

Chicago Tribune Company and Chicago Typographical Union No. 16, Communications Workers of America, AFL-CIO. Case 13-CA-28307

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The issue we address in this decision is whether the management-rights clause in the collective-bargaining agreement between the Respondent and the Union authorizes the Respondent's unilateral implementations of provisions for drug and alcohol testing and for discipline for certain off-the-job drug-related conduct.¹ The Respondent's contested conduct involves its implementation of an alcohol and drug abuse policy. All efforts directed toward creating a safe, drug-free workplace are of the utmost national concern. Of equal concern, however, is the statutory right of the selected bargaining representative to bargain over mandatory subjects of bargaining and to rely on the stability of the terms of the agreement it negotiates with an employer on behalf of the unit employees. These rights, expressed in Section 8(a)(5) and Section 8(d) of the Act, are central to promoting our national labor policy of industrial peace. In finding that the Respondent's conduct is unlawful, we do not discourage the Respondent from establishing an alcohol and drug-free workplace. Rather, we encourage the Respondent and the Union to work together through the collective-bargaining process toward that goal.

The Board has considered the decision and the record in light of the exceptions and briefs and has de-

¹ On December 12, 1989, Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs. The Respondent filed answering briefs to the General Counsel's exceptions and to the Charging Party's exceptions.

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

The Respondent filed a motion to strike the General Counsel's exceptions and supporting brief on the ground that they fail to meet the specificity requirements of Sec. 102.46(b) and (c). We deny the Respondent's motion. Although the General Counsel's exceptions and supporting brief do not conform in all particulars with Sec. 102.46, they are not so deficient as to warrant striking.

² In adopting the judge's ruling that the management-rights clause of the collective-bargaining agreement privileged the Respondent's unilateral implementation of the attendance policy set forth in its Standards of Conduct Employee Guide (Standards), we reject the Charging Party's argument that the policy directly conflicts with the collective-bargaining agreement. As more fully described in the judge's decision, the attendance policy provides for a system of limitations on absences involving varying levels of discipline. The Charging Party contends that this policy contradicts art. V, sec. 6 of the General Laws of the Printing, Publishing and Media Workers Sector Union (General Laws) which is incorporated into the collective-bargaining agreement and provides that journeymen shall employ a substitute while absent and shall not suffer loss of situation or priority standing if a substitute is not available. This contention, however, ignores art. II, sec. 2 of the collective-bargaining agreement which states that "the provisions of the Modified Agreement for Consent Decree (Decree) in the matter known as *Chicago Typographical Union No. 16 v. Chicago Tribune Co.*, No. 86-C-1998 (N.D. Ill.) supersedes any conflicting provision in this Agreement." The Decree states at par. 9 that "the Compa-

ny's composing room employees have no ability to engage a substitute." The General Laws provision relied on by the Charging Party, therefore, is clearly superseded by the Decree and the Respondent's attendance policy, accordingly, does not conflict with an express term of the collective-bargaining agreement.

cided to affirm the judge's rulings, findings,³ and conclusions as modified, but not to adopt the recommended Order.

The judge found that the management-rights clause in the collective-bargaining agreement between the Respondent and the Union authorized the Respondent's unilateral implementation of the provisions for drug and alcohol testing and for discipline for certain off-the-job drug-related conduct set forth in its Standards of Conduct Employee Guide (Standards), effective February 1, 1989. We disagree. We find, instead, that the drug and alcohol testing provision is an unlawful midterm modification of the terms and conditions of employment contained in the collective-bargaining agreement. We further find that the management-rights clause in the agreement lacks the specificity to constitute a clear and unmistakable waiver of the right to bargain about discipline for off-the-job drug-related employee conduct.

With respect to drug and alcohol testing, the Respondent unilaterally implemented the Standards, effective February 1, 1989, which contains the following provisions:

Whenever Management has an "articulable belief" that an employee may be under the influence of an intoxicant during working hours on Company property, the employee will be given an opportunity to explain his/her conduct as part of the overall investigation process. If the employee is taking prescription or non-prescription medication, acceptable proof may be requested. All employees suspected of being under the influence will be required to undergo a medical evaluation and take an alcohol and/or drug test as determined by the Medical Division. . . .

If the employee displays work-related problems and is not taking prescription or non-prescription medication, the following procedure should be strictly followed:

The employee shall be escorted to the Medical Division and asked to submit to a medical evaluation. The Medical staff will be apprised of the employee's behavior, symptoms and all relevant facts and requested to administer an appropriate alcohol/drug test. The Medical Division will request that the employee sign a "Consent Agree-

ny's composing room employees have no ability to engage a substitute." The General Laws provision relied on by the Charging Party, therefore, is clearly superseded by the Decree and the Respondent's attendance policy, accordingly, does not conflict with an express term of the collective-bargaining agreement.

³ Member Cracraft agrees with the judge's finding that the management-rights clause contained in the collective-bargaining agreement authorizes the unilateral reservation of the right to discipline employees for failing to abide by departmental dress and grooming standards. She, therefore, finds it unnecessary to pass on the judge's additional rationale for dismissing this allegation of the complaint.

ment,” agreeing to submit to a drug urine screen and/or alcohol blood test, as appropriate.

Article XXIV of the collective-bargaining agreement executed by the parties on January 3, 1989, states:

The General Laws of the Printing, Publishing and Media Workers Sector Union (formerly International Typographical Union) in effect as of the effective date of this Agreement and not in conflict with State or Federal Laws shall govern relations between the parties on those subjects concerning which no provision is made in this Agreement.

Article II, section 14 of the General Laws referred to above states: “No journeyman shall be required to submit to a physical examination as a condition of employment.”

In reviewing these provisions, the judge found that it could be argued that the drug and alcohol testing provisions of the Standards conflict with the collective-bargaining agreement, resulting in an unlawful mid-term modification of the agreement violative of the proviso to Section 8(d).⁴ He reasoned that the General Laws, which prohibit physical examinations for journeymen, governed the relations between the parties in this matter because no provision was made in the agreement on the subject of physical examinations.⁵ He further reasoned that the drug and alcohol testing provisions of the Standards might be found in conflict with the General Laws if there were some indication in the record of what the General Laws considered to

⁴The proviso to the first paragraph of Sec. 8(d) reads as follows:

Provided, That where there is in effect a collective-bargaining contract covering employees in any industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice on the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

⁵In this regard, the drug and alcohol testing provisions differ from the attendance policy and the corrective action options set forth in the Standards. The General Laws permit journeymen to use substitutes (see art. V, sec. 6) and prohibit the use of suspensions (see art. II, sec. 3). However, in contrast to the subject of physical examinations, provisions on the use of substitutes and on suspension are made elsewhere in the agreement and therefore supersede the General Laws. Thus, as discussed above, the Decree states that composing room employees have no ability to engage a substitute. Similarly, as the judge found, the management-rights clause in the agreement expressly grants management the right to suspend employees for just cause.

be a physical examination or of what sort of testing the Respondent intended to use in cases of suspected alcohol or drug abuse. He determined, however, that because of the uncertainty of what procedures were contemplated, he could not conclude that the adoption of drug and alcohol “tests” violates the contractual proscription against “physical examinations.”

The Charging Party excepts to the judge’s conclusions on the ground that the Standards calls for specific procedures which clearly fall within any accepted definition of a physical examination. We find merit in this exception.

The Standards refers to a “medical evaluation” by the medical division and to a “drug urine screen” and an “alcohol blood test.” At a minimum, therefore, the Standards contemplates that medically trained personnel will evaluate the physical condition of an employee believed to be under the influence of an intoxicant and will collect urine and/or blood samples.

We find that these provisions are sufficiently specific to fall within the contractually prohibited category of physical examinations. It is common knowledge that a routine physical examination involves the evaluation of the physical condition of an individual by medically trained personnel and may include the collection of blood and urine samples for laboratory analysis. Indeed, the Board has treated other similar technical tests as virtually synonymous with physical examinations. In *Lockheed Shipbuilding Co.*,⁶ the collective-bargaining agreement provided as follows: “There shall be no Doctor’s physical examination . . . except as required by law” The Respondent argued, inter alia, that the provision did not preclude pulmonary and audiometric testing which it had implemented for the purpose of screening out or disqualifying employees from employment. The Board, however, adopted the following conclusion by the administrative law judge:

Physical examinations being a mandatory subject of bargaining, and the Respondent having failed to show that the Unions either agreed to or waived and/or acquiesced in the Respondent’s use of the pulmonary and audiometric testing program for the purpose of terminating or refusing to employ employees, or that the testing program was in accordance with applicable laws and regulations, the Master Agreement or past practices, it is found that the Respondent violated Section 8(a)(5) and (1) by implementing the pulmonary and auditory tests for the purpose of screening out, or disqualifying employees from employment. [Footnotes and citation omitted.]

