Anheuser-Busch, Inc. *and* Brewers and Maltsters, Local Union No. 6, affiliated with the International Brotherhood of Teamsters. Case 14–CA–25299

July 22, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On October 1, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and supporting briefs. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions and the General Counsel filed a reply brief to the Respondent's answering brief. The Respondent filed separate answering briefs to the General Counsel's and Union's exceptions, and separate reply briefs to the General Counsel's and the Charging Party's answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

The panel unanimously agrees with the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by failing timely to respond to the Union's October 5, 1998 request, for relevant information and that it did not violate the Act by failing to respond to the July 2, 1998 oral information request. A majority of the panel agrees with the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Union prior to the installation and use of surveillance cameras in the workplace.[3] A different majority agrees with the judge's decision not to revoke the discipline imposed on 16 employees whose misconduct was recorded by the surveillance cameras.[4]

1. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice to and bargain with the Union prior to the installation and use of surveillance cameras. The Respondent installed hidden surveillance cameras in work and break areas of its facility. For approximately 6 weeks it observed 18 unit employees in a stairwell, in an elevator motors room, and on the rooftop. Sixteen of the employees were later disciplined for misconduct that the Respondent observed through use of the cameras.[5] We find, for the reasons set forth by the judge, and recently articulated by the Seventh Circuit Court of Appeals in *National Steel Corp. v. NLRB*, 324 F.3d 928 (2003), enfg. 335 NLRB 747 (2001), that the use of hidden surveillance cameras in the workplace is a mandatory subject of collective bargaining. While the area surveilled was not a part of the physical plant in which employees worked frequently, the record shows that employees did work there regularly, at least once a month, to perform the lock out and tag out procedure that is used to immobilize the elevators for cleaning. In fact, the surveillance cameras filmed employees in the elevator motors room going about their assigned tasks. Additionally, we find, in agreement with the judge, that the roof area was a designated break area where employees often took their breaks without any prohibition from the Respondent, and that the elevator motors room became an extension of the roof break area.[6] We conclude, contrary to our dissent-

[1] The Respondent has requested oral argument. We deny the request as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] We have modified the judge's recommended Order and notice to conform to his findings.

[3] Chairman Battista and Member Walsh. Member Schaumber would find, based on the specific facts of this case, that the Respondent's unilateral installation and use of surveillance cameras did not violate Sec. 8(a)(5) and (1). Cf. *Quazite Corp.,* 315 NLRB 1068, 1076–1077 (1994) (the judge found employer's use of surveillance camera to monitor fire alarm wiring in restroom ceiling without notice to the union did not violate Sec. 8(a)(5)). (Member Schaumber relies on the judge's unreviewed finding on this point solely for its persuasive value in addressing facts analogous to those presented here.) Specifically, the Respondent here installed the cameras to detect suspected, illegal drug-related activity. The cameras were trained inside of and at the staircase leading to an isolated elevator motor's room located on the roof of a building, and clearly posted with warnings and the words "Danger, Authorized Personnel Only." Very few employees were authorized to enter the motor's room, and those who were so authorized entered the room no more than twice a month for specific maintenance functions. Thus, in Member Schaumber's view, the Respondent's limited use of cameras in a single isolated area distinguishes this case from decisions such as *Colgate Palmolive Co.,* 323 NLRB 515 (1997), in which the Board analogized the use of video cameras in areas frequented by employees to intrusive investigatory tools such as physical examinations, drug and alcohol tests, and polygraph examinations.

[4] Chairman Battista and Member Schaumber (Member Walsh dissents).

[5] Five employees were discharged for visiting a remote site, smoking marijuana and/or being away from their work area for a long period of time. Seven employees were given last chance agreements and suspensions for visiting a remote work area for lengthy periods of time, sleeping while at work, or urinating on the roof. Four employees were given suspensions for being away from their work area for a lengthy period of time.

[6] The judge observed that the Respondent never issued written or oral instructions to its employees prohibiting them from going into the unlocked elevator motor's room and never told employees that it could not be used as a break area. The judge further noted the finding of one of the three arbitrators who considered grievances in this case, viz., that the roof area was frequently used by employees for breaks and that the elevator motor's room was not an area that was off limits to employees.

ing colleague, that the cameras were trained on a work and break area where employees regularly performed their assigned duties and were permitted to take breaks, and therefore the unilateral installation and use of the cameras violated Section 8(a)(5) of the Act.[7]

2. We affirm the judge's proposed remedy, and reject the General Counsel's contention that the Respondent must rescind the discipline received by the 16 employees whose misconduct was observed by the cameras. The judge concluded that the employees' misconduct was in violation of plant rules, and such misconduct was the basis for the suspensions and termination. In these circumstances, the judge found it inconsistent with the policies of the Act, and public policy generally, to reward parties who engaged in unprotected conduct. We agree.

