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An Analysis of Negotiated Drug Testing Provisions in the Railroad Industry

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AN ANALYSIS OF NEGOTIATED DRUG TESTING PROVISIONS IN THE RAILROAD INDUSTRY

by

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VITA

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CHAPTER I

INTRODUCTION

In 1986, a computer operator employed with a major airline company neglected to update the reservation information in the computer. The system malfunctioned for eight hours and the company sustained a loss of $19 million. The employee was later found to be using illegal drugs.[1]

In 1987, a Conrail train crashed into an Amtrak passenger train, killing sixteen people and injuring over 100 others. The Conrail engineer was subsequently found to be at fault, having failed to obey a traffic signal while under the influence of marijuana.[2]

In 1989, a bar patron alerted the Federal Aviation Administration of the excessive drinking of three Northwest Airline pilots the night prior to a scheduled morning flight. While the pilots completed the 50 minute flight without incident, tests performed upon landing revealed high levels

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[1]Peyton B. Schur and James F. Broder, Investigation of Substance Abuse in the Workplace (Stoneham: Butterworth-Heinemann, a division of Reed Publishing, 1990), 12.

[2]Drew Douglas, "Senate Floor Fight Possible: Panel Approves Drug Testing For Transportation Workers," Congressional Quarterly Weekly Report 45 (March 1987): 476-77.

of alcohol in the blood. The pilots' licenses were revoked, they were discharged from their jobs, and they face possible fines of up to $250,000 and 15 years in prison.[3]

The above incidents demonstrate a growing and pervasive problem in our workplace -- employee substance abuse.[4] A recent National Institute for Drug Abuse (NIDA) study revealed that approximately two-thirds of new entrants into the workforce had previously used illegal substances. Similarly, substance abuse within the existing workforce is reportedly at 10-20 percent.[5]

The estimated usage of controlled substances at the workplace is indeed alarming and the related costs are staggering. A 1986 U.S. Chamber of Commerce study placed the cost of workplace substance abuse at more than $60 billion per annum.[6] [7] Included in the estimate is the aggregate cost

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[3]John Greenwald, "Flying Too High in the Sky?," Time, 27 (August 1990), 48.

[4]Note: For the purposes of this discussion, "substance" hereinafter refers to both alcohol and illegal drug abuse.

[5]Schur and Broder, Investigation of Substance Abuse in the Workplace, 12.

[6]Dianna L. Stone and Debra A. Kotch, "Individuals' Attitudes Toward Organizational Drug Testing Policies and Practices," Journal of Applied Psychology 74 (June 1989): 518.

[7]Note: Many studies suggest the amount is much closer to the $100 billion figure. See generally: Sami M. Abbasi and Kenneth W. Hollman, "Drug Testing: The Moral, Constitutional, and Accuracy Issues," Journal of Collective Negotiations in the Public Sector 17 (1988).

of such expenses as employee absenteeism, reduced productivity, property damage, and employee accidents. More difficult to measure is the cost to the employer of damaged employee morale, loss of public confidence, and the effect of increased governmental controls.

The growth of workplace substance abuse has ignited the general public's demand for action. Following the Conrail tragedy and the ensuing public outrage, Congress enacted the Federal Drug-Free Workplace Act of 1988 (a piece of Reagan-era legislation referred to as HR 4719).[8] Applicable to businesses with federal contracts of $25,000 or more, the Act stipulates that affected employers must consciously commit to the operation of a drug-free workplace. Failure to comply with the legislation may ultimately mandate suspension or loss of the contract as well as the future inability to participate in government projects. The act requires the following:

1. A policy forbidding drug abuse at the workplace (including the consequences of non-compliance) must be formally communicated to all employees.

2. Employers must play the part of educator -- developing programs designed to increase the awareness of the dangers of drug use, its consequences and any rehabilitative recourse.

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[8]"Federal Drug-Free Workplace Regulations," The Bureau of National Affairs (June 1990): 12:201-12:203.

3. The employer shall require the employee (as a "condition of employment") to follow the anti-drug policy and to notify the employer of any subsequent related convictions within 5 days after such an occurrence.

4. The employer shall notify the granting federal agency of all convictions within 10 days upon notification of conviction.

5. Convicted employees must be enrolled in a rehabilitative program.

6. The employer is required to make every good faith effort to operate a drug-free workplace utilizing the preceding requirements.[9]

An interesting caveat to the Federal legislation is the absence of approved unilaterally implemented employee searches, testing programs and other avenues designed to establish employee compliance with the Drug-Free Workplace Act. Apparently, it is sufficient that an employer clearly communicate the necessary requirements in order to establish his commitment to a drug-free workplace. The language is considered unambiguous, and the intent and ramifications are clear. The American Civil Liberties Union "commends HR 4719 as a bill that would provide specific criteria for employer

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[9]Ibid.

compliance."[10] The belief is that such legislation will ultimately strengthen the efforts of both business and government in the endeavor to eliminate workplace substance abuse.

Thus, the public sector has initiated procedures designed to control the problem of substance abuse. However, the majority of employers are NOT affected by this federal legislation. Instead, the private employer is subject to court and arbitration systems.[11] While the typical government contractor is clearly not sanctioned to randomly test employees for drug-free compliance, the extent of the private employer's right to maintain a drug-free environment is rather vague. Increasingly, employers are instigating programs designed to ascertain the degree of substance abuse in the employee population. The implementation of such programs has been fraught with legal and moral dilemmas. Recent landmark court decisions such as Samuel K. Skinner, Secretary of Transportation, et. al. v. Railway Labor Executives' Association, et. al. and Consolidated Rail Corporation v. Railway Labor Executives' Association, et. al. have determined the appropriateness of an employer's response to workplace

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[10]William A. Hancock and Judith S. Stern, eds., The Legal Aspects of Substance Abuse in the Workplace (Chesterland: Business Laws, Inc., 1987), 439.

[11]See generally: Tia Schneider Denenberg and Richard V. Denenberg, Alcohol and Drugs: Issues in the Workplace (Washington, D. C.: The Bureau of National Affairs, Inc., 1983).

substance abuse.[12] One effect of these decisions can be seen through negotiated testing provisions in the railroad industry.

Specifically, this thesis will analyze the transportation industry's, particularly the railroads', response to the problem of substance abuse. In recent years, the transportation industry has been involved in many arbitration proceedings and Supreme Court decisions related to alcohol and substance abuse. Increasingly, railroad employers are implementing some form of drug testing procedure in an attempt to eradicate workplace substance abuse. These attempts by the employer have not necessarily been embraced by employees and labor unions. While all concerned parties concur that action is needed to control the problem of substance abuse, all are not in agreement as to the most effective course of action. The controversy appears to center on two issues: the "safety sensitivity" of the position involved and the "mechanics" of a drug testing policy.

Safety Sensitivity

Perhaps no other issue related to workplace substance abuse has garnered as much interest as the effect of substance

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[12]Samuel K. Skinner, Secretary of Transportation, et. al. v. Railway Labor Executives' Association, et. al., 109 S.Ct. 1402 (1989) and Consolidated Rail Corporation v. Railway Labor Executives' Association, et. al., 109 S.Ct. 2477 (June 19, 1989). Note: These cases will be further discussed in Chapters II and IV respectively.

abuse on personal safety. As the previously cited examples indicate, employees under the influence of drugs and alcohol threaten the safety of others. Indeed, the National Institute on Drug Abuse "has concluded that drug abuse is the most common health hazard in the American workplace."[13] A study by the Research Triangle Institute in North Carolina supports this theory, having proven that those employees who use drugs at work are "three times as likely as nonusers to injure themselves or someone else."[14]

Historically, employee drug testing has been accepted in determining the ability of an individual to perform his duties in a "safety sensitive" position. In 1976, Division 241 Amalgamated Transit Union v. Suscy, the Seventh Circuit court upheld as "reasonable" and "constitutional," mandatory drug tests administered to bus drivers involved in serious accidents during the course of their occupational duties. Additionally, those drivers suspected of being under the influence were legally subjected to the same tests. The court held that:

> The CTA has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff union can have no reasonable expectation of

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[13]David Copus, Matters of Substance: Alcohol and Drugs in the Workplace (Washington, D.C.: Seyfarth, Shaw, Fairweather and Geraldson, 1987), 1.

[14]Schur and Broder, Investigation of Substance Abuse, 12.

privacy with regard to submitting blood and urine tests.[15] Labor unions and employers appear to differ in perceptions as to what constitutes a "safety sensitive" position. Employers typically broadly define such positions as all jobs potentially affecting the safety of fellow employees, passengers and the general public. This, apparently in an effort to test as many employees as possible; thereby reducing the employer's general liability. Conversely, labor "narrowly" classifies safety sensitive positions as those with a demonstrably negative effect on safety. This narrow classification is obviously an attempt to reduce the number of employees subject to legalized testing. As demonstrated in the following chapter, courts and arbitrators alike often scrutinize the safety sensitivity of positions involved in disputes arising from the implementation of drug testing programs.

Administration of Drug Testing

In addition to the issue of safety, management and labor consistently disagree on issues regarding the "mechanics" or administrative processes of drug testing. Indeed, many court cases and grievances have been advanced by employees and unions in response to the procedural aspects of a drug testing

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[15]Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 f.2d 1264 (7th Cir. 1976).

policy.[16] In the introduction of a drug testing policy, it behooves the employer to clearly communicate all facets of the program to the workforce. Who and when to test, the type of test and the procedures to be followed in the obtainment of a valid sample are issues that must be addressed. Similarly, confidentiality and accuracy of various testing techniques are at issue in the implementation of a drug testing policy. Because a positive test result often has a disastrous effect on an employee's career, employers will ideally make provisions for confirmation testing. Ultimately, a successful drug testing policy addresses these employee concerns with sensitivity -- seeking cooperation with labor in the eradication of workplace substance abuse.

The study of this issue will focus on the specifics of drug testing while demonstrating the nexus between the wide range of related topics and the decisions of the arbitrators and the courts. Chapters 2 and 3 will explore employer and employee response to the problem of workplace substance abuse and the implementation of a drug testing policy. Chapter 4 examines union response to drug testing, specifically addressing the appropriateness of unilaterally implementing

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[16]Note: For the purposes of this discussion, "procedural aspects" refers to the processes followed in the implementation and execution of a drug testing program.

such a program ("major" versus "minor" dispute).[17] Chapter 5 analyzes labor arbitration decisions. Chapter 6 will then examine the basic elements of negotiated drug testing agreements in the railroad industry, concluding with recommendations in the establishment of a drug testing program in a unionized environment.

As drug testing usage increases in the workplace, the importance of protecting both the employer and employee's rights follows suit. A drug testing policy that places an employer in an untenable legal position is as unacceptable as the policy that trammels an individual's right to privacy. The ultimate goal is the implementation of a policy that effectively balances the opposing concerns while mitigating the insidious effects of workplace substance abuse.

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[17]Note: A major dispute is defined as one that "changes established rules or working conditions" within a unionized environment, while a minor dispute "involves the interpretation or application of an existing agreement." Dennis L. Casey, "Drug Testing in a Unionized Environment," Employee Relations Law Journal 13 (Spring 1988): 604.

CHAPTER II

EMPLOYER REACTION TO WORKPLACE SUBSTANCE ABUSE

Today's employer is constantly challenged by an ever-changing workplace. Governmental regulations, an increasingly diverse work force and the involvement of the legal system have all combined to complicate the previously less complex employer/employee contract.[18] International competition has placed additional pressure on the employer to insure the existence of a successful and productive workforce. The pervasive problem of workplace substance abuse threatens the very existence of the employer's business.[19] Most would agree that the employer has an inherent right to ensure the safe and efficient operation of his business. Most would also concede that workplace substance abuse negatively effects each of these basic rights. This chapter will examine the employer's role in combating substance abuse at the workplace.

As the airline example in Chapter I illustrated, an intoxicated employee places an employer in a potentially ruinous position. The average employer is ill-equipped to sustain a loss of millions of dollars, be it in lost profits or related lawsuits. Increasingly, employers are developing

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[18]See generally: William B. Johnston and Arnold H. Packer, Workforce 2000: Work and Workers for the Twenty-First Century, (Indianapolis, Indiana: Hudson Institute Inc., 1987).

