United Hoisting & Scaffolding, Inc. *and* International Union of Elevator Constructors, Local No. 1, AFL–CIO. Case 29–CA–105701

July 1, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On January 31, 2014, Administrative Law Judge Lauren Esposito issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt her recommended Order dismissing the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed; however, jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for review of the award as to its appropriateness for deferral.

Stephanie LaTour, Esq., for the Acting General Counsel.
Gregory R. Begg, Esq. (Peckar & Abramson), of River Edge, New Jersey, for the Respondent.
Jonathan Walters, Esq. (Markowitz & Richman), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 29–CA–105701, filed on May 21, 2013, by International Union of Elevator Constructors, Local No. 1, AFL–CIO (Local 1 or the Union), a complaint and notice of hearing (the complaint) issued on August 29, 2013. The complaint alleges that United Hoisting & Scaffolding, Inc. (United or Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by implementing a drug testing policy without providing the Union with an opportunity to bargain, and by discharging two employees for subsequently refusing to take a drug test pursuant to the newly implemented policy. Respondent filed an answer denying the complaint's material allegations. This case was tried before me on September 26, 2013, in Brooklyn, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material to the complaint's allegations, Respondent has been a corporation with an office and place of business in Long Island City, New York, engaged in the business of constructing and maintaining temporary scaffolding and elevators to hoist construction materials and equipment at various building sites in the New York City area. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admitted at the hearing and I find that at all material times Local 1 has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent's employees erect and maintain temporary hoists at building construction sites, which carry workers and materials up to various levels of the building during the construction process. Respondent's employees also perform testing on the temporary hoists as mandated by the New York City Department of Buildings. When construction is finished and the temporary hoist is dismantled, tenants use the newly-installed elevators inside the building in order to continue work. Richard Halloran, who testified at the hearing, has been Respondent's president for over 20 years.

Respondent's employees work at various building jobsites, and at Respondent's shop in Long Island City. As of May 2013, Respondent employed two employees on a full-time basis—James Connors and Nohar Singh—and obtained additional employees as necessary through Local 1's hiring hall. As of May 2013, Connors had been employed by Respondent as an elevator mechanic foreman for 22 years, and Singh had been employed for almost 5 years. Connors and Singh both testified at the hearing.

B. The Collective-Bargaining Relationship

Respondent is a member of the Hoisting and Scaffolding Trade Association, Inc. (HASTA), a multiemployer association which has had a collective-bargaining relationship with Local 1 for a number of years. The most recent collective-bargaining agreement between Local 1 and HASTA is effective by its terms from August 1, 2010, to March 17, 2015. Halloran served on the HASTA negotiating committee during the negotiations for this agreement in 2010. Gary Riefenhauser, Local 1's vice president and business agent, and Lenny LeGotte, Local 1's president and business manager, were members of Local 1's negotiating team during the 2010 negotiations. Riefenhauser testified at the hearing, and stated that he attended all of the bargaining sessions during the 2010 negotiations.

During the 2010 HASTA negotiations, Local 1 raised the issue of a substance abuse policy, which was not explicitly provided for under the terms of the HASTA agreement.[1] Local 1

[1] Connors and Singh testified without contradiction that prior to May 2013 the only drug tests they were ever asked to submit to were done at the behest of the general contractor on the site where they were

also has a collective-bargaining relationship with a multiemployer association comprised of elevator manufacturing companies (such as Otis and Thyssen-Krupp), known as the Elevator Manufacturers' Association of New York (EMANY). During the 2010 HASTA negotiations, LeGotte told the HASTA representatives that the Union had negotiated a substance abuse policy with EMANY, and asked the HASTA representatives if they would be interested in adopting the same substance abuse policy. According to Riefenhauser, the HASTA representatives, including Halloran, said that they were not interested in discussing the issue at that time.

