). Moreover, regular Board policies concerning Section 10(b) and "hidden" violations will apply. See, e.g., Uniglass Industries, A Division of United Merchants & Mfrs., 276 NLRB 345, 349 (1985), enfd. 123 LRRM 2591 (2d Cir. 1986); Don Burgess Construction Corp., 227 NLRB 765, 766 (1977), enfd.

III. Union Waiver of its Bargaining Rights

Union waiver of the right to bargain over drug testing has emerged as an important issue in many of the cases we have considered. We have concluded that regular Board policies regarding waiver should apply to drug testing cases. Thus, any waiver by the union of this statutory right to bargain, either by contract, past practice or by inaction, is not to be lightly inferred and must be "clear and unmistakable". 16/

A. Waiver by Contract or Past Practice

A waiver by contract may be found where the language of the agreement is specific, and/or the history of prior contract negotiations suggests that the subject was discussed and "consciously yielded". 17/ Waiver will not be inferred from the contract's silence on the subject, 18/ from a generally worded management prerogatives clause 19/ or from a "zipper" clause. 20/

596 F.2d 378 (9th Cir. 1979); Russell-Newman Mfg. Co., 167 NLRB 1112, 1115 (1967), enfd. 406 F.2d 1280 (5th Cir. 1969).

16/ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). See generally Owens-Corning Fiberglas Corp., 282 NLRB No. 85 (5 January 1987); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) and cases cited therein.

17/ See, e.g., Press Co., Inc., 121 NLRB 976, 977-78 (1958); Proctor Mfg. Corp., 131 NLRB 1166, 1169-70 (1961); NL Industries, Inc., 220 NLRB 41, 43-44 (1975), enfd. 536 F.2d 786 (8th Cir. 1976); Southern Florida Hotel & Motel Assn., 245 NLRB 561, 567-68 (1979).

18/ See, e.g., Elizabethtown Water Co., 234 NLRB 318 (1978); T.T.P. Corp., 190 NLRB 240, 244 (1971).

19/ See, e.g., Ciba-Geigy Pharmaceuticals Division, ante, n. 16, 264 NLRB at 1017; Merillat Industries, Inc., 252 NLRB 784, 785 (1980).

20/ Suffolk Child Development Center, Inc., 277 NLRB No. 158, JD slip op. at 11 (30 December 1985).

Similarly, waiver by past practice must clearly encompass the program at issue. 21/

Applying the above principles, we have concluded that, in the absence of clear bargaining history to the contrary, broad management rights clauses giving an employer the right "to issue, enforce, and change Company rules", or to "make and apply rules and regulations for production, discipline, efficiency and safety," or requiring employees to observe the employer's existing rules and regulations, do not, standing alone, constitute a waiver of the union's right to bargain over drug testing. Such clauses refer only to employer rules and regulations generally and do not refer clearly and specifically to drug testing. And, as previously observed, drug testing is not a "rule or regulation" but, rather, is a unique and distinctive means of enforcing rules regarding drug use.

For essentially the same reasons, we have concluded that a union's acquiescence in a past practice of requiring applicants and/or current employees to submit to physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing. 22/ This would be true even where such past practices exist in conjunction with the kind of general, non-specific management rights clauses discussed above. 23/ Similarly, acquiescence in drug testing "for cause" does not by itself waive a union's right to bargain over random drug testing because such expansion of an existing drug testing program constitutes "a material, substantial, and . . . significant change. . . ." Murphy Diesel Co., supra, 184 NLRB at 763.

21/ Compare Continental Telephone Co., 274 NLRB 1452, 1453 (1985) with Beacon Piece Dyeing & Finishing Co., Inc., 121 NLRB 953, 956-959 (1958).

22/ Murphy Diesel Co., ante, n. 13, 184 NLRB at 763; Owens-Corning Fiberglas, ante, n. 16, 282 NLRB No. 85, slip op. at 3.

23/ Murphy Diesel Co., supra; Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1016-1017; Lockheed Shipbuilding Co., ante, n. 5, 273 NLRB at 177.

