Management's Unilateral Implementation of Drug Testing Programs: Are the Unions Left Holding the Jar

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I. INTRODUCTION

Chemical dependency in this country costs employers over 75 billion dollars annually in reduced productivity.1 In an effort to maintain a safe and profitable business, employers have attempted to deter substance abuse through the use of drug testing programs. The implementation of such programs has been the source of great concern within organized labor.2 Unions have asserted that drug testing is both invasive of an individual's right to privacy, and unreliable.3 As a result, management's insistence on drug testing has forced the unions to seek protection against unreasonable testing programs.4

Traditionally, our legal system has safeguarded against actions intrusive of an individual's rights. However, in the case of drug testing, the legal system has allowed little security to private sector union members.5

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1 Research Triangle Institute, Economic Cost to Society of Alcohol and Drug Abuse and Mental Illness: 1980, at 3 (June, 1984)(submitted to Alcohol, Drug Abuse, and Mental Health Administration Office Program Planning and Coordination. Park 1 Building, Room 13C-15, 5600 Fisher's Lane, Rockville, MD 20857). Among drug users, absenteeism is 2.5 times greater than non-drug users, medical claims are three times higher than non-drug users, and accidents three or four times more likely. Id.

2 See Section II of this Note.

3 See Potomac Electric Power Co. and Electrical Workers, Local Union 1900, Arb. No. 16-30-0110-84 (June 30, 1986) (H. Zumas, Arb.).

4 See supra note 2.

5 P. Petesch, A Legal Perspective on Alcohol and Drug Programs in the Workplace 3 (Paper for the National Safety Council Exposition) (1986). This paper was presented at two sessions of the National Safety Council Congress and Exposition in Chicago, Illinois on October 20 and 21, 1986.
This limited protection has allowed management the opportunity to abuse the practice of drug testing. Moreover, the lack of legal assistance has placed an additional burden on the unions to ensure the preservation of employee rights.6

As will be discussed in the following pages, the union defends the rights of its members primarily through negotiation and representation in arbitration. Consequently, these union functions play a significant role in the issue of drug testing.

The most important aspect of negotiation is bringing management to the bargaining table. Generally, the National Labor Relations Act [hereinafter NLRA], recognizes two forms of bargaining—mandatory and permissive.7 If a subject of bargaining is mandatory pursuant to Section 8(d) of the NLRA,8 the employer is required to bargain in "good faith to impasse."9 However, if a topic is permissive, the decision to bargain is left solely to the discretion of the parties.10 Given this distinction, the determination of drug testing as either a mandatory or permissive subject of bargaining is of great importance to the unions in assuring the protection of employee rights.11

Finally, union representation in arbitration also plays an integral role in the protection of its members.12 Thus, it is important to understand the current trends in arbitration on the issue of drug testing in order to determine the degree of success unions are achieving in guarding employee rights.

II. DRUG TESTING

The concern over chemical dependency in the work place has grown dramatically in the last decade.13 Recent studies have indicated that 10

6 Id. at 31.
8 Section 8(a)(5) of the National Labor Relations Act states in pertinent part: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." National Labor Relations Act § 8(a)(5), (codified as amended at 29 U.S.C. § 158(a)(5)).
9 See First Nat'l Maintenance Co., 452 U.S. at 674; Allied Chem. & Alkali Workers Local 1, 404 U.S. at 179; Fibreboard Paper Prod. Corp., 379 U.S. at 211.
10 See section III of this Note.
12 See Section IV of this Note.
to 23% of all workers use dangerous drugs while on the job. In response to the drug problem, it is estimated that nearly 30% of all Fortune 500 companies are requiring pre-employment drug screening. Additionally, the percentage of Fortune 500 companies testing current employees has been found to be as high as 30%; one-quarter of these companies terminate employees who test positive. Thus, drug testing has become a substantial factor in the movement to thwart substance abuse in the workplace.

The increased use of drug testing has raised many scientific, legal, and ethical concerns. These concerns include the limited reliability of urine testing, as well as the limited availability of legal relief from invasive testing procedures. In order to better understand the technical and legal problems faced by organized labor it is first necessary to examine the scientific makeup of the prevalent drug testing procedures.

There are numerous methods of testing available to the employer. These tests include: the blood test, the breath test, the brainwave test, and the urine test. While each of these procedures possess similar invasive qualities, the most common and the only one to be addressed in this Note, is urine testing.

1982, 20 million people were using marijuana; 30% of the entire population had tried marijuana; and 11% of the population used marijuana in the last year. J. Masi & M. O'Brien, Dealing with Drug Abuse in the Workplace, Business & Health 30 (Dec. 1985). This study indicates that one out of ten workers use illegal drugs on the job. C. Cornish, Drug Testing and Treatment and the Law 1 (Apr. 4, 1986) (unpublished manuscript) [hereinafter Cornish]. These statistics were derived from a study undertaken by the National Institute of Drug Abuse in 1986. Of the companies which conducted the pre-employment screening, it was reported that two-thirds refused to hire applicants who tested positive. President's Commission on Organized Crime, America's Drug Habit: Drug Abuse, Drug Trafficking, and Organized Crime 430 (1986).


See Cornish, supra note 15.

See supra note 1. The total estimated annual cost to the United States from alcohol and drug abuse as of 1983 was 135 billion dollars; 75 billion dollars was attributed to reduced productivity in the workplace. Id. Alcohol and Drugs in the Workplace, Spec. Rep. (BNA) 31 (1986).

Blood tests, while extremely accurate, and able to measure functional impairment, have been found to be too complex and expensive to use regularly in the workplace. Id. Breath tests are limited to the use of alcohol detection. However, they have frequently been used by employers; and they are capable of measuring functional impairment.

The brainwave test measures chemical changes in the brain which emit electrical charges. The charges become altered upon impairment with both drugs and alcohol. In addition, the test is able to measure functional impairment. It is manufactured by National Patent Analytical Systems, Inc. and is marketed under the name of The Veritas 100.
The urine test most widely utilized by the employer is the Enzyme Multiple Immunoassay Technique [hereinafter EMIT]. The EMIT test is attractive to employers for several reasons. First, the test is extremely economical, costing approximately ten dollars per sample. Second, the EMIT test has been marketed as an "on site" screening test, making it relatively simple to administer and requiring only minimally experienced personnel.

The EMIT test is based on complex immunochemistry. Manufacturers of the test claim an accuracy rate of 99% under "optimal conditions". Independent studies, however, have demonstrated that under certain conditions the EMIT test yields false results up to 37% of the time. Not surprisingly, this extreme sway in reliability has been met with great concern by organized labor. There are several reasons for the potential unreliability of the EMIT, the most prevalent of which stems from technological defects and procedural errors. Lack of specificity, i.e., the tests inability to distinguish between certain non-drug components and drug components, is the most pronounced technological flow of the EMIT. This occurrence is called cross-reactivity. Cross-reactions are caused by the use of numerous over-the-counter medical products as well as by certain organic foods.