Thus, the Board implicitly assumed that the category of physical examinations included pulmonary and audiometric tests.

⁶273 NLRB 171, 177 (1984).

Similarly, we find that the General Laws prohibition of physical examinations includes urine and blood tests, such that the drug and alcohol testing provisions of the Standards conflict with the collective-bargaining agreement and amount to a modification of the agreement.⁷

As set forth above, the proviso to Section 8(d) requires that when, as here, a collective-bargaining agreement is in effect, an employer seeking to modify the terms and conditions contained in the contract must obtain the union's consent before implementing the change.⁸ We have found that the drug and alcohol testing provisions at issue here constitute a modification of the agreement. Further, it is undisputed that the Respondent neither sought nor obtained the Union's consent to this modification. Accordingly, we find that the Respondent's unilateral implementation of the drug and alcohol testing provisions is contrary to the requirements of Section 8(d) of the Act, and, therefore, constitutes a violation of Section 8(a)(5) and (1) of the Act.

The collective-bargaining agreement contains no similar express provision concerning discipline for off-the-job drug-related activities. This provision of the Standards must, as the judge found, be analyzed in light of the management-rights clause. As noted earlier, the judge found that the language in the clause allowing the Respondent to "establish and enforce reasonable rules and regulations relating to . . . employee conduct" authorized the unilateral implementation of the provisions concerning discipline for off-the-job drug-related activities. Contrary to the judge, we find that the management-rights clause lacks the specificity to constitute a clear and unmistakable waiver of the Union's right to bargain over discipline imposed for employee conduct away from the job.

The relevant section of the Standards states:

⁷We are aware that the laboratory procedures and conditions for collection of the sample may differ according to the specific drug urine screen used, and that these procedures may differ from other urine tests conducted in connection with routine physical examinations. Any uncertainty generated by such differences, however, does not preclude a determination that a clause which bars the general category of physical examinations also bars the general category of blood and urine tests.

Our dissenting colleague charges that we have equated the possible components of a physical examination with a physical examination and thereby unreasonably confused the meaning of these terms. We have committed no such error. We have merely found that a category *includes* its component parts. If the entire category of physical examination is barred, reason requires a finding that all items within the category, such as blood and urine tests, are also barred. As noted above, this is not a novel approach. The Board similarly treated pulmonary and audiometric tests as included in the covered category of physical examinations in *Lockheed Shipbuilding Co.*, *supra*. Thus, the majority's approach is clearly consistent with Board precedent. *Pennsylvania Power Co.*, 301 NLRB 1104 (1991), relied on by our dissenting colleague, is factually inapposite and provides no support for his view in this case. That case, unlike this one, had no allegation that the implementation of the employer's drug policy was unlawful, and instead involved simply an information request in which the Board addressed an employer's confidentiality argument.

⁸We agree with the judge's finding that although the complaint was not framed in terms of Sec. 8(d), the matter was fully litigated.

Off-the-job illegal drug activities or alcohol addiction that could have an adverse effect on an employee's job performance or that would jeopardize the safety of other employees, the public, Company equipment, or the Company's relations with the public or its employees is prohibited and will be grounds for termination of employment.

Off-the-job selling, distributing or manufacturing illegal drugs by an employee is a dischargeable offense. Likewise, illegal selling, distribution, manufacturing of alcohol is also a dischargeable offense. The arrest for any of these activities will result in immediate suspension without pay and lead to termination of employment, regardless of legal dispositions.

As the judge correctly stated, the starting point for analyzing the clause at issue here is indisputable: waiver of a statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board, in applying this standard, has repeatedly required specificity for finding a waiver. Thus, in *Johnson-Bateman Co.*,⁹ the Board held that the management-rights clause permitting issuance of "company rules" was too general to constitute a waiver of the union's right to bargain about the respondent's implementation of a drug and alcohol testing requirement. By contrast, in *United Technologies Corp.*,¹⁰ the Board found the management-rights clause which allowed the respondent to "make and apply rules and regulations for production, discipline, efficiency and safety" was sufficiently specific to constitute a waiver of the right to bargain over the elimination of the third step of the established progressive discipline procedures for absenteeism.

Applying these principles to the instant case, we find that the clause allowing the Respondent to make and enforce reasonable rules governing "employee conduct" lacks the specificity to constitute a waiver of the right to bargain over the implementation of discipline for drug-related conduct occurring when the employee is not on the job.

Collective-bargaining agreements are the means by which the parties establish terms and conditions of employment. As such, they necessarily focus on the work process.¹¹ It follows that management-rights clauses

⁹295 NLRB 180 (1989).

¹⁰287 NLRB 198 (1987), Supplemental Decision and Order 292 NLRB 249 (1989), *enfd.* 884 F.2d 1569 (2d Cir. 1989).

¹¹We note that the case cited by our dissenting colleague as support for his assertion that employee conduct during nonworking time as it relates to alcohol and drug use is of concern to unions and employers involves conduct which occurred during the course of a working day. In *New Jersey Bell Telephone Co.*, 301 NLRB 719 (1991), cable splicers McLellan and Reilly were working on a Saturday and went to a bar for lunch. They left the company truck parked outside the bar. They were subsequently suspended for, *inter alia*, drinking on the job and being away from the job without permission. We see little connection between this type of conduct and the conduct regulated by

Continued

typically reserve to management the right to take certain actions concerning that process. Thus, the management-rights clause in the instant case retains the right to “direct and control the operations” and “to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct.”

The off-the-job conduct regulated by the Standards, however, is far removed from the work process. Some of the regulated conduct involves selling, distributing, or manufacturing illegal drugs—activity away from the job which has no direct bearing on job performance. Further, the Standards provides that arrest for these activities will result in immediate suspension and can lead to discharge regardless of legal dispositions. Thus, the Standards reaches off-the-job conduct which ultimately could prove to have no connection with illegal drugs. We find that the language of the management-rights clause lacks the specificity to warrant the conclusion that it authorizes such far-reaching rules governing conduct away from the workplace. Nor do we find anything in the bargaining history that warrants such a conclusion.

Five collective-bargaining agreements executed by the Respondent and the Union, covering the period from 1971 to 1992, were submitted into evidence. None of these agreements regulates employee conduct away from the job.¹² Although the current agreement is the first to contain a management-rights clause, there is no express indication in the clause that it extends to conduct away from the job. Against this background, and in consideration of the broad reach of the Standards, we find that the right to regulate employee conduct reserved to management in the management-rights clause does not constitute a clear and unmistakable waiver by the Union of the statutory right to bargain about the Respondent’s implementation of discipline for off-the-job drug-related activities. We, therefore, find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the provisions for discipline for off-the-job drug-related activities contained in the Standards.

the Standards which occurs outside of the workday and away from the workplace.

Similarly, *United Technologies Corp.*, supra, cited by our dissenting colleague as supporting a broad waiver here, related to disciplinary policy with respect to absenteeism, and thus involved conduct which, unlike the conduct in this case, is clearly work related.

¹²The record reveals one instance where the Respondent implemented rules concerning off-the-job conduct. The Respondent introduced a substance abuse policy, effective in 1986, which contained provisions concerning off-the-job drug-related activities. However, we agree with the judge’s findings that the Union was not afforded adequate notice and opportunity for bargaining about this policy and that the 1986 policy was significantly narrower than the 1989 Standards. We further note that there appears to have been no discussion of the 1986 policy during the mediated negotiations for the current collective-bargaining agreement. In these circumstances, we cannot find that in agreeing to the management-rights clause, the Union clearly and unmistakably waived the right to bargain about discipline for off-the-job drug-related activities.

CONCLUSIONS OF LAW

1. By implementing, without the consent of the Union, the drug and alcohol testing provisions set forth in the substance abuse policy of the Standards of Conduct Employee Guide, effective February 1, 1989, the Respondent unilaterally modified that provision of the collective-bargaining agreement prohibiting physical examinations for journeymen. The Respondent’s conduct constitutes a refusal to bargain within the meaning of Section 8(d) of the Act, and is, therefore, an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unilaterally implementing the provisions for discipline for off-the-job drug-related conduct set forth in the substance abuse policy of the Standards of Conduct Employee Guide, effective February 1, 1989, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, and to take certain affirmative actions designed to effectuate the purposes of the Act. We shall order the Respondent to rescind the provisions for drug and alcohol testing and for discipline for off-the-job drug-related activities set forth in the Standards of Conduct Employee Guide. We shall further order the Respondent to bargain collectively with the Union concerning the provisions for discipline for off-the-job drug-related conduct set forth in the Standards of Conduct Employee Guide.