B. Waiver by Union Inaction

Where an employer gives a union advance notice of an intention to change a term or condition of employment, the union must make a reasonably timely request for bargaining over the matter to avoid a finding of waiver or acquiescence. 24/ Further, the union must actually make it reasonably clear it desires to bargain; simply protesting the change may not be enough to preserve the right to bargaining. 25/ However, the employer's notice must be sufficiently in advance of implementation to allow for bargaining and must be more than a mere announcement of a fait accompli. 26/

IV. Remedies to be Sought From the Board

As a remedy for an unlawful, unilateral implementation or modification of a drug testing program, the Regions should seek an order requiring the employer to revoke all aspects of the new policy and to bargain with the union to agreement or to a good faith impasse before again implementing a drug testing program. 27/ In addition, the Regions should seek reinstatement or rescission of discipline, with appropriate backpay, for any employees discharged or disciplined for refusing to submit to the

24/ See, e.g., Kansas National Education Assn., 275 NLRB 638, 639 (1985); Citizens National Bank of Willmar, 245 NLRB 389, 389-90 (1979), enfd. 106 LRRM 2816 (D.C. Cir. 1981); Meharry Medical College, 236 NLRB 1396 (1978). But see Southern Newspapers, Inc., d/b/a The Baytown Sun, 255 NLRB 154, 161 (1981); Allen W. Bird II; Caravelle Boat Co., 227 NLRB 1355, 1358 (1977).

25/ See American Buslines, Inc., 164 NLRB 1055, 1055-56 (1967).

26/ See, e.g., Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1018; Intersystems Design & Technology Corp., 278 NLRB No. 111, slip op. at 2-4 (28 February 1986).

27/ If the violation entails a contract modification under Section 8(d), see n. 14, supra, then the remedy would include a prohibition on any implementation for the life of the current agreement without the union's consent. See C & S Industries, Inc., ante, n. 14, 158 NLRB at 461.

drug test. 28/ However, it is not clear that such a remedy would be appropriate for an employee disciplined or discharged for testing positive under a drug test. 29/ The Regions should submit any cases involving the latter issue to the Division of Advice.

V. Interplay Between Deferral to Arbitration and Section 10(j) Injunctive Relief

The Regions should apply the established Board criteria in determining whether to defer cases under Collyer or Dubo. Thus, if a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective-bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case. 30/ However, deferral to arbitration is discretionary under Section 10(a) of the Act. 31/ Since issuance of a complaint is a jurisdictional prerequisite to Section 10(j) injunctive relief, deferral would be inappropriate if Section 10(j) injunctive proceedings are otherwise warranted. Hence, the Section 10(j) issue, if raised, must be considered in deciding whether to defer to the parties' arbitration procedures.

28/ See Murphy Diesel Co., 184 NLRB at 765; Boland Marine & Mfg. Co., ante, n. 7, 225 NLRB at 824-25; Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1019; Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 412 (9th Cir. 1978).

29/ See Taracorp, Inc., 273 NLRB 221, 222-24 (1984).

30/ See Arbitration Deferral Policy Under Collyer - Revised Guidelines, released 10 May 1973 and GC Memorandum 84-5, "Guideline Memorandum concerning United Technologies Corp., 268 NLRB No. 83," dated 6 March 1984. Thus, for example, deferral would not be appropriate where the employer is unwilling to waive time limits on the filing and processing of a grievance relating to the implementation of the disputed program. See The Detroit Edison Co., 206 NLRB 898 (1973). Deferral is an affirmative defense that must be timely raised by the charged party. Cf. Alameda County Assn., 255 NLRB 603, 605 (1981).

31/ See Collyer Insulated Wire, 192 NLRB at 840. See also Lectromelt Casting & Machinery Co., 269 NLRB 933, 934 (1984); NLRB v. Walt Disney Productions, 146 F.2d 44, 48 (9th Cir. 1945), cert. denied 324 U.S. 877 (1945).

A Section 10(j) order enjoining an employer from subjecting current unit employees to an unlawful, unilaterally implemented drug testing program may be warranted where such implementation is demonstrably undermining the union's ability to function effectively as the employees' bargaining representative. 32/ Accordingly, to evaluate the need for Section 10(j) relief, the Regions should inquire into any actual effect of an unlawfully implemented drug testing program on the union's representational capacity.

