

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

## Advice Memorandum

DATE: October 15, 2015

TO: David E. Leach, Regional Director  
Region 22

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

SUBJECT: Shore Point Distribution Co., Inc, 530-6067-4055-6300  
E. Kirschenbaum & Associates, LLC 530-6050-6800-0000  
Case 22-CA-151053 530-6050-0120-0000  
530-6050-3385-0000  
530-6067-4055-0150  
530-6067-4055-0100  
530-6067-4055-8500

The Region submitted this case for advice on whether Shore Point Distribution Co., Inc. violated Section 8(a)(5) by failing to bargain with the International Brotherhood of Teamsters, Local 701 before installing a global positioning system (“GPS”) device on an employee’s truck. A private investigator used the GPS device to maintain and regain visual contact with the truck while following the employee for four days collecting evidence that led to the employee’s discharge. We conclude that the charge should be dismissed, absent withdrawal, because although the Employer’s use of the GPS tracking device was a mandatory subject of bargaining, it did not constitute a “material, substantial, and significant” change in employees’ terms and conditions of employment in this case. Therefore, the Employer was under no obligation to bargain over the installation and use of the GPS device.

### FACTS

Shore Point Distribution Co., Inc. (the “Employer”) is a wholesale beverage distributor that supplies alcoholic beverages throughout central New Jersey from its main facility in Freehold, New Jersey. The Employer’s drivers, helpers, and warehousemen are represented by the International Brotherhood of Teamsters, Local 701 (the “Union”). The most recent collective bargaining agreement between the parties is effective from April 1, 2014 until March 31, 2017. It contains work rules, *inter alia*, prohibiting stealing time and requiring that drivers adhere to Department of Transportation regulations mandating that drivers accurately account for their time on daily log records.

The Employer has a practice of retaining a private investigator to follow an employee suspected of stealing time and using any results obtained through the investigator's personal observation for disciplinary purposes. The Union is aware of this practice and has no objection to it.

In March 2015,<sup>1</sup> the Employer became concerned that one of its employees (the "Employee") was stealing time after noticing that he seemed to be taking more time than other drivers to complete the same routes. To confirm whether he was stealing time, the Employer hired E. Kirschenbaum & Associates (the "Private Investigator") to follow the Employee on his routes on April 6, 7, 8 and 10 and videotape him engaging in certain activities. To facilitate the investigation, the Employer placed a GPS tracking device on the Employee's truck during the days he was being followed. The GPS was used only to ensure that the Private Investigator could both maintain and regain visual contact if he lost sight of the Employee.

The Private Investigator personally observed the Employee engaging in work rule violations including: operating his truck in an unsafe and illegal manner, failing to follow specified delivery times, stealing time, and falsifying his daily log. On one occasion on April 10, the Private Investigator lost visual contact with the Employee but could tell from the GPS that his truck was stopped in a particular town in New Jersey. Because the Private Investigator remembered that the Employee lives in that town, he called the Employer to get the Employee's home address. There, he discovered the Employer's truck parked in the Employee's driveway during work hours.

On April 13, the Employer terminated the Employee based on the Private Investigator's observations. On April 24, the Union filed a charge alleging that the Employer unilaterally installed the GPS device and engaged in electronic surveillance in violation of Section 8(a)(1) and (5).

### ACTION

We conclude that the Employer's installation and use of the GPS tracking device was a mandatory subject of bargaining but that it did not constitute a "material, substantial, and significant" change in employees' terms and conditions of employment. Accordingly, the Employer had no obligation to bargain over the use of the GPS device, and the charge should be dismissed absent withdrawal.

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<sup>1</sup> All dates hereinafter are in 2015 unless otherwise noted.