[19]Ibid.

methods of detecting and dealing with workplace substance abuse. These methods frequently take the form of:

1. Supervisory Training
2. Employee Assistance Programs
3. Drug testing

Supervisory Training

Typically, an employee's supervisor is the ideal individual to recognize the signs of workplace substance abuse. These signs may include increased absenteeism, reduced productivity, changes in product quality and changes in individual personality. The observant supervisor is in a position to protect the employer against future disastrous situations. Conversely, the supervisor who is not trained to handle workplace substance abuse may cause the employer irreparable harm, as the following example illustrates. In this case, a company supervisor ordered an employee suspected of being under the influence of alcohol to leave the premises after he was judged unfit to perform his duties. After assuring his supervisor that he was able to drive safely, the employee was subsequently involved in an accident, killing himself and several others. Blood tests revealed high levels of alcohol in the employee's system. The victims' families sued the company for wrongful death under the theory of

employer vicarious liability.[20] The Texas Supreme Court in Otis Engineering upheld the plaintiff's right to bring action, stating that: "changing social standards and increasing complexities of human relationships in today's society justify imposing a duty upon the employer to act reasonably when he exercises control over his servants."[21]

The Otis Engineering Texas Supreme Court case demonstrates the importance of well-trained supervisors in the workplace, as well as the potential legal liability of the employer. Not only should the supervisor recognize an impaired employee, he or she must also be trained in the correct way of dealing with a suspected substance abuser. Arbitrators have traditionally placed great importance on the credibility of a supervisor's statement. A supervisor able to demonstrate knowledge of the signs of workplace substance abuse is frequently the determining factor in an arbitrator upholding a company's decision to suspend or even terminate an employee due to workplace substance abuse.[22] The Denenbergs

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[20]Note: Employer vicarious liability refers to a situation in which the employer is held responsible for the negligent conduct of an employee. Such conduct typically results in an injury to a third party. Kenneth R. Redden, J.D. and Enid L. Veron, J.D., Modern Legal Glossary (Charlottesville: The Michie Company, 1980), 547-548.

[21]Otis Engineering Corp. v. Clark, 668 S.W. 2d 307 (Tex. 1983).

[22]Note: Signs of substance abuse may include increased absenteeism, decreased productivity, and changes in temperament. See generally: James T. Wrich, "Beyond Testing: Coping With Drugs at Work," Harvard Business Review

state:

> Although arbitrators scrutinize carefully the quality and quantity of lay testimony offered to establish that an employee was intoxicated, there is little disagreement that, in principle, the observations of lay witnesses are sufficient to establish intoxication. The witnesses do not necessarily need to be medically qualified, nor does their testimony need to be supported by blood tests or other medical evaluations.[23]

The supervisor unable to identify the characteristics of an intoxicated employee may place the employer's disciplinary decision in jeopardy. For example, one arbitrator

> found it difficult to understand how a member of management could walk (with the allegedly intoxicated grievant) fifty to sixty feet from the work area to his office, talk to the grievant for about fifteen or twenty minutes. . . ask a supervisor to observe him, . . . walk with him from the office to an automobile . . . and never observe his walk, never see him stagger or weave: in fact, he could not even testify how the employee walked.[24]

The alcohol intoxicated employee is typically much easier to identify than the drug-impaired individual, and hence, training is essential in such situations.[25] Not only are sufficiently trained supervisors necessary in the identification of problem employees, the ability to confront

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(January/February 1988).

[23]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 68.

[24]Ibid., 69.

[25]Note: As discussed later, an experienced supervisor is necessary in cases where drug tests are administered on the basis of "probable cause." Lawrence Z. Lorber and J. Robert Kirk, Fear Itself: A Legal and Personal Analysis of Drug Testing, AIDS, Secondary Smoke, VDT's (Alexandria: ASPA Foundation, 1987), 14.

an employee and to recommend appropriate assistance is also of vital importance in controlling employee substance abuse.

Employee Assistance Programs

Once the problem of workplace substance abuse has been detected, it remains for the employer to address the situation. Depending upon company policy, the employer may chose to discipline or even discharge the employee. Increasingly, companies include Employee Assistance Programs (hereafter referred to as EAPs) in their arsenal against workplace substance abuse. A survey conducted by the National Institute on Alcohol Abuse and Alcoholism found that 25% of Fortune 500 companies had an EAP in place in the early 1970's. In 1979, the figure had risen to 57.7%. By 1987, the number of Fortune 500 companies with EAPs reached 80%.[26]

Historically, industrial companies began practicing early forms of today's EAP prior to the First World War. Companies were very paternalistic in nature -- they provided housing, company-sponsored unions, insurance and pension plans, and various other facilities designed to encourage the perception that an employer was also the friend of the employee. The forces behind the movement were not only concerned with the employee, rather employers sought to reduce

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[26]"Employee Assistance Programs: Benefits, Problems, and Prospects," The Bureau of National Affairs (Special Report 1987): 10.

strikes and combat unionism, while instilling in the workplace a sense of loyalty and teamwork.[27] The middle 1920's witnessed the abrupt end of employer-sponsored paternalistic benefits. The need to reduce costs, the passage of the Wagner Act (in which company-sponsored unions were made illegal), and the growth of unions are cited as the major contributing factors.[28] During the time period before World War II, few companies sponsored any type of emotional/psychological health program such as industrial psychologists and social workers. However, during the war, the government funded industrial programs designed to emphasize mental health. The programs diminished after the war, and throughout the 1950's, mental health programs for the workforce were few.[29]

During the 1950's, alcoholism gained national attention as an occupational health problem. In a sense, alcoholism heralded the growth of industrial mental health programs. As more companies developed programs to treat alcohol-related problems, the number of afflictions receiving treatment increased. Drug-related problems, domestic violence, depression, and divorce are just a few of the maladies that

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[27]William J. Sonnenstuhl and Harrison M. Trice, Strategies for Employee Assistance Programs: The Crucial Balance (New York: ILR Press, Cornell University, 1986), 1 passim.

[28]National Labor Relations Act (commonly referred to as the Wagner Act) 49 Stat. 449, 29 U.S.C. 151, Sect. 8(a)(2), (1935).

[29]Sonnenstuhl and Trice, Strategies for Employee Assistance Programs: The Crucial Balance, chap. 1 passim.

these employer-sponsored mental health programs addressed. The expansion of problems covered by employer healthcare groups developed into formalized Employee Assistance Programs in the early 1970's.

Today's Employee Assistance Program attempts to rehabilitate via the referral of employees to an appropriate treatment facility. With the emergence of EAPs, the question of whether to discipline or to rehabilitate problem employees becomes increasingly controversial.[30] With regard to the arbitration of workplace substance abuse cases, the Denenbergs postulate:

> The most salient question posed by the EAP movement is whether the employer who maintains or recognizes an EAP or even promulgates a policy on alcohol rehabilitation incurs an obligation to try rehabilitation before imposing discipline.[31]

Arbitrators differ in addressing the situation. Many arbitrators reinstate an employee provided that he or she seeks treatment through an EAP.[32] Others have held that "once an employee has been terminated, he or she may not use the employer's rehabilitation program as a crutch to regain

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[30]Victor Schacter, et. al., Drugs and Alcohol in the Workplace: Legal Developments and Management Strategies (New York: Executive Enterprises, 1987), 53.

[31]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 36.

[32]Ibid.

employment."[33] An analysis of various arbitration awards indicates that an employer's knowledge of an employee's drug or alcohol problem prior to termination is sufficient cause to offer reinstatement coupled with the assistance of a rehabilitative program. Reinstatement was denied in those cases where it was revealed that the employee admitted a substance abuse problem following termination of employment.

Thus, it generally appears that an employer has an obligation to communicate the existence of an EAP to its workforce, while encouraging those individuals with problems to seek rehabilitative assistance. Additionally, those employees identified with substance abuse problems generally must be given the opportunity to utilize the employer's EAP prior to the termination of employment.

Beginning in July 1992, employers of 25 or more employees will also be affected by the Americans With Disabilities Act of 1990.[34] The Act allows testing for the use of illegal substances, and does not prohibit employers from requiring that employees refrain from using alcohol and drugs at the workplace. Of particular concern to employers is the fact that rehabilitated employees and those employees currently enrolled in rehabilitative efforts (and who are not currently

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[33]Lloyd Loomis, "Employee Assistance Programs: Their Impact on Arbitration and Litigation of Termination Cases," Employee Relations Law Journal 12 (Autumn 1986): 277.

[34]Americans With Disabilities Act of 1990 (ADA) Pub. L. No. 101-336 (July 26, 1990).

using drugs) are expressly protected by the Act.[35]

Drug Testing

Supervisory training and the establishment of Employee Assistance Programs are indeed crucial to the detection and elimination of workplace substance abuse. Ideally, both programs approach the problem of substance abuse in a humanitarian and largely non-confrontational manner, thus minimizing conflict between management and labor. However, the growing practice of drug testing applicants and employees is filled with controversy and perhaps no other employment issue so severely divides the employer and employee.

Regardless of the controversy, drug testing usage has increased. A study of Fortune 500 companies found that the practice of drug testing had risen from 3% to 30% between the years of 1982 and 1985.[36] [37] What are the factors responsible for the marked increase? Schacter cites a number of reasons. First, whereas drug and alcohol abuse may go undetected by the

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[35]Note: The Act provides that it shall interact without lessening the standards applied under the Rehabilitation Act of 1973. The Rehabilitation Act applies to government contractors and contains similar regulations against disability discrimination. See generally: The Rehabilitation Act of 1973, 29 U.S.C.A. Sect. 701-796.

[36]Schacter, et.al., Drugs and Alcohol in the Workplace: Legal Developments and Management Strategies, 11.

[37]Note: In the absence of more recent data, assuming a similar growth pattern, drug testing within these same companies may be conservatively estimated to be close to 70%. Ibid.

supervisor, a drug test frequently reveals the use of illegal substances. Second, the desire to eliminate the problem of abuse, even when the employee consistently denies a problem, has led employers to use every reasonable means in controlling the problem. Third, an employer's decision to discharge or discipline an employee due to workplace substance abuse is easier to justify with the concrete, objective results of a drug test. Finally -- and most importantly -- most literature suggests employers are turning to drug testing in an effort to deter employees from using drugs at the workplace.[38] [39] Drug testing programs are typically administered to three populations: (1) all job applicants; (2) employees suspected of substance abuse ("probable cause"); and (3) randomly selected employee groups. Pre-employment testing of job applicants is the least problematic for employers. Because all applicants are tested, there is little basis for allegations of discrimination. Because the applicant is free to decline a position offer, and thereby avoid drug testing, assumptions of coercion and intrusiveness are typically unsubstantiated. In Jevic v. The Coca-Cola Bottling Company of New York, Inc the New Jersey Court upheld the right of private employers to require job applicants to submit to drug

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[38]Ibid.

[39]Note: The exact deterrence value of drug testing is questionable, although studies do appear to support this theory.

testing prior to a concrete offer of employment. The court upheld the use of pre-employment screening stating:

> . . . it sanctions the efforts of the private sector to combat drug use through policies which reasonably balance the interest of the employer and country with the legitimate privacy concerns of the prospective employee. Defendant's mandatory test policy strikes such a balance. As such, plaintiff's arguments are wholly unpersuasive.[40]

Employers implement pre-employment drug screening in an attempt to circumvent the great costs of substance abuse to the organization. They seek to control the spread of workplace substance abuse while minimizing the risk a "problem employee" presents to an employer's financial stability and reputation.

Probable cause testing is administered to those employees showing apparent substance abuse impairment and frequently to employees involved in work-related accidents. This type of testing is relatively easy to administer and presents few serious problems to the employer. The successful implementation of probable cause testing requires extensive supervisory training, as defending the choice of testing an employee depends upon a credible witness to an employee's impairment. In addition, the testing of employees following an accident was upheld in Skinner v. Railway Labor

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[40]Jevic v. The Coca-Cola Bottling Company of New York, Inc., 89-4431 (Dis. New Jer. 1990).

Executives' Association.[41] At issue in this case were federal government regulations mandating that railroads test all involved employees following a major train accident. The Court agreed with the regulators (reversing a lower court's decision), stating:

> A substance impaired railroad employee in a safety-sensitive job can cause great human loss before any signs of the impairment become noticeable, and the regulations supply an effective means of deterring such employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs.[42]

Interestingly, the Court rejected notions that individualized suspicion be present before testing, concluding that:

> An individual suspicion requirement would also impede railroads' ability to obtain valuable information about the causes of accidents or incidents and how to protect the public, . . . the suspicion that a particular employee is impaired is impracticable in the chaotic aftermath of an accident when it is difficult to determine which employees contributed to the occurrence . . .[43]

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[41]Samuel K. Skinner, Secretary of Transportation, et. al. v. Railway Labor Executives' Association, et. al., 109 S. Ct. 1402 (1989).

[42]Ibid.

[43]Ibid.