We shall also order that the Respondent remove from the files of employees all memoranda, reports, or other documents resulting from the application of the drug and alcohol testing provisions and/or the provisions for discipline for off-the-job drug-related activities set forth in the Standards of Conduct Employee Guide.

ORDER

The National Labor Relations Board orders that the Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing the provisions for drug and alcohol testing set forth in the Standards of Conduct Employee Guide, contrary to its existing collective-bargaining agreement with Chicago Typographical Union No. 16, Communications Workers of America, AFL–CIO without the consent of the Union.

(b) Unilaterally implementing the provisions for discipline for off-the-job drug-related activities set forth in the Standards of Conduct Employee Guide.

(c) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the provisions for drug and alcohol testing set forth in the Standards of Conduct Employee Guide.

(b) Rescind the provisions for discipline for off-the-job drug-related activities set forth in the Standards of Conduct Employee Guide.

(c) Remove from the files of unit employees all memoranda, reports, or other documents resulting from the implementation of the provisions for drug and alcohol testing and for discipline for off-the-job drug-related activities set forth in the Standards of Conduct Employee Guide.

(d) Bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning discipline for off-the-job drug-related conduct:

All "current employees" in the composing room as defined in paragraph 1(a) of the Modified Agreement for Consent Decree in *Chicago Typographical Union No. 16 v. Chicago Tribune Co.*, No. 86-C-1998 (N.D. Ill.), whose names appear on the list attached to the current collective-bargaining agreement and all those who may in the future be employed as typographical associates to perform manual paste-up functions in the composing room, excluding guards and supervisors as defined in the Act.

(e) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found herein.

¹³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER OVIATT, dissenting.

The administrative law judge found that aspects of the Respondent's drug and substance abuse rules of conduct that were unilaterally instituted during the term of the collective-bargaining agreement were permitted by the management-rights clause of that agreement. Accordingly, he dismissed the complaint with respect to those issues and as to other unilateral changes alleged in the complaint to be unlawful. Because I find that the administrative law judge properly interpreted the pertinent contractual provisions, and that the Union waived its right to bargain about the disputed rules, I would affirm his determination that the complaint should be dismissed in its entirety. I therefore dissent from my colleagues' conclusion that the imposition of these rules violated Section 8(a)(5) and (1).

I. BACKGROUND

The pertinent part of article VI, the management-rights provision of the current agreement, states that: "[T]he Company has and remains [retains] exclusively to itself . . . the exclusive right to . . . establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct . . ." The discipline and discharge provision of the agreement, article VII, section 1, provides, among other things, that the "foreman shall be judge of an employee's . . . general fitness to work for the Company. However, the fairness of his judgment shall be subject to review under the Grievance Procedure." This same article also provides, in section 2, that the foreman may discharge a unit employee "for violation of Company rules conspicuously posted . . ."

The contract also contains a broad waiver provision, in article XXII, providing in pertinent part that the Company and Union

. . . each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement and the Modified Agreement for Consent Decree, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

After the agreement went into effect, the Respondent unilaterally promulgated "Standards of Conduct" that included among "examples" of prohibited conduct, the "refusal to submit to an alcohol and/or drug test when requested by the immediate supervisor or management representative." The Standards also required that an employee suspected of being under the influence of an intoxicant undergo a "medical evaluation" and an "alcohol and/or drug test as determined by the

Medical Division.” In addition, the Standards contained a prohibition of off-the-job “illegal drug activities or alcohol addiction” which could affect job performance, safety, or “the Company’s relations with the public or its employees,” and provided that arrest for drug or alcohol offenses would result in “immediate suspension without pay” and lead to termination, “regardless of legal dispositions.”

In finding that these provisions of the Standards did not constitute an unlawful midterm modification of the agreement, the judge relied principally on the quoted language from the management-rights clause. He reasoned that these words related to the very regulation of employee conduct covered in the Standards. He found that the waiver of the Union’s right to bargain contained in the management-rights clause was both specific enough to cover the provisions of the drug-related standards and broad enough to encompass the range of conduct covered in those standards to warrant a finding that the Respondent did not first have to bargain about those standards. The judge also relied on the “Discipline and Discharge” provision which, he noted, gave the foreman the right to discharge an employee for “violation of Company rules conspicuously posted” This, he observed, was an acknowledgement by the parties that the Respondent had the exclusive right to promulgate and revise rules governing the activities of its employees, subject to the Union’s right to challenge the reasonableness of the rules through the grievance procedure.

My colleagues reverse the judge, however, with respect to the standards on drug testing. They do so because the Union’s General Laws, which are made a part of the contract to the extent that “no provision is made in” the agreement, provide that “[n]o journeyman shall be required to submit to a physical examination as a condition of employment.” The majority reasons that the medical evaluation and drug testing in the Standards is in essence a “physical examination.” The majority also finds that the management-rights clause provision governing “employee conduct” is not sufficiently specific to constitute a waiver of the Union’s right to bargain over discipline for drug-related employee conduct off the job. In the majority’s view, “employee conduct” in the management-rights provision refers only to employee conduct while at work. I disagree.

II. ANALYSIS

A. Drug Testing

In reviewing the allegations of the complaint, I am mindful of the Board’s recent admonition that: “To overlook the pervasive drug problem in this country and in the workplace, and to disregard the violence that accompanies that national concern would be unrealistic and contrary to national policy.” [Footnote

omitted.] *Pennsylvania Power Co.*, 301 NLRB 1104, 1107 (1991). In my experience, unions are often as much aware of, and concerned about, the impact on the workplace of drug and substance abuse problems as are employers. Thus, when a union, as here, enters into a management-rights provision that permits the employer to establish “reasonable rules . . . relating to . . . employee conduct,” and when a union, also as in this case, agrees to permit a foreman to judge the “general fitness to work” of an employee and to discharge an employee for “violation of Company rules,” the union must have understood this to include those rules related to drug and substance abuse.

My colleagues, however, conclude that the Respondent violated the Act when it unilaterally promulgated the drug-testing rules because the contract contains a prohibition on physical examinations.¹ The judge rejected reliance on the physical examination prohibition because the General Counsel had not made a record on what the Union’s General Laws considered to be a “physical examination” or on what sort of “medical evaluation” the Respondent intended in cases of suspected alcohol or drug abuse. I agree. In common parlance, a “medical evaluation” and urine and blood tests are not the same as a “physical examination.” What the majority has done is to take possible components of a physical examination and to equate them with a “physical.” In my view, the majority’s analysis unreasonably stretches and confuses the meaning of these terms.²

B. Drug-Related Conduct Off the Job

I also disagree with the majority’s observation that collective-bargaining agreements “necessarily focus on the work process,” to the exclusion of nonworking time conduct related to drugs or alcohol that may directly affect job performance. Nonworking time employee conduct as it relates to alcohol and drug use is often of concern both to unions and employers. See, e.g., *New Jersey Bell Telephone Co.*, 301 NLRB 719 (1991). Particularly is this true of the composing room employees in this case, whose alertness is critical to their work. This being so, I find the judge’s analysis to be correct.

I note also that the language of the agreement—“reasonable rules” concerning “employee conduct”—

¹ It is interesting to note that the General Counsel made no such contention; the Charging Party alone made this argument.

² If anything, the language of the Standards supports the view that “medical evaluation” is nothing more than the medical division’s evaluating the employee’s condition solely on the basis of (1) the employee’s conduct, as reported to the medical staff by the employee’s supervisors, and (2) the results of the tests. Thus, the Standards provides the employee be asked to sign a “Consent Agreement” limited just to “a drug urine screen and/or alcohol blood test. . . .” The employee’s consent is not sought for a “physical examination.” Further, as provided in the Standards, after being “apprised of the employee’s symptoms, and all relevant facts” the medical staff “will be requested to administer an appropriate alcohol/drug test.” The medical staff is not being requested to administer a “physical examination,” including tests.

is not limited in any way to on-the-job activities. It is thus reasonable to infer that the contract's references to an employee's "general fitness," and to "reasonable rules" related thereto, include, when it comes to drug and alcohol abuse, more than on-the-job activity. In my experience, it is not realistic in these circumstances to require parties engaged in collective bargaining first to identify every subject to be covered in the rules of conduct in order for there to be a waiver of the duty to bargain about matters covered under those rules. In my opinion, the agreement's language waives the Union's right to bargain about rules covering an employee's off-duty conduct as it relates to drugs and alcohol. See *United Technologies Corp.*, 287 NLRB 198 (1987); *LeRoy Machine Co.*, 147 NLRB 1431, 1432 (1964).³ The majority blinds itself to the realities of industrial life and gives short shrift to the Respondent's earnest efforts to act in consonance with the national drug policy. I dissent.