26 Id.
28 Id.
30 Id.
31 See infra note 40. There have been three main studies on the reliability of urine tests: the O'Connor Regent Study which indicated a 17% false positive rate; the New Jersey Department of Corrections which indicated a 25% false positive rate on cannabinoid testing; and the 1985 Survey-Center of Disease Controls which indicated a 37% false positive rate.
32 In the matter of arbitration between the Potomac Electric Power Company and Local Union 1900, Arb. No. 16-30-0110-84. (June 30, 1986) (H. Zumas, Arb.) the union contended that implemented testing procedures were unreliable and that they resulted in unjust discipline of employees who tested positive. The arbitrator looked to the testing procedures including the laboratory used, its past history of reliability, the use of confirmation tests, and current statistics on drug testing reliability. In this case, he held that there was no proof or reason to believe that the drug tests were unreliable.
33 See supra note 29, at 309.
34 Id.
35 Id.
36 See supra note 26. Cross-reactions have resulted from such over the counter medications as Nuprin, Contac, and Advil. Additionally, some natural substances, such as
Procedural errors, on the other hand, account for a majority of the discrepancies in the EMIT test. Experts have discerned that the "hallmark" of reliable testing is a qualified laboratory with state-of-the-art equipment utilizing highly skilled laboratory technicians. Yet, due to the multitude of laboratories needed to handle the recent demands for urine testing, the necessary quality standards have not routinely been met. What has resulted is too many laboratories offering testing services without stringent quality assurance methods. In addition, many of these laboratories are not clinical in nature, and therefore are exempt from federal inspections or licensing.

Due to the inequities of the EMIT, the manufacturers, as well as numerous authorities, have recommended that a confirmation test be given in order to verify all positive screening results. Confirmation tests use highly specific and accurate testing methods designed to yield extremely reliable results. Of course, with this high degree of reliability, there is an increased cost—$80 to 100 dollars per sample.

As a result of the increased cost of the confirmation test, many employers have relied solely on the results of the EMIT to ascertain if an employee is chemically dependent. Given the technical and procedural flaws of the EMIT, it is evident that an employer's failure to confirm a positive urine test will inevitably result in the unjust discipline or discharge of innocent employees.

In addition to the flaws of the EMIT, there are several design limitations of urine testing in general. The most prevalent limitation is urine testing's failure to indicate "functional impairment", i.e., impairment at

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poppy seeds, which are found on over 1.5 billion Burger King hamburgers sold each year, have caused cross-reactions.


38 See supra note 29, at 313.

39 Id.


41 The leading manufacturer of the EMIT screening test is Syva Corporation. Another popular screening test is the abuscreen test, which is manufactured by Roche Diagnostics. See supra note 19, at 31.

42 See supra note 19, at 31. Confirmation tests require clinical laboratory toxicologists. The tests used are: thin layer chromatography; gas chromatography; and gas chromatography/Mass Spectrometry.

Confirmation tests are recommended by: The National Institute of Drug Abuse; The National Medical Services; and Dr. Carlton Turner, Presidential Advisor on Drug and Alcohol Abuse.

43 See supra note 19, at 31.
the time of the test. The urine test also is unable to identify frequency or quantity of use. These shortcomings, as well, have raised concerns regarding the overall fairness of the urine test.

Due to the problems surrounding the reliability of drug testing, several legal theories have been advanced challenging its use in the workplace. Employees have looked to constitutional, legislative and judicial relief. Because this Note primarily concerns those interests of union members in the private sector, the legal aspects addressed in this section will specifically pertain to that group of employees.

Generally, constitutional claims may only be brought by governmental employees alleging state action. However, private sector employees may find protection under the Constitution in limited situations where an employer implements testing procedures pursuant to a federal regulation.

To date, legislative action addressing the issue of drug testing has, however, also provided limited relief to the private sector. There has been some progress in the form of municipal legislation. For example, the City of San Francisco recently enacted an ordinance, one of the first of its kind, prohibiting the use of drug screening in certain circumstances. The ordinance states, inter alia, that drug testing can only be implemented:

1. when an employer has reasonable belief of impairment;
2. in situations where impairment of an employee would place others in danger.

Unions have argued that because urine tests cannot prove functional impairment, employers are unjustly placing restrictions on the off-duty behavior of employees. In addition, it has been proven that certain components from the ingestion or passive inhalation of marijuana can remain in the body for up to 30 days. Therefore, an employee who may have merely been present in a room with people smoking marijuana or ingested the drug weeks ago in the privacy of his or her own home, may test positive. See supra note 5, at 3.

However, the arbitrator, in the matter of Arbitration between Potomac Electric Power Company and Local Union 1900, found that a positive urine test while not proof of functional impairment, indicates a "high probability" that the worker was impaired on the job. This decision is currently on appeal. Potomac Electric Power Co. and Local Union 1900, Arb. No. 16-30-0110-84 (June 30, 1986) (H. Zumas, Arb.).

See supra note 5, at 3.

 Constitutional claims brought by public sector employees are generally under the fourth amendment right to privacy, and the fifth amendment right against self-incrimination. See supra note 5, at 5.

See supra note 5, at 5.

It is important to note that there are also a number of narcotics bills before the United States Congress which support drug testing. The House Committee on Education and Labor, Subcommittee on Health and Safety held hearings on the Impact of Alcohol and Drug Abuse on Worker Health and Safety on October 31, 1985 and December 12, 1985. The House Select Committee on Narcotics Abuse and Control held a hearing on Drug Abuse in the Workplace on May 7, 1986. None of the hearings focused on any proposed legislation.

danger; and (3) if the employer provides the employee with an opportunity to have the sample re-tested.

The legislative progression of drug testing appears to be taking a similar route to that of polygraph legislation. Accordingly, such an analogy indicates eventual state and federal action. However, while the future may show some promise for legislative relief, the present potential for the abuse of drug testing illustrates an imminent need for the protection of employee rights.

Finally, employees who have been injured through management's institution of drug testing may attempt to seek relief in a civil court. Several tort actions sought by employees have included defamation, intentional infliction of emotional distress, wrongful discharge, and negligence. On the whole, however, these actions have provided relief only to a very few, and only in a limited number of circumstances.

Union members, moreover, have been given even less of an opportunity to obtain a civil remedy. In some jurisdictions, union members under a collective bargaining agreement which provides for alternative grievance procedures, have been prohibited by the courts from pursuing civil litigation.

Because the legal system offers limited relief in this area, private sector employees are vulnerable to invasive testing procedures. This lack of legal protection has allowed management to readily implement drug testing, and has forced union members to rely solely upon the rights found in their collective bargaining agreements. Accordingly, this has placed a tremendous burden on the unions to ensure sufficient employee protection in the collective bargaining process, and further, to competently represent union members in grievances over drug testing programs. The following sections of this Note address these issues by determining the bargaining status of drug testing pursuant to Section 8(d) of the NLRA; and by evaluating the results of a cross section of arbitration decisions involving the issue of drug testing.

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51 A large number of states have enacted laws regulating polygraph testing. To date, 28 states have some kind of legislation on the issue. The laws range from complete bans to restrictions on testing, and the questions asked. There is also federal legislation pending. See H.R. 1524, 99th Cong. 2d Sess. (1986); H.R. 1815 99th Cong., 1st Sess. (1986).


