

CAN YOU USE VIDEO SURVEILLANCE TO SUPPORT EMPLOYEE DISCIPLINE?

July 2005 Case Is the Latest Test

When confronted with concerns of employee misconduct, Districts have turned to hidden surveillance cameras for the proof to support suspension/termination. However, to ensure that video evidence will be considered if the discipline is challenged, Districts must comply with the collective bargaining requirements reinforced by the July 2005 United States District of Columbia Circuit Court of Appeals case of Brewers & Maltsters, Local Union #6, et al. v. Anheuser-Busch, Inc.

The questions to be considered are as follows:

Q: Is the District obligated to bargain with the union prior to installing the surveillance cameras, and, if it fails to do so, does it commit an unfair labor practice?

A: Yes. Both the Seventh Circuit and District of Columbia Circuit Courts have consistently held that the installation and use of hidden surveillance cameras in the workplace constitutes a mandatory subject of bargaining, and in the absence of such bargaining, is an unfair labor practice. The Circuit Courts based their decisions on the National Labor Relations Board (NLRB) decision in Colgate-Palmolive

Company, (1997), where the Board equated surveillance cameras to “investigatory tools.” The Board held that “the use of hidden surveillance cameras has the potential to affect the continued employment of the employees whose actions are being monitored.”

Of course, these employers raised the question of what must be negotiated. The D.C. Court held as follows: (1) While an employer must bargain over the proposed use of hidden surveillance cameras and the general reasons for such, it does not need to apprise the union of the location of the cameras or the times they will be in use; (2) the NLRB did not require bargaining over each instance where surveillance cameras would be used; (3) the Board’s opinion was that the union and employer should bargain only over the general requirements such as:

- (a) whether or not cameras may be used
- (b) in which areas they may be used
- (c) whether the employer would be required to demonstrate some level of suspicion before using the cameras, and
- (d) whether the recorded information may be used to discipline employees.

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By addressing the above issues, the Board determined that it preserved the benefits of hidden surveillance while also involving the union in developing the terms and conditions of their members' employment.

Q: Does past or current unilateral camera use by a District constitute a waiver by the union that relieves the District's obligation to bargain?

A: No. The Seventh Circuit in National Steel Corp. v. NLRB, (2003), recognized the longstanding principle that "a party to collective bargaining... waives its right to bargain over an issue only by clearly and unmistakably expressing its intent to do so." Similarly, the D.C. Circuit Court in Anheuser-Busch recognized the well-established principle that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."

Q: Can video surveillance tapes that reveal employee misconduct be used by the District in disciplinary proceedings even though the evidence was obtained as a result of an unfair labor practice?

A: Possibly. If the District has an alternate source of information about the alleged misbehavior that is then proven by the video surveillance, the tape could be permitted. The NLRB has actually gone both ways on the issue:

In UAW v. Tocco, Inc., (1997) , the NLRB ordered make-whole relief for employees discharged for drug use after the employer unilaterally changed its drug testing policy from testing because of possession to one of testing based on measures of overall safety, efficiency and production records.

However, previously, in Great Western Produce, Inc., (1990), the NLRB found that although the employer's unilateral work rule changes, including tracking excessive tardiness and absenteeism, was an unfair labor

The NLRB has gone both ways on whether evidence gained from an unfair labor practice can be used.

practice, the employer did not have to reinstate an employee who was discharged for violating a substantive work rule if it could demonstrate that it would have discharged the employee even absent the unfair practice.

The Circuit Court in Anheuser-Busch therefore felt that the NLRB had treated like situations differently.

In the more recent Anheuser-Busch case, the NLRB affirmed the decision not to revoke the discipline. In doing so, the NLRB relied primarily on Section 10(c) of the National Labor Relations Act, which precludes make-whole relief even when misconduct is discovered through unlawful means. However, the Circuit Court disagreed and held that "because the Board failed to distinguish adequately its prior decisions that support ordering make whole relief, a remand is necessary so that the Board can apply, distinguish adequately, or overrule those precedents."

Because the remand to the NLRB only occurred in July 2005, it is unknown at this time how they chose to address it. While the statutory language of Section 10(c) appears clear, the differing NLRB precedents of Tocco and Great Western raise doubt. If a District's suspensions and/or terminations are based or derived solely from discoveries that constitute unfair labor practices – including non-negotiated placement of surveillance cameras – there is a strong possibility that the employees may be reinstated, either by the NLRB or the Courts.