³ The majority also relies on the fact that the previous five collective-bargaining agreements contained nothing regulating employee conduct away from the job. The majority concedes, however, that this is the first contract having a management-rights clause. Of equal importance, the majority does not dispute that, as recited by the judge, the Union's vice president, Steven Berman, interpreted the management-rights and waiver provisions, among other things, to "wipe out . . . other agreements . . ." Thus, the majority's reliance on the absence of any mention of off-duty conduct in prior agreements is questionable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT implement the provisions for drug and alcohol testing contained in the Standards of Conduct Employee Guide, contrary to our existing collective-bargaining agreement with Chicago Typographical Union No. 16, Communications Workers of America, AFL-CIO without the consent of the Union.

WE WILL NOT unilaterally implement the provisions for discipline for off-the-job drug-related activities contained in the Standards of Conduct Employee Guide.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the provisions for drug and alcohol testing contained in the Standards of Conduct Employee Guide.

WE WILL rescind the provisions for discipline for off-the-job drug-related activities contained in the Standards of Conduct Employee Guide.

WE WILL remove from the files of unit employees all memoranda, reports, or other documents resulting from the implementation of the provisions for drug and alcohol testing and for discipline for off-the-job drug-related activities contained in the Standards of Conduct Employee Guide.

WE WILL bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning discipline for off-the-job drug-related conduct:

All "current employees" in the composing room as defined in paragraph 1(a) of the Modified Agreement for Consent Decree in *Chicago Typographical Union No. 16 v. Chicago Tribune Co.*, No. 86-C-1998 (N.D. Ill.), whose names appear on the list attached to the current collective-bargaining agreement and all those who may in the future be employed as typographical associates to perform manual paste-up functions in the composing room, excluding guards and supervisors as defined in the Act.

CHICAGO TRIBUNE COMPANY

Emilie F. Fall, Esq., for the General Counsel.

Keltner W. Locke, Esq. (King & Ballow), of Nashville, Tennessee, for the Respondent.

Gail E. Mrozowski, Esq. (Cornfield & Feldman), of Chicago, Illinois, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Chicago, Illinois, on July 24-26, 1989,¹ based on a charge filed on January 23, and a complaint issued on March 31. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by, on or about February 1, "unilaterally implement[ing] 'Standards of Conduct' which affect terms and conditions of employment" in the relevant bargaining unit, i.e., without affording the Charging Party an opportunity to negotiate regarding policies relating to five areas ("substance abuse and drug testing"; "attendance and attendance corrective actions"; "progressive discipline"; "mandatory overtime"; and "dress code"). The answer denies the complaint in critical aspects.

Briefs were received from all parties on or about October 2. Based on the record and legal precedent, I make the following findings of fact,² conclusions of law, and recommendation.

I. FACTS

The Respondent has recognized the Charging Party as the representative of its composing room employees for many years, and the two entities have executed a series of basically similar bargaining agreements, apparently without serious difficulty; the four contracts in evidence cover the period January 15, 1971, through January 14, 1983. When the last

¹ All dates hereafter refer to 1989, unless otherwise indicated.

² Certain errors in the transcript have been noted and corrected.

contract in this line expired, however, the parties were unable to conclude negotiations for the next agreement, and in July 1985, the unit employees went on strike.

The record tells us nothing about the substance of the negotiations prior to the strike, and we do not have a complete picture of the poststrike negotiations. We do know the following.

After the Respondent partially refused the Union's offer to return the employees to work in February 1986, the Union brought suit in U.S. District Court, contending that a 1975 supplemental agreement required the Respondent to reinstate all of the employees. In an effort to resolve this and other formal disputes between the two sides, District Judge Aspen elicited their agreement to enlist the mediatory efforts of William J. Usery, Jr.. Between March 1987 and November 1988, the parties met often to bargain for a collective agreement. Virtually all of the "meetings" in fact were conducted by written communication, with Usery engaging in shuttle diplomacy between the two caucuses; there is, accordingly, nothing in the record in the form of discussions that might be illuminative of the parties' intent as to particular portions of the agreement which was finally signed.

None of the four contracts which preceded the strike contained either a management-rights clause, a zipper clause, or an abolition-of-past-practices clause. They were nuts-and-bolts contracts which included few provisions pertaining to either the scope, nature, or juridical effect of the contracts or to employer control over the workforce. At this mid-1980's juncture in the relationship, however, the Respondent sought to restructure the contract.

The earliest proposal contained in this record was a complete contract submitted to the Union on June 11, 1987 (G.C. Exh. 2). While the document preserved many of the provisions contained in the prior agreements, it also introduced a management-rights clause some two pages in length and comprising 21 sections, ranging from the unlimited ("The sole and exclusive rights of management shall include but are not limited to the following rights: . . . To establish or continue policies, practices and procedures for the conduct of the business and, from time to time, to change or abolish such policies, practices or procedures") to the esoteric ("sole and exclusive right to . . . operate such vending machines as it may determine and to place them within its plant in such locations as it may determine"). Of some interest to us here were proposed provisions authorizing sole employer discretion "[t]o make and enforce safety rules and rules governing the conduct of employees within the plant and for the maintenance of discipline"; "[t]o suspend, discharge or otherwise discipline employees for cause and otherwise to take such measures as management may determine to be necessary for the orderly, efficient and profitable operation of its business"; and "to require of any employee at any time a physical examination . . . to determine said employee's physical and mental ability to perform his job assignment efficiently and safely."

Proposed article VI ("Discipline and Discharge") recited that the Company's "right to discipline employees for cause" included but was not limited to "(a) suspension . . . for not more than four (4) months, (b) reduction in pay . . . (c) demotion, (d) transfer to another job classification, and (e) discharge." There followed a provision for imposing a penalty and then suspending it, thus placing the employee on

"disciplinary probation." Next came a lengthy list of "causes for discharge" (not to be considered exclusive), which included "Violation of Company rules," possessing or using intoxicants or illegal substances on or away from company property, and "Unexcused absence and tardiness."

Another provision relevant to this case would have required that "[e]ach employee covered by this Agreement shall work overtime when asked, unless he is excused by the Company" and would have made refusal to work overtime "grounds for discharge or other disciplinary action." Finally, pertinent to this case was a "Waiver" clause, also referred to as a "zipper" clause, which will be set out infra.

The Union, on June 12, 1987, made an informal counterproposal. In response to Respondent's management-rights clause, the Union wrote cryptically, "Prefer Union's Management's Rights proposal." The record does not disclose what this refers to, but obviously the Union had made some earlier stab at such a clause. As for the "Discipline and Discharge" provision, the Union wrote, in part, "Agree to concept of progressive discipline,³ but have difficulty with list of items which automatically constitute 'cause.'" Thus, the Union made no specific objection to such disciplinary actions as suspensions and demotion, as proposed by Respondent.

With regard to overtime, the Union wrote, in pertinent part, "Cannot agree to mandatory OT but agree to a reasonable standard." What the Union meant by this is unclear. The four contracts had contained the following, also less than pellucid, language: "It is the intention of the Union that employees shall cooperate with the Office [i.e., management] by working a reasonable amount of overtime when requested to do so to meet the requirements of the Office." Finally, the Union's response to the "Waiver" proposal was "OK—with additional clause proposed by Union—also Union proposal re: zipper." What the "additional clause" or the "Union proposal re: zipper" were, we do not know.

The Respondent immediately redrafted its proposals. However, it made no change in the management-rights clause, the overtime provision, or the waiver clause. It did, however, amend its "discipline and discharge" proposal to eliminate the illustrative list of "causes for discharge," substituting therefor, in part, "The Company shall have the right in its sole discretion to post work rules and applicable standards of conduct, the violation of which shall constitute causes for discipline, up to and including discharge." This language is reminiscent of a provision which had appeared in the four preceding contracts under the heading "Discharges—Discipline":

The foreman may discharge composing room employees (1) for incompetency; (2) for neglect of duty; (3) for violation of Office rules conspicuously posted and which shall in no way abridge the civil rights of employees or their rights under accepted I.T.U. laws. Dated copies of Office rules shall be furnished to the chapel chairman.

The Union came back with a new "Discharge and Discipline" provision, which would have established a true pro-

³In fact, Respondent's proposal did not strictly involve the concept of "progressive discipline"; as shown above, it simply enumerated various forms of discipline which Respondent could, but need not, impose (and would not be limited to).

gressive disciplinary system, with penalties increasing for each offense. It also would have deleted the proposed posting of work rules and applicable standards of conduct, and it offered a revised version of the foregoing clause from the previous contracts:

The company may discharge or discipline employees for incompetency; for neglect of duty; for violation of work rules conspicuously posted and which do not in any other [sic] way abridge employee rights under this agreement.