54 See supra note 5, at 27.

55 See supra note 5, at 29.

III. THE BARGAINING STATUS OF DRUG TESTING PROGRAMS

The collective bargaining process is of major importance to organized labor. The ability to bargain over controversial issues enables the unions to adequately protect the interests of its members, avoid later disputes, and prevent arbitrary unilateral actions by employers. The bargaining process is statutorily provided for in Section 8(d) of the NLRA. Section 8(d) has been interpreted as establishing two types of bargaining rights: mandatory and permissive.

Mandatory subjects of bargaining are those which fit into Section 8(d)'s statutory phrase, "wages, hours, and other terms and conditions of employment." When a subject is classified as mandatory, Section 8(a)(5) requires that the topic be negotiated in good faith to impasse. This status of negotiation is reached only if both parties fail to come to an agreement after discussing all of the possible options available; failure by either party to respect this interest is considered an unfair labor practice under the NLRA. Generally, all other subjects which fall outside of the statutory language of Section 8(d) are considered to be permissive. In a situation involving a permissive subject of bargaining, the decision to negotiate is left entirely to the discretion of the parties; there is no statutory obligation to negotiate.

Therefore, labeling of drug testing programs as either mandatory or permissive is of crucial importance to the unions. It is the determining factor in establishing whether or not the union will have a voice in the implementation and structuring of drug testing programs. With this in mind, the issue to be addressed in this section is whether a management decision to unilaterally implement drug testing is a subject of mandatory bargaining within the statutory phrase of Section 8(d), "terms and conditions of employment."

59 The statutory language of section 8(d) states in pertinent part: "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." National Labor Relations Act § 8(d), (codified as amended at 29 U.S.C. § 158(d)).
60 See supra note 8.
61 Id.
63 Permissive subjects of bargaining are all those subjects which are not mandatory or illegal. They include, but are not limited to: prices, product design, financing, benefits for retired employees, performance bonds, indemnification clauses, and industry promotion. See supra note 57, at 293.
The courts have recognized that Congress intentionally used the indefinite language "terms and conditions of employment," to enable the National Labor Relations Board [hereinafter NLRB] freedom of interpretation in light of changing industrial conditions. The Supreme Court has intimated that the process of determining a topic's bargaining status is twofold.

The Court has ruled that, initially, a topic must fall within what has been judicially interpreted as the meaning behind the statutory language of Section 8(d). A subject meeting this qualification is, on its face, a mandatory subject of bargaining. The Court, however, has further required that a subject not be, what the Court has termed, a "man-

64 Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 219 (1964) (Stewart, J., concurring). Justice Stewart, while recognizing the NLRB's need for the expansion of mandatory collective bargaining subjects, rejected the theory stating:

I am fully aware that in this era of automation and on rushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon ... the working men and women of the nation, these problems have engaged the solicitous attention of government, of responsible private business, and particularly of organized labor.

It is possible Congress may give organized labor a heavier hand, in controlling what to date have been found to be prerogatives of private business management. That path would make a sharp departure from traditional principles of a 'free enterprise' economy.

Id. at 219; See also Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1979).

However, there is legislative history which strongly supports the theory that congress did not intend that mandatory subjects be restricted by formal guidelines. Congress set forth that: "The appropriate scope of collective bargaining cannot be determined by a formula, it will inevitably depend upon the traditions of industry, social and political climate at any given time, the needs of employers and employees, and many related factors." H. Min. Rep. No. 245, 78th Cong., 1st Sess. (1947).

Additionally, Professor Bernard Meltzer has commented that:

The NLRB has tended to expand the bargaining duty in response to new conditions ... That expansion has frequently been independent of direct legal compulsion and has resulted from changing technology, changes in parties views as to what subjects should be governed by jointly determined rules, and from determination of unions to exert economic power to enlarge the area governed by jointly determined standards. Expansion has been the primary characteristic of the scope of mandatory bargaining ... (emphasis added)


agement prerogative". Given this second limitation, a subject which is facially mandatory within the interpreted meaning of Section 8(d), will only be considered a true mandatory subject if, ultimately, it is not found to be a management prerogative.

Thus, to effectively determine drug testing's bargaining status, two determinations are necessary: first, whether such testing falls within the Supreme Court's interpretation of Section 8(d); and second, whether it is a matter outside of the area of management prerogative. If it is found that drug testing satisfies both of these determinations, only then will it be a mandatory bargaining topic, and only then will management have a statutory obligation to negotiate.

In resolving the question of whether drug testing is a mandatory subject, the first of the aforementioned determinations requires a judicial analysis of the requirements of Section 8(d).

The Supreme Court in Fibreboard Paper Products Corp. v. NLRB, hereinafter "Fibreboard" established several guidelines to determine a topic's bargaining status under Section 8(d). The Court, relied upon three specific criteria: (1) whether the subject in question falls within the literal meaning of the statutory language of Section 8(d); (2) whether the subject is of "vital concern" to both the employer and the employee; and (3) whether the bargaining practices of other industries include the subject as a bargaining topic.

The first criteria in Fibreboard requires a determination as to what qualifies as "effecting the . . . terms and conditions of employment" pursuant to Section 8(d). Case law on subjects possessing similar characteristics to those of drug testing have set forth specific incidents which may play an important role in determining this issue. For example, the
implementation of drug testing programs has been closely compared to early cases involving the use of the polygraph test.\textsuperscript{70}

In \textit{Medicenter, Mid-South Hospital and Local 847},\textsuperscript{71} [hereinafter \textit{Mid-South}] the NLRB found the implementation of polygraph testing to be a mandatory subject of bargaining within the statutory guidelines of Section 8(d). The facts of that case revealed that Mid-South Hospital suffered substantial damage due to vandalism committed by employees prior to picketing. The hospital, after failing to receive union consent, executed the use of a polygraph test conditioned upon employee acquiescence.

The union asserted that the unilateral implementation of polygraph testing without negotiation was a violation of Section 8(a)(5) of the NLRA. The NLRB agreed, concluding that the institution of a polygraph test as a requirement of continued employment was a substantial change in both the conditions of employment and past hospital policy.\textsuperscript{72} The Board held that the "promulgation of a new prerequisite to conditioned employment" directly impinged upon the job security, and therefore was a "term and condition" subject to negotiation. Furthermore, the Board reasoned that the new testing policy was a significant departure from the hospital's previous practice of "human assessment".

The holding in \textit{Mid-South} found there to be two determinative factors in evaluating a testing procedure's qualification as a mandatory subject of bargaining pursuant to Section 8(d): (1) the severity of the resulting discipline;\textsuperscript{73} and (2) the amount of variance in the new procedure, compared to past company practice.\textsuperscript{74} Where these factors have a considerable effect on the present "terms and conditions" of employment, the rationale of \textit{Mid-South} dictates that a subject is mandatory pursuant to Section 8(d).

However, in an instance where an employer's action only minimally effects an employee, the reasoning of \textit{Mid-South} indicates that a subject

\textsuperscript{70} See supra note 5, at 73. Polygraph testing has commonly been compared to drug testing.

