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THE UNION WORKPLACE MEETS BIG BROTHER: ADVISING CLIENTS ON EMPLOYER CONDUCT WITH REGARD TO HIDDEN SURVEILLANCE

By Jamila Asha Johnson[1]

Abstract

Hidden cameras may guide a union employer to find employee misconduct, but at what cost? Since the late 1990s, two federal appeals courts and the National Labor Relations Board (NLRB) have required employers to bargain with unions before using hidden video surveillance to observe employees. Until more recently, however, it was less apparent how lawyers should advise clients when an employer wished to use hidden cameras or had already installed non-disclosed video surveillance. In August 2005, the D.C. Circuit Court of Appeals decided a case surrounding surveillance at an Anheuser-Busch facility, which provided further guidance on these issues. This Article analyzes the Anheuser-Bush decision and clarifies the scope of what might happen to an employer who fails to bargain and that subsequently takes actions based on hidden camera technology. It also addresses how an employer can discuss hidden cameras with a union without undermining the benefits of such technology.

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INTRODUCTION

<1> In the United States, 51 percent of companies use video surveillance according to the 2005 Electronic Monitoring and Surveillance Survey conducted by the American Management Association and The E-Policy Institute. This figure increased from 2001, where only 33 percent of companies practiced such behavior.[2] However, while many companies value hidden cameras, not everyone sees the technology as a benefit. Employees and unions tend to perceive hidden surveillance devices as invasive of employee privacy.[3] Two United States federal legislative proposals — the first in 1970 — requiring notice of monitoring have failed.[4] While no federal statute prohibits surveillance in the classic workplace, the United States *does* regulate surveillance in union workplaces via the National Labor Relations Act (NLRA).[5] The NLRB enforces the NLRA and requires employers to bargain with unions for the right to use hidden surveillance.[6]

<2> In June of 1998, Anheuser-Busch installed hidden surveillance cameras to monitor an area where employees occasionally worked and took breaks, without giving the union notice of the surveillance.[7] Anheuser-Busch found sixteen employees engaging in misconduct during the month it recorded footage. The hidden cameras produced images of workers urinating on company property, smoking marijuana, and taking extended breaks.[8] The corporation informed the union, then fired, suspended, or warned the employees. Seven years later, in 2005, the U.S. Court of Appeals for the D.C. Circuit held that Anheuser-Busch's use of hidden cameras was a mandatory subject of union bargaining and that the NLRB had poorly justified its decision to not force the company to engage in make-whole relief.[9]

<3> In the *Anheuser-Busch* case, this relief may ultimately include back pay (less any pay the workers earned elsewhere while fired) and possibly re-instatement based on the decision of the NLRB.[10] As the recent D.C. Circuit opinion in *Anheuser-Busch* suggests, electronic investigations into employee misconduct must be handled delicately. The case also provides helpful suggestions for how lawyers representing employers and unions should handle the issue of hidden surveillance.

UNDERSTANDING THE DUTY TO BARGAIN

<4> Federal wiretap laws, state statutes, and judicial rulings heavily regulate an employer's ability to secretly record oral communications.[11] However, few restrictions prevent an employer from secretly installing video cameras in the workplace

to monitor employee behavior when no sound is recorded or to use video footage to conduct investigations. The only substantial federal restrictions arose from a series of NLRB decisions that interpreted the NLRA to require employers to bargain with unions *before* installing and using hidden cameras in the workplace.

<5> The NLRA strives, in part, to create a society where organized employees engage in conversations with employers regarding job security and the conditions of employment.[12] The structured discussion between employers and unions is called collective bargaining.[13] While collective bargaining is a popular term in the media, it can create misconceptions for a professional that seldom handles labor law. Collective bargaining addresses two types of subjects — mandatory subjects of bargaining and permissive subjects. With mandatory subjects, collective bargaining does not require that the employer and the workers come to an agreement — the parties must only bargain until they reach an agreement or an "impasse".[14] An impasse occurs when it is clear that no further progress is expected on an issue. With permissive subjects of bargaining there is no requirement to even reach an impasse.[15]

<6> It is also important to note that if a contract is already in place, the union may be limited in its recourse against an employer that unilaterally implements a hidden camera surveillance program.[16] Collective bargaining agreements often include provisions that require a union to arbitrate disputes that arise after a contract is in place and include catch-all provisions that may include an employer's right to implement means of investigating worker misconduct. In these situations the union is limited in the legal action it may bring against an employer.