With regard to "Management Rights" and "Waiver," the Union simply wrote "Union Proposal 6/12/87." As for "Overtime," the Union accepted, inter alia, the Company proposal that "[o]vertime shall be worked when deemed necessary by the Company," but marked "Discussion" next to the separate clause making refusal to work overtime grounds for discipline.

In January 1988, the parties agreed to submit a package, including an agreement for consent decree and a collective-bargaining agreement, to the unit members for ratification; the Union bargaining committee expressly remained neutral on the question of acceptance. The agreement contained, inter alia, the laundry list management-rights clause; a "Discipline and Discharge" article which provided, inter alia, that the "disciplinary range will consist of the following: (1) oral warning; (2) written warning; (3) suspension and (4) discharge"; mandatory overtime coupled with discipline for refusal; and the waiver clause. The package was rejected by the union membership.

Subsequently, in June 1988, mediator Usery recommended to the parties in summary form the basic outline of an agreement. These recommendations included, among others, a management-rights clause and a waiver clause taken directly from another agreement in effect at the Tribune which had resulted from an interest arbitration. Although in subsequent correspondence the Union sought to delete the recommended management rights and waiver clause, the Respondent opposed such deletions, and the Union thereafter responded by seeking certain modifications of Usery's original proposal, but not again asking for the elimination of those clauses.⁴ The membership thereafter ratified, and the parties executed on January 3, 1989, a bargaining agreement which included such clauses, evidently the ones recommended by Usery.

The pertinent portions of the clauses of the executed contract which the parties refer to on brief follow:

ARTICLE II

PURPOSE

Section 2. This Agreement covers only those matters specifically contained herein and supersedes all prior agreements whether express, implied, written or oral between the Company and the Union, including any letters of interpretation, verbal understandings and past practices. . . .

⁴In responding to the Union's initial request to delete the clauses, Respondent's attorney wrote to Usery, "Deleting the entire management rights clause (article IV) leaves the International Union's general laws (article XXIV) as the controlling authority in many matters that would otherwise be reserved to management."

. . . .

ARTICLE VI

MANAGEMENT RIGHTS

Except as specifically limited by the express language of this Agreement and the Modified Agreement for Consent Decree . . . , the Company has and remains [sic] exclusively to itself the customary rights, privileges and authority in the exercise of its management function, including, but not limited to, the exclusive right to manage, plan, direct and control the operations and work force, to establish and change existing methods, to select and hire employees and assign them to work as needed, to transfer and promote employees, to establish hours of work, to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct, to suspend, discipline and discharge regular employees for just cause and to lay off employees or relieve them from duty for lack of work or for other proper reasons.

. . . .

ARTICLE VII

DISCIPLINE AND DISCHARGE

Section 1. The foreman shall be judge of an employee's competency as a workman and of his/her general fitness to work for the Company. However, the fairness of his judgement shall be subject to review under the Grievance Procedure.

Section 2. The foreman may discharge composing room employees (1) for incompetency; (2) for neglect of duty; (3) for violation of Company rules conspicuously posted and which shall in no way abridge the civil rights of employees or their rights under accepted Printing, Publishing and Media Workers Sector laws. Dated copies of Company rules shall be furnished to the chapel chairperson. . . .

ARTICLE X

SHIFTS, HOURS, AND APPLICABLE RATES

Section 9. . . . It is the intention of the Union that employees shall cooperate with the Company by working a reasonable amount of overtime when requested to do so to meet the requirements of the Company. . . .

. . . .

ARTICLE XXII

WAIVER

The parties hereto acknowledge that, during the negotiations that resulted in this Agreement and the Modified Agreement for Consent Decree, each had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining; and all such subjects have been discussed and negotiated on; and the agreements contained in this Agreement and the Modified Agreement for Consent

Decree were arrived at after the free exercise of such rights and opportunities. Therefore, the Company and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement and the Modified Agreement for Consent Decree, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

ARTICLE XXIV

GENERAL LAWS

The General Laws of the Printing, Publishing and Media Workers Sector Union (formerly International Typographical Union) in effect as of the effective date of this Agreement and not in conflict with State or Federal Laws shall govern relations between the parties on those subjects concerning which no provision is made in this Agreement.

It should be noted that a provision substantively identical to the last one appeared in the previous contracts, and copies of the General Laws were evidently attached to those contracts as they are to the present one. Those laws have included, and now include, the sentence, "Suspension is prohibited as a method of discipline."

The record shows that in November and December 1988, Respondent published and made known to the other unions with which it bargains a booklet entitled "Standards of Conduct Employee Guide." The purpose of the publication was to make uniform the substance and applicability of rules throughout the company. The record further shows that two days after Respondent and the Charging Party signed their bargaining agreement, Respondent by letter notified the president of the Charging Party, August Sallas, that Respondent intended to implement such a code of conduct in the composing room, thereby making "minor modifications to existing company policy," to "become effective in the Composing Room on February 1, 1989." The letter further stated that if Sallas had "any questions or wish[ed] to discuss this matter in more detail," he should contact Respondent's labor relations manager. By letter of January 10, Sallas asked for a meeting "to discuss Chicago Tribune Company's minor modifications to existing company policies prior to implementation."

Such a meeting was held on January 17. The meeting opened with Respondent's attorney James Kulas distributing copies of the lengthy document to the union representatives. When the union spokesmen asked for time to study the new code, Kulas instructed a fellow company representative to read and explain it. The union agents replied that they needed time to study the rules and asked if Respondent was prepared to negotiate, but Kulas said the meeting was informational and explanatory only, and there would be no negotiation. In rejecting the Union's request for another meeting, Kulas made it clear that the Company would not engage in substantive negotiations.

On the following 2 days, Kulas and other agents of Respondent met with groups of composing room employees to explain the new "Standards of Conduct." The standards became effective in the composing room on February 1. The Union filed its charge on January 23. On brief, Respondent does not argue that Respondent indicated to the Union that it was prepared to engage in bargaining about the rules, and the record is clear that Respondent was presenting the Union with a fait accompli.

The "Standards" consist of 30 pages of occasionally duplicative rules and guidelines. The first substantive section, "Standards of Conduct," lists "examples" of prohibited conduct, such as discrimination, gambling, neglect of job duties, etc. These examples include "Refusal to submit to an alcohol and/or drug test when requested by the immediate supervisor or management representative" and to enter or complete a rehabilitation program.⁵ The next major section, "Corrective Action Policy," lists a series of disciplinary alternatives, any of which may be instituted "depending on the seriousness of the offense," "either singly or in combination." The manual identifies these "corrective options"—counseling, verbal warning, written warning, probation, suspension, and termination—and describes in some detail the methods by which and the circumstances in which such discipline will be dealt out. The complaint attacks the adoption of this section under the misnomer of "progressive discipline."

The following section, entitled "Attendance Policy," is also alleged to be unlawfully adopted. It introduces a system of limitations on absence, tardiness, and early departure. Based on "revolving" 12-month periods, these violations (referred to as "incidents") would receive designated levels of discipline (counseling, verbal warning, written warning, "Decision Making Leave—5 work days without pay," "Suspension—10 work days without pay," and termination) for graduated numbers of "incidents." Although absences would not be characterized as "excused or unexcused, legitimate or illegitimate," "the reasons given for the absence" is one of the factors on which "[e]mphasis shall be placed," which indicates that discretion is involved in deciding whether an "incident" deserves discipline.

The next section, "Overtime Policy," also complained of here, provides that overtime work "is a requirement" of the job; employees "should expect to work overtime whenever operational needs require it"; and employees who refuse to do so "will be subject to Corrective Action." While this language sounds mandatory, the policy also seems to allow the exercise of supervisory discretion, by recognizing that some circumstances, "such as illness or a family emergency," may excuse overtime work.

The next, and longest, section (also a complaint allegation) provides that employees "suspected of being under the influence" of an intoxicant will be required to undergo a medical evaluation "and take an alcohol and/or drug test as determined by the Medical Division," on pain of suspension and termination for refusal to do so. When an employee agrees to submit to testing, he or she "will be" suspended without pay pending receipt of the test results (which "typically require 48 to 72 hours"), and even if the results are negative,

⁵Except perhaps for this sort of conduct, the only other identified basis for discipline in this section which is taken up in the complaint is "Failure to abide by departmental dress and grooming standards."

the employee may be reinstated and compensated only if he or she had not engaged in any "serious violation(s) of the Standards of Conduct." In the event of positive test results, the employee has 24 hours in which to contact the Employee Assistance Program and arrange admission to an approved rehabilitation program; failure to do so may result in termination. The testing requirements include other procedures, including random testing for a 2-year period.