\textsuperscript{71} 221 N.L.R.B. 670 (1975).

\textsuperscript{72} \textit{Clash Between Drug, Alcohol Tests and Privacy Rights Debated at American Bar Assoc. Meeting}, Gov't Empl. Rel. Rep. (BNA) Vol 4, at 1214 (Aug. 25, 1986). At an ABA meeting on August 21, 1986, drug testing's status as a subject of collective bargaining was debated. Stephen Pepe, a labor attorney with the O'Melvey & Meyers law firm, stated that there was a duty to bargain over drug testing programs. Mr. Pepe explained that because of the possibility of disciplinary action, the implementation of testing programs would substantially effect the "terms and conditions of employment" thereby qualifying it as a mandatory subject of bargaining. \textit{Id.}

This Note will further expand on Mr. Pepe's theory, specifically focusing on the court's and legislature's interpretation the meaning of "substantially effect" with regards to the use of drug testing programs.

\textsuperscript{73} \textit{Medicenter, Mid-South Hosp. and Local 847}, 221 N.L.R.B. at 672.

\textsuperscript{74} \textit{Id.} at 673.
may not qualify as mandatory. For example, where an employer initiates a new testing policy, and the resulting discipline is merely the requirement to attend an employee assistance program,\(^7^5\) it is entirely possible that the policy in that instance would be deemed to have only an indirect effect on the employment relationship, and therefore not be a mandatory subject.

Similarly, where an employer has demonstrated a long history of drug testing in the work place, unless the newly implemented program is significantly different from the company's past practices, the parties have mutually consented to those terms as a part of their current bargaining agreement.\(^7^6\)

Therefore, the determination of a test's bargaining status depends largely upon the degree to which the above criteria affect the existing "terms and conditions of employment."\(^7^7\) The holding in *Mid-South* intimates that unless a testing procedure only minimally touches the current employer-employee relationship, it will be found to substantially alter the terms and conditions of employment. Where this is the case, a drug testing program will fall within the literal meaning of Section 8(d) and satisfy the first criteria of *Fibreboard*.

The second and third criteria in *Fibreboard*,\(^7^8\) as set forth earlier are more easily applied to the topic of drug testing.

The second criteria, which required that a subject be of "vital" importance to both the employer and employee,\(^7^9\) is satisfied by the implementation of drug testing programs due to the fact that an employ-

\(^7^5\) An EAP is an employer-sponsored rehabilitation center for employees who suffer from chemical dependency, or various psychological disorders. Approximately 30% of the Fortune 500 companies utilize EAP's as an alternative to disciplinary action. *See* Cornish, *supra* note 15.

76 *See* Brotherhood of Maintenance, Lodge 16 v. Burlington N.R.R., 802 F.2d 1016 (8th Cir. 1986)(the Court determined that the testing procedure was not a significant departure from previous company practices).

It is important to note that the most common change in testing procedures has been the employer's requirements for giving the test. This is exemplified where the prior practice of an employer indicates testing only upon reasonable suspicion, but the new testing procedure is random in nature. Where a substantial discrepancy of this sort is found, it has been widely held that an employer is obligated to bargaining collectively. *See* Metropolitan Edison Co. and System Council U-9, (Oct. 9, 1986) (J. Aarons, Arb.).

\(^7^7\) There is additional case law indicating that management's execution of testing procedures alone affects the employer-employee relationship enough to qualify them as mandatory. *See* NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966). Similarly, the NLRB and the courts have ruled that the implementation of psychological testing programs, and mental stress examinations, impact the employment relationship to such an extent that they constitute mandatory subjects of bargaining. *See* Gerry's Cash Mkts., Inc v. NLRB, 602 F.2d 1021 (1st Cir. 1979).


\(^7^9\) *Id.*
er's need to maintain safety in the work place, counterbalanced by the employee's right to privacy is unquestionably of "vital" importance to both management and organized labor.\textsuperscript{80}

The third criteria, which required that the bargaining practices of other industries include the subject as a bargaining topic,\textsuperscript{81} is also satisfied by the implementation of drug testing policies due to the fact that the topic of drug testing has been traditionally included under the categories of work rules and safety procedures which are commonly incorporated in bargaining agreements.\textsuperscript{82}

Thus, the second and third criteria of \textit{Fibreboard} are satisfied by the topic of drug testing. As a result, where an implemented drug testing program meets the first requirement of \textit{Fibreboard}, as examined previously in this Note, the program will facially\textsuperscript{83} qualify as a mandatory subject of bargaining.

However, as was discussed earlier, a subject's qualification as facially mandatory is only the first of two requirements which must be satisfied prior to its recognition as a mandatory subject. Indeed, the Supreme Court in addition to the statutory requisite has further required that a bargaining topic be outside the area of management prerogative.

In \textit{First National Maintenance Corp. v. NLRB},\textsuperscript{84} the Supreme Court reasoned that while some decisions are unequivocally mandatory due to their direct impact on the employment relationship, others with a seemingly similar relationship are primarily focused on a management concern. With this in mind, the Court held that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweigh the burden placed on the conduct of business."\textsuperscript{85} The Supreme Court, thus, requires that a topic be outside the area of "management's prerogative."\textsuperscript{86}

\begin{footnotesize}
\footnote{80 \textit{See supra} note 5, at 42.}
\footnote{81 \textit{Fibreboard Paper Prod. Corp.}, 379 U.S. 203.}
\footnote{82 \textit{See supra} note 57, at 292.}
\footnote{83 The term "on its face" is used in this Note to identify a subject which qualifies under the statutory language of section 8(d) of the NLRA, and the holding in \textit{Fibreboard}, but has not been determined to be outside the "core of entrepreneurial control."}
\footnote{84 452 U.S. 666 (1981).}
\footnote{85 \textit{Id.} at 678.}
\footnote{86 The Court's implementation of the balancing test in \textit{First National Maintenance Corp. v. NLRB} [hereinafter \textit{FNM}] takes into consideration only those concerns of management and intentionally, fails to recognize the legitimate interests of organized labor. Thus, the Supreme Court's pro-management implications make it apparent that where employer's interest in a specific area outweigh what the Court perceives to be any resulting benefit from negotiation, a subject otherwise within the statutory confines of mandatory bargaining will be judicially deemed a management prerogative. Indeed, Justice Brennan in his dissent in \textit{FNM} questions the majority's institution of a}
\end{footnotesize}
Given this second qualification, while drug testing on its face may satisfy the statutory language of Section 8(d), if it is found to be a management prerogative, it will not ultimately qualify as a mandatory subject of bargaining.

Generally, in the case of the unilateral implementation of drug testing programs, employers have forcefully asserted that they are not required to bargain over drug testing policies because they have a management prerogative to ensure the safety of the work environment. However, with the exception of certain industries highly predisposed to danger and unavoidable emergency situations where management's need for safety is imminent, the NLRB and the courts have intimated that drug testing does not fall within the area of management prerogative.