Random Testing

The reasonableness of pre-employment and probable cause testing has been upheld by the courts in most circumstances, provided the employer follows a few very simple guidelines.[44] "Random" testing, however, presents an entirely different challenge to the employer. To substantiate a need for random testing, employers must "show a compelling business need, such as for example, proof that they have experienced widespread problems of employee drug or alcohol abuse that have adversely effected their operations."[45] In short, random drug testing should be used only where there exists an obvious threat to public safety. Random testing of private sector employees is frequently deemed invalid by the courts. While Executive Order 12564 allowed for the random testing of federal employees involved in law enforcement activities, or again, situations affecting public safety, labor and labor unions are quite adverse to random testing in the private sector.[46] The conflict arising out of random drug testing is demonstrated by the statements of Peggy Taylor, deputy director of the legislative department of the AFL-CIO. Taylor vehemently opposes random testing, describing such measures as "the most

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[44]See generally: Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace.

[45]Schacter, et. al., Drugs and Alcohol in the Workplace: Legal Developments and Management Strategies, 23.

[46]Executive Order 12564.

egregious kind of testing to any employee and union group in light of the potential for harassment of selected employees that the employer doesn't like."[47]

The most notable case upholding a random drug testing policy involved the horse racing industry. In Shoemaker v. Handel, the random testing of jockeys at the race track was "ruled permissible."[48] Jockeys were "deemed to have a diminished expectation of privacy because the horse racing industry is closely regulated."[49] Additionally, the compelling interest of safety in the industry was advanced as a bona fide defense to random drug testing.[50] More often however, cases involving the random testing of private sector employees have favored the employee.[51]

The problem of workplace substance abuse is obviously extraordinarily complex. The employer is strictly limited in

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[47]Mathea Falco and Warren I. Cikins, eds., Toward A National Policy on Drug Testing and AIDS Testing (Washington, D.C.: Brookings Institution, 1989), 54.

[48]Shoemaker v. Handel, 795 f.2d 1136 (3d Cir. 1986).

[49]Ibid.

[50]Ibid.

[51]Note: A similar issue was addressed in a well-publicized case between the National Football League and the National Football League Players Association. Arbitrator Richard Kosher concluded that the collective bargaining agreement was violated when the league implemented random drug testing, thereby violating clauses forbidding "random or spot checks." Donald J. Peterson, "The Ins and Outs of Implementing a Successful Drug Testing Program," Personnel (October 1987): 52.

his handling of the situation -- be it offering rehabilitative assistance or identifying the substance abuser. While concern for public safety is commonly advanced as a defense for an employer's actions, the courts have traditionally narrowly defined the situations in which such measures -- namely drug testing -- will be upheld. The next chapter will explore the reactions of employees to the introduction of drug testing in the workplace.

CHAPTER III

THE REACTION OF EMPLOYEES TO DRUG TESTING

An employer's decision to implement a drug testing program is not always welcomed by the employee population or incumbent labor organization. Such employers are frequently characterized as paternalistic, bordering on the "Big Brother is watching" mentality. Additionally, many employees believe that the drug testing employer regards all employees as guilty unless tests prove the absence of illegal substances. Thus, the employer is faced with many dilemmas when he decides to adopt a drug testing plan.

Employees are hesitant to allow employers access to matters concerning their personal, "off-duty" life. Drug testing provides information (aside from the presence of alcohol or drugs) regarding an employee's personal life -- such as the use of medication for a myriad of diseases, pregnancy, even a predisposition to serious ailments such as heart attacks and arteriosclerosis.[52] Employees are loath to share such information with employers, fearing a variety of negative repercussions. The opponents of drug testing believe the majority of employers will take advantage of such information, selectively choosing only the "fittest" of individuals for the workforce. Employers are averse to hiring

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[52]Fern S. Chapman, "The Ruckus Over Medical Testing," Fortune 112 (August 1985): 58.

individuals with a serious diseases, foreseeing an increase in insurance rates, extended absences and workplace accidents. The majority of similar criticisms of drug testing will never be satisfactorily answered for its many opponents. However, the employer can mitigate the damage done to employee morale and limit time spent in litigation by addressing several recurring employee concerns: (1) the idea that drug testing is an invasion of privacy, (2) the possibility of the defamation of one's character, (3) violations of the employee's protected rights, namely the Rehabilitation Act of 1973 (29 U.S.C.A.) and Title VII of the Civil Rights Act of 1964, (42 U.S.C.A.) and (4) administrative issues, specifically the accuracy of test results and the chain of custody of the sample.

Invasion of Privacy

Public sector employers and employees are regulated by a number of very specific federal regulations and constitutional guarantees.[53] In dealing with drug testing, violations of the Fourth Amendment have frequently been advanced by the public sector employee. Briefly, the Fourth Amendment protects the public from "unreasonable searches and

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[53]See generally: Robert H. Sand, "Current Developments in Safety and Health," Employee Relations Law Journal 15 (Summer 1989).

seizures."[54] The idea that drug testing constitutes an unreasonable search is a popular one, however the typical private sector employer is not affected by the Fourth Amendment. Nevertheless, those employers who act as government agents, federal contractors or who are federally regulated, are governed by the parameters of the Fourth Amendment. Such was the situation in the previously cited Skinner decision. In Skinner, the Railway Labor Executives' Association argued that the railroad operated within the meaning of the Fourth Amendment. The Court agreed, concluding:

> The tests in question (drug tests) cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C (of the Federal Railroad Administration's regulation requiring drug testing of employees involved in serious accidents) does so by compulsion of sovereign authority and . . . must be viewed as an instrument or agent of the Government.[55]

Thus, the Court concluded the railroad acted as a government agent in that it performed the federal mandate of drug screening employees involved in serious accidents, and in so doing activated coverage by the Fourth Amendment. The Skinner Court also agreed with the finding of urine collection and breathilizer tests as searches under the Fourth Amendment:

> This court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol

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[54]Ibid., 125.

[55]Samuel K. Skinner, Secretary of Transportation, et. al. v. Railway Labor Executives' Association, et. al., 109 S.Ct. 1402 (1989).

> content and the ensuing chemical analysis constitute searches. Similarly, subjecting a person to the breath test . . . must be deemed a search . . . Moreover, although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches, since they intrude on expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable.[56]

Understandably, tests involving one's blood are readily characterized as "searches." These tests involve a decisively intrusive act upon the body to obtain the sample. In contrast, tests involving breath and urine have previously eluded simple classification. Employees typically label urine tests "searches," in that such tests involve an innately personal bodily function, while employers would argue that urine is a waste product and therefore outside the parameters of a search. Drug testing programs often mandate that a neutral observer be present when the urine sample is produced -- a situation that presents privacy problems for many employees.

In 1986, the New York Supreme Court ruled that "a compelling argument can be made that urine testing . . . (using a sample obtained under the observation of a supervisor of the same sex) is an even greater intrusion of privacy than blood testing."[57] Similarly, in AFGE v. Weinberger, the court concluded that a urine test is "highly intrusive. . . it is

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[56]Ibid.

[57]Caruso v. Ward, 506 N.Y.S. 2d 789 (N.Y. City Sup. Ct. 1986).

doubtful that a program not requiring direct observation goes very far toward minimizing the overall intrusion."[58] Conversely, previous court decisions have agreed with the notion that observation is a reasonable component of drug testing, speculating that "urine voiding observed by a person of the same sex is only a minor invasion of plaintiff's (employee) personal rights,. . . and did not involve anything out of the ordinary."[59] Ostensibly, the observer ensures the integrity of the employee's sample, and despite negative response from employees, many companies include direct observation of urine collection in drug testing programs. For example, Santa Fe Pacific Railroad instituted a drug testing program, following the federal regulations adopted after the 1987 Conrail incident in which sixteen (16) people were killed and 100 others injured[60]. Santa Fe's policy forces employees undergoing drug testing to be "directly observed by a health professional of the same sex during void," or to "be completely disrobed except for a patient gown and then void alone in a chemical-free room."[61] Enduring a similar situation

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[58]AFGE v. Weinberger, CV-48-6353 (S.D. Ga. Dec. 2, 1986).

[59]McKechnie v. Dargan, CV-84-4339 (April 28, 1986).

[60]Drew Douglas, "Senate Floor Fight Possible: Panel Approves Drug Testing For Transportation Workers," Congressional Quarterly Weekly Report 45 (March 1987): 476-77.

[61]Tom Post, "You Said Yes, But Santa Fe Knows How Tough It Is," Business Month (March 1990): 43.

would conceivably cause even the most blasé employee some amount of discomfort. (One could also assume the observer would be similarly discomfited). Apparently the Skinner court agrees with the argument that since urination is a function normally performed in private, an employer test requiring a urine sample is indeed a search, and as such, must pass the reasonableness test in order to be considered valid. In Skinner, the tests were deemed reasonable in that they were administered following an accident and theoretically the results would assist the Federal Railroad Association in conducting its investigation of the case. Simply stated, while the test inarguably intruded on an individual's ideas of privacy, such an intrusion was deemed permissible because the greater cause of preserving workplace safety was served.

Defamation of Character

While the perceived invasion of one's privacy is certainly a major concern of employees, the possible defamation of one's character is equally troublesome. The consequences of workplace substance abuse are broad, ranging from simple discipline to termination of employment and possible legal action. Consequently, it is important for the employer to handle substance abuse cases with the utmost discretion. The case of Houston Belt and Terminal Railway

Company v. Wherry illustrates the merits of such prudence.[62] The plaintiff, a switchman for the Terminal Railway Company, was involved in an accident at the workplace. A subsequent drug test by the company physician showed the presence of methadone in the urine. Despite a warning by the physician to perform additional tests, company officials proceeded on the premise that methadone is a drug used to treat heroin addicts. The company dismissed the employee, further stating in various memorandums, including one to the U.S. Department of Labor, that the reason for dismissal was workplace substance abuse. The employee underwent a confirmatory urinalysis test. The results of this test did not indicate the presence of methadone, but of a similar compound commonly mistaken for the drug.[63] The employee sued for defamation of character and was awarded $150,000 for damage to his reputation and $50,000 in punitive damages.[64] Thus, it is important that an employer thoroughly investigate all pertinent facts prior to disciplinary proceedings. Moreover, an employer must be selective in who is privy to information regarding employee drug testing. Given the sensitivity of

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[62]Houston Belt and Terminal Railway Company v. Wherry, 548 S.W.2d 743 (Tex. App. 1976).

[63]Kenneth W. Holman, et. al., "Drug Testing: Employers, Employees, and the Courts," IM (November/December 1987): 24-5.

[64]"Drug Testing By Private and Public Employers," Business Laws, Inc. (1987): D:22.

drug testing, it behooves the employer to establish precise procedures to follow in the event of a positive test result. The use of confirmation tests and employee interviews may ultimately prevent the employer from undertaking potentially libelous actions.

The Rehabilitation Act and Title VII of the Civil Rights Act of 1964

Allegations of invasion of privacy and defamation of character are particularly problematic for the employer in that such charges usually result in some type of legal action. Justifying the compromise of an individuals' constitutional rights depends upon a jury's interpretation of one's "inalienable rights," and a subsequent judgement as to whether a violation occurred. Similarly, actions brought under the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964 involve a determination by the courts as to questions of possible violations of the acts.[65]

Under the Rehabilitation Act, government contractors, the federal government, and companies receiving federal financial assistance must refrain from discrimination against disabled individuals. The act's definition of handicapped is rather broad, and includes individuals "with current problems

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[65]Rehabilitation Act of 1973 (29 U.S.C.A.) Sect. 701-796 and Title VII of the Civil Rights Act of 1964 (42 U.S.C.A.).

or histories of alcoholism or drug abuse."[66] Once an individual is deemed disabled, the employer has a duty to accommodate said disability, unless the accommodation would result in undue hardship. The employer is not required to accommodate those individuals whose current use of alcohol or drugs prevents the performance of the duties of a position or whose "employment would present a clear and present danger to the property or safety of fellow workers or the public."[67]

Correspondingly, Title VII of the Civil Rights Act of 1964 bars employers from discriminating against applicants or the current workforce on the basis of color, sex, race, religion, or national origin. Thus, an employer's drug testing program must be free of discriminatory practices, intentional or not. A drug test resulting in a disproportionate number of positives within a protected class would justify close scrutiny as to possible discrimination. Such a situation existed in New York City Transit Authority v. Beazer -- the landmark case involving a Title VII discrimination suit.[68] The plaintiffs brought suit under Title VII violations, contending that drug tests identifying methadone users disproportionately affected African Americans

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[66]Steven C. Kahn, "Drugs and Alcohol in the Workplace," Employment Relations Today (Summer 1985): 128.

[67]Holman, et. al., "Drug Testing: Employers, Employees, and the Courts," 25.