Section 10(j) relief may also be indicated where implementation of a drug testing program is unlawfully motivated 33/ or a program is unlawfully, discriminatorily applied -- for example, to union officers or other officials involved in grievance adjustments. 34/

Even in cases where there is no evidence of discriminatory motivation or other irremediable adverse impact on the union, Section 10(j) proceedings may be warranted if a Board order in due course will be unable to undo or provide an effective remedy for employees' compelled submission to unlawful drug testing. Thus, injunctive relief could be appropriate if an employer were to unlawfully implement a highly invasive, random or universal drug testing program under which all or a substantial number of the employer's current employees would be imminently affected. 35/

32/ See, e.g., Morio v. North American Soccer League, 632 F.2d 217 (2d Cir. 1980).

33/ Cf. Arcamuzi v. Continental Airlines, Inc., 819 F.2d 935 (9th Cir. 15 June 1987).

34/ Cf. Gottfried v. Samuel Frankel, 818 F.2d 485 (6th Cir. 1 May 1987).

35/ Conversely, if the program involved only testing "for cause" or on some other limited basis, or if few or no current employees were at risk of being tested, Section 10(j) relief would probably not be warranted. Similarly, even where the program is extensive, Section 10(j) proceedings may be unwarranted, and deferral to arbitration appropriate, if the employer is willing to suspend the program pending arbitration or if the arbitration process can be quickly completed. Thus, in evaluating this aspect of a case, the Regions should inquire into 1) the current impact on unit employees, i.e., how many employees have been or are likely

If the Charging Party has not requested Section 10(j) relief, and the Region concludes that Section 10(j) relief is not warranted under the criteria set forth above, and the case is otherwise deferrable, the Region should defer under Dubo and/or Collyer, and apply regular post-arbitral Board policies. 36/ If Section 10(j) relief has been requested and appears warranted, or the Region sua sponte concludes that Section 10(j) relief may be warranted, the Region should stay its action on the charge and submit the matter to Advice on the Section 10(j) issue, regardless of whether the case otherwise would be deferrable. 37/

VI. Future Submissions to the Division of Advice

As stated in General Counsel Memorandum 87-4 (2 July 1987) the Regions are no longer required to submit all cases involving drug testing to the Division of Advice. Henceforth, cases should only be submitted in the following circumstances:

1. The case presents novel or complex legal issues that are not resolved by this memorandum (see, e.g., ns. 14 and 29, *supra*, and accompanying text).

2. The Charging Party requests Section 10(j) relief, the investigation reveals *prima facie* merit to the charge, and the Region believes that Section 10(j) is warranted. However, if the Regional Director believes that 10(j) relief is clearly unwarranted, a meritorious case need not be submitted to Advice; rather, the Region may obtain telephonic clearance to deny the Charging Party's request from the Division of Operations-

to be tested imminently; and 2) whether arbitration will expeditiously resolve the dispute.

36/ See Olin Corp., 268 NLRB 573 (1984); Armour & Co., 280 NLRB No. 96 (24 June 1986). Compare Badger Meter, Inc., 272 NLRB 824 (1984) with Alfred M. Lewis, Inc., 229 NLRB 757 (1977), *enfd.* 587 F.2d 403 (9th Cir. 1978).

37/ Of course, a Region must fully investigate the case and evaluate the merits of the charge before submitting a drug testing case to Advice with its 10(j) recommendation. The clarity of the violation is an element in evaluating the appropriateness of Section 10(j) proceedings.

Management. 38/ Where there is a close question as to the warrant for 10(j) relief, the case should be submitted to Advice.

3. A meritorious case presents circumstances posing the danger of irreparable injury, and the Region accordingly recommends sua sponte Section 10(j) relief.



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38/ Casehandling Manual (ULP) Section 10310.1, paragraph 2. Of course, a non-meritorious case even with a 10(j) request does not have to be submitted to Advice. Id., at paragraph 5.