<7> There are two advantages that come with engaging in collective bargaining about the use of hidden cameras. First, information from the bargaining process is often transmitted to workers. Workers may therefore be on notice that their behavior may be monitored. Workers may choose to modify their behavior after bargaining begins to avoid possible termination or lesser sanctions. Second, collective bargaining gives the union a chance to argue against the implementation of hidden surveillance or to try and set the terms of the surveillance (under what circumstances surveillance can be used in investigations, whether surveillance footage can be the only proof required for termination, etc.). But it is important to remember that an employer is never required to compromise as long as it engages in good-faith bargaining.

<8> The United States Supreme Court has held that mandatory

subjects of bargaining are matters that are, “plainly germane to the ‘working environment’ and ‘not among those managerial decisions, which lie at the core of entrepreneurial control’” that are exempt from the duty to bargain.[17] Lie detectors and drug testing policies,[18] which are integral parts of employers investigations, are deemed mandatory subjects for collective bargaining. In 1997, the NLRB in its *Colgate-Palmolive* decision, added hidden cameras to the growing list of mandatory subjects.[19] The employer in *Colgate-Palmolive* installed cameras in its facility and also in the air vent of the men’s restrooms.[20] The Board found that use of surveillance cameras was not fundamental to the basic direction of an enterprise and impinged directly on employment security.[21] However, the ruling did not prevent the employer from using hidden surveillance after engaging in collective bargaining on the issue.[22]

<9> The U.S. Court of Appeals for the Seventh Circuit issued the second major decision relating to video surveillance and bargaining. In *National Steel Corporation v. NLRB*, the Seventh Circuit upheld the decisions of the NLRB establishing employee surveillance as a mandatory subject of bargaining.[23] The case involved a National Steel facility where, in addition to 100 plain-view cameras, the corporation periodically used hidden cameras in investigations against employees. One such investigation involved a camera in a manager’s file cabinet placed to catch employees making long-distance calls after hours. In February of 1999, National Steel discharged an employee who filed a union grievance. The court wholly supported the decision of the NLRB and reiterated the risks to employee job security when such investigations take place and ordered that the company engage in collective bargaining as to whether the company could use hidden surveillance.[24]

<10> In the summer of 2005, the D.C. Circuit decided another case involving hidden cameras. Anheuser-Busch caught its employees breaking the law. The company caught a man urinating off a roof. It had proof of employees taking drugs. According to the severity of the behavior the company disciplined employees by firing, suspending or adding the incident to personnel files. Yet, the NLRB had said Anheuser-Busch failed to bargain and thus was in the wrong. After this decision both the company and the union were displeased with the ruling. Anheuser-Busch disagreed with the Board finding fault with its actions.[25] The corporation maintained that it merely recorded people performing not only inappropriate acts, but illegal acts.

<11> While the NLRB ruling affirmed that the corporation had committed a wrongful act; the Board did not require make-whole relief, such as reinstatement or monetary compensation for employees, to the dismay of the Union.[26] The NLRB pointed to 29 U.S.C. § 160(c) and stated that, "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for cause."[27] In essence, the NLRB agreed that because the cameras revealed employees engaged in illegal acts, Anheuser Busch could properly discharge them. However, the company would have to bargain for future use of hidden video surveillance.

<12> The D.C. Circuit, in contrast, found that the NLRB had not adequately distinguished precedent suggesting that in situations where job security is at risk from investigative tools (such as polygraphs) that reinstatement could still be an option.[28] In situations where an employer terminates a union employee with information it has gathered through a means that should be, but was not, bargained for in the collective bargaining agreement, the NLRB has required that the employer put the employees back in the position they were in prior to the action based on this information.[29] It upheld the finding of fault and remanded for a new judgment or directed the Board to overrule its past precedent. Nevertheless, the court continued to give full support for the interpretation of the NLRA requiring employers to bargain with unions for hidden surveillance.