[68]New York City Transit Authority v. Beazer, 440 U.S. 568 (1977).

and Hispanics. Since methadone users were considered ineligible for job opportunities, the plaintiffs argued they were discriminated against in the employment process. However, the plaintiffs failed to provide statistical evidence to support a disproportionate impact theory, and the defendants prevailed. Regardless of the outcome, the case is important as it "validated the use of the disparate impact theory in pre-employment drug testing cases."[69]

Title VII and the Rehabilitation Act work together to protect the employee against unlawful discriminatory conduct on the part of the employer. When analyzed in conjunction with previously discussed cases dealing with issues of defamation and invasion of privacy, it would seem that a successful drug testing policy has provisions in which the employer makes every effort to treat the employee with "kid gloves." As the above discussion illustrates, while it appears that the courts and the federal government recognize the usefulness of drug testing, the slightest questionable act on the part of the employer will usually result in the employee prevailing in his claim.

Chain of Custody and Test Accuracy

Employees may consider themselves incidental participants in the drug testing situation, as their role ends

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[69]Ibid.

when the sample is produced. The process of drug testing is difficult to comprehend by the average employee. Employees do not choose the parties responsible for the actual testing of the specimen, nor are they present when the sample is tested. Most employees are not aware of the various types of testing techniques, while test accuracy rates are similarly foreign areas to the employee's general knowledge. The administrative path a sample follows causes many employees concern, cloaked as it is in relative secrecy. Chief among the issues posed by employees are: the chain of custody of a given sample, and the perceived accuracy of test results.

Before an employer implements a drug testing program, it is advisable that all components of the program are clearly communicated. Preservation of the chain of custody of the sample is important in protecting both the employer and employee from mistakenly assigning a positive reading to an individual who in fact produced a clean sample. Mislabeling a sample, problems with shipping of the sample to the laboratory, and procedural errors within the testing facility are common occurrences in the handling of body fluid specimens.[70] McCormicks' Rules of Evidence state that when physical evidence (i.e. urine or blood sample) is introduced in court, "an adequate foundation for admission (of the evidence) will require testimony first that the object is the

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[70]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 76.

object which was involved in the incident, and further that the condition of the object is substantially unchanged."[71] Courts and arbitrators alike have ruled in favor of the employee where integrity of the sample has been at question.[72] Denenberg cites an arbitration case where an employee accused of being intoxicated while at work was suspended pending investigation.[73] The arbitrator ruled in favor of the employee after finding that the blood sample in question had been mishandled. The company had previously implemented a policy in which a shop steward and an employer representative would witness the obtainment of the sample and subsequently mail it to the laboratory:

> This was not done in this case. . . . the night superintendent testified that he took the blood test to his home, kept it in the refrigerator all evening, brought it back to the plant in the morning, laid it in a box where the outgoing mail was to be picked up at 1:00. . . sample was in the company's mail room for approximately three or four hours where anyone could have tampered with it.[74]

On a larger scale, in 1984, the United States Army conducted drug tests of some 60,000 soldiers. The Army later admitted roughly half of the urine samples had been mishandled in that "samples were mixed up in the laboratories due to clerical

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[71]Copus, Matters of Substance: Alcohol and Drugs in the Workplace, 63.

[72]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 77.

[73]Holliston Mills, 60 LA 1030, 1037 (Simon, 1973).

[74]Ibid.

errors, and service members received results from specimens that were not their own."[75]

The importance of a documented chain of custody cannot be overemphasized. An employee falsely accused of workplace substance abuse on the basis of a sample not his own is unfairly and unnecessarily required to endure the stigma attached to drug and alcohol abusers. Likewise, an employer required to reinstate a known substance abuser due to the mishandling of a sample, is placed in an unacceptable position. In conjunction with a strict chain of custody, the accuracy of the testing procedure and the handling of samples may also be at question. Substance abuse testing is not infallible.[76] Stories abound of drug tests registering legal substances and foodstuffs as illegal drugs. The typical drug test is unable to determine the ingestion date of the substance or the amount of the drug originally taken. Therefore, a positive test result does not necessarily prove an individual was impaired in the performance of his job responsibilities.[77] As evidenced in the previously cited

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[75]Abbasi, et. al., Drug Testing: The Moral, Constitutional, and Accuracy Issues, 226.

[76]William A. Nowlin, "Employee Drug Testing: Issues for Public Employers and Labor Organizations," Journal of Collective Negotiations in the Public Sector 16 (1987): 297.

[77]Note: Depending upon the test, most drugs can be detected by a urine sample for up to three days after they have been used. Some drugs, such as marijuana, can be detected two to three weeks after use. Therefore, in the absence of the more obvious signs of drug use, it is easy to see how proving on the job impairment by a drug test only is

Wherry case, a false positive has serious repercussions for both the employer and employee.

Before instituting disciplinary proceedings, an employer should consider the use of a confirmation test. Such a test uses the same specimen previously labeled as positive, and is of a different technology. An employer's failure to perform confirmatory testing may also place the reasonableness of the drug testing program at question. In Jones v. McKenzie, the district court ordered reinstatement of an employee previously discharged on the basis of a positive test result.[78] Because the employer failed to perform a second test, the court also carefully scrutinized the necessity for testing, finding the employee's position as a school bus attendant had no impact on public safety, and therefore testing was improper.[79] Many companies argue that the added cost of confirmation testing renders it prohibitive. However, when compared to the cost of possible court actions, confirmation testing is a bargain.

In deciding to implement a drug testing program, the employer must carefully balance the need for workplace safety with the effects testing may have on the employee population. Improperly administered drug testing programs have the potential to destroy an employee's career and livelihood.

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rather difficult. Schacter, et. al., Drugs and Alcohol in the Workplace: Legal Developments and Management Strategies, 12.

[78]Jones v. McKenzie, 628 f. Supp. 1500 (D.D.C. 1986).

[79]Ibid.

similarly, the relationship between labor and management is forever changed and may very well deteriorate. As Abbasi surmises:

> The potential harm of drug screening (may) outweighs the potential benefit, particularly when one considers that workers are forced to undergo the drug testing ordeal to prove their innocence against a presumption of guilt.[80]

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[80]Abbasi, et. al., Drug Testing: The Moral, Constitutional, and Accuracy Issues, 232.

CHAPTER IV

DRUG TESTING UNDER COLLECTIVE BARGAINING AGREEMENTS

The issues faced by the private employer in the implementation of a drug testing program are vast and complex in that most court actions and grievances are brought by individual employees who believe their rights have been violated or who perceive that the employer has sought access to areas unrelated to the employment relationship. Such cases are problematic in that they involve the balancing of an entire establishment's policies with an individual's perceptions as to what constitutes information legitimately accessible to the employer (e.g. information regarding activities outside of the workplace). Unionized environments, however, present the employer with a unique array of challenges. The employer is typically bound by a bargaining contract, and deviation from the provisions of the contract frequently may result in a class action, or it may impact the entire bargaining unit.

Many disputes concerning drug testing in a unionized setting have been brought before the judicial system.[81] The issues have varied; however, the majority of cases involve the right of an employer to unilaterally implement a drug

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[81]Ibid., chap. 7-8 passim.

testing policy.[82] Unions typically support the theory that drug testing is a mandatory subject of bargaining prior to implementation.[83] Employers are equally adamant that many cases involve situations in which testing may be commenced absent prior union negotiations. This chapter will explore the controversy, focusing on two distinct groups: employers covered by the National Labor Relations Act, and employers bound by the Railway Labor Act.

The National Labor Relations Act

In 1987, the National Labor Relations Board (NLRB) issued a memorandum authored by Rosemary Collyer, then General Counsel of the Board. The memorandum focused on drug and alcohol testing in the workplace, and was "intended to assist the Regional Offices in the disposition of pending and future cases involving drug testing."[84] The General Counsel reached three major conclusions regarding workplace testing:

1. Drug testing is a mandatory subject of bargaining for both current employees and job applicants.

2. The implementation of a drug testing program involves a substantial change in the working environment.

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[82]Ibid.

[83]Ibid.

[84]NLRB General Counsel's Memorandum on Drug and Alcohol Testing, Memorandum GC 87-5, September 8, 1987.

3. In the event an employer maintains that a union waived its right to bargain, the waiver must be "clear and unmistakable."[85]

The conclusions reached by the General Counsel rely heavily on the wording of Section 8(d) of the National Labor Relations Act (NLRA):

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract. . .[86]

The General Counsel clearly defines employee drug testing as a mandatory subject of bargaining, rejecting the posture that testing is a management right excluded from Section 8(d) of the NLRA. Similarly, the General Counsel defined "applicant drug testing" as a mandatory bargaining subject. The Board based its decision on several cases, notably White Farm Equipment Company v. NLRB, where the NLRB held that "an employer's hiring practices inherently affect terms and conditions of employment."[87] Further, the General Counsel

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[85]Ibid.

[86]Labor Management Relations Act, 61 Stat. 136, as amended by Act of September 14, 1959, 73 Stat. 519.

[87]White Farm Equipment Company v. NLRB, 242 NLRB 1373, 1375 (1979).

declared:

> . . . 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.[88]

In general, employers opine that since applicants are not employees (as defined by the NLRA), they are necessarily beyond the scope of bargaining.

In addition to defining drug testing as a mandatory subject of bargaining, the General Counsel also held the implementation of a drug testing program substantially changes the working environment -- even where there exists a policy forbidding the use or possession of drugs at the workplace, or where there exists a practice of conducting physical examinations on the workforce:

> . . . 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 determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform work. (emphasis added).[89]

Finally, the General Counsel issued the parameters to define a "clear and unmistakable" waiver by a representative union. An employer must notify the union of the pending installation of a drug testing program and must bargain in good faith to an agreement or to an impasse. A union may be

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[88]NLRB General Counsel's Memorandum, 1987.

[89]Ibid.

deemed to have waived its right to bargain if any one of three circumstances exist: (1) contract language specifically addressing drug testing and the union's agreement to refrain from bargaining, (2) a past practice of waiving rights with regard to the subject of drug testing, and (3) union inaction in response to an employer's stated intent to implement a drug testing program.

The General Counsel's memorandum is important as it is the first communication by the Board addressing the issue of drug testing. In all situations, the General Counsel clearly favored the side of labor, creating a climate where it is virtually impossible for an employer to implement a drug testing program absent good faith bargaining with the union. The General Counsel's opinions were finally tested in 1989, with two separate decisions in which drug testing of current employees and testing of job applicants were addressed.

In Johnson-Bateman Company and International Association of Machinists (IAM), Local Lodge 1047 v. NLRB, the subject of an employer's right to unilaterally implement a drug testing program and a union's waiver of bargaining were addressed.[90] In this case, Johnson-Bateman announced that any employee requiring medical treatment for a workplace injury would be subjected to a drug and alcohol test. Johnson-Bateman

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[90]Johnson-Bateman Company and International Association of Machinists, Local Lodge 1047 v. NLRB, 295 NLRB No. 26 (June 15, 1989).

unilaterally implemented this policy on the basis of a management prerogative clause contained in all bargaining agreements with the IAM:

> The management of the plant, direction of the working forces, and work affairs of the Company, including but not limited to the right . . . to issue, enforce, and change company rules is vested in the Company . . . the Company reserves and retains solely and exclusively, all of the rights, privileges, and prerogatives which it would have in the absence of this Agreement . . .[91]

The union subsequently charged the employer with violation of the National Labor Relations Act, stating that unilateral implementation of the drug testing program violated Section 8(a)(5) of the Act:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .[92]

The NLRB held that drug testing clearly effected the working environment, and as such the employer was required to bargain in good faith with the IAM. The Board further concluded that the management prerogative clause contained in the bargaining agreement did not preclude Johnson-Bateman from bargaining with the union, as the union had not "clearly and unmistakably" waived its bargaining rights.[93]

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[91]Ibid. See also Glen H. Mertens, "Current Developments in Labor-Management Relations," Employer Relations Law Journal 15 (Summer 1989): 115.

[92]National Labor Relations Act of 1935.

[93]Johnson-Bateman Company and International Association of Machinists, Local Lodge 1047 v. NLRB, 295 NLRB No. 26 (June 15, 1989).

The Johnson-Bateman case clearly demonstrates the Board's acceptance of the General Counsel's memorandum. Drug testing of employees plainly constitutes a mandatory subject of bargaining and thus requires a clear waiver on the part of labor prior to implementation. Conversely, the General Counsel's opinions concerning applicant testing did not fare as well in Star Tribune and Newspaper Guild of the Twin Cities, Local 2 v. NLRB.[94] In 1987, the Star Tribune adopted a policy requiring all accepted applicants to submit to a drug test. The company refused to bargain with the union regarding applicant testing, maintaining the issue did not constitute a mandatory subject of bargaining. The NLRB agreed with the newspaper, finding that applicants are not employees and therefore are outside the reaches of mandatory bargaining.[95] The decision of the NLRB clearly contradicts Collyer's memorandum and demonstrates the growing realization that workplace substance abuse poses a very real threat to workplace safety. Applicant testing is usually conducted on the basis of its deterrent effect as well as on the premise that substance abusers should not be allowed access to potentially safety sensitive positions. With the Star Tribune decision, management is afforded some latitude in its efforts to control workplace substance abuse.

