Employer Had Duty to Bargain Changes to Drug and Alcohol Testing Requirements, NLRB Reaffirms

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The National Labor Relations Board (“Board”) reiterated its stance on drug and alcohol testing requirements by finding a California newspaper publisher violated its duty to bargain under the National Labor Relations Act (“NLRA”) by unilaterally changing its drug and alcohol testing policies without notifying the Union representing some of its workers and providing it with an opportunity to negotiate. Union-Tribune Pub. Co., 353 NLRB No. 2 (2008).

The Union-Tribune Publishing Co. publishes the San Diego Union-Tribune and employs approximately 1,600 people. This case involved two different bargaining units, the pressroom unit and the packaging unit. The pressroom employees had been represented by a union since the late 1980s. The most recent collective bargaining agreement expired on July 31, 2005, and the parties were in negotiations for a successor agreement at the time the dispute arose.

Although no written drug or alcohol policy existed in the previous collective bargaining agreements, it was undisputed that the Company had, in fact, been applying a substance abuse testing policy to pressroom employees since at least 1986. The Company’s policy required employees to submit to drug and/or alcohol testing when: (1) they were involved in any on-the-job accident where the employee was injured and required medical attention; (2) they were involved in any on-the-job accident involving equipment, machinery or motorized vehicles; or (3) their conduct raised suspicion of being under the influence of drugs or alcohol.

In 1991, the Company advised the union by letter that those employees with a “certifiable” cumulative trauma injury or disorder (CTD) would not be subject to the drug testing requirements. A CTD was defined as a “repetitive injury to a body part occurring over a long period of time.” In 2006, however, the Company required an employee who filed a Worker’s Compensation claim for cumulative trauma hearing loss (a CTD) to undergo drug and alcohol testing. Instead of waiting to determine if the employee was in fact suffering from a CTD through examination by a doctor, the Board found “a loss control manager... who does not possess a medical degree, decided that [the employee’s] injury should not be classified as a cumulative trauma injury and directed the company doctor to administer a drug and alcohol test to the employee.” This apparently contradicted the terms of the 1991 letter excusing employees with CTDs from undergoing drug testing.

The Union claimed this change to the Company’s policy constituted an unfair labor practice because it was made unilaterally and the Union was given no notice of the change and no chance to bargain. The employer argued that it acted in accordance with past practices and employees were not compelled to submit to drug and alcohol testing.

Since 2005, the union also represented the packaging unit. It had been negotiating the terms of a collective bargaining agreement with the Company, but no first contract had been reached at the time the dispute arose. However, a drug and alcohol policy, similar to the one governing the pressroom unit, had been applied to the packaging department. Employees could be required to submit to drug and/or alcohol testing if: (1) there was reasonable suspicion that the employee was under the influence of drugs and/or alcohol; (2) an on-the-job accident required more than first-aid treatment; or (3) an on-the-job accident resulted in $1,000 or more of property damage.

California/OSHA regulations require employees exposed to certain sound level thresholds to undergo annual hearing tests. The Company provided free annual hearing tests to employees where a standard threshold shift (STS) had occurred in either or both of the tested employee’s ears. In 2006, the
Company required seven employees, whose annual hearing tests demonstrated an STS, to have their hearing retested and to be tested for drugs and alcohol. The Union representing the packaging unit claimed the Company engaged in a unilateral change to its drug and alcohol testing policy without providing prior notice to the Union and without affording the Union an opportunity to bargain over the change. The Company contended, as it did in the pressroom case, that there was no change to the Company’s past practices and employees were not compelled to submit to drug and alcohol testing.

The NLRB’s Administrative Law Judge (ALJ) found that in 2006 the Company’s actions did effectuate unilateral changes in its past practices without giving notice to the Union and allowing the Union an opportunity to bargain. The Board affirmed the decision of the ALJ, concluding that the employer had violated the NLRA by unilaterally changing its substance abuse testing requirements, a mandatory subject of bargaining, without affording the union notice or an opportunity to bargain.

With regard to the pressroom unit, the Board found that the 1991 letter excusing employees with CTDs from drug and alcohol testing became an effective addition to Company's drug and alcohol policy. Allowing an individual without a medical degree to decide whether an employee had a CTD, and was thus excused from drug and alcohol testing, was a unilateral change to company policy for which the Union was not given notice. The ALJ concluded this was inconsistent with the Company’s past practice. There was no evidence that employees had a “choice” about submitting to the drug and alcohol testing, the ALJ concluded.

With regard to the packaging unit, the Board found that the change in policy requiring employees who had experienced an STS on their annual hearing test to submit to drug and alcohol tests also constituted an unfair labor practice. Again, the Board held, the Company failed to produce evidence suggesting that its actions were consistent with any past practices. Furthermore, it found employees were compelled to submit to drug testing. It “had to be done,” the Company safety director had said.

However, the NLRB held in favor of the employer concerning two employees who were terminated because of positive drug and/or alcohol test results. The Board held that those terminations did not violate the NLRA because the terminations were for cause, even though those employees' abuse was discovered through an unlawful, unilateral change to the terms and conditions of employment.

Employers with unionized workforces need to be careful in the implementation of any new policy and/or procedure substantially affecting employees’ terms and conditions of employment, such as every aspect of drug and alcohol testing. Employers must provide the union with notice and an opportunity to bargain before implementing any material changes. Consultation with counsel is strongly advised prior to the implementation of any policy or procedure that could be considered a change to the terms and conditions of employment.

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