The holding of the NLRB in the previously discussed case of Mid-South strongly supports the premise that drug testing is not a management prerogative. In that case, the hospital additionally argued that they had the right as an employer to use a polygraph test to aid in the investigation of vandalism allegedly committed by hospital personnel. The Board, however, rejected the hospital's contention, ruling that "adopting the polygraph testing is not within the prerogative area which an employer can exercise the core of entrepreneurial control." In its opinion, the Board expanded on its reasoning as to why the polygraph test fell outside of the zone of management prerogative, specifically stating balancing test. He stated: "This one-sided approach hardly serves 'to foster in a neutral manner' a system for resolution of these serious, two-sided controversies." First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 690 (1981) (J. Brennan, dissenting).

87 See Brotherhood of Maintenance, Lodge 16 v. Burlington N.R.R., 802 F.2d 1016 (8th Cir. 1986); Medicenter Mid-South Hospital, 221 N.L.R.B. 607 (1975); Potomac Electric Power Co. and Union Local 1900, Arb. No. 16-30-0110-84 (Oct. 9, 1986) (H. Zumas, Arb.).

88 Generally, inherently dangerous industries such as the airlines have been recognized as having a management prerogative to ensure the safety of its passengers. Boeing to Test All New Job Applicants for Drugs, Gov't Empl. Rel. Rep., (BNA) No. 219 A-8 (Nov. 13, 1986). However, it should be noted that even in situations where danger would seem inherent, such as in nuclear power facilities, arbitrators have not allowed management to flagrantly violate an employee's right to privacy. Metropolitain Edison Co. and System Council U-9 (Oct. 25, 1986) (J. Aarons, Arb.).

89 Chairman Murphy, in the Board decision of Medicenter, Mid South Hospital and Local 847 221 N.L.R.B. 607 (1975), found that "whether or not the polygraph program is a mandatory bargaining subject, ... [the incident] created an emergency situation excusing or justifying such unilateral action as a temporary measure to try to bring that situation under control." Id. at 608.


91 221 N.L.R.B. 607 (1975).

92 Id. at 609.
that it was not a managerial decision "fundamental to the basic direction of a corporate enterprise." 93

Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad 94 lends further support to the premise that drug testing is not a management prerogative. In that case, the railroad unilaterally implemented new drug testing procedures in response to several recent accidents believed to be related to substance abuse. Burlington, inter alia, asserted that it had a management prerogative to implement drug testing procedures to insure a safe work environment.

The court allowed the proposed testing procedures, holding that they were minor changes in the prior testing practices of the railway. 95 However, the court rejected Burlington's argument that drug testing was a management prerogative. Moreover, in his dissent, Judge Arnold stated that "the railroad and the employees may ultimately come to an understanding that Burlington National's proposed method...is the best way of approaching this problem. However, that result must be reached through arms-length bargaining between parties." 96

Additionally, union attempts to seek temporary restraining orders in order to thwart the implementation of drug testing, have resulted in several federal district court opinions. 97 These opinions have also supported the conclusion that drug testing does not fall within the ambit of management prerogative.

In Electrical Workers, Local Union 1900 v. Potomac Electric Power Co., 98 the court issued a temporary restraining order, ordering the Potomac Electric Power Company to stop the implementation of drug testing, pending arbitration. 99 The judge, while recognizing the "terrible menace" of substance abuse in the workplace, stated "that does not mean we have to resort to hysterical measures." 100 Further, the judge held that "[i]n my opinion the plaintiff is likely to prevail on the merits of this lawsuit at least in the sense that the draconian measures which the

93 Id.
94 802 F.2d 1016 (8th Cir. 1986).
95 Id. The court's holding was pursuant to the Railway Labor Act, 45 U.S.C. §§ 151-88.
96 Brotherhood of Maintenance, Lodge 16, 802 F.2d at 1024 (J. Arnold, dissenting) (emphasis added).
98 Id.
99 Id. Although the court firmly ruled in favor of the union in this case, the union was unsuccessful in stopping the company's unilateral action in arbitration. The arbitrator ultimately held that management did have the authority to introduce the new drug testing procedures. This decision is discussed at length in Section IV of this Note. See Potomac Electric Power Co. and Electrical Workers, Local 1900, Arb. No. 16-30-0110-84 (June 30, 1988) (H. Zumas, Arb.).
defendant has proposed and perhaps implemented cannot be unilaterally imposed under law without exhaustion of some procedures under the collective bargaining agreement."\textsuperscript{101} The judge concluded that if the testing were allowed, employees would be forced to "undergo invasions of privacy which are almost unheard of in a free society . . . .\textsuperscript{102}

The holdings of the above-mentioned cases indicate that to date, the courts have not been willing to include drug testing in the category of a management prerogative. Given this, where a drug testing program satisfies the criteria of \textit{Fibreboard} as discussed previously in this Note, it will be a mandatory subject of bargaining pursuant to Section 8(d) of the NLRA.


As a result of the incorporation of alternative grievance procedures within most collective bargaining agreements, disputes over management's implementation of drug testing programs have primarily been decided in arbitration. This section will discuss several of the most recent arbitration decisions, highlighting the factual and legal issues evaluated in those opinions.\textsuperscript{103}

A. Arbitration Decisions

In the matter of arbitration between the \textit{Potomac Electric Power Company and International Brotherhood of Electrical Workers, Local Union 1900},\textsuperscript{104} the arbitrator allowed the Potomac Electric Power Company [hereinafter PEPCO] to unilaterally implement drug screening of employees suspected of substance abuse. In this case an employee notified PEPCO management of a problem involving the sale and use of illegal narcotics at The Potomac River Generating Station [hereinafter Po River]. PEPCO, which operates Po River responded by utilizing a private investigation firm to look into the allegations. The investigation revealed the use and sale of marijuana, PCP, and heroin at Po River.

Consequently, PEPCO implemented a search using trained dogs to detect the presence of controlled substances in both employee lockers and

\textsuperscript{101} Id. (emphasis added).

\textsuperscript{102} Id.


\textsuperscript{104} Potomac Electric Power Co. and Electrical Workers, System U-9, Arb. No. 16-30-0110-84 (June 30, 1986) (H. Zumas, Arb.)
motor vehicles. The contents of all lockers and motor vehicles which were indicated by the dogs as containing drugs were thoroughly searched. Additionally, PEPCO requested all suspected employees to submit to urine testing; failure to respond resulted in disciplinary action. At the completion of the investigation, PEPCO discharged three employees, and placed the remainder on probation.

At arbitration, the union asserted that PEPCO randomly tested the employees without "probable cause", an action inconsistent with the company's past practices, in violation of the bargaining agreement.

In opposition, PEPCO argued that management, due to a dramatic increase in drug and alcohol abuse in the workplace, has a "special responsibility to assure that its employees are drug free." Moreover, PEPCO asserted that a broad management rights clause included within the current collective bargaining agreement gave them the right to promulgate rules against drug abuse.

The arbitrator held that PEPCO's unilateral implementation of drug testing was acceptable, premised upon his finding that the testing was reasonable and based upon legitimate safety needs consistent within the collective bargaining agreement.