The 2010–2015 HASTA agreement recognizes Local 1 as the exclusive bargaining representative for "all Elevator Constructor Mechanics" employed by HASTA's members who are "engaged in construction work . . . within a radius of 50 miles of City Hall of the City of New York," with certain geographic exceptions not relevant to this case. The HASTA agreement's recognition provisions further state as follows:

> The Association represents that it is duly authorized by its members employing Elevator Constructors to enter into this collective bargaining agreement, that in so doing it is authorized to bind such members to the terms and conditions of this Agreement for the full term of this agreement, that it will require, as a condition of membership in said Association, that such Employer members of the Association shall continue to be bound by such terms or, shall upon admission to the said Association, after the date of execution of this Agreement, agree to be bound from that date forward by all the terms and conditions of this Agreement.

Finally, the recognition provisions state that "No modification, variation or waiver of any term or provision herein shall be valid unless agreed upon in writing by both the Association and the Union."

The HASTA agreement also contains management rights and complete agreement or "zipper" provisions. Section III, entitled, "Employer Rights," states, "The Employer reserves and retains the sole and exclusive right to manage its operations and to direct the work force, except only to the extent that express provisions of this Agreement specifically limit or qualify these rights." Section IX, entitled "Complete Agreement," states, "This Agreement constitutes the complete agreement between the parties, and there is no other Agreement, written or oral, which exists between them."

Finally, the HASTA agreement contains provisions establishing a grievance and arbitration procedure. Section VI, entitled, "Arbitration," defines a grievance at section 1 as "a grievance, complaint, or dispute concerning the interpretation or application of any provision of this Agreement" originating with "any employee, any employer, or the Union." Section VII, entitled, "Employee Grievances," further provides that "Should any employee have a grievance based upon a disciplinary action of the Employer (including a disciplinary discharge) or a discriminatory transfer or reduction of status," such a grievance will be addressed by the Union pursuant to the procedures for arbitration.

Respondent's counsel stated at the hearing that Respondent does not dispute its membership in HASTA, Local 1's status as exclusive collective-bargaining representative, or its collective-bargaining relationship with Local 1, and does not dispute its obligation to bargain with Local 1 or comply with the HASTA agreement.

C. The Events of May 9, 2013

On May 9, 2013, Connors and Singh were working on a job at Madison Square Garden, preparing an elevator car for a test to be performed by representatives of the New York City Department of Buildings. Connors arrived at about 9:30 a.m., as he had previously been working at a job in Long Island City. He began working with Singh to prepare the elevator for the test, when Guido, a safety officer for Respondent, told Connors that Joe Covello, one of Respondent's managers,[2] wanted the employees to submit to a drug test immediately. Guido told Connors and Singh to go to the toilet trailer, and Connors and Singh proceeded downstairs. However, Connors found the demand that they take a drug test odd, and called Riefenhauser to ask about it. Riefenhauser testified that Connors called him at about 11 a.m., and told him that he was being asked to take a drug test pursuant to a new policy. Riefenhauser asked Connors whether this was Madison Square Garden, and Connors confirmed the location.[3] Riefenhauser asked Connors whether Madison Square Garden was requiring that the employees be drug tested, and Connors told him no, Respondent initiated the drug test requirement. Riefenhauser then told Connors that Respondent did not have a drug policy, and that the employees were not required to take a drug test.

Singh, meanwhile, had gone to the toilet trailer. When he did not see Connors or any other employees there, he stepped out of the trailer, where he saw Guido. Singh told Guido that he wanted to use the company phone to call Riefenhauser, but Guido said that if Singh left the trailer he would be fired.

Connors testified that after he finished his conversation with Riefenhauser, he looked for Singh, to have Singh talk to Riefenhauser about the drug test. Singh then spoke to Riefenhauser, who told him that he should not take the drug test because it was not required under the Union's contract. Singh testified that about an hour later, Guido told him that he and Connors were fired, and stated that Covello wanted the keys for the company vehicle.

Reifenhauser testified that Covello called him about an hour later.[4] Reifenhauser asked Covello what was going on, and Covello replied that Respondent had a new policy, and that the employees would be fired if they didn't take the drug test.

working, and were not required by the Respondent. Each was only asked to submit to a drug test on one occasion.