HOW TO BARGAIN WITH A UNION ABOUT HIDDEN VIDEO SURVEILLANCE

<13> In 2003, when National Steel Corporation went before the Seventh Circuit, it argued that mandatory bargaining for hidden surveillance violated public policy.[30] The company argued that hidden cameras would be of no value to employers if employees were made aware that the cameras were in use. National Steel Corporation insisted that the bargaining destroyed the necessary layer of secrecy required to meaningfully use the technology. If concealment was compromised the technology would fail to produce results — especially if the company must disclose the location of cameras.[31]

<14> Anheuser-Busch also argued before the D.C. Circuit that the NLRB's requirement of bargaining was unworkable since it would require "instance-by-instance" bargaining.[32] The company feared that every union workplace would be forced to run to the union *each* time it suspected employee or third-party misconduct. It insisted that going to the union representatives

with every investigation would be cumbersome and undercut the timeliness of investigations while exposing a practice predicated upon secrecy.[33] Both the Seventh Circuit and the D.C. Circuits rejected these arguments.

<15> The D.C. Circuit held that the NLRB left practical and sensible room for employers to meet the general requirements for bargaining without forcing employers to consult with the union on each investigation.[34] Similarly, the Seventh Circuit found that the NLRB did not specify that the locations of each camera be disclosed, thus the National Steel Corporation had enough secrecy to veil its investigations.[35]

<16> In practical terms, however, employers may wonder what autonomy they retain with respect to deployment of hidden cameras in light of the *National Steel* and *Anheuser Busch* cases? In previous cases where the NLRB has told employers to bargain with the union, the NLRB's administrative order decision did not delve into specifics. Rather the Board requested that employers and unions engage in good faith bargaining to either reach an agreement where both parties accommodate the risks and benefits of the technology and its impact upon employees or to reach an impasse.[36] Bargaining in good faith also includes the responsibility to supply union representatives with information relevant to the collective bargaining process.[37]

<17> The *National Steel* and *Anheuser-Busch* cases do provide helpful suggestions for lawyers advising clients. For one, employers can always return to overt camera usage. The NLRB has suggested that employers are free to use overt video surveillance to further its goals without reaching a collective bargaining agreement so long as it is not used in manner with a tendency to coerce, interfere or restrain employee job security or protected concerted union activity.[38] *Hidden* surveillance, however, is believed to innately restrain job security and is never to be used without bargaining with a union.[39]

<18> Based on the *Anheuser-Busch* case, employers can expect to bargain on several non-exclusive elements of hidden surveillance. For example, when an employer bargains over hidden cameras, its negotiations may include the purposes for surveillance and the general buildings or types of work areas where hidden surveillance may be used.[40] An employer and union representatives may also bargain over whether hidden cameras can ever be used in the workplace.[41]

<19> In the event that an employer cannot come to an agreement with unions on hidden video surveillance, but does not want the issue to cause a wedge in other subjects of

bargaining, cameras are not the only way that a company can investigate employee misconduct. A company may use private investigators to uncover such misconduct. Installing directly visible cameras may also be a solution. As mentioned above, an employer and a union may bargain over the general areas in which hidden cameras may be used.[42] This does not, however, suggest that the employer must disclose each location. Instead an employer may bargain with the union to install cameras in certain types of work areas without detracting from the secrecy of the precise location.[43]

<20> Another possible issue that can be bargained over is the level of suspicion that must be held by the employer before hidden cameras are utilized.[44] Such an agreement does not jeopardize the investigative value of hidden cameras since the specifics of location are not at disclosed. While perhaps cumbersome, its results may eliminate disputes with a union whose membership fears hidden cameras being installed without cause. During the bargaining process, employers can also agree not to use cameras as a sole basis for disciplining employees as another way to preserve the efficacy of using hidden cameras.[45] In such a situation an employer would agree to investigate further if the hidden cameras revealed suggestions of employee misconduct and find additional means to discipline such misconduct.