It was determined that the implemented drug testing was to be considered a safety procedure within the confines of a broad management rights clause in the current collective bargaining agreement. Moreover, the arbitrator found that PEPCO, in light of the potential for danger inherent in the industry, had the right and responsibility to ensure that employees performing complex duties were not under the influence of drugs. Finding this, he held that so long as there was a "valid reason" to

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105 Id. at 5. All search teams included a union representative.
106 Id. at 9. The actual drug test used by PEPCO was the EMIT for the initial screening, and the GSMS (Gas Chromatograph-Mass Spectrometry) to confirm all positive EMITs.
107 Id. at 18. Under a memorandum issued in April of 1986, PEPCO instituted a drug policy as part of the personnel services policy No. 304. This policy required urine testing when a "triggering event" gave the company reason to inquire into a possible policy violation. "Triggering events" were qualified as: acting strangely, appearing in possession of a controlled substance, a serious accident, or tips from police, the public, or other employees.
108 Id. at 19. The arbitrator held that there is no such requirement that PEPCO must have "probable cause" prior to conducting a search.
109 The management rights clause states in pertinent part:

   Article 19.02 of the Agreement pertaining to health and safety authorizes PEPCO to formulate and publish safety rules to which the employees shall be required to conform.

Further, Section 20.01 provides, in pertinent part:

   However, it should be understood that the establishment and enforcement of safety and health rules and regulations is a proper function of management and to this end the final determination for the adoption and implementation of safety and health rules shall be the sole responsibility of the Company.

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believe that an employee was impaired, PEPCO had the right to implement drug testing.

The matter of arbitration between Metropolitan Edison Company and International Brotherhood of Electrical Workers, System Council U-9,[110] [hereinafter Metropolitan Edison] involved a factual situation similar to that presented in PEPCO, but ironically resulted in a different outcome. It is important to note the arbitrators' particular areas of concentration in these cases in order to understand their contradictory decisions.

In Metropolitan Edison, a dispute arose when management advised representatives of the System Council that they intended to unilaterally implement, without Council consent, a new drug and alcohol policy. The new policy, titled "Employee Fitness for Duty Procedure/Drug and Alcohol,"[111] required all production, maintenance and clerical employees be subject to random urine testing, including such testing during routine physical examinations.

In support of the new policy, the Metropolitan Edison Company [hereinafter Met Ed] argued in arbitration that there was a potential for "serious mishaps" in the operation of a nuclear power facility, rendering safety considerations paramount. Met Ed also asserted that there had been a long history of prior company policies involving drug and alcohol abuse, and that these policies provided a strong basis for "contractual propriety" of the newly proposed program.[112] Additionally, the company claimed that an "employer-employee relationship" clause[113] in the current collective bargaining agreement clearly enumerated its right to implement the new drug policy without union consent.

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[111] Id. at 8. "Employee Fitness for Duty Program/Drug and Alcohol," Section 4.2.1 of the collective bargaining agreement.
[112] Past company practices were demonstrated in the prior GPU Nuclear Policy statement on the issue of drug testing, issued November 16, 1981, which stated in pertinent part:

1. [Any person] found to be using, possessing or under the influence of such substances on the nuclear station site shall be immediately terminated from employment and thereafter denied access to all GPU System nuclear stations. Provided, however, based on the circumstances the Company in its sole discretion may reduce the foregoing disciplinary action to not less than two (2) weeks suspension without pay for an employee's first violation of mere possession.

2. [Any person] reasonably suspected of using, possessing or being under the influence of such substances on the nuclear station site shall be:

a. subject to an immediate and full investigation by Company security personnel, and

b. denied access to the Station pending the outcome of the Company's investigation.

[113] Article II, entitled "Employer-Employee Relationship," Section 2.15 states:

"It is understood by the parties to this agreement that the right to hire, to transfer, to reassign, to demote, to discipline, to lay off and to discharge employees for proper cause, is vested in the Company, subject to the limitations of this Agreement."
The union, however, contended that the new drug testing procedures were a "sharp departure from past practice," and that the drastic change in the "terms and conditions" of employment violated the union's right to negotiate. The union further argued that in the event the company had the right under the collective bargaining agreement to implement the new drug policy, the policy should nevertheless be rejected because its random nature precluded a finding of reasonableness.\textsuperscript{114}

Arbitrator Aaron quite effortlessly determined that Met Ed had the right under the current collective bargaining agreement to unilaterally implement a new drug testing policy. The ease of his decision focused on both the realization of the dangers involved with substance abuse in the work place, as well as a broad prerogative of management incorporated in the bargaining agreement.\textsuperscript{115}

However, the arbitrator qualified his holding on this broad management right by stating that "such policies and/or rules shall not be contrary to law or the terms of the collective bargaining agreement." In evaluating the consistency of the proposed test with the collective bargaining agreement, the arbitrator found that a positive test would inevitably result in disciplinary action. But the arbitrator also found that, according to the "Employer-Employee Relationship" clause of the bargaining agreement, any resulting disciplinary action must be for "proper cause". Thus, the arbitrator found that because random drug testing would result in discipline without "proper cause", it was inconsistent with the current bargaining agreement, and could not be unilaterally implemented.

In reaching this conclusion, the arbitrator held that the term "proper cause" has "varying linguistic modes", from which the most appropriate definition is qualified as "some reasonable grounds or suspicions or basis for employer action . . . [for] testing employees to find misconduct."\textsuperscript{116} The alternative, it was held, "of permitting broad employer action, . . . strips

\textsuperscript{114}Metropolitain Edison Co. and Electric Workers, System Council U-9, at 10 (Oct. 9, 1986)(J. Aarons, Arb.). When referring to the term "reasonable" the union was inferring to "reasonable suspicion" or "belief" that an employee tested has been using drugs.

\textsuperscript{115}The broad management clause in the bargaining contract states:

In the interest of safety, continuity of service, and efficient and orderly operation, the Brotherhood agrees that its members will abide by the Company's rules and regulations. Accordingly, it is understood by both the Brotherhood and the Company, that all rules and regulations now in effect or as adopted or changed in the future shall be strictly enforced and observed at all times. However, no rule or regulation shall be adopted which is contrary to the law, or to the terms of this Agreement, except at a legally enforceable order of an agency of the Government.

\textsuperscript{116}Metropolitain Edison Co. and Electric Workers, System Council U-9, at 10 (Oct. 9, 1986)(J. Aarons, Arb.).
employees of basic rights which are incorporated in the concept of 'proper cause.'”

Finally, Arbitrator Aaron emphasized that there were other equally effective and less intrusive methods of determining substance abuse in the work place. Moreover, he held that an employer who finds it necessary to implement random drug procedures must negotiate such policies with the existing union and may not unilaterally implement these programs in violation of the current collective bargaining agreement.

Arbitrator Zumas in the previously discussed case of PEPCO seemingly paid close attention to balancing the issue of reasonableness versus safety in the work place. It may be suggested, however, that Arbitrator Aaron in Metropolitan Edison, alternatively looked to the four corners of the bargaining agreement, and gave considerably less weight to the issue of reasonableness in his rejection of management's newly proposed testing program.