[2] Connors testified that he believed that Covello was one of Respondent's officers, and testified without contradiction that Covello reported directly to Halloran.

[3] Riefenhauser testified that he found Respondent's demand that employees take a drug test at that particular phase of the work on the Madison Square Garden project odd, because employers typically raised such concerns with the Union prior to a project's beginning. The Madison Square Garden project had begun 3 years earlier.

[4] Covello did not testify at the hearing.

Covello said that the employees were fired, and that he did not want them to take the company van home because he didn't know whether they were sober.[5] Reifenhauser asked Covello what made him think the employees were not sober, given that they had been working for Respondent for 20 years. Covello replied that they were not to drive the company vehicle, because they had refused to take the drug test. Reifenhauser told Covello that the employees had their tools in the company vehicle, and Covello said that they could return to get them the next day. Reifenhauser then told Connors and Singh to go home because they were discharged. Riefenhauser told Connors that Covello had said that because he and Singh were too incapacitated to drive the company vehicle, they should give the keys to Guido. Riefenhauser told Connors that the Union would proceed from that point.

Reifenhauser testified that the next day, Covello called him at around 5 a.m. and told him that if Connors and Singh set foot in the building they would be arrested. Covello said that the employees were not permitted in the building, because he did not know whether or not they were sober.

D. The Grievance and Arbitration Procedure

On May 13, 2013, Riefenhauser initiated the grievance procedure by sending Halloran letters stating that the Union wished to grieve the discharges of Connors and Singh. On May 23, 2013, Respondent's counsel wrote to Riefenhauser denying the grievance, and stating that Connors and Singh were legitimately terminated for refusing to comply with Respondent's drug testing policy. Respondent also contended in this letter that Connors was discharged because he lacked the skills, training, and experience necessary to maintain and repair variable frequency drives and programmable logic controllers. In subsequent correspondence between Respondent and union counsel, the Union contended that Respondent had violated the National Labor Relations Act by implementing a drug testing policy without providing the Union with notice and the opportunity to bargain. The Union also contended that the claim that Connors lacked sufficient training and experience to continue his employment was belied by his 22 years of work for Respondent.

The grievances were not resolved, and on August 28, 2013, the Union demanded a meeting of the New York Hoisting Trade Arbitration Committee to discuss them, pursuant to the collective-bargaining agreement's grievance and arbitration procedure. The Union stated that if the grievances were not resolved at the meeting, it intended to submit them to arbitration. The Arbitration Committee meeting was held on October 3, 2013, but the grievances were not resolved, and the Union demanded arbitration in writing that day.

III. ANALYSIS AND CONCLUSION

A. The Positions of the Parties

The General Counsel contends that Respondent violated Section 8(a)(5) of the Act by implementing a drug testing policy without providing Local 1 with notice and the opportunity to bargain. Because the Board has held that drug testing is a mandatory subject of bargaining, Respondent violated Section 8(a)(5) by its unilateral implementation. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). The General Counsel further argues that the evidence does not establish that the Union waived its right to demand bargaining regarding the implementation of the drug testing policy. The General Counsel asserts that there was no "clear and unmistakeable" express waiver of the right to demand bargaining on the Union's part, and that Respondent in fact waived its right to bargain regarding drug testing by explicitly declining to do so during the negotiations culminating in the 2010–2015 HASTA contract. Finally, The General Counsel contends that Connors and Singh were discharged on May 9, 2013, solely for refusing to submit to a drug test, and that Respondent's claim that Connors was no longer qualified to continue his employment is both irrelevant and unsubstantiated by the evidence.