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[94]Star Tribune and Newspaper Guild of the Twin Cities, Local 2 v. NLRB, 295 NLRB No. 63 (June 15, 1989).

[95]Ibid.

The Railway Labor Act

The National Labor Relations Act governs the interactions of management and labor. However, railroad and airline carriers and employees are covered under the auspices of the Railway Labor Act (RLA). The RLA addresses many of the same issues as the NLRA -- namely mandatory bargaining and dispute resolution:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce. . .[96]

In drug testing cases brought under the RLA, the Court must first classify the type of labor dispute in question. The RLA defines two separate categories of labor disputes: major and minor. A major dispute occurs when the employer "changes established rules or working conditions," while a minor dispute "involves the interpretation or application of an existing agreement."[97] In the case of a major dispute, Section 156 of the Act requires:

> Carriers and representatives of the employees shall give at least 30 days written notice of an intended change in agreements affecting rates of pay, rules, or working

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[96]Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. Section 152.

[97]Dennis L. Casey, "Drug Testing in a Unionized Environment," Employee Relations Law Journal 13 (Spring 1988): 604.

conditions. . .[98]

The parties involved must then follow a requisite bargaining process during which the status quo must be maintained. In other words, employers must give ample notice to representative unions of pending changes in the bargaining agreement. Prior to the conclusion of the bargaining process, the employer is forbidden to implement any changes. Indeed, injunctive relief may be sought by the union in the event the employer accelerates the implementation of a drug testing program. Conversely, in a minor dispute, the employer is able to unilaterally implement the new drug testing program, while the union is required to challenge the propriety of the program through the normal grievance and arbitration channels handled by the National Railroad Adjustment Board (the Board generally has jurisdiction over such disputes). In certain situations, a minor dispute may be judged a major dispute if the employer's claims are obviously insubstantial, frivolous or made in bad faith.[99] A dispute is considered minor when an employer "asserts a contractual right to take a contested action" and the action is "arguably justified by the terms of the parties' collective bargaining agreement."[100] Additionally, a minor dispute claim does not require the

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[98]Railway Labor Act, Section 156.

[99]Casey, "Drug Testing in a Unionized Environment," 604.

[100]Betty Southard Murphy, et. al., "Drug Testing Subject to Union Bargaining," Personnel Journal (September 1989): 24.

employer to maintain the status quo pending arbitration proceedings.[101] Cases involving drug testing of employees covered by the RLA frequently concern the major dispute versus minor dispute dilemma. The U. S. Court of Appeals addressed the permissibility of a unilaterally implemented drug testing program in the 1986 case of Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad.[102] The plaintiff union objected to several unilaterally implemented management policies concerning drug testing: the testing of employees involved in workplace accidents and the testing of employees returning to work following a leave of absence. These testing procedures were conducted as part of a previously bargained mandatory physical exam. The court sided with the railroad, holding the dispute as minor. In deciding the case, the court noted that Burlington Northern Railroad had a past practice of testing (including probable cause testing) to enforce its alcohol and drug policies. The court maintained the new testing practices did not "substantially change" the working environment, and as such, did not require mandatory bargaining under the RLA.[103] (Interestingly enough, the General Counsel's memorandum substantially departs from the Burlington court's decision as it states that drug testing is a mandatory subject

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[101]Ibid.

[102]Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad, 802 f.2d 1016 (8th Cir. 1986).

[103]Ibid.

of bargaining, even where testing is added to a pre-existing physical examination policy). Subsequent court decisions under the RLA have agreed with the Burlington decision, generally holding that

> . . . the addition of a drug screen as a second component of the urinalysis previously required of all employees does not constitute such a drastic change in the nature of the employees' routine medical examination or the parties' past practices that it cannot arguably be justified by reference to the parties' agreement.[104]

The Burlington Northern case demonstrates a more lenient treatment of management then seen in the previously discussed NLRB cases. Whereas the NLRB memorandum clearly favored labor, the Burlington court attempted to balance the rights of both parties, eventually siding with management. Clearly, given the nature of the industry, the courts must consider the issue of safety in RLA cases, hence the slight favoring of management. Indeed, the courts have historically upheld testing in safety sensitive situations even where testing may infringe upon an individual's rights.[105]

Management did not fare as well in Brotherhood of Locomotive Engineers v. Burlington Northern Railroad.[106] The

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[104]RLEA v. Norfolk and Western Railway, 833 f.2d 700 (7th Cir. 1987).

[105]See generally, Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 f.2d 1264 (7th Cir. 1976) as previously discussed in Chapter I.

[106]Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company, 838 f.2d 1087 (U.S. App. 1988).

defendant, Burlington Railroad, had historically enforced a general safety policy, Rule G. Widely enforced by most railroads, Rule G prohibits railroad employees from possessing or using drugs or alcohol at the workplace:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.[107]

The Burlington Railroad, in an effort to comply with Rule G, implemented a post-accident testing policy. Under this policy, all new members involved in a "human factor" accident were required to submit to urinalysis testing unless "responsibility for the accident is clearly identified." The District Court ruled the revised testing policy constituted a minor dispute, "because it is arguably justified under an implied provision of the collective agreement between Burlington Northern and the Brotherhood of Locomotive Engineers."[108] The Court of Appeals disagreed, concluding that mandatory testing was a clear change in the working environment, and as such required good faith bargaining.[109] Prior to the revised policy, employees suspected of workplace

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[107]Ibid.

[108]Ibid.

[109]Ibid.

substance abuse had the option of submitting to testing in an effort to prove the absence of illegal substances, or they could elect suspension pending an investigation. The new policy provided for the termination of employees found to be in violation of workplace substance abuse rules. The Court of Appeals reasoned the addition substantially changed existing workplace conditions. Unquestionably, safety issues were a major concern in the Burlington case; however, the court clearly believed that deviation from the prior bargaining agreement constituted a major dispute claim. While Rule G may be an accepted industrywide standard to uphold, the enforcement of the rule must follow previously accepted bargaining guidelines. The Burlington Northern cases differ in how the employee was treated following drug testing. Under the earlier case, employees found to be impaired were suspended from the workplace and this practice did not change with the revised drug testing procedures. Under the Brotherhood of Locomotive Engineers Association v. Burlington case, the employee faced termination -- a substantial change from previous policy.

More recently, the issue of major versus minor disputes was addressed in the 1989 landmark Supreme Court decision of Consolidated Rail Corporation (Conrail) v. Railway Labor

Executives' Association, et. al..[110] Since 1976 (the date the Consolidated Rail Corporation began), Conrail required physical examinations of all employees. The examinations included urinalysis testing for general medical reasons and occasionally included the screening of urine for the presence of drugs. In 1987, Conrail unilaterally implemented a revised drug screening program, mandating the inclusion of drug screening in all medical examinations. Conrail's policy previously included medical examinations in three situations. First, all employees were required to submit to testing every three years until age fifty (at which time examinations were conducted every two years going forward). Second, train crew employees returning to work following a leave of absence of thirty days or more were subjected to a "return-to-duty" medical examination. Third, employees suffering from serious medical conditions (i.e. heart attacks, epilepsy, etc.), were required to undergo "follow-up" physical examinations designed to test the employee's ability to perform normal job functions. Employees deemed unfit to work following a physical examination were placed on unpaid leave until fitness for duty was re-established. Drug screening was included in the overall physical examination policy, although not every employee was subjected to drug screening. Generally, drug

[110]Consolidated Rail Corporation v. Railway Labor Executives' Association, et. al., 109 S.Ct. 2477 (June 19, 1989).

screening was used only when the physician suspected substance abuse, or in situations where an employee returned to work following a drug-related leave of absence. With the announcement that drug testing would be part of all physical examinations (including periodic and return to work), the Railway Labor Executives' Union filed suit, claiming the change substantially altered employment conditions. Additionally, the union introduced a deviation of the major dispute claim, classifying the Conrail dispute a "hybrid" dispute. The union argued:

> . . . the dispute in this case . . . is neither a major dispute nor a minor dispute . . . where an employer has made a clear change in . . . working conditions. . . . as embodied in agreements, but asserts that it has made the change in the manner prescribed in such agreements, because it has a contractual right to make the change, the ensuing dispute is a "hybrid dispute."[111]

The union contended that in the case of a hybrid dispute, the company must maintain the status quo and refrain from implementing the change pending the Board's determination of whether the employer has the "contractual right to make the change." Should the employer implement the change prior to the Board's decision, the union maintained that the dispute would then escalate to a major dispute. In opposing the union, Conrail relied on the fact that physical examinations were an accepted clause in the bargaining agreement and that

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[111]Ibid.

drug screening tests had been conducted in the past. The high Court rejected the notion of a hybrid dispute stating:

> . . . we shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category . . . we hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified . . . the employer may make the change and the court must defer to the arbitral jurisdiction of the Board.[112]

The Court then turned to the specific issue at hand: "whether the inclusion of drug testing in periodic and return-from-leave physical examinations is arguably justified by the parties' collective bargaining agreement." While the agreement was not part of the physical evidence introduced in the case, the Court found that collective bargaining contracts may contain certain "implied" agreements. Previous courts hearing the Conrail case had found that "Conrail's authority to conduct physical examinations is an implied term of the collective bargaining agreement, established by longstanding past practice and acquiesced in by the union." The Supreme Court (in a 7-2 decision), agreed that drug testing and medical examinations constituted an implied contractual agreement and subsequently defined the conflict as a minor dispute. The Conrail decision is historically significant in that "implied agreements" and past practices were deemed to

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[112]Ibid.

have a conclusive impact on whether a dispute is characterized as major or minor. The Court established relatively concrete guidelines in determining the classification of such a dispute.[113] Additionally, the Court emphasized the role of the National Railroad Adjustment Board, stating that in the event of a minor dispute, the employer may unilaterally make the change, while the courts must defer the dispute to the grievance and arbitration proceedings of the Board.

While organized labor and management concur regarding the seriousness of substance abuse at the workplace, theoretical differences frequently divide the two groups. Labor appears committed to the eradication of substance abuse provided the rights of all members are given due consideration. Concurrently, management's efforts are occasionally hampered by labor's objections and by the wording of existing bargaining agreements.

Both the National Labor Relations Act and the Railway Labor Act were enacted to protect the rights of employees while balancing the need of management to conduct business in an efficient and safe manner. Lengthy disputes tend to erode

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[113]Note: Previous to Conrail, a similar situation presented itself in Railway Labor Executives' Association, et. al. v. Southern Railway Company, 860 f.2d 1038 (U.S. App. 1988). However, the merits of this case were never decided, as the Court of Appeals held that the union failed to file arguments "during the relevant period within which the suit could be brought."

profits and the relationship between management and labor suffers. In deciding to implement a drug testing program, the organized employer must proceed with extreme caution. The Supreme Court cases previously discussed demonstrate that the successful implementation of such a policy requires careful scrutiny of existing bargaining contracts and the support of representative unions is ideal.

CHAPTER V

LABOR ARBITRATION OF SUBSTANCE ABUSE GRIEVANCES

The number of companies utilizing drug testing measures is steadily increasing. Consequently, an increased number of employees are affected by the complexities of substance abuse testing. A successful drug testing program is dependent upon the cooperation of the exclusive bargaining representative and strict adherence to existing bargaining contracts. However, a cooperative relationship between management and labor does not always guarantee a completely harmonious reaction to drug testing programs. Indeed, as the number of companies using drug testing increases, so too have labor arbitrators witnessed a rise in substance abuse grievances. This chapter will provide a brief historical review of substance abuse grievances, and will study a number of arbitration proceedings dealing with an employer's right to implement drug testing programs. Specific attention will be devoted to establishing the role of the arbitrator in deciding substance abuse grievances.

An Historical Review of Arbitration Cases

Prior to 1989, few major court decisions existed in which to guide arbitrators in deciding substance abuse grievances. In particular, court cases concerning drug

testing in the railroad industry appear to be relatively scarce. However, the issues involved in these early arbitration cases were fundamentally similar to the issues discussed in previous chapters.