Other provisions in this section relate to procedures in the event of use, possession, selling, or manufacturing of alcohol and drugs. There is a further potential (not a requirement) for testing when employees sustain injuries or cause vehicle accidents, or when there is a history of "accidents, near accidents, or accidents that are the fault of the employee." There are other provisions, including prohibition of off-the-job "illegal drug activities or alcohol addiction" which could affect job performance, safety, or "the Company's relations with the public or its employees," and there is the principle that "arrest" for drug or alcohol offenses "will" result in "immediate suspension without pay and lead to" termination, "regardless of legal dispositions." Finally, provision is made for searches of employees and property, including the use of trained dogs; refusal to submit to a search will result in suspension and may result in termination.

The adoption of the final section, entitled "Safety Policy," which sets out a list of safety work practices, is not alleged to be violative of Section 8(a)(5).

II. ANALYSIS

The most appropriate mode of analysis here seems to be the discussion, seriatim, of the five topics named in the complaint whose adoption assertedly violated Section 8(a)(5).

A. Substance Abuse and Drug Testing

Although the complaint, by using the above language, appears to attack the entire "policy" relating to the captioned matter as it is set out in the Standards of Conduct, on brief, counsel for General Counsel asks only that an 8(a)(5) violation be found with respect to the institution of "drug and alcohol testing and discipline for certain off-the-job drug-related conduct." Thus, although the bargaining agreement does not, as does the policy, expressly refer to such subjects as the "use or possession" of drugs or alcohol during work time or refusal to submit to searches as dischargeable offenses, the General Counsel appears to be conceding that management was entitled to promulgate rules pertaining thereto in the Standards handbook.

Respondent begins its argument on this general issue by pointing out that in August 1985, after the strike had begun, Respondent both mailed to and subsequently handed to the Union's president at a negotiating meeting a copy of a policy on "drug and alcohol abuse." Because the Union did not object to the policy, the Respondent contends, when it subsequently became effective in 1986, it bound the Union-represented employees as well as the other employees of Respondent, and when the policy was promulgated as part of the Standards of Conduct, it did "not constitute a unilateral change, but only a restatement of the status quo." There are reasons for not accepting this argument.

First, the proffer of the policy in 1986, while done at the bargaining table, was not clearly labeled as a proposal which

management was prepared to put into effect. Instead, the covering letter stated in part: "We are considering implementing the attached policy throughout the company. If you have questions or would like to meet me on this policy, please contact me by September 1, 1985." Notes of the bargaining session show a very brief and general conversation about the matter. No further discussion of the policy was had, management never stated that it had gone beyond "considering" implementation of the policy, and it was not until 8 months later that the policy was published, as having been "adopted" and applicable to "all employees," in an in-house journal, apparently without any prior formal notice to the Union. In these circumstances, I cannot agree with Respondent that adequate notice and opportunity for bargaining was afforded.

I do agree, however, that the policy as adopted in 1986 cannot be attacked now as a nullity. But I cannot accept that, as Respondent asserts, the promulgation of the drug policy in 1989 constituted merely a "restatement of the status quo." For one thing, as General Counsel points out, the 1986 policy was much more circumscribed than that set out in the Standards of Conduct. The only testing provided by the former was in the case of employees "involved in a job-related accident"; the 1989 policy authorizes testing of "all employees suspected of being under the influence" and, as well, contains a number of other provisions not found in the earlier edition.

Respondent's reliance on these rules which preexisted the 1989 agreement might also be argued to be made inappropriate by one provision of that agreement. The briefs devote a good deal of space to the evidence relating to past practices (relating to such matters as overtime requirements, types of discipline, and disciplinary systems) under the earlier bargaining agreements, much of such evidence involving occurrences in the 1970's. After consideration, I question whether any of this evidence is relevant, except insofar as it might cast light on the parties' common understanding of the language of the current contract.

As noted, the agreement signed in January 1989 provided a new item:

This agreement covers only those matters specifically contained herein and supersedes all prior agreements whether express, implied, written or oral between the Company and the Union, including any letters of interpretation, verbal understandings and past practices.

This clause appears to make irrelevant any contentions based on the experience of the parties prior to January 3, 1989. Respondent introduced evidence of past practices (e.g., the practice of issuing written warnings) in an effort to show that the Standards of Conduct effected no material changes in terms and conditions of employment. General Counsel also produced experiential evidence to prove the opposite. But if the foregoing clause were to be read so as to include in the phrase "past practices" all procedures routinely employed in the composing room prior to the 1989 agreement, such a construction would seem to have the effect of nullifying that history and making the terms of the January 1989 contract the only terms against which to measure whether the February Standards of Conduct caused alterations in the existing conditions of employment.

Such an approach would obviously favor General Counsel and the Charging Party. However, they make no such contention on brief, accepting, like the Respondent, that the terms by which to judge alteration are the terms which existed prior to January 3, 1989. General Counsel makes this position specific (e.g., the contention that the corrective action policy in the Standards of Conduct “represents a substantial and material change from the prior disciplinary practice in the composing room”). This may be because General Counsel does not regard the pre-January 3 counterparts (or lack of counterparts) of the Standards as “past practices.” The phrase seems to have a rather clear meaning, but it is used in a context that connotes consensuality and does not necessarily imply other existing conditions. Given the General Counsel’s apparent decision to abjure this interpretation, and since the phrase is not without ambiguity, I would defer to the approach adopted by all parties for purposes of this aspect of the analysis.

As indicated, the evidence shows that the “drug and alcohol testing and discipline for certain off-the-job drug-related conduct” (the particular rules, as earlier noted, singled out by General Counsel on brief) announced in the Standards of Conduct are more extensive than the policy adopted in 1986.⁶ Despite the foregoing, however, I am inclined to agree with Respondent that the unilateral implementation of the substance abuse policy was authorized by the management-rights clause, which is a major theme of Respondent’s position throughout.

The starting point is indisputable: waiver of a statutory right must be “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In making this assessment, “[t]he Board looks to a variety of factors, including the evidence of contract negotiations, the precise wording of the relevant contractual provision, and the completeness of the bargaining agreement.” *Bancroft-Whitney Co.*, 214 NLRB 57 (1974). The quantum of proof necessary to show that the parties “clearly and unmistakably” agreed to a waiver is the question presented here.

As Respondent points out on brief, a Board panel (Member Johansen dissenting on this point) reversed an administrative law judge’s decision in *United Technologies Corp.*, 287 NLRB 198 (1987), and held that a management-functions clause which vested the employer with “sole right and responsibility to direct the operations of the company and in this connection . . . to select, hire, and demote employees, including the right to make and apply rules and regulations for production, discipline, efficiency, and safety” (emphasis added by Board), granted the employer the right unilaterally to alter its established progressive discipline procedures for absenteeism by eliminating suspension as the third disciplinary step. The panel majority recognized a need for some specificity, but found sufficiently specific the word “discipline.” *Ibid.* fn. 4. Concluding further that the evidence re-

garding the bargaining history of the management-rights clause gave no indication that the contract language was intended to mean “something other than that which it plainly states,” the panel majority dismissed the complaint.

On review, the Court of Appeals for the Second Circuit agreed with the Board majority. *NLRB v. United Technologies Corp.*, 884 F.2d 1569 (2d Cir. 1989). The Court, while recognizing that “national labor policy disfavors waivers of statutory rights by unions” (quoting *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)), believed that the Board majority correctly held that the employer’s retention of the right to make rules and regulations for “production, discipline, efficiency, and safety” “granted the company the unilateral right to make changes in its progressive system of discipline for absenteeism.” And, thought the Court, this language, “taken together” with the company’s right “to discharge or otherwise discipline any employee for just cause . . . plainly grants United Technologies broad authority to make disciplinary rules and impose discipline leading up to and including discharge for good cause.” *Id.* at 1575.