Respondent argues that the charge should be deferred to the grievance and arbitration process contained in the HASTA collective-bargaining agreement pursuant to *Collyer Insulated Wire* and *United Technologies Corp.*, and that the complaint should therefore be dismissed. *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). Respondent argues that the six components of the *Collyer* analysis are satisfied here, and notes that the Board has in the past deferred to the grievance procedure allegations that the unilateral implementation of substance abuse policies and other work rules violated Section 8(a)(5). The General Counsel and the Union contend that deferral under *Collyer* is inappropriate, because, given the parties' bargaining history and the wording of the HASTA agreement's management-rights and zipper clauses, the resolution of the unilateral change allegation does not involve a matter of contract interpretation. General Counsel further argues that an arbitrator would not be able to fully remedy Respondent's failure to bargain regarding the drug testing policy, because they would not be empowered to order a notice posting. Finally, The General Counsel asserts that Respondent should not be permitted by deferral of the complaint's allegations to argue in the context of an arbitration hearing that its termination of Connors was engendered by Connors' lack of qualifications.

B. Deferral to Arbitration

As stated above, Respondent argues in its posthearing brief that the charge should be deferred to the grievance and arbitration procedure contained in the HASTA collective-bargaining agreement, pursuant to *Collyer Insulated Wire* and *United Technologies*. Whether deferral to the grievance and arbitration process is appropriate is a "threshold question" which must be decided prior to addressing the merits of the allegations at issue. *Sheet Metal Workers Local 18—Wisconsin (Everbrite, LLC)*, 359 NLRB 1095, 1096 (2013), quoting *L. E. Myers Co.*, 270 NLRB 1010, 1010 fn. 2 (1984). Under *Collyer* and *United Technologies*, prearbitral deferral to the grievance and arbitration procedure is warranted where:

> the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights;

[5] There is no evidence that Connors and Singh were intoxicated or incapacitated in any way on May 9, 2013.

> the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration.[6]

Sheet Metal Workers Local 18—Wisconsin, 359 NLRB 1095, 1095–1096. The Board has held that its deferral policy ensures that where the parties have voluntarily created a dispute resolution mechanism "culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties" to resolve conflict in that manner. *United Technologies*, 268 NLRB at 558. It is also well settled that a deferral defense can be raised at the hearing even if, as in the instant case, it was not previously asserted in a party's pleadings. *Sheet Metal Workers Local 18—Wisconsin*, 359 NLRB 1095, 1096; *Hospitality Care Center*, 314 NLRB 893, 894 (1994).

The evidence establishes that, as Respondent argues, the majority of the criteria for deferral to arbitration are satisfied here. The parties' collective-bargaining relationship is well established, and there is no evidence that it has been less than productive overall. The complaint does not contain allegations against Respondent premised upon animosity toward the exercise of Section 7 rights, and there is no other evidence to that effect. The HASTA agreement provides for the arbitration of a broad range of disputes—any "grievance, complaint, or dispute concerning the interpretation or application of any provision" of the contract, and all disciplinary matters including discharge. This language would clearly encompass the Union's grievance regarding Respondent's discharge of Connors and Singh (for whatever the asserted reason), and whether Respondent's implementation of the drug test policy violated the agreement. Respondent has represented that it is willing to resolve the dispute through the grievance and arbitration procedure. Finally, Respondent cites a number of cases where the Board has deferred to the grievance and arbitration procedure allegations that an employer violated Section 8(a)(5) of the Act by unilaterally implementing substance abuse or drug testing policies. See, e.g., *Wonder Bread*, 343 NLRB 55 (2004); *Southern California Edison Co.*, 310 NLRB 1229 (1993), review denied 39 F.3d 1210 (D.C. Cir. 1994); *Inland Container Corp.*, 298 NLRB 715 (1990); *Standard Oil Co. (Ohio)*, 254 NLRB 32 (1981).