In the late 1970's and early 1980's, arbitration cases typically dealt with alcohol abuse more often than drug abuse. While workplace impairment was not necessarily acceptable, the stigma attached to such actions was relatively minor when compared to today's present environment. At this time, arbitrators were still "feeling their way" around substance abuse grievances, establishing the precedent to be followed in arbitrating similar future cases. These early cases frequently concerned the permissibility of subjecting an employee to testing, as well as questions of whether testing constituted an invasion of privacy and other constitutional rights (particularly in the case of public sector employees). Arbitrators often required evidence that an employee had freely consented to testing, holding that a "waiver of constitutional rights cannot be presumed."[114]

As the 1980's progressed, arbitrators were frequently presented with cases where the unilateral implementation of drug testing policies was at issue. Arbitrators carefully scrutinized existing bargaining contracts in an effort to ascertain whether unilateral implementation constituted a

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[114]Capital Area Transit Authority, 69 LA 811, 815 (Ellman, 1977).

major or a minor dispute. Previous to the Conrail decision, the major versus minor dilemma presented arbitrators an issue for which there was no legal precedent. Interestingly enough, these earlier cases agreed with the spirit of the later Conrail decision. For example, a similar case was grieved in October 1988. In this case, the Southeastern Pennsylvania Transportation Authority unilaterally implemented a substance abuse policy titled Industrial Relations Order No. 85-1 which stated in part:

> Any employee suspected of being in violation of this order (to remain drug free at the workplace) may be required to take a blood/urinalysis or other toxicological test(s). An employee found to be under the influence of, or, so tested, whose test(s) results show a qualitative and/or quantitative trace of such material in his/her system shall be discharged from Authority service.[115]

The claimant in this case had a documented history of substance abuse problems. Pursuant to policy, the employee was allowed to return to work following rehabilitation, but was required to undergo periodic testing. After several follow-up tests (all negative), the employee produced a positive test result and was subsequently discharged under Order No. 85-1. The union contended that 85-1 constituted a major dispute under the Railway Labor Act, while the company asserted the dispute was minor. The arbitrator held that 85-1 was both a major and a minor dispute. The requirement of

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[115]Southeastern Pennsylvania Transportation Authority, 17 LA 957 (S. E. Buchheit, 1988). Special Board of Adjustment No. 957, Award No. 17.

reasonable suspicion testing was deemed minor, as existing company policy clearly stated that workplace substance abuse was a "dischargeable offense." In rendering this part of the decision, the Special Adjustment Board stated:

> . . . it is apparent from the facts of this case and others before the Board that in certain circumstances employees have for some time undergone suspicion based testing without protest. Protest has only arisen when employees tested positive and were subsequently discharged. In these circumstances, this Board must hold that the imposition of reasonable suspicion based testing was not a deviation from the parties' Contract and practice and therefore a proper exercise of management discretion.[116]

The Board further decided that the clause mandating discharge in the event of a positive result constituted a major dispute.

> In essence, 85-1 has changed a well established term and condition of employment from one of discharge for being under the influence at work, to one of mandated discharge solely for a trace of a controlled substance being found within an employee's system, without there being any proof of impairment.[117]

The collective bargaining agreement in force at this time allowed for discharge only in the event of impairment or possession. The discharge of claimant was subsequently reversed, although rehabilitation and future testing were ordered.

The arbitration of substance abuse grievances presents a unique challenge to the arbitrator. The controversy

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[116]Ibid.

[117]Ibid.

surrounding employee drug testing is seemingly endless. Perhaps no other subject requires the arbitrator to balance management's business needs with the personal rights of employees to the extent of substance abuse grievances. Substance abuse grievances involve a multitude of issues typically absent in other grievances. Chief among these issues is the notion that there be "just cause" for discipline or discharge. In the absence of "just cause," countless employer decisions have been overturned. The role of the arbitrator involves three major tasks: (1) consideration of the appropriateness of testing, (2) the evaluation of technical methods, and (3) an analysis of the resulting discipline involved.

The Appropriateness of Drug Testing

The arbitration of substance abuse grievances commences with an inquiry into the threshold issue regarding the appropriateness of initially implementing the drug testing program. In answering this question, the arbitrator must ascertain whether the employer's testing policy meets several criteria. Primarily, the employer's policy must be clearly communicated to all employees. The various forms of discipline must be addressed, and an employee should be left in no doubt as to the consequences of violating policy. The arbitrator must also review the procedures followed in selecting employees for testing. Selection procedures (as

seen in Chapter III) frequently involve random or probable cause testing.[118] Many collective bargaining contracts address specific procedures to be followed in the selection process, and the arbitrator must decide whether management has followed these procedures. Generally, where labor has negotiated a testing program based on reasonable cause, arbitrators have been disinclined to uphold an employer's decision to unilaterally add random testing.[119] Probable cause testing appears to have fared better in the arbitration process, provided the employer presents sufficient proof of reasonable cause.[120] As previously discussed, successful probable cause testing depends in large measure on credible testimony by supervisors. Arbitrators carefully analyze such testimony, placing credence in testimony given by well-trained supervisors.

> Supervisors' observations of a worker's aberrant behavior tends to be accepted as reasonable cause to test. However, both the nature of the behavior and the expertise of the supervisor are factors in the determination of reasonable cause. . . A drug testing policy that gives specific instructions to supervisors and indicates typical signs of drug use, increases the likelihood that a request for a drug test will be viewed "reasonable."[121]

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[118]Note: Applicant testing will not be considered in this chapter, as few applicants are given the opportunity to initiate grievance proceedings.

[119]Peter A. Veglahn, "Drug Testing That Clears The Arbitration Hurdle," Personnel Administrator (February 1989): 63.

[120]Ibid.

[121]Ibid.

The need for corroborating eye-witness testimony has consistently been present in arbitration cases, beginning with a 1958 decision where disciplinary measures were overturned because the arbitrator held that a .19 blood alcohol level alone was inadequate proof to justify discharge.[122] Additionally, arbitrators traditionally uphold the reasonableness of drug testing when evidence of substance abuse is combined with impaired job performance -- particularly in safety sensitive positions. When job impairment is combined with visible evidence of intoxication, the employer's decision to test the employee is typically judged favorably.

> To maximize the chances of surviving arbitral review, the practical option for most employers may be to test as few employees as possible and to be prepared to produce concrete evidence in support of the decision to test in each instance. Such evidence would include documented reports of job-related impairment or performance deficits so serious that substance abuse was a plausible explanation.[123]

In concert with the arbitral review of the selection process, arbitrators also scrutinize the record for signs of discrimination, harassment or retaliation.[124] Such a review

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[122]Kaiser Steel Corp., 31 LA 832 (Grant, 1958).

[123]Tia Schneider Denenberg and Richard V. Denenberg, "Employee Drug Testing and the Arbitrator: What are the Issues?," The Arbitration Journal 42 (June 1987): 22.

[124]Ibid.

also entails a determination of whether the employer has applied disciplinary measures consistently and equally to all employees. The importance of the consistent handling of employees was demonstrated in a 1990 arbitration case.[125] In this case, the grievant held a position in the Maintenance Department of the Texas Metropolitan Transit Authority where he frequently had occasion to operate heavy machinery. In 1989, the grievant voluntarily entered a Salvation Army sponsored drug rehabilitation program and returned to work following completion of the program. Following advisement of the grievant's drug problem, the employer administered a drug test. The grievant tested positive and was subsequently discharged. The arbitrator in this case overturned the dismissal, stating that the employer had violated a "memorandum of understanding" between the Authority and the Union which previously established a drug and alcohol treatment program for employees. The arbitrator found the agreement stipulated that employees with drug or alcohol problems be allowed one chance to participate in the employer sponsored EAP program and that the grievant had not been allowed to do so. Instead, the grievant participated in a plan of his own choosing.

> . . . with note and attention given to Grievant's concern for eradicating his drug addiction, his voluntary decision to seek treatment outside the context of the

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[125]Metropolitan Transit Authority (Harris County, Texas) and Transport Workers Union of America Local 260 (S. Nicholas, Jr., May 12, 1990) (unreported).

> program should not have led to forfeiture of his right to have the program made available on a one-time basis. . . the Grievant was denied the benefit of a Return-to-Work Agreement akin to the afforded fellow employee. . . Grievant was treated disparately from those employees who were put on notice via their Return-to-Work Agreement. . .[126]

Such issues typically occur when the company has failed to articulate concrete procedures to be followed in the selection process. Thus, the importance of establishing the basis by which employees are chosen to be tested cannot be overemphasized.

Evaluation of Technical Methods

Substance abuse grievances involve a multitude of issues typically absent in other grievances. Not only must the arbitrator consider the appropriateness of testing employees, but the followed procedures, validity and the significance of testing results are also carefully evaluated. The presence of such technical issues requires arbitrators to diligently study many subjects that may previously have been foreign to their general knowledge. However, there is evidence that many arbitrators may experience some difficulty in keeping abreast of new developments, particularly technical distinctions.[127]

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[126]Ibid.

[127]Denenberg and Denenberg, "Employee Drug Testing: What Are the Issues?," 19.

A recent survey (conducted by CompuChem Laboratories) of some 300 arbitrators found that most of these professionals "have little understanding of the differences in accuracy among commonly used analytical methods."[128] This same group also demonstrated little or no knowledge in the technical process of confirming positive test results. The CompuChem survey is unsettling, as it demonstrates an ignorance of issues crucial to the resolution of workplace drug testing grievances. Several issues must be addressed by the arbitrator involved in a substance abuse case. First, the accuracy of the testing mechanism must be ascertained. This includes the presence of confirmation testing.[129] Confirmation tests tend to strengthen an employer's position in the arbitration process. Arbitrators frequently uphold disciplinary measures when the record shows testing to confirm an initially positive test result.[130] The CompuChem survey found that the majority of surveyed arbitrators were unclear as to the most effective combination of tests to be used for confirmation purposes. The Denenbergs hypothesize that "advocates may find it prudent to rely heavily on expert witnesses to educate the decision makers in the nuances of the

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[128]Ibid.

[129]Note: Confirmation testing involves dividing the urine or blood collected into several samples. The first sample is tested, with the remaining samples tested in the event that the first results in a positive test reading. Ibid.

[130]Ibid.

various test methodologies."[131] Thus, it is important for arbitrators to make every effort to study drug testing methods.

The second technical issue that must be addressed is the threshold for registering a positive test result. While alcohol tests have a clearly established level representing intoxication, drug tests lack a scientifically accepted level indicating impairment. Drug tests are unable to determine such things as when the drug was ingested, the amount used, and the level of impairment.[132] Employers and laboratories typically establish a minimum level to be classified as a positive result.[133] The presence of illegal substances below the minimum level registers a negative test result. Interestingly enough, employers differ in what is considered to be the minimum level. It is precisely this lack of a universal minimum level that causes much concern in an arbitral review.

Such shifts illustrate that 'positive' is not an

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[131]Ibid, 23.

[132]Note: In addition, many questions have arisen regarding the accuracy of a positive reading, as poppy seeds, herbal teas, etc., have been shown to register a positive test result. See generally: Abbasi, et. al., Drug Testing: The Moral, Constitutional, and Accuracy Issues.

[133]Note: Drug tests measure the presence of substances in the body using nanograms per milliliter. A nanogram is one billionth of a gram. The minimum level varies between employers who may set the level as low as 25 ng/ml to a high of 200 ng/ml and greater. Denenberg and Denenberg, "Employee Drug Testing: What Are the Issues?," 23.

> objective threshold -- certainly not a threshold which correlates with impairment -- but the result of an administrative decision by the laboratory and the employer. . . Some forensic experts have cautioned that the level could be changed deliberately to achieve results that justify the program. . .[134]

Arbitrators are commonly confronted with the dilemma of varying minimum levels. Understandably, arbitrators may find it difficult to resign themselves to the fact that an employee with a 75 ng/ml positive reading in one company could conceivably have the same reading in another company, but escape the ramifications of a positive test result, e.g. discharge. Arbitrators typically resolve this issue in favor of the employer when company policy clearly states a minimum level as being in violation of company rules. As one arbitrator stated:

> The evidence in this case does not conclusively show that a recording of 100 ng/ml in the urine, if confirmed, is synonymous with any mental or physical impairment. . . I do not consider it unreasonable for the company to deem an EMIT test of 100 ng/ml. . . a <u>prohibited or an acceptable level</u> (emphasis in original) of the drug, and to conclude that such a level <u>may</u> cause impairment or may result in being under the influence.[135]

It is precisely this controversy that mandates a prudent employer to combine test results with eye-witness testimony. As noted previously, arbitrators tend to uphold probable cause testing when credible evidence is produced. Should such a

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[134]Ibid.

[135]Local and Local 7, Industrial Union of Marine and Shipbuilding Workers of America and Bath Iron Works Corporation, (E. Schmertz, June 30, 1986) (unreported).

test result in a minimum level reading, an employer's position (and ultimately his decision) is strengthened.