The Employer violated its duty to bargain here if (1) the use of the GPS device was a mandatory subject of bargaining;<sup>2</sup> and (2) it constituted a material, substantial, and significant change in the terms and conditions of employment.<sup>3</sup> The Board has found a number of similar techniques for investigating and monitoring employee misconduct to be mandatory subjects of bargaining. In *Colgate-Palmolive Co.*, the Board explained that the installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining because it “has the potential to affect the continued employment of employees whose actions are being monitored.”<sup>4</sup> On that basis, the Board analogized hidden cameras to physical examinations, drug and alcohol testing and polygraph testing – all of which had previously been found to be mandatory subjects of bargaining because they are “investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct” and have “serious implications for . . . employees’ job security[.]”<sup>5</sup> Following *Colgate-Palmolive Co.*, the Board in *National Steel Corp.* held that an employer’s periodic use of hidden cameras to investigate specific cases of suspected theft and other instances of wrongdoing was a mandatory subject of bargaining.<sup>6</sup> Thus, under well-settled Board precedent, the Employer’s installation and use of a

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<sup>2</sup> See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488, 499 (1979) (finding employer was obligated to bargain over changes in in-plant cafeteria and vending machine food and beverage prices and services because those prices and services were “plainly germane to the working environment” and “not among those managerial decisions[] which lie at the core of entrepreneurial control” and therefore were mandatory subjects of bargaining) (internal citations omitted).

<sup>3</sup> See, e.g., *Golden Stevedoring Co., Inc.*, 335 NLRB 410, 415-16 (2001) (citations omitted) (holding that an employer was obligated to bargain over changing its disciplinary policy from a system of oral reprimands to a system of written warnings because the change was material).

<sup>4</sup> 323 NLRB 515, 515-16 (1997) (holding employer’s unilateral installation and use of hidden surveillance cameras violated Section 8(a)(5)).

<sup>5</sup> *Id.* at 515-16 & nn.6-8 (citing, e.g., *Johnson-Bateman Co.*, 295 NLRB 180 (1989) (drug and alcohol testing) and *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975) (polygraph testing)). See also *Anheuser-Busch, Inc.*, 342 NLRB 560, 560-61 (2004) (finding that installation of surveillance cameras that led to the discipline of 16 employees was a mandatory subject of bargaining), *enforced in relevant part*, 414 F.3d 36 (D.C. Cir. 2005).

<sup>6</sup> 335 NLRB 747, 747 (2001), *enforced*, 324 F.3d 928 (7<sup>th</sup> Cir. 2003).

GPS device to track an employee suspected of stealing time was a mandatory subject of bargaining.

An employer has a duty to bargain over a unilateral change in terms and conditions of employment, however, only if that change is a “material, substantial, and a significant one[.]”<sup>7</sup> In *Rust Craft Broadcasting of New York, Inc.*, the Board determined that an employer’s substitution of timeclocks for manual notations to record work time was not a material, substantial, and significant change in employee’s terms and conditions of employment because, *inter alia*, the rule itself that employees must record their time in and out remained unchanged. The employer merely substituted a more dependable mechanical method for enforcing the rule.<sup>8</sup> In contrast, the Board has found that a unilateral change is material, substantial, and significant where it results in more stringent requirements or would likely impact employment security.<sup>9</sup>

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<sup>7</sup> *E.g., Golden Stevedoring Co., Inc.*, 335 NLRB at 415-16.

<sup>8</sup> 225 NLRB 327, 327 (1976). *See also Litton Systems*, 300 NLRB 324, 331-32 (1990) (finding no material change where the employer unilaterally installed a central buzzer system for employee breaks, replacing the practice of employees taking breaks in accordance with various unsynchronized clocks because, *inter alia*, “[t]he official time allotted for the breaks has not changed”), *enforced*, 949 F.2d 249 (8<sup>th</sup> Cir. 1991); *Goren Printing Co.*, 280 NLRB 1120, 1120 (1986) (finding unilateral change requiring employees to give written notice to management if they were leaving early in lieu of oral notice not to be a material change because, *inter alia*, the rule itself of giving notice to management remained intact despite the procedural change).