Given the evidence and the *Collyer* analysis described above, the crux of the matter here is therefore whether the dispute is well-suited to resolution by arbitration. The Board considers an issue to be well-suited to arbitral resolution when "the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011). Deferral is not appropriate, by contrast, where no interpretation of the contract is pertinent to Respondent's contentions regarding its failure to comply with a particular contract provision. *San Juan Bautista Medical Center*, supra, citing *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979). For example, deferral is inappropriate where the dispute turns upon interpretation of the Act, or of other statutory provisions incorporated into the collective-bargaining agreement. See *Avery Dennison*, 330 NLRB 389, 389–391 (1990) (declining to defer allegations involving transfer of bargaining unit work, withdrawal of recognition and unilateral changes which implicate "the very existence of a collective-bargaining relationship"); *San Juan Bautista Medical Center*, 356 NLRB at 736, 736–738 (declining to defer dispute centered on applicability of statutory exemption to Puerto Rico law requiring payment of a Christmas bonus). Deferral is also unwarranted where the disputed contract provision is clear and unambiguous, so that the "special competence" of an arbitrator is not required. *University Moving & Storage Co.*, 350 NLRB 6, 20 (2007); *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001). Thus, the Board has held that contract provisions which require the payment of pension and welfare fund contributions and explicitly enumerate terms such as leave accrual and wage rates do not require any interpretive expertise, and that disputes involving such language are not particularly suited for resolution within the arbitral context.[7] See, e.g., *Chapin Hill at Red Bank*, 359 NLRB 1119, 1124 (2013) (deferral inappropriate where Respondent failed to identify a contract term requiring interpretation, and Respondent's contractual obligation to make pension fund contributions was clear); *University Moving & Storage Co.*, 350 NLRB at 20–21 (contract language which "explicitly and unequivocally provides for" pay out of accrued sick leave "presents no question of contract interpretation"); *Grane Health Care, Inc.*, 337 NLRB 432, 436–437 (2002) (wage rates specified by contract clear and unambiguous); *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979), enfd. 636 F.2d 1210 (3d Cir. 1980) (merit increase provisions clear and unambiguous).

In the instant case, however, the resolution of the Union's grievances involves the interpretation of several contract provisions, including the management-rights clause and the complete agreement or "zipper" clause, appropriate for the special inter-

[6] The Board applies the analysis articulated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), in order to determine whether deferral to an arbitrator's award is appropriate. Under these cases, the Board will defer to an award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the arbitrator's decision is not "clearly repugnant" to the Act's purposes and policies. In addition, the evidence must establish that the arbitrator considered the unfair labor practice issue before the Board, meaning that the contractual and unfair labor practice issues are factually parallel, the arbitrator was generally presented with the facts relevant to the unfair labor practice, and the arbitrator's decision "is susceptible to an interpretation consistent with the Act." *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659 (2005), citing *Olin Corp.*, 268 NLRB at 574.

[7] The Board has also held that allegations regarding unilateral changes in wage rates are particularly unsuited for deferral in that they constitute "a basic repudiation of the bargaining relationship" and the principles of collective bargaining. *Oak Cliff-Golman Baking Co.,* 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), supplementing 202 NLRB 614 (1973). The Board distinguishes such cases, however, from situations involving alleged unilateral changes in terms less vital to the essence of the employment relationship, as the latter do not constitute a wholesale rejection of collective bargaining in and of itself. See *Inland Container Corp.*, 298 NLRB at 716 fn. 3; *Textron, Inc.*, 310 NLRB at 1211 fn. 8.

pretive competence of an arbitrator. There is no definite, unambiguous contract term or obligation to be applied here. Respondent's contention that it was permitted to unilaterally institute a drug testing policy will turn at least in part upon the interpretation of the contract's management rights clause, which states that Respondent "reserves and retains the sole and exclusive right to manage its operations and to direct the work force," unless "express provisions of this Agreement specifically limit or qualify these rights." The General Counsel is correct that this management-rights clause does not specifically empower Respondent to promulgate safety rules or other standards which could nominally encompass drug testing, as was the case in *Southern California Edison Co.*, 310 NLRB at 1230–1231. See also *Textron, Inc.*, 310 NLRB 1209, 1210 fn. 6 (1993); *Certainteed Corp.*, 2013 WL 772784 at p. 2 (Feb. 28, 2013). (Board Decision not included in bound volumes.) However, the Board has deferred unilateral change allegations based upon broader management-rights language, as in *Wonder Bread*, and even in situations where there were no specific contract provisions in dispute.[8] See *Wonder Bread*, 343 NLRB at 56 fn. 2; *Inland Container Corp.*, 298 NLRB at 716; *Standard Oil Co. (Ohio)*, 254 NLRB at 34–35.