Finally, a technical review of substance abuse grievances includes the chain of custody of the sample and the treatment of the employee. Many grievants advance the notion that the sample in question is not their own. Indeed, cases abound of questionable administrative procedures with regard to drug testing. Additionally, arbitrators consider whether the employee's due process rights were protected. Such grievances typically arise where there exists no formal policy regarding drug testing procedures. Once again, the need for a concrete testing policy is obvious.

Resulting Discipline

Unquestionably, arbitrators are frequently called upon to review grievances concerning drug testing and the administrative procedures involved. Just as common however, are grievances brought forth in response to resulting disciplinary measures. In 1986, the National Institute on Drug Abuse (NIDA) stated that "a single positive test result, even if confirmed, should not form the sole basis for disciplinary action."[136] Conceivably, this conclusion is based on the fact that drug testing may result in false positives. Similarly, Veglahn advises, "to ensure against such a

[136]Denenberg and Denenberg, "Employee Drug Testing: What are the Issues?," 24.

possibility (false positives and false negatives), drug testing policies that feature multiple tests prior to disciplinary action should be implemented."[137] Many arbitrators uphold disciplinary measures when the record indicates job impairment via eyewitness testimony. Conversely, a large number of arbitrators may order reinstatement when the employee is proven to have a substance abuse problem -- particularly alcoholism.

> . . . the just cause standard is interpreted to require management to grant an employee's requests for leaves of absence to seek treatment, and arbitrators are likely to require that an employee be given at least one last chance, beyond the normal cycle of progressive discipline, to correct behavior or misconduct attributed to alcohol abuse, provided that the employee has actively sought professional help. . .[138]

Many arbitrators believe the presence of an employer-sponsored EAP mandates management to allow the employee to seek treatment prior to disciplinary procedures.

In many cases, off-duty substance abuse results in disciplinary measures. Generally, arbitrators have held that such situations are beyond the scope of typical disciplinary procedures. As previously stated, drug tests do not show when the substance was ingested. Likewise, a positive test result does not indicate on the job impairment.

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[137]Veglahn, "Drug Testing That Clears the Arbitration Hurdle," 64.

[138]Tim Bornstein, "Getting to the Bottom of the Issue: How Arbitrators View Alcohol Abuse," The Arbitration Journal 44 (December 1989): 48.

> Testing does one thing. It detects what is being tested. It does not tell us anything about the recency of use. It does not tell us anything about how the person was exposed to the drug, it doesn't even tell us whether it affected performance.[139]

Off-duty drug use is subject to an employer's disciplinary procedures only when such use has a demonstrated negative impact on an employer's business.

> The employer must . . . demonstrate that there is a valid nexus between the off-duty misconduct and the status of the grievant as an employee. . . this may be accomplished by showing that the misconduct has damaged the employer's business or will do so if the employee is reinstated, that fellow employees would refuse to work with the offender or would be exposed to danger from the offender. . .[140]

Thus, off-duty drug use is generally outside the realm of employer discipline. Most arbitrators subscribe to the notion that while an individual may be subject to an employer's rules while actually on duty, once the employee has left the premises, what he does on his own time is his own business. This is rather an interesting concept for two reasons. First, most drug abuse involves an illegal activity and presumably an employer is well within its rights to employ law-abiding citizens. One might argue that employer drug testing merely eases the task of law enforcement officials by identifying those individuals who have chosen to ignore public law. Second, when this idea is applied to alcohol use, few people

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[139]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 26.

[140]Ibid, 25.

would argue with the notion that off-duty usage has little bearing on the employment relationship. Alcohol is a legal substance used by many individuals, and accepted standards exist in labeling an individual as "under the influence." Many tests performed by employers identify the presence of alcohol ingested off duty. Is it within an employer's rights to discipline an employee merely because he had a few glasses of wine the prior night? It is precisely such complex issues that challenge arbitrators in substance abuse grievance proceedings.

Insubordination

Disciplinary measures for insubordination frequently arise when the employee refuses to be tested. A review of such cases revealed a propensity to rule in the favor of employees, even where testing is an explicit component of a collective bargaining agreement. For example, a truck driver involved in a minor accident was discharged for refusing to submit to a sobriety test. The company's collective bargaining agreement authorized testing for reasonable suspicion, further stating that an employee who refused to undergo testing would be assumed to be under the influence. The arbitrator ruled in favor of the employee, stating:

> This refusal clearly does not make refusal to take the sobriety test a punishable offense; the offense to be proven remains drinking or being under the influence

of alcohol.[141]

Similarly, in a case where the employee was discharged for refusing to sign a testing consent form, the arbitrator ruled in favor of the grievant, finding that the employee refused to sign the form only because his reading ability prevented him from fully understanding the document.[142]

Discharges for insubordination have been upheld where it was demonstrated that the employer had reasonable suspicion to request testing and where the employee was clearly informed that failure to submit to the test would result in such discipline.[143] Similarly, arbitrators typically sustain discharges for an employee's refusal to submit to a search, where reasonable suspicion has been established and where the employer has demonstrated concern for the employee's privacy and dignity.[144]

In Amtrak Service Workers Council, the arbitration board outlined the proof necessary to sustain a discharge for

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[141]Blue Diamond Company, 66 LA 1136, 1139-41 (Summers, 1976).

[142]Southern California Rapid Transit District, 76 LA 144, 151 (Sabo, 1980).

[143]American Standard, 77 LA 1085 (Katz, 1981).

[144]Shell Oil Co., 81 LA 1205 (Brisco, 1984) and Shell Oil Co., 84 LA 562 (Milentz, 1985).

insubordination.[145] Proof of the following conditions must be met: (1) that the order given was clear, (2) that the employee was informed that non-compliance would result in discipline, (3) that the order was proper, reasonable, not unlawful and did not jeopardize the employee's health or safety and (4) that despite the preceding, non-compliance occurred.[146]

Indeed, arbitrators of substance abuse grievances are not faced with a particularly simplified task. The varying nuances of workplace substance abuse grievances present arbitrators with a vast array of challenges.

While many arbitrators disagree on this complex issue, most appear to place extreme significance on the manner in which the employee was handled by the employer (e.g. an employee's due process rights). An individual's dignity and privacy must be protected in order for the arbitrator to further consider the grievance. Likewise, the employee must be fully aware of any and all consequences associated with workplace substance usage.

Given the imprecise nature of drug testing, it is imperative that employers establish policy and testing procedures, and then make every effort to strictly adhere to

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[145]Amtrak Service Workers Council and the National Railroad Passenger Corporation (J. Simons, June 27, 1989) (unreported).

[146]Ibid.

the program. The next chapter will address the implementation of such programs designed to withstand an arbitrator's scrutiny.

CHAPTER VI

DESIGN AND IMPLEMENTATION OF DRUG TESTING PROGRAMS IN A UNIONIZED ENVIRONMENT

A 1990 Bureau of National Affairs Survey focusing on employer bargaining objectives for the year found that the subject of negotiated drug testing headed the list of bargaining issues.[147] No longer do the common themes of wage increases and bonuses dominate the negotiation process. Both management and labor recognize the enormity of the problem of workplace substance abuse, and both are willing to negotiate the terms by which such a program may be implemented. The BNA report further found:

-51% of respondents who do not currently include drug testing provisions in their bargaining contracts stated that they will seek to bargain one into the contract.

-32% of respondents currently operate with a bargained drug testing policy. Of these, 23% will attempt to broaden their policies.

-Provided that all respondents are able to maintain their policies, as well as those seeking to include drug testing programs prevail, two-thirds of survey participants will have a drug testing program in place.[148]

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[147]"Employer Bargaining Objectives, 1990," Bureau of National Affairs (October 5, 1989): 11.

[148]Ibid., 16.

The increased interest in negotiated testing is not surprising given the recent popularity in the subject. However, as indicated in previous chapters, drug testing involves a multitude of complex issues. Implementing a drug testing program requires careful thought and deliberation, as well as the cooperation of labor. This chapter will explore the concerns of employers and unions in the design and implementation of drug testing programs, and will conclude with a suggested model program.

Employer Concerns In the Implementation Process

Employers develop drug testing programs for many reasons. For instance, many employers are philosophically opposed to substance abuse, and they seek to identify those individuals whose ideals may conflict with the organization. Or, because substance abusers are responsible for many workplace accidents, employers may seek to provide a safe workplace for employees, customers and the general public. Regardless of the motivation, employers who implement drug testing programs are increasing. As a result, these employers must consider a variety of issues crucial to the successful implementation of drug testing programs.

Employers must first ascertain the prevalence of substance abuse at the workplace. Although not an exact science, employers should review records for security problems, increases in workers' compensation claims and

injuries, decreases in quality and productivity, and increased absenteeism.[149] These situations may be indicative of a widespread substance abuse problem. Once the need for a company-wide policy on workplace substance abuse is established, any comprehensive policy must be committed to writing. The company's philosophy should be defined, as well as the specific rules and procedures that are to be followed. Enforcement of the policy must be addressed, and the consequences of violating policy must be outlined. Successful implementation of the policy requires full communication to all employees.

The employer is then confronted with the decision of who and how to test. Most experts agree that applicant drug testing may be implemented with few legal problems, provided that testing is conducted on an equal and nondiscriminatory basis.[150] Testing of incumbent employees is more problematic. As previously noted, random drug testing creates its own legal concerns and challenges. Probable cause testing has been better received by the courts, employees and unions, provided the cause is reasonable and nondiscriminatory.[151] For this reason, supervisory training is crucial to any successful

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[149]Schacter, et. al., Drugs and Alcohol in the Workplace, 78.

[150]Donald J. Peterson, "The Ins and Outs of Implementing a Successful Drug Testing Program" Personnel (October 1987): 53.

[151]Ibid.

probable cause testing program. Such training must include instruction in how the program functions, as well as how to determine candidates for probable cause testing.

Of chief concern to the employer designing a drug testing program is the accuracy of test results. A test's accuracy is measured by its "sensitivity" and "specificity." The sensitivity of a test describes how accurately a test detects "true positives," while the specificity of a test measures the "true negatives."[152] An employer must research the accuracy ratings of any laboratory prior to its inclusion in the drug testing program. Provisions must also be made for those employees using legal substances that may mimic illegal compounds. To further ensure against false positives, confirmation testing of all positive results should be included in the drug testing program.

Once the organization develops the means to identify substance abusers, the employer must then decide how best to deal with these individuals. The decision to discipline or rehabilitate is a complicated one. Many companies sponsor an Employee Assistance Program designed to assist the employee in controlling his drug or alcohol habit. There appears to be great support for such employer-sponsored rehabilitation measures. One expert believes "that an Employee Assistance Program (EAP), adopted with the cooperation of top management

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[152]Ibid., 53.

and the union, is an essential ingredient in remedying the drug problem in the workplace."[153] Conversely, disciplining or discharging those employees who have chosen to ignore company policy may have more of a deterrent effect. Such employers must consider workplace morale and public relations issues.

However an employer decides to conduct its drug testing program, successful implementation depends upon careful consideration of the above issues. In addition, employers should seek the support of representative unions. The following section will address the concerns advanced by organized labor as crucial components to the cooperation between management and labor.

Union Concerns In the Implementation Process

In a recent letter to members of the AFL-CIO, president Lane Kirkland outlined the organization's position on employer drug testing programs. While admitting the safety threat posed by impaired individuals at the workplace, Mr. Kirkland appeared dubious as to the role that drug testing plays in the eradication of workplace substance abuse.

> . . . it is equally clear that drug testing is subject to numerous objections . . . the process cuts deeply into individual privacy rights. There are serious questions about testing accuracy; and a false positive report can stigmatize its victim for life. Contrary to the general belief, drug testing cannot establish whether a worker is currently addicted to a drug, is under the influence of a drug or is unable to do his/her work because of drug use. Testing that leads to discipline rather than

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[153]Ibid., 54.

> treatment gives the employer broad power to punish employees who are doing their job because the employer disapproves of their off-duty conduct.[154]

Kirkland's letter addressed all of the major concerns advanced by organized labor with respect to workplace drug testing. Certainly, organized labor would like to see workplace substance abuse eliminated. The problem is differing opinions on the part of labor and management as to the type of program that best accomplishes this goal.

Of primary concern to organized labor are negotiations over the implementation of drug testing programs. As discussed in previous chapters, unions are vehemently opposed to the unilateral implementation of drug testing programs.