<sup>9</sup> *See, e.g., Golden Stevedoring*, 335 NLRB at 415-16 (unilateral switch from oral to written warning system was a material, substantial, and significant change because written warnings were retained in the employee’s personnel file and could affect employment security); *Amoco Chemicals Corp.*, 211 NLRB 618, 618 n.2 (1974) (same), *enforced in relevant part*, 529 F.2d 427 (5<sup>th</sup> Cir. 1976); *Murphy Diesel Co.*, 184 NLRB 757, 762-63 (1970) (unilateral implementation of new and more stringent rules requiring employees to submit signed, written explanations within two days of returning to work and setting quotas of absences or tardy incidents that would lead to various disciplinary steps where there had not been such a formal system constituted material, substantial, and significant changes), *enforced*, 454 F.2d 303 (7<sup>th</sup> Cir. 1971); *Garney Morris, Inc.*, 313 NLRB 101, 101, 119-120 (1993) (affirming ALJ determination that unilateral implementation of a new and much more detailed warning form and procedure for written discipline violated Section 8(a)(5)), *enforced*, 47 F.3d 1161 (3d Cir. 1995).

Applying this Board precedent, we concluded in *PPG, Inc.* that an employer who videotaped an employee suspected of workers compensation fraud without providing the Union an opportunity to bargain over the use of the video camera did not violate Section 8(a)(5) because the videotaping was not a significant change.<sup>10</sup> The employer had a past practice of investigating such fraud using personal observation, and following the unilateral change, it merely obtained the same type of information through additional electronic means.<sup>11</sup>

In this case, the Employer has an established practice, to which the Union does not object, of retaining an investigator to follow employees suspected of stealing time. The information obtained by the GPS device was used in conjunction with the Private Investigator's personal observations and provides the same information that he could obtain by following the suspect Employee's truck. Indeed, on the one occasion that the Private Investigator apparently relied on the GPS, he used it only to help track the Employee when he lost sight of the truck in order to continue his personal observations. Thus, this case is closely analogous to *PPG, Inc.* Further, like the time clock in *Rust Craft Broadcasting of New York, Inc.*, the GPS device in this case merely provided a mechanical method to assist in the enforcement of an established policy.

Moreover, although the information provided by the GPS in this case was of use to the Private Investigator, it did not increase greatly the chance of the Employee being disciplined. The Employee in this case was already being followed for four days by a professional noting his every movement. Additionally, there is no evidence that any information from the GPS device was used in the Employee's discipline independent of the Private Investigator's personal observations.

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<sup>10</sup> Case No. 6-CA-33492, Advice Memorandum dated November 3, 2003.

<sup>11</sup> *Id.* at 4. Compare *BP Exploration of Alaska, Inc.*, Case 19-CA-29566, Advice Memorandum dated July 11, 2005 (concluding that an employer's unilateral installation of vehicle data recorders (VDRs) on employees' trucks constituted a significant change from the past practice of two security officers monitoring driving for a small percentage of the day using personal observation and radar guns because the VDRs collected far more information and therefore greatly increased employees' chances of being disciplined).

Accordingly, the charge should be dismissed absent withdrawal.<sup>12</sup>

/s/  
B.J.K.

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<sup>12</sup> Our conclusion here does not turn on the fact that the unilateral change affected only one employee. As the Board explained in *Carpenters Local 1031*, 321 NLRB 30, 32 (1996): “Nothing in the Act nor in the legislative history limits Section 8(a)(5) violations to conduct affecting more than one employee.” *See also Caterpillar, Inc.* 355 NLRB 521, 523 (2010) (“The fact that the unilateral change . . . may have affected only one unit employee, and not the other members of the bargaining unit, does [not] render the change inconsequential or insignificant”) (*quoting Ivy Steel & Wire*, 346 NLRB 404, 419 (2006) (finding change in one unit employee’s pay material)).