The instant case is in fact similar to the situation addressed by the Board in *Wonder Bread*. As discussed above, in *Wonder Bread* the Board deferred an allegation that the employer violated Section 8(a)(5) by unilaterally implementing a policy requiring physical examinations and possible drug testing to the grievance and arbitration procedure. 343 NLRB at 55–56. The management-rights clause considered by the Board in *Wonder Bread* stated that "the management of the plant, the methods of operation, and the direction of the workforce is vested in the company except as specifically modified by this Agreement." 343 NLRB at 55. Its wording was therefore relatively general, as is the case with the management-rights provision at issue here. The language defining issues appropriate for the grievance and arbitration procedure in *Wonder Bread*—"any difference . . . between the Company and the Union as to the interpretation or application of any provision of this Agreement"—was also comparable in breadth to the arbitration provisions in this case. 343 NLRB at 55. The Board in *Wonder Bread* nevertheless rejected the General Counsel's argument that no contract provision could "reasonably be interpreted as authorizing the alleged unilateral action." *Wonder Bread*, 343 NLRB at 56. Instead, the Board found that given the lack of "restriction on the subject matter of grievances that may be filed and pursued to arbitration," the issue of "reasonable interpretation" was "one . . . for the arbitrator."[9] Id.

Nor do I find that, as the General Counsel argues, the bargaining history combined with the language of the management-rights and zipper clauses results in a clear and unambiguous preclusion of Respondent's prerogative to implement a drug test, such that arbitral contract interpretation is unnecessary. In my view, a conclusion that the management-rights clause could not possibly be interpreted as permitting Respondent to unilaterally implement a drug testing policy does not inescapably follow from Respondent's declining to bargain regarding a substance abuse policy during the 2010 HASTA negotiations, as the General Counsel contends. Regardless, as discussed above, the cases declining to defer on the basis of clear and unambiguous contract language involve explicitly defined rights and obligations such as wage rates and fund contribution requirements. By contrast, as further discussed above, the Board has deferred unilateral change allegations based upon general management rights-language such as the provision contained in the HASTA agreement, or, indeed, where there is no specific contract provision in dispute.

It should be noted in this respect that the Board has also deferred to arbitration unilateral change allegations which implicate zipper clauses and bargaining history. For example, in *Radioear Corp.*, 199 NLRB 1161 (1972), the General Counsel contended that the employer violated Section 8(a)(5) by unilaterally terminating a Thanksgiving "turkey money" bonus, which had been provided for many years but was not explicitly addressed in the collective-bargaining agreement. *Radioear Corp.*, 199 NLRB at 1161. The employer contended that given the contract's zipper clause and the union's unsuccessful attempts during the previous contract negotiations to include language preserving all existing benefits, the "turkey money" was not intended to have the effect of a contract benefit. Id. Although the administrative law judge found that the employer had violated Section 8(a)(5) given the absence of a clear and unequivocal waiver on the part of the union, the Board deferred the charge to the grievance and arbitration procedure under

[8] Contrary to the General Counsel's contention, deferral of a unilateral change allegation under *Collyer* does not involve a consideration of whether a party waived its right to bargain over the subject matter of the unilateral change. Posthearing brief for the General Counsel at p. 23–24. As the General Counsel states, in *Southern California Edison Co.*, the Board considered whether an arbitrator's award was "susceptible to the interpretation that the arbitrator found a waiver" of the union's right to demand bargaining regarding drug and alcohol testing. 310 NLRB at 1231. However, the Board did so as part of its determination that the arbitrator's award was not "clearly repugnant to the Act" pursuant to the *Spielberg Mfg. Co.* analysis for evaluating whether deferral to an arbitrator's award was appropriate. The instant case, by contrast, involves prearbitral deferral under *Collyer*, and therefore implicates the distinct, six factor test discussed previously.