<21> Perhaps an equally contentious issue for employers is the question of when to approach the union, and with what preliminary information. This is especially true if a lawyer learns that the client has not yet disclosed the use of hidden cameras to its union employees. Section 8(a) (5) and (1) of the NLRA mandate that the duty to bargain in good faith also includes a duty to provide the union with information that is relevant to the bargaining.[46] Employers can violate the act not only by failing to bargain, but also by refusing to provide relevant information in a timely manner.[47] Anheuser-Bush neglected to provide information about other cameras, as the union requested, until six months after the request was made.[48] Lawyers should advise employer clients to respond in a timely manner to requests regarding hidden surveillance by providing information on their use.

MINIMIZING THE EFFECTS OF FAILING TO BARGAIN WHEN CAMERAS HAVE ALREADY BEEN INSTALLED

<22> The *Anheuser-Busch* case creates additional incentive for employers to bargain, or at the very least to try and minimize

damages if the Board determines that the employer should have bargained on the subject before disciplining employees. When the D.C. Circuit remanded the case to the NLRB, it did so only on the issue of make-whole relief.[49] The Court found that nothing within 29 U.S.C. § 160(c) requires the Board to deny make-whole relief when an employer discovers employees' misconduct only through its own unlawful action.[50]

<23> The D.C. Circuit cited *Tocco*, *Inc.* to show that the NLRB has found make-whole relief appropriate in cases where an employer had changed its drug testing policy. [51] In *Tocco,* the NLRB found make-whole relief appropriate where an employer had fired an employee after changing the drug testing policy without bargaining with the union for the change.[52] Like changes in drug testing policy, changing a means of surveillance significantly threatens job security. Employees who know that their drug use will be tested would refrain from use. An employee who is aware of the possibility of hidden surveillance will behave in a more appropriate manner while on breaks. The *Anheuser-Busch* court called for make-whole relief on remand or for the NLRB to overrule its line of drug test cases and polygraph cases.[53]

<24> For labor lawyers, this decision should be a strong indication of the possible sanction for a failure to bargain. It is impossible for management at Anheuser-Busch to overlook a worker who urinated from their roof. It is even harder to overlook individuals who used illegal drugs on the company's (or corporation) property. If an employer has installed hidden surveillance, but has yet to review the footage, the most prudent course may be to not view the recordings.

<25> If an employer has bargained with the union for hidden cameras, but is using them in a way that is inconsistent with the collective bargaining agreement, the employer could still be violating the NLRA. It is best to always keep good records during investigations to show that even without the surveillance footage the company knew of the misconduct. If a union successfully challenges the location of the camera, such documentation may be the only safeguard preventing a judgment for make-whole relief.

CONCLUSION

<26> Most employers can use hidden surveillance in the workplace without repercussion. Recent court decisions have begun to make clear the duties of employers of union employees with respect to video surveillance. Attorneys advising

union employers should be aware of the limitations on the use of hidden surveillance cameras.

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Footnotes

1. Jamila A. Johnson, University of Washington School of Law, Class of 2007. Thank you to Professor Anita Ramasastry, Carson Strege-Flora, Terrance Keenan, and Dmitri Iglitzen, partner in the law firm of Schwerin Campbell Bernard LLP, for their insight and support.

2. AMAnet.org, 2005 Electronic Monitoring & Surveillance Survey, http://www.amanet.org/press/amanews/ems05.htm (last visited July 31, 2006); Nancy King, *Labor Law For Managers Of Non-Union Employees In Traditional And Cyber Workplaces*, 40 AM. BUS. L.J. 827, 849 n.114 (2003) (discussing electronic monitoring generally).

3. Katy Huppert*, I'll Be Watching You,* The University Daily Kansan, Sept. 23, 2000, http://www.kansan.com/stories/2005/sep/22/ill_be_watching_you ; Charles J. Sykes, *Big Brother in the Workplace*, HOOVER DIGEST, NO.3 2000, http://www.hooverdigest.org/003/sykes.html.

4. *Id.*

5. 29 U.S.C.A. §§ 151-69 (2005).

6. *See* 29 U.S.C. § 158(d); Colgate-Palmolive Co., 323 N.L.R.B. 515, 515 (1997).