A more recent case, heavily relied on by the General Counsel and the Charging Party, is *Johnson-Bateman Co.*, 295 NLRB 180 (1989) in which the employer unilaterally adopted a drug/alcohol testing procedure during the course of a contract. There, the management-rights clause read, in part, that “the management of the plant . . . including but not limited to the right . . . to discipline or discharge for just cause . . . to issue, enforce and change Company rules [is reserved to the company].” (Emphasis added.) The Board noted that it had “repeatedly held that generally worded management-rights clauses or ‘zipper clauses’ will not be construed as waivers of statutory bargaining rights.” *Id.* at 184. It cited *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985), which found no waiver by the union of the right to bargain about changes in medical benefits because the management-rights clause made “no specific reference to employee medical benefits or other terms of employment.” *Ibid.*

In *Johnson-Bateman*, the Board held that the clause referring to the issuance of “company rules” is “couched in the most general of terms and makes no reference to any particular subject areas, much less a specific reference to drug/alcohol testing” and thus did not amount to an “express, clear, unequivocal, and unmistakable waiver” of the right to bargain about a unilaterally-adopted rule that employees would be tested when they sustained injuries.⁷ The Board found to be consistent with this holding the case of *LeRoy Machine Co.*, 147 NLRB 1431 (1964), where it had concluded that management’s reservation of the right to “determine the qualifications of employees” constituted a union waiver of the right to bargain about a new rule requiring employees with poor attendance records to undergo physical examinations; the distinction between that case and *Johnson-Bateman* was said to be the “degree of specificity of language” in the *LeRoy* management-rights clause. *Johnson-Bateman*, *supra* at 185 fn. 26.

It should be clear from the cases that the decision whether to draw an inference of waiver from the particular language

⁶The 1986 policy provided for discretionary drug or alcohol testing only in the event of a “job-related accident,” while the Standards of Conduct require testing when employees are “suspected of being under the influence.” While the 1986 policy specifically provided for discipline for “off-the-job illegal drug use, possession or sale which adversely affects” an employee’s job performance, safety, or Respondent’s reputation, the Standards embellish this by adding “alcohol addiction” and also making off-the-job “distributing or manufacturing” of drugs and alcohol a “dischargeable offense.” In addition, it appears that, under the Standards, the mere “arrest” for any any of these activities might lead to termination, “regardless of legal dispositions.”

⁷The Board made no reference to the language in the clause regarding the right to “discipline or discharge for just cause,” unlike the Second Circuit in *United Technologies*.

of a management-rights clause is not subject to any immutable natural laws. Although, as *Johnson-Bateman* and countless other cases have held, an affirmative finding of waiver can also be derived from bargaining history (which would require “the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter,” *id.* at 185), there is no evidence here of full discussion and conscious exploration which demonstrates yielding or clear and unmistakable waiver.⁸ What legal significance is to be attached to a clause like the present one, in which Respondent retained the exclusive rights, *inter alia*, to “establish and enforce reasonable rules and regulations relating to employee conduct [and] to suspend, discipline and discharge regular employees for just cause?” (Emphasis added.) *LeRoy Machine*, *supra*, and *United Technologies Corp.*, *supra*, would seemingly find this language specific enough to constitute a waiver of most or all of the changes alleged to have been unlawfully implemented here. *Johnson-Bateman* was dealing with language which was a good deal less precise than that found in the instant case. The right to “issue, enforce and change Company rules” is perhaps as vague as this sort of clause can get. What “rules”? Work rules? Conduct rules? Benefit rules? When, on the other hand, this Union was presented by mediator Usery with the clause allowing the Respondent to “establish and enforce reasonable rules and regulations relating to . . . employee conduct,” (followed immediately by “to suspend, discipline and discharge”), what could the Union have believed “employee conduct” to have referred to if it was not the subject area of employee behavior and the disciplinary measures necessary to control that behavior?

These parties examined contract language on and off for over 6 years. I cannot believe that the Union did not recognize the logical and necessary import of these words, much like the word “discipline” in *United Technologies*, when it signed the agreement.⁹ While it is true that Respondent’s original management-rights proposal in 1987 had encompassed both “rules governing the conduct of employees within the plant and for the maintenance of discipline,” the management-rights clause imported by Usery from another contract must have seemed to Respondent to serve the same purpose as its own language, and I cannot think that the Union did not similarly recognize that effect. The words had to mean *something*, and that something related to the regulation of employee conduct. The words are specific and, at the same time, broad. The right to make “and enforce” rules governing “employee conduct” necessarily entails the right to make corollary rules implementing and enforcing such regulations.

⁸Neither the fact that the Union at first opposed the Respondent’s preferred clause, but seemed willing to accept some sort of management-rights clause, and then flatly opposed any such clause, but finally entered a contract containing one; nor the fact that Respondent eventually agreed to less specificity than it originally asked for, meet these criteria.

⁹Where, as here, membership ratification is a prerequisite to union acceptance, an interesting question arises as to how an employer sets about proving a conscious waiver. Must he produce all voting members to question them about their subjective understanding of the management rights clause? The test, I think, must be an objective one, as suggested by the Court in *United Technologies*, *supra*: whether the contract “plainly grants” the authority argued for.

I also find some support for this analysis in the fact that the clause as adopted required any rules and regulations to be “reasonable.” This word, I believe, clearly connotes an implication that management would make the rules and the Union could grieve their reasonableness; in such a context, it would be unlikely that prior negotiation of the rules was contemplated.

Similarly, the understanding of the parties may be further derived from their adoption of the “Discipline And Discharge” provision, which is almost identical to that found in the preceding contracts, giving the foreman the right to discharge for incompetency, neglect of duty, and “violation of Company rules conspicuously posted and which shall in no way abridge the civil rights of employees or their rights under accepted Printing, Publishing and Media Workers Sector Laws. Dated copies of Company rules shall be furnished to the chapel chairperson.” It is perfectly clear that, in agreeing to such a provision, the parties were acknowledging the exclusive right of the Respondent to promulgate and revise rules governing the activities of the employees, subject only to certain limitations (conspicuous posting, no abridgement of named rights, furnishing of dated copies to the chapel chairperson).¹⁰ Ceding such power to the Respondent in this article very strongly suggests the breadth of the rights in the management functions clause to “establish and enforce reasonable rules and regulations relating to . . . employee conduct” and to “suspend, discipline and discharge regular employees.”

In reaching this conclusion, I have considered an October 4, 1988 letter written by Union Vice President Steven Berman in response to a query by an assistant shop steward regarding the effect of the management rights and waiver provisions in the pending proposal. Although Respondent’s brief stresses only the sentence emphasized below, I believe that the sentence should be read in context:

These provisions wipe out any past practices, other agreements and the obligation of employer to negotiate over major changes in working conditions during the life of an agreement. The provision states that the parties had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining and further each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement. In short, if its not in the contract you don’t have it. I have listed below some of the items that the Composing Room members now enjoy, but are not in the proposed Agreement: [a list of benefits, such as life insurance and scholarships, follows].

As I read what Berman (a lifelong printer, not a lawyer) wrote, his focus was on the summary sentence: “In short, if it’s not in the contract you don’t have it.” “The provision” that he addresses appears to be the zipper clause, not the management-rights clause. One way of saying “you don’t

¹⁰Union Vice President Berman was asked if, when he worked in the Tribune composing room, he was aware of any written rules not recited in the bargaining agreement which applied to him, and he identified the “posted office rules.”

have it” is to note that “if it’s not in the contract,” the employees cannot “get it” by asking the employer to bargain about it during the term of the contract.¹¹

B. Attendance and Attendance Corrective Actions

Although the complaint generally alleges the unilateral adoption of the policies as captioned above to be violative, General Counsel’s brief submits that the violation to be found relates to the “attendance point system.”

The record shows that the Respondent had maintained in the past an unstructured and unwritten policy of issuing verbal and written warnings, or discharging, employees for absenteeism and tardiness. The Standards of Conduct which became effective on February 1 establish a schedule of progressive discipline based on the number of “incidents” incurred by an employee on a “revolving 12-month basis.” The explanation of the policy, however, indicates that the corrective actions are to be applied with discretion; while “[a]ll absences from work, tardiness, and early departures for any reason whatsoever shall be recorded and are part of the employee’s overall attendance record,” “[e]mphasis shall [be] placed on the number of absences, the duration of each absence, and the reasons given for the absence,” and “should it become necessary to impress on an employee that there is a need to improve his/her attendance to an acceptable level, the supervisor shall implement the appropriate option of Attendance Corrective Action Policy.” (Emphasis added.) Thus, it appears that the new policy does not operate automatically in the event of the occurrences covered, but rather that the supervisor may take disciplinary action when he or she deems it to be necessary, much as in the past.

I need not pass on the Respondent’s claim that the change is not a material one. The attendance point system falls well within the regulation of “employee conduct” preserved by the management-rights clause as a management prerogative.

C. Progressive Discipline

As previously noted, the general disciplinary policy adopted by Respondent is not what would normally be termed a “progressive discipline” system, as alleged in the complaint; General Counsel recognizes that fact on brief by asking that the adoption of a “formal disciplinary system” be found unlawful.¹²

While, as discussed, it can be argued that all “past practices” have been wiped from this slate, it may be worth noting that the record indicates that all of the Standards of Conduct “corrective actions” (counseling, verbal warning, written warning, probation, suspension without pay, and termination of employment) appear in the record as forms of dis-

¹¹ Why Berman distinguished between “major changes” and, presumably, minor ones, is not found in the record, but the fact that he did so suggests to me that he was not intending to discuss the statutory obligation to bargain over changes in terms and conditions. It would be puzzling for Berman to imply that the duty to bargain obtained as to “minor” changes, but not as to “major” ones.