In PEPCO and Metropolitan Edison the parties had dealt with drug testing programs resulting from past company practice or policies, but the parties had never specifically negotiated over drug testing procedures. The final case examined in this section illustrates how arbitrators are evaluating the unilateral implementation of such procedures where testing has been previously negotiated in a collective bargaining agreement.


In the negotiation of their 1982 collective bargaining agreement the NFLPA and the NFLMC established Article XXXI: "Player's Rights to Medical Care and Treatment." The Article enacted a collectively

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117 Id. at 16.
119 Article XXXI of the collective bargaining agreement:

Players' Rights to Medical Care and Treatment

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Section 5. Standard Minimum Pre-Season Physical: Beginning in 1983, each player will undergo a standardized minimum pre-season physical examination, outlined in Appendix D, which will be conducted by the Club physician. If either
bargained policy for detection of drug abuse and the education and treatment of players determined to be chemically dependent. It provided that a centralized organization would be used to: (1) evaluate chemical dependency facilities, (2) provide education on the subject of substance abuse, (3) test players reasonably suspected of being chemically dependent, and (4) protect the confidentiality of medical reports and the names of players involved. Club physicians were also permitted to, upon reasonable cause, send players to the organization for testing and chemical abuse problems.

However, in January of 1986, discussions began between the NFLMC and the NFLPA with the intent to modify Article XXXI. The parties agreed upon several of the proposed modifications, but the NFLPA

the Club or the player requests a post-season physical examination, the Club will provide such an examination and player will cooperate in such examination.

Section 6. Chemical Dependency Programs: The parties agree that it is the responsibility of everyone in the industry to treat, care for and eliminate chemical dependency problems of players. Accordingly, the parties agree to jointly designate Hazelden Foundation, Century City, Minnesota or its successor if such becomes necessary, to evaluate existing facilities to assure the highest degree of care and treatment and to assure strictest observance of confidentiality. Any treatment facility which does not meet standards of adequacy will be eliminated and a successor facility in the same metropolitan area chosen by Hazelden. Hazelden will be responsible for conducting an ongoing educational program for all players and Club personnel regarding the detection, treatment and after-care of chemically dependent persons. The cost of retaining Hazelden will be paid by the clubs.

Section 7. Confidentiality: All medical bills incurred by any player at a local treatment facility will be processed exclusively through Hazelden which will eliminate all information identifying the patient before forwarding the bills to any insurance carrier for payment. Details concerning treatment any player receives will remain confidential within Hazelden and the local chemical dependency facility. After consultation with Hazelden and the player, the facility will advise the club of the player's treatment and such advice will not in and of itself be the basis for any disciplinary action. No information regarding a player's treatment will be publicly disclosed by Hazelden, the facility or the club.

APPENDIX D.
STANDARD MINIMUM PRE-SEASON PHYSICAN EXAMINATION

Urinalysis
Check for (including but not limited to):
- Protein
- Glucose
- PH Factor
- Diabetes
- Renal Failure
- Gout
refused to agree to the NFLMC's proposal requiring, *inter alia*, that all players would be subject to two unscheduled drug tests during each season, in addition to the scheduled pre-season testing.

In July of 1986, Commissioner Rozelle, in spite of the Parties' failure to reach an agreement, nevertheless unilaterally implemented the proposed modifications to the existing drug policy. The Commissioner relied upon his authority under Section 8.13(A) of the National Football League [hereinafter NFL] Constitution and By-laws and Article VIII of the current collective bargaining agreement. These provisions allowed the Commissioner broad authority to protect the integrity and public confidence in the game of professional football.120

The NFLPA contended in arbitration that Commissioner Rozelle did not have the authority under either Article VIII of the current collective bargaining agreement, or Section 8.13(A) of the NFL Constitution and By-laws to alter the terms and conditions of the bargaining agreement without the consent of the NFLPA.

The arbitrator labeled this case a “classic dispute” between management rights and specific employee rights in the collective bargaining agreement. He held that, although originally the organization may have

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120 Disciplinary Powers of Commissioner:

8.13(A) Whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League, or has been or is guilty of conduct detrimental to the welfare of the League of professional football, then the Commissioner shall have complete authority to: (1) Suspend and/or fine such person in an amount not in excess of Ten Thousand Dollars ($10,000.00), and/or (2) Cancel any contract or agreement of such person with the League or with any member thereof.

* * *

ARTICLE VIII
COMMISSIONER DISCIPLINE

Section 1. Commissioner Discipline: Notwithstanding anything stated in Article VII of this Agreement, Non-Injury Grievance, all disputes involving a fine or suspension imposed upon a player by the Commissioner for conduct on the playing field, or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: The Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA [National Football Player's Association]. Within 20 days following written notification of the Commissioner's action, the player affected thereby or the NFLPA, with the approval of the player involved, may appeal in writing to the Commissioner. The Commissioner will designate a time and place for hearing, which will be commenced within 10 days following his receipt of the notice of appeal. As soon as practicable following the conclusion of such hearing, the Commissioner will render a written decision, which decision will constitute full, final, and complete disposition of the dispute, and will be binding upon the player(s) and club(s) involved and the parties to this Agreement with respect to that dispute.
had an "existing right" to conduct drug testing, when the parties collectively bargained, and agreed to certain drug testing provisions, both parties are then obligated to respect those provisions. Thus, he determined that the issue of drug testing had already been resolved in the 1982 negotiations and included in the collective bargaining agreement.

The arbitrator held that the Commissioner's proposed drug program was a "document affecting the terms and conditions of employment of NFL players," and that where specific provisions of the collective bargaining agreement conflict they supersede those proposed. As a result, the portion of the proposed drug program which required unscheduled testing, was found in conflict with the specific provisions of Article XXXI that required testing only for reasonable cause, and was therefore not permitted.

B. Summary Analysis

An overview of the above-mentioned arbitration decisions demonstrates the complexity of the issue of drug testing and employee rights under a collective bargaining agreement. Although the difficulties involved in the analysis of these decisions are compounded by the uniqueness of each bargaining agreement, there is a great deal of consistency in the rationales supporting the resulting decisions. The arbitrators, as a whole, considered three specific areas in making their determinations: (1) management rights as enumerated in the bargaining contract; (2) the consistency of the proposed test with the current agreement; and (3) the reasonableness of the testing procedure utilized.

The initial objective of the arbitrators was to determine whether management had the right under the current bargaining contract to unilaterally initiate new drug testing programs. Management's right, if any, to take such action was found by the arbitrators to fall within the employer's right to provide a safe work environment. Accordingly, the arbitrators looked to management rights clauses, safety clauses, and other provisions vesting management with extended dominion in order to ascertain the scope of their authority within the contract. The employer's past practices in the area of safety rules were also a determining factor.

Not surprisingly, all three of the arbitration decisions analyzed in this Note, regardless of their outcome, found management had the right to implement new testing procedures. This broad managerial authority to

121 See supra note 115 and accompanying text.
122 See supra note 113 and accompanying text.
123 See supra note 120 and accompanying text.
124 See Metropolitain Edison Co. and Electrical Workers, System Council U-9, at 14 (Oct. 9, 1986) (J. Aarons, Arb.).
enact safety policies was justified from collective bargaining agreements. Due to the union's failure to limit management rights in this area, management was given the upperhand in instituting testing policies. The unions, as a result, must pay close attention to the amount of control conceded to management to execute safety policies.