7. Brewers and Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36, 39 (D.C. Cir. 2005).

8. *Id.*

9. *Id.* The union appealed the NLRB decision not to sanction the employer with "make-whole relief". The employer appealed the conclusion that employers could not install hidden surveillance without first bargaining for the cameras. The employer argued that the restriction defeated the very concept of "hidden" surveillance. Make-whole relief is a remedy that attempts to return the fired employee to the position he/she would have been in, minus the employer's misbehavior. It can include giving an

employee back their former job and paying lost wages less any wages earned by other employment. The purpose of make-whole relief is to put a party in the position or conditions it was in prior to any unlawful employer behavior. *See* Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 372 (1977); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 769 (1976).

10. *See* Teamsters Local Union No. 639 v. NLRB, 924 F.2d 1078, 1085 (D.C. Cir. 1991). A court gives great deference to the remedy selection of the NLRB. The Board does not always need to give complete relief but the Board must adequately distinguish other precedent when crafting remedy. Failure to do so will give the courts grounds to remand. *See* Teamsters Local Union No. 639, 924 F.2d at 1085.

11. Jon Neiditz, *Privacy and the US Workforce*, 828 PLI/PAT 121, 139 (2005).

12. H.D. Warren, Annotation, *What Amounts To "Collective Bargaining,"* 147 A.L.R. 7 (2006).

13. *Id.*

14. 2 Guide to Employment Law and Regulations § 17:311 (2006); Quaker State Oil Ref. Corp., 107 N.L.R.B. 34, 35 (1993).

15. *Id.*

16. 2 Guide to Employment Law and Regulations § 17:120 (2006).

17. Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979) (citing 29 U.S.C. §§ 158(a)(5), (d) (2006)).

18. Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997).

19. *Id.*

20. L. Camille Herbert, Employee Privacy Law § 8A:36 (2005).

21. Colgate-Palmolive Co., 323 NLRB at 515.

22. *Id.*; *See also* 2 Guide to Employment Law and Regulations § 17:313 (2006).

23. Nat'l Steel Corp. v. NLRB, 324 F.3d 928 (7th Cir. 2003).

24. *Id.* at 932.

25. *Brewers and Maltsters*, 414 F.3d at 44.

26. Anheuser-Busch Inc., 342 N.L.R.B. No. 49, 2004-2005 NLRB Dec. (CCH) ¶ 16,734 (July 22, 2004).

27. *Brewers and Maltsters*, 414 F.3d at 46.

28. *Id.*

29. *Id.*

30. Reginald C. Govan & Freddie Mac, *Workplace Privacy*, 712 PLI/LIT 245, 293 (2004).

31. Nat'l Steel Corp., 324 F.3d at 932.

32. *Brewers and Maltsters*, 414 F.3d at 44.

33. *Id.*

34. *Id.*

35. Nat'l Steel Corp., 324 F.3d at 933.

36. *See* Colgate-Palmolive Co., 323 NLRB at 516; *Nat'l Steel Corp.*, 324 F.3d at 933.

37. ConAgra, Inc. v. NLRB, 117 F.3d 1435, 1439 (D.C. Cir. 1997).

38. *Brewers and Maltsters*, 414 F.3d at 42-43; *See*, e.g., Nat'l Steel Corp., 324 N.L.R.B. 499 (1997); John Vering, *NLRB Slaps Anheuser-Busch Over Surveillance Cameras*, 15 No. 7 Mo. Emp. L. Letter 7 (2005).

39. *Brewers and Maltsters*, 414 F.3d at 42-43

40. *Id.* at 44.

41. *Id.*

42. *Id*.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 45.

47. *Id.*; *See* Kimberly Kemper, *Industrial Relations: An Unfair Practice Was Found*, 22 NO. 23 Empalert 6, Nov. 10, 2005.

48. *Brewers and Maltsters*, 414 F.3d at 46.

49. *Id.* at 48.

50. *Id.* at 47.

51. *Tocco, Inc.*, 323 N.L.R.B. 480 (1997).

52. *Id.*; L. Camille Herbert, Employee Privacy Law, EMPPL § 5:4 (2006).

53. *Brewers and Maltsters*, 414 F.3d at 47-48.

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