¹² As correctly stated in General Counsel’s brief:

The Standards of Conduct handbook details a range of “Corrective Action” options, ranging in severity from “counselings” and verbal warnings that parallel the prior practice of oral warnings (R. Exh. 7), to termination of employment. Whereas these options are progressively severe, the Tribune retains discretion to select any option to deal with an offense, depending on the severity of the offense, without progressing through the range.

cipline which were used in the composing room in the past. The Charging Party makes an argument based on the facts that article XXIV of the agreement provides, “The General Laws of the Printing, Publishing and Media Workers Sector Union . . . shall govern relations between the parties on those subjects concerning which no provision is made in this Agreement,” and article II, section 3, of the General Laws, states, “Suspension is prohibited as a method of discipline.” As Respondent points out, however, the management-rights clause of the new agreement specifically empowers Respondent “to suspend” employees for just cause.¹³

Although the “Corrective Action Policy” is certainly more formalized and detailed than the disciplinary procedures applied in the past, by and large it is not a great deal different than the actual practice. However, a few provisions (such as “Whenever an employee is placed on probation for a second time in a revolving 12-month period, he/she will be subject to immediate termination”) do not appear to have any specific counterparts in past practice, and I cannot say that the policy is simply a replication of preexisting procedures.

Nonetheless, it appears to me that the “exclusive right to . . . establish and enforce reasonable rules and regulations relating to . . . employee conduct” must ineluctably have been understood to include the authority to issue formal (and grievable) rules setting out the types of discipline which could be administered.

D. Mandatory Overtime

As executed on January 3, 1989, the bargaining agreement contained the same provision relating to mandatory overtime as had the prior contracts: “It is the intention of the Union that employees shall cooperate with the Company by working a reasonable amount of overtime when requested to do so to meet the requirements of the Company.” The General Counsel argues that the “practice under the prior contracts and under the working conditions posted January 15, 1985,¹⁴ has *always* allowed composing room employees to turn down overtime work *completely some of the time*.” (Emphasis added.) Although there is some general testimony that, in the past, employees had been allowed to refuse overtime, it would appear that they had to offer some excuse in order to do so. Documentary evidence (see R. Exhs. 14, 15, 16) indicate that the Respondent has taken the consistent position that this contract provision authorizes it to require employees to work overtime, and it appears that the Union has at least once acquiesced (R. Exh. 15: “It is still the position of the Union that the issuing of the [warning] letters [for refusing to work overtime] was unwarranted, *considering the overtime work record of the two machinists*.” (Emphasis added.))

The Standards of Conduct pertaining to “Overtime Policy” does not seem to make that policy any more mandatory than the contract language. It makes clear to employees that

¹³ While there is no evidence that “probation,” as such, was a term of disciplinary art in the past, I agree with counsel for Respondent that the “final warnings” which had previously been issued could be considered the functional equivalent of probation.

¹⁴ The record shows that on that date, after the contract had expired in 1983, the Respondent declared an impasse and posted “new working conditions,” which actually was a draft collective-bargaining agreement containing, *inter alia*, the language quoted above.

overtime is “a requirement of their jobs,” but it also spells out the existence of an ingredient of reasonableness: the policy explicitly recognizes that there are circumstances which can make overtime work onerous for a given employee, but “[w]hen refusal to work overtime becomes unreasonable,” overtime may be compelled.

The basic argument advanced by General Counsel here is that the policy stated in the Standards of Conduct “conflicts with the language of the current collective bargaining agreement” and represents a significant and material change in that it “establishes mandatory overtime with disciplinary consequences flowing from each refusal to work overtime, unlike in the past.” I find it difficult to agree with either statement. Moreover, I am inclined to think, as Respondent contends, that this particular issue is the sort contemplated by the Board in *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)): “[W]hen ‘an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,’ the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” See also *Thermo Electron Corp.*, 287 NLRB 820 (1987).

E. Dress Code

Of the 20 paragraphs listed as “examples of prohibited behavior” under the heading “DISRUPTIVE CONDUCT” in the Standards of Conduct, the complaint names the following item as violative of Section 8(a)(5): “Failure to abide by departmental dress and grooming standards.”

The record shows that the composing room employees have not been, and are not now, subject to dress and grooming standards. General Counsel nonetheless argues that the reservation of a right to discipline employees for failing to abide by standards which *may* be promulgated some day “constitutes a unilateral expansion of the management rights provision . . . amounting to a unilateral mid-term modification of that provision.” Apart from the effect, as found here, of the “employee conduct” authority granted by the management-rights clause, it is difficult to conceive that provisionally making subject to enforcement a nonexistent dress code constitutes a material change in the terms and conditions of employment of the composing room employees which could give rise to a bargaining obligation. I would, accordingly, find no violation based on this sentence.

As discussed, the complaint alleges that the adoption of various policies, “without having afforded the Union an opportunity to negotiate and bargain,” violated Section 8(a)(5). This statement of the cause of action implies that, had there *been* proper notice and bargaining, the Respondent would have been entitled to make the changes complained of. The format used here is that customarily found in situations in which a union is the exclusive bargaining representative, no contract is in effect, and the employer makes unilateral changes in the terms of employment. See, e.g., *Bay Area Sealers*, 251 NLRB 89, 90 (1980), *enfd.* in pertinent part 665 F.2d 970 (9th Cir. 1982).

At the end of the brief, however, counsel for General Counsel advances a separate argument, affecting all five subject areas of the complaint, that “the waiver provision in the current collective bargaining agreement protects both parties

to the agreement from being obligated to bargain during the term of the contract regarding changes in mandatory subjects of bargaining regardless of whether the subjects are treated in the contract . . . unless Respondent’s unilateral changes are privileged by the management rights provision.” Although I have concluded that the changes are so privileged, I should say that the waiver clause does not appear to shield the parties from having to bargain about changes in mandatory subjects “regardless of whether the subjects are treated in the contract.” The clause on its face, rather, only precludes either party from seeking to bargain “with respect to any subject matter not specifically referred to or covered” in the agreement; it is the standard response to the principle adopted in *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enfd.* 196 F.2d 680 (2d Cir. 1952).

Section 8(d) of the Act, however, does expressly prohibit insistence on discussing or agreeing to a midterm modification of “the terms and conditions contained in a contract for a fixed period.”¹⁵ It could be argued here, I think, that Respondent made a misstep, resulting in a violation of the Act.¹⁶

Article XXIV of the January 3, 1989 contract provides (as did the previous contracts) that the General Laws of the Union “shall govern relations between the parties on those subjects concerning which no provision is made in this Agreement.” The General Laws state, in article II, section 14, “No journeyman shall be required to submit to a physical examination as a condition of employment.” “[N]o provision is made” in the January 1989 agreement on the “subject” of physical examinations. Counsel for Respondent, attempting to show that this General Laws provision was not adhered to in the past, introduced two letters from the 1970’s in which management instructed employees that they would be required to submit to physicals in order to retain their positions. There is no evidence of compliance with these instructions, and I do not view them as effecting a tacit rescission of article II, section 14, of the General Laws.

It could be argued, therefore, that the portions of the Standards of Conduct which require employees to take alcohol and drug tests are in conflict with article XXIV of the agreement.¹⁷ I might be persuaded that this was so if there was some indication in the record of what the General Laws considered to be a “physical examination” or of what sort of testing Respondent intends to use in cases of suspected alcohol or drug use. It may be that no procedures are contemplated which would fall within the normal understanding of the term “physical examination.”

In view of this uncertainty, I can reach no conclusion that the adoption of “tests” violates the proscription against “physical examinations.”

¹⁵ Since counsel for General Counsel cites *Jacobs*, her “regardless of” reference may simply be a timesaving effort to meld the *Jacobs* rule and Sec. 8(d).

¹⁶ While the complaint is not framed in terms of an 8(d) violation, the case was plainly tried on that basis, and there is no doubt that the matter was “fully litigated.” *NLRB v. Bighorn Beverage Co.*, 614 F.2d 1238, 1241 (9th Cir. 1980).

¹⁷ General Counsel does not make this argument; the Charging Party’s brief contains a passing reference to this provision of the General Laws.

CONCLUSIONS OF LAW

1. Respondent Chicago Tribune Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chicago Typographical Union No. 16, Communications Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act as alleged in the complaint (and clarified by General Counsel's brief).

[Recommended Order omitted from publication.]