[9] As the General Counsel states in her posthearing brief, the Board in *Johnson-Bateman* rejected the employer's contention that its unilateral implementation of a drug testing policy was "solely a matter of contract interpretation," and therefore inappropriate for a Board determination. 295 NLRB at 186; Posthearing brief for the General Counsel at 24–25. However, the Board's conclusion in this respect took place in the context of the doctrine that where the employer and the union advance "equally plausible interpretations" of contested contract provisions, the dispute is one of contract interpretation in which the Board will not in effect serve as an arbitrator. *Johnson-Bateman*, 295 NLRB at 186, *citing NCR Corp.*, 271 NLRB 1212 (1984). The Board has since held that the equally plausible interpretations or "sound arguable basis" defense applies solely to allegations involving unlawful midterm contract modifications, and not unilateral changes in mandatory subjects of bargaining. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), enfd. 475 F.3d 14 (1st Cir. 2007). As a result, this aspect of the Board's *Johnson-Bateman* decision is not pertinent here. In *Johnson-Bateman Co.* neither party contended that the unilateral implementation allegation should be deferred to arbitration, and the Board therefore did not address deferral. 295 NLRB at 181 fn. 6.

Collyer. Id. The Board found that deferral was appropriate in that "the collective-bargaining agreement, and the events surrounding its execution, are at the heart of the disagreement."[10] Id.

For all of the foregoing reasons, I find that the contract provisions implicated by the grievances here are not "clear and unambiguous" such that the interpretive competence of an arbitrator is superfluous. As a result, I find that the dispute herein is well suited to resolution through arbitration.

The other arguments raised by the General Counsel and the Charging Party against deferral of the charge are unavailing. The General Counsel provides no legal support for its assertion that deferral is not appropriate because the arbitrator will not be able to fully remedy the violation by assuring the employees that Respondent will comply with its bargaining obligation. In fact, as discussed above, there is a substantial history of Board deferral with respect to allegations that employers unlawfully unilaterally implemented substance abuse or drug testing policies, despite arbitrators' customary lack of authority to order a notice posting. Nor is there legal precedent for the General Counsel's argument that the charge should not be deferred in order to prevent Respondent from pursuing its contentions regarding Connors' purported lack of expertise in arbitration.

For all of the foregoing reasons, I find that that deferral of the complaint's allegations to the grievance and arbitration procedure under the HASTA collective-bargaining agreement is appropriate. As such, I recommend that the complaint be dismissed.

[10] The union in *Radioear Corp.* subsequently requested that the Board review the arbitrator's award after the arbitrator explicitly declined to opine as to the applicability of the zipper clause to the existence of an obligation on the employer's part to bargain over the "turkey money." 214 NLRB 362, 363 (1974). The Board, considering the zipper clause as well as other evidence in the record, found that the union waived its right to bargain regarding the "turkey money," such that no bargaining obligation existed on the employer's part, and therefore dismissed the complaint. *Radioear Corp.*, 214 NLRB at 364.

CONCLUSIONS OF LAW

1. The Respondent, United Hoisting & Scaffolding, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Elevator Constructors, Local No. 1, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, International Union of Elevator Constructors, Local No. 1, AFL–CIO, has been the limited exclusive collective–bargaining representative of the following appropriate unit of employees for the purposes of collective bargaining: All elevator constructor mechanics as set forth in section 1A of the collective–bargaining agreement between Local No. 1 and the Hoisting and Scaffolding Trade Association effective from August 1, 2010, through March 17, 2015.

4. The complaint's allegations are appropriate for deferral to arbitration pursuant to *Collyer Insulated Wire* and *United Technologies*.

ORDER

It is recommended that the complaint be dismissed; provided, however, that the Board shall retain jurisdiction of this proceeding for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or have reached a result that is repugnant to the Act.