Maintaining consistency with the existing bargaining contract has been the greatest hurdle for management in initiating new drug testing policies. Although a majority of arbitration decisions to date have allowed employers the right to implement safety procedures, such as drug testing, they have been very insistent upon requiring that such policies adhere to the current bargaining agreement. Generally, consistency has been evaluated in three respects: (1) consistency with all other existing terms and conditions of the bargaining agreement; (2) consistency with past practices not specifically negotiated within the current contract; and (3) consistency with specifically negotiated terms concerning drug testing found within the collective bargaining agreement.

In the first situation, where drug testing policies have not been negotiated, the arbitrators required that the newly proposed testing procedures be consistent with all other terms and conditions of the current collective bargaining agreement. This was illustrated in Metropolitan Edison where the new testing procedures were disallowed as inconsistent with the current contract.125 The arbitrator found that because a positive drug test may result in disciplinary action, it could only be utilized upon "proper cause" as required by the disciplinary procedures set forth in the current bargaining agreement. It was held that the proposed use of random testing without "proper cause" was inconsistent with the terms and conditions of the current contract, and therefore could not be adopted.

In the second situation, the arbitrators required that the proposed testing procedures be consistent with past drug testing policies. The arbitrators found that where specific drug testing terms were not incorporated within the bargaining agreement, but employers had used drug testing in the past, the parties had mutually assented to those terms. Where this was found to be the case, the arbitrators concluded that the past practices of the employer, even though not specifically negotiated, were terms of the bargaining agreement.

The holding in PEPCO demonstrates this point.126 In that case the arbitrator held that the past practices of management were to use drug testing only upon reasonable belief of impairment. Accordingly, Arbitrator Zumas pointed out that the testing undertaken by PEPCO had been

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125 See Metropolitan Edison Co. and Electrical Workers, System Council U-9, at 18 (Oct. 9, 1986) (J. Aarons, Arb.).
126 See Potomac Electric Power Co. and Electrical Workers, Local Union 1900, Arb. No. 16-30-0110-84 (June 30, 1986) (H. Zumas, Arb.).
directed at only those employees who had been initially identified by the trained dogs as possessing drugs. Therefore, he ruled that this particular use of drug screening was consistent with the past practices of the company, and was an acceptable method of testing.\textsuperscript{127}

The third situation encountered by arbitrators involves the rare collective bargaining agreement in which drug testing procedures have been specifically negotiated over and those terms of the negotiation have been incorporated within the bargaining agreement. The arbitrator in NFL Arbitration determined that the terms specifically set forth in the bargaining agreement will supersede any proposed terms which are in conflict.\textsuperscript{128} In that case, the specific terms of the existing contract requiring testing only upon "reasonable cause" were found to supersede the proposed terms for unscheduled drug testing. It is therefore, important that the union be specific in addressing the issue of drug testing in negotiation, in order to adequately protect employee rights.

In some cases arbitrators have also evaluated the reasonableness of an implemented drug testing policy.\textsuperscript{129} Determinations on this issue have been non-contractual in nature, and have been found to arise from the instilled constitutional values of the arbitrators.\textsuperscript{130} As a result, many arbitration decisions involving the implementation of drug testing programs have involved a balancing test to evaluate the necessity of a safe work environment versus employee rights.\textsuperscript{131} Because such balancing tests can be extremely subjective, the issue of reasonableness has been the most difficult to predict when attempting to determine the future outcome of an arbitration decision. Issues which are commonly balanced by arbitrators include: industry danger,\textsuperscript{132} past drug problems,\textsuperscript{133} methods of testing,\textsuperscript{134} reliability of testing,\textsuperscript{135} reasons for testing,\textsuperscript{136} the necessity of proving functional impairment,\textsuperscript{137} and the overall invasiveness of a test on an employee's right to privacy.

\textsuperscript{127} Id. at 36.
\textsuperscript{130} See supra note 5, at 14.
\textsuperscript{131} See supra note 5, at 14.
\textsuperscript{132} Id. at 37.
\textsuperscript{133} Id. at 39.
\textsuperscript{134} Id. at 41.
\textsuperscript{135} Id. at 45.
\textsuperscript{136} Id. at 37.
\textsuperscript{137} See supra note 5, at 15.
The arbitration cases of PEPCO and Metropolitan Edison demonstrate the subjectivity and the inherent potential for inconsistency of the balancing process. In both of these cases the arbitrators stressed the importance of a safe work environment. However, in PEPCO the arbitrator accorded great deference to the issue of reasonableness. He found that managements' responsibility to provide a safe work environment, compounded by the widespread use of illegal substances in the work place and the potential for danger in PEPCO's "safety sensitive" industry, far outweighed any employee right to privacy. Conversely, in Metropolitan Edison the arbitrator gave much more weight to the "contractual propriety" of the newly proposed test. The arbitrator determined that even though the operation of Met Ed was inherently dangerous the testing procedure violated the "proper cause" requirement of the collective bargaining agreement.

The question of reasonableness, for the most part, has been given the least amount of weight in determining the acceptability of drug testing programs. In fact, some arbitrators have found it unnecessary to address the issue at all, reasoning that a dispute over drug testing is solely contractual in nature. This disposition was evident in the NFL Arbitration138 where Arbitrator Kasher held that the issue of reasonableness was not an important consideration in determining the contractual relationship of the parties.139

The aforementioned analysis illustrates the three considerations of arbitrators when evaluating drug testing policies. These considerations—management rights, contractual consistency, and reasonableness, and their interrelationships delineate the rights of both management and labor in the arbitration process. Accordingly, the above arbitration decisions establish several key considerations for organized labor in both negotiation and representation in arbitration.

V. CONCLUSION

This Note has demonstrated that organized labor's effectiveness in negotiation is imperative to the adequate protection of its members from invasive drug testing procedures. Negotiation must be achieved by asserting that drug testing is a mandatory subject of bargaining for the reasons set forth in section III above.

The best results in negotiation will be evidenced where the union representative is aware of both the technical and procedural short comings of drug testing, as well as, the inequities of the collective

139 Id.
bargaining agreement in question. For these reasons, this Note has highlighted those areas which the unions must address in negotiation in order to prevent the unilateral implementation of drug testing programs. Primarily, the unions strategy should center, not around disallowing testing procedures, but around bargaining for a procedure which will most effectively preserve both the privacy rights of its members, as well as a safe work environment.

Although the courts and legislators to date have provided the private sector employee with limited protection, this Note has shown that where the unions are well informed and able to thoroughly negotiate over drug testing, the private sector employee can enjoy a safe work environment free from invasive testing procedures. Thus, the unions are not left helpless holding the specimen jar—as the title of this Note may suggest, rather they are holding the key to effective protection of employee rights—negotiation.

ROYCE ROBERT REMINGTON