

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

Advice Memorandum

DATE: November 3, 2003

TO : Gerald Kobell, Regional Director
Region 6

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

SUBJECT: PPG, Inc.
Case 6-CA-33492

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when, without bargaining with the Union, it began videotaping employees, away from the plant, for purposes of investigating potentially fraudulent claims for workers compensation or contractual health benefits. We conclude that this allegation should be dismissed, absent withdrawal, because the Employer's use of videotaping to investigate workers compensation fraud did not involve a substantial change in employee terms and conditions of employment where the Employer had an established practice of investigating fraud through other similar methods such as personal observation of employees away from the workplace.¹

FACTS

The International Chemical Workers Local 45C (the Union) represents approximately 490 production employees at the Employer's facility in New Martinsville, West Virginia. There is a collective-bargaining agreement in effect through August 2005.

Bargaining unit employee Baker was terminated while on Workers Compensation and sick and accident benefits, after the Employer conducted videotape surveillance of Baker at his home which demonstrated that Baker was performing physical activities that were inconsistent with his stated physical limitations. Baker was terminated for providing false information to the Employer regarding his physical limitations and fraudulently collecting workers compensation

¹ This case was also submitted for advice as to whether the Employer unlawfully refused to provide the Union with the identities of all employees being investigated and videotaped away from the plant. The Union had sought that information for use in its grievance of the employee discharge discussed below. The Region has since informed us that the Employer disclosed that information prior to arbitration of the grievance, and issuance of complaint would not effectuate the purposes of the Act.

and contractual benefits. The Employer never informed the Union that it would be videotaping employees away from the plant, and did not offer to bargain prior to doing so.

Prior to this incident, the Employer had not engaged in any videotape surveillance of employees away from the plant. The Employer had only utilized surveillance cameras at the plant, for security purposes, and the Employer had negotiated with the Union before making any changes in the number or placement of those cameras. However, the Employer asserts that, for many years, it has conducted "personal observation" surveillance of employees away from the plant to determine whether employees it suspected of fraud were engaging in physical activity that was inconsistent with their receipt of benefits. The Union has been aware of, and has never requested bargaining over, that practice.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by unilaterally beginning a practice of videotaping employees away from the workplace, because the use of videocameras to investigate workers compensation fraud did not involve a substantial change in employee terms and conditions of employment.

In Westinghouse Electric,² the Board held that the employer did not violate Section 8(a)(5) by failing to notify and consult with the union before contracting work to outside employers, where the contracting was motivated solely by economic considerations and did not vary significantly in kind or degree from what had been the established practice, and where the union had an opportunity to bargain about subcontracting practices generally in the course of contractual bargaining. The Board found that there was no unlawful unilateral change because there was no "departure from the norm"; the thousands of subcontracts the employer had entered during the relevant period were "recurrent event[s] in a familiar pattern comporting with the Respondent's usual method of conducting its manufacturing operations." The Board also noted that the subcontracting had not had any significant impact on employees' job interests.

Similarly, in Rush Craft Broadcasting of New York,³ the Board affirmed an ALJ who had concluded that the employer

² 150 NLRB 1574 (1965).

³ 225 NLRB 327 (1976).

had not violated Section 8(a)(5) by requiring employees who had formerly manually filled out timecards to switch to using newly installed time clocks. The Board held:

In the circumstances of this case, it is clear that while the change to a mechanical procedure for recording working time marked a departure from the previous practice, more importantly the rule itself remained intact. And to those employees who had conscientiously followed this rule in normally making their timecards, the new time clock procedure would have been inconsequential.⁴

In reaching that conclusion, the Board distinguished Murphy Diesel Company,⁵ where the Employer had instituted new rules requiring employees who had been absent to present written explanations signed by the employee and foreman, on the grounds that that had involved "a material, substantial, and significant change from prior practice" which "vitally affected" employment conditions.⁶

Here, we conclude that the Employer's introduction of videotaping as a new method for investigating workers compensation fraud did not vary significantly from what had been the established practice and did not result in a substantial change in employees' terms and conditions of employment. The Employer obtains the same type of information it had previously obtained; the only difference is that it is using a videocamera rather than relying solely on the personal observations of investigators.⁷ As in Rust

⁴ Ibid. See also The Trading Port, 224 NLRB 980 (1976) (same); Goren Printing Co., 280 NLRB 1120 (1986), affd. 84 3 F.2d 1385 (1st Cir. 1988) (Board relied on Rust Craft Broadcasting to find that employer did not violate Section 8(a)(5) by unilaterally requiring employees to submit written notes if they wanted to leave work early instead of merely giving oral notice, because, "The rule itself remains intact and the procedural change has an inconsequential impact on those employees who complied with the earlier notice requirement.").

⁵ 184 NLB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971).

⁶ 225 NLRB at 327, citing Murphy Diesel, 184 NLRB at 763. See also Vincent Industrial Plastics, 328 NLRB at 300 fn. 1 (switch from employee self-reporting to supervisor observation and reporting of time records was a "significant and substantial" change).

⁷ For a similar analysis, see Roadway Express, 13-CA-39940-1, Advice Memorandum dated April 15, 2002 (no violation

Craft, the change would be inconsequential to those who obeyed the law and followed the Employer's well-established rules. This case is thus distinguishable from Colgate-Palmolive Co.,⁸ where the Board held that the employer violated Section 8(a)(5) by unilaterally installing security cameras in the workplace. In Colgate-Palmolive, the Employer had not conducted any similar type of surveillance before installing the videocameras.

We do not, however, accept the Employer's argument that the issue of employee videotaping and other forms of surveillance away from the workplace is a non-mandatory subject of bargaining. Since such surveillance can lead to employee discipline, it is a mandatory subject of bargaining even if it affects only a small subset of employees and does not involve the "working environment." Thus, although the Employer was free to unilaterally institute videotaping, since doing so was not a significant change in the Employer's surveillance practices, the Employer would have to bargain with the Union, should the Union so desire, about the continued maintenance of this type of surveillance program and the parameters of such a program.⁹ Here, however, the Union has not requested bargaining and the charge alleges only an unlawful unilateral change, not a refusal to bargain. We conclude that the Employer has not made a significant change in terms and conditions of employment, and therefore did not violate Section 8(a)(5) in this regard.

where employer installed computer tracking devices on its vehicles to monitor driver locations rather than relying on driver call-ins previously required).

⁸ 323 NLRB 515 (1977).

⁹ See Westinghouse, supra, 150 NLRB at 1576-77 (although employer did not violate Section 8(a)(5) by unilaterally contracting out work consistent with its past practice, employer would have to bargain with the union on request with respect to any restrictions or other changes in the current subcontracting practice which the union may wish to negotiate). The Union's failure to request bargaining over non-workplace surveillance in the past does not constitute a waiver that would preclude it from seeking bargaining over that issue in the future. See Roll & Hold Warehouse Distrib. Corp., 325 NLRB 41, 42 (1997), enf'd. 162 F.3d 513 (7th Cir. 1998).

Accordingly, the Region should dismiss these allegations absent withdrawal.

B.J.K.