> We deplore the recent efforts by many employers, in the hysteria of the moment, to bypass the collective bargaining process and require mandatory screening or impose punitive programs which ride roughshod over the rights and dignity of workers and are unnecessary to secure a safe and efficient workforce.[155]

Organized labor clearly believes that the unilateral implementation of drug testing erodes the union's position, and results in the unfavorable treatment of its members. In collective bargaining, labor attempts to secure a very concrete substance abuse policy where testing is used minimally or as a last resort.

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[154]President Lane Kirkland's Letter to the Members of the AFL-CIO, May 21, 1986.

[155]AFL-CIO Executive Council Statement on Mandatory Drug and Alcohol Tests, May 21, 1986, p. 4.

Labor does not appear to be opposed to drug testing per se, rather the opposition occurs in the inherent ambiguity of many testing programs. Each situation possesses its own unique characteristics, and many programs are not adaptable to these situations. Consequently, labor frequently supports the inclusion of testing only in the event of reasonable cause.[156] Random testing is unequivocally opposed to by organized labor, because they believe such testing may be used by employers to discredit union supporters and to generally discriminate against selected members of the workforce.

Another chief concern of labor is that all testing must protect the rights, dignity and confidentiality of the employee. Concurrently, labor generally supports rehabilitation over discipline. The AFL-CIO Executive Council Statement repeatedly asserts that an employer's policy must be based

> primarily upon education and on the prevention of addiction; . . . and that provides rehabilitation rather than punishment for those whose alcohol or drug addiction, has, in fact, impaired their job performance.[157]

Typically, unions contend that most substance abusing employees are salvageable and should be protected against disciplinary procedures provided that they are enrolled in

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[156]Note: In this case, "reasonable cause" is narrowly defined as potentially jeopardizing workplace safety or obviously impaired job performance. Ibid., 9.

[157]Ibid., 8.

some type of rehabilitative effort. This notion has resulted in much debate between management and labor, as the Denenbergs quote one labor management authority:

> This has proved to be an area of delicate balance in labor relations. On the one hand, unions have claimed that alcoholism has often served as an excuse to terminate employees whom management found unsatisfactory for other reasons. On the other hand, where contract language existed which provided for medical treatment of alcoholism and a "second chance" before discharge or termination, managements have reported union abuse, claiming that unions often insist on the protection provided for alcoholic employees for workers who are not actually alcoholics.[158]

Thus, the decision of whether to include rehabilitation measures in a bargaining contract is likely to cause a certain amount of dissension in the negotiation process.

Organized labor is quite skeptical as to the accuracy of most testing measures, and as such, condones confirmation testing. Additionally, labor generally believes that the representative union should be included in the decision of which laboratory to use, the method of testing to be practiced, and the threshold by which a sample is deemed to be positive or negative. The presence of waiver of rights clauses is negatively viewed by unions, as labor believes that all employees should be given the opportunity to challenge any or all testing results and the circumstances in which they were obtained. Likewise, the presence of a union

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[158]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace, 138.

representative during testing or searching is deemed appropriate by organized labor, chiefly as a means to ensure that the rights of the employee are protected. The representative may also be called upon to act as a witness should the case find its way to arbitration.

Negotiated Agreements

Coordinating substance abuse programs between the goals of employers and the beliefs of labor is a complex and problematic undertaking indeed. While both parties agree as to the seriousness of the issue, dissension invariably results when it comes to the actual design and implementation of any program. Due to the volatile nature of this issue, those employers who seek the cooperation and support of representative unions are typically more successful in implementing substance abuse programs and identifying affected individuals. By anticipating possible problems associated in dealing with substance abuse cases and negotiating a program that addresses these issues, both the employer and the union will be better equipped to quickly and efficiently identify problem employees and begin the eradication of workplace substance abuse.

A study of several negotiated agreements between various Transportation Unions and Railroad Carriers revealed an almost

formulaic approach to substance abuse programs.[159] These agreements were negotiated in the early 1980's, with the latest one dated 1985. In all cases, both management and labor agreed as to the seriousness of workplace substance abuse and both pledged support in identifying and controlling the growth of the problem. Employee Assistance Programs were mentioned in all agreements, and rehabilitation prior to disciplinary measures was emphasized. Interestingly enough, these earlier agreements lacked any drug or alcohol testing provisions. The means by which an employee was identified as a workplace substance abuser were generally vague; however, it appears that all programs rely on supervisory and co-worker observance of an employee's abnormal behavior. Presumably, these agreements were not too arduous to negotiate, as the employee is given every conceivable latitude in correcting a substance abuse problem. Apparently, these early agreements represent the precursor of today's agreements in which the majority include some type of drug testing provision.

The following model illustrates a suggested Negotiated Drug and Alcohol Testing Policy. The thrust of the policy is

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[159]Note: See generally: "Drug and Alcohol Abuse Prevention Program/Joint Brotherhood of Locomotive Engineers and Burlington Northern Railroad Management Program," signed August 30, 1984, Fort Worth, Texas; "Drug and Alcohol Abuse Prevention Program/Joint United Transportation Union and Burlington Railroad Management Program," signed September 7, 1984, St. Paul, Minnesota; and the "Agreement Between Baltimore and Ohio Railroad Company, et.al. and Employees Represented by Brotherhood of Locomotive Engineers," signed May 2, 1983, Baltimore, Maryland.

characterized by the establishment of a cooperative relationship between management and labor in the control of workplace substance abuse. The burden of reporting workplace substance abuse is shared by all employees and failure to report these occurrences is cause for immediate discharge.

The successful implementation of this program depends upon mass communication of the policy to all employees. It is imperative that all employees are advised of the parameters of the drug testing policy, including the ramifications of violating the policy. Additionally, supervisory training is considered to be an integral part of the program. To that end, all supervisors are required to attend seminars dealing with workplace substance abuse. The intent of this program is to increase the supervisor's knowledge of the signs of substance abuse as well as the proper procedures to follow in dealing with such individuals. Thus, supervisors are prepared in the event that they must act as witnesses in related arbitration or legal proceedings.

(Management and Labor) are committed to establishing programs that promote safety in the railroad industry. To that end, this policy has been developed to clearly outline (Management and Labors') position on workplace substance abuse. For purposes of this policy, "workplace substance abuse" includes any and all activities related to the sale, use, possession, or distribution of drugs and/or alcohol by any and all employees.

Employee involvement with drugs and alcohol erodes both the efficiency and the integrity of the workforce. The safety of employees, customers, and the general public is put at risk. This Drug and Alcohol Policy closely follows Rule G which prohibits railroad employees from possessing or using drugs or alcohol at the workplace:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substance, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.[160]

This policy is intended to control and/or eliminate the insidious effects of workplace substance abuse and to provide

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[160]Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company, 838 f.2d 1087 (U. S. App. 1988).

substance abusing employees with a means of combatting their problem.

I. "Workplace" Defined

The term "workplace" is intended to broadly include any and all property, buildings, company transportation, parking lots (including employees' private vehicles), and any other areas associated with the Company's business in any way.

II. Reporting Violations

Management and Labor believe a cooperative effort among all employees is necessary to identify and treat substance abusing employees. To that end, all employees who suspect a co-worker of violating the Drug and Alcohol Policy must immediately report all occurrences to their supervisors. Violations include creating hazardous working conditions that may jeopardize the employee or his/her co-workers. Failure to report such occurrences will result in immediate discharge.

III. Searches

The Company reserves the right to conduct searches of employees and their personal effects including but not limited to lockers, briefcases, purses, lunch boxes and private vehicles. Such searches may be conducted at any time, but only in the event that reasonable suspicion of a policy violation exists.

IV. Pre-Employment

All individuals applying for a position with the Company will be given drug and alcohol screening tests following an offer of employment. Management and Labor believe that to eradicate workplace substance abuse, we must first control the type of individual selected to join the Company, and thus make every effort to ensure that we are not hiring an individual who may exacerbate the problem. Positive test results will be considered in making all final employment decisions.

V. Current Employees

Current employees will be subjected to drug and alcohol urine screening tests in the following situations:

a. Following all workplace accidents;

b. When a supervisor observes behavior that may be attributable to substance abuse;

c. During routine physicals, including those administered to employees returning to work following an absence (for any reason) of thirty days or more; and

d. All employees previously supplying a positive test result will be subject to subsequent testing upon two days written notice by the Company. This periodic testing will continue for one year at which time, if all tests are negative, testing will end. Should the employee produce a positive test result during this time, disciplinary procedures will follow.

VI. Procedures

All employees suspected of violating this policy will be held out of service pending obtainment of test results (this includes employees involved in workplace accidents). All employees will be provided with transportation home. Under no circumstances are employees to be allowed to drive themselves.

Employees will be compensated for all time involved in testing, including compensation for transportation to and from the testing facility.

Employees who have been tested as negative will be immediately reinstated to their positions. Such employees who were held out of service pending test results will be compensated for all time lost.

For those employees testing positive, discipline will be conducted as follows:

a. Employees with less than one year of service will be immediately discharged with no compensation for time lost pending notification of test results;

b. Employees who had previously tested positive will be immediately discharged;

c. All other employees will be given the opportunity to provide another confirmatory specimen. If this test is also positive, the employee will be given the opportunity to enroll in the Employee Assistance Program (EAP). After the completion of this program, the employee will be returned to

active duty and will be subjected to subsequent periodic testing as outlined in Section Vd. Should the employee refuse to enter the EAP, the employee will be placed on suspension pending investigation. At the end of the investigation, the employee will be subject to disciplinary procedures, up to and including discharge for insubordination, or will be required to undergo testing prior to reinstatement. A positive test will result in immediate discharge, while a negative test will result in reinstatement. All reinstated employees will be subject to the periodic re-testing measures described in Section Vd;

d. All positive test results will be confirmed via a second method of testing (on the same specimen);

e. All specimens will be tested by a laboratory mutually agreed to by management and the union;

f. In all cases, the privacy and dignity of the affected employee will be maintained. Collection procedures will not be observed, except where reasonable suspicion of specimen tampering exists;

g. "Positive" will include all specimens registering a .75 ng/ml or greater for a drug test, or 0.19 or greater for an alcohol test;

h. Should a Drug and Alcohol Policy violation occur in conjunction with other rule violations, each violation will be treated separately, and disciplinary procedures instituted for each violation;

i. Should the employee request that a union representative be present during testing, every effort will be made to accommodate the request. If no representative is available, the employee may request that a co-worker act as his representative for purposes of witnessing testing procedures; and

j. An employee who refuses to submit to testing will be considered insubordinate and disciplinary procedures up to and including discharge will be invoked.

VII. Employee Assistance Program

Management and Labor believe substance abuse is a disease. This, however, is not a valid excuse in justifying the violation of Company rules. Employees who believe they may have a substance abuse problem are encouraged to voluntarily participate in company-sponsored rehabilitation efforts. All employees with a positive test result will be subject to the provisions outlined in Section VI.

Conclusion

Recent public attention has brought the problem of substance abuse to the forefront of workplace issues to be addressed by the employer. The problem of substance abuse is far-reaching and the effects are potentially devastating. However, in the final analysis, workplace substance abuse concerns everyone.

This research project has addressed several strategies used to combat substance abuse. Nonetheless, workplace drug and alcohol testing has been the focal point of this paper. As such, attempts have been made to demonstrate the complexities of substance abuse testing. The employers' need to protect profits, the workplace and the public's well-being have all been advanced as compelling enough reasons to adopt drug testing measures.

While an employer's motivation in implementing substance abuse controls is admirable, the rights of employees cannot be compromised. In the recent campaign to eliminate workplace substance abuse, many employers have been overzealous in their efforts. The result has been an inherent suspicion regarding drug testing at the workplace. Many employees have seen their privacy invaded, been the victims of slipshod procedures, or have been negatively influenced by the great publicity surrounding drug testing. Thus, a collaborative effort is necessary in the eradication of workplace substance abuse.

Such cooperation is best achieved by including labor in the design and implementation of a workplace substance abuse policy. While including another party in the negotiation process may occasionally be tedious, an employer ultimately increases the programs' prognosis for success.

A comprehensive, union negotiated program will typically educate the employer in the seriousness of workplace substance abuse. The provisions of the policy are thoroughly communicated and the employee is asked to contribute to the success of the program. Rehabilitative efforts are frequently included, while disciplinary measures are utilized sparingly. Likewise, a policy that eliminates discrimination as well as ambiguous selection and haphazard technical procedures is better positioned to survive an arbitral review.

Workplace substance abuse is not a problem that will be resolved with a minimum of effort. The cooperation and dedication of the employer and the employee is crucial to this endeavor. Society as a whole would benefit from programs designed to educate the public in the perils of drug usage. Until such a time arrives, the task of controlling substance abuse will remain with the employer.

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The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval by the Committee with reference to content and form.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Science.

Dec 15 1992 _____
Date Director's Signature