We reject the argument that the discipline must be reversed because it is essentially the fruit of unlawful surveillance, i.e., surveillance without opportunity to bargain. In *Taracorp*, 273 NLRB 221 (1984), the Board found unlawful an investigatory interview that was conducted after the respondent denied the employee's request for union representation.[8] The unlawful interview yielded information of misconduct that was the basis for a discharge. The Board held that the discharged employee was not entitled to reinstatement and backpay. The Board reasoned that there was an insufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy. *Taracorp,* supra at 223 fn. 13.

The principle that an employee discharged or disciplined for misconduct is not entitled to reinstatement and backpay even though the misconduct is uncovered in an unlawful way, is embodied in the remedial restrictions in Section 10(c) of the Act, which provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or dicharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

As in *Taracorp*, we find an insufficient nexus in the instant case between the Respondent's unlawful installation and use of the cameras and the employees' misconduct to warrant a make-whole remedy.[9] In agreement with the judge, we find that the General Counsel's requested make-whole relief is contrary to the specific remedial restriction contained in Section 10(c) of the Act.[10]

Our colleague cites cases involving an unlawful unilateral change in a rule regulating employee conduct (e.g., attendance rules or production standards) and discipline of an employee for violating that rule. In such cases, the Board properly revokes the discipline. See *Great Western Produce,* 299 NLRB 1004 (1990). These cases are inapposite, however, as the unilateral change at issue here did not concern employee conduct rules, and the rules that the employees violated were unaltered and preexisting.

Although our colleague relies in particular on *Tocco, Inc.*, 323 NLRB 480 (1997), that reliance is misplaced. In *Tocco*, the Board revoked the discipline of employees who were discharged under the employer's drug use policy after the employer had unlawfully changed that policy. Although, as our colleague notes, the change concerned the employer's interpretation of the term "cause" under the drug testing policy, the change nonetheless was to the very policy under which the employees were discharged. By contrast the unilateral change here did not concern any rule that the employees were disciplined for violating. Thus, as in *Taracorp*, supra, there is an insufficient nexus between the unfair labor practice and the employee discipline to justify revoking the discipline as a means to remedy the unfair labor practice.

Finally, our colleague says that there is a "recent trend toward weakening our remedies." We perceive no such trend. The Board approaches each case individually, and tailors a remedy appropriate to each specific case, consistent with Section 10(c) of the Act. That is all we have done here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Anheuser-Busch, Inc., St.

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[7] We do not suggest that an employer, in bargaining, *must* apprise the union of the location of the cameras or the time in which they will be in use. "Effective accommodation is necessarily dependent on the facts of [each] individual case and the course of bargaining itself." *National Steel v. NLRB*, supra at 933 fn. 3. The employer must apprise the union of its proposal to use such cameras, and the general reasons for the proposal.

[8] See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[9] Member Schaumber concurs that the discipline imposed on 16 employees shown on the videotapes should not be rescinded, because the employees were disciplined for unprotected conduct that violated established plant rules and regulations, and in some instances, state and Federal law. The employees' improper and illegal misconduct, not the alleged failure to bargain, was the sole basis for the disciplinary action. See *Taracorp Industries*, supra.

[10] Although the judge did not order rescission of the discipline imposed by the Respondent, the judge suggested that we consider deferring the issue of discipline to the parties' grievance-arbitration procedure. Neither the General Counsel nor the Charging Party seeks deferral of this issue. The Respondent opposes deferral to the extent that previously arbitrated matters would be redecided, and discipline for which no grievances were filed would also be deferred to arbitration. Since all parties oppose deferring to arbitration to at least some degree, and as we agree with the judge that Respondent's discipline of its employees should not be rescinded, we do not find that deferral is appropriate here.

Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the attached notice for that of the administrative law judge.

2. Substitute the following for paragraph 1(b).

"1(b) Failing and refusing to respond in a timely fashion to requests for information respecting matters relevant to unit employees."

3. Substitute the following for paragraph 2(b):

"2(b) On request, bargain collectively with the Union by timely furnishing it with the information it requests respecting matters relevant to unit employees."

MEMBER WALSH, dissenting in part.

I join Chairman Battista in finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally installing and using surveillance cameras in the workplace without giving the Union notice and an opportunity to bargain.[1] However, I dissent from my colleagues' failure to rescind the discipline imposed on 16 employees for conduct discovered solely through use of the unlawfully installed cameras. In order to remedy its unlawful conduct, the Respondent must be ordered to rescind the employees' discipline, expunge the employees' files of any reference to their discipline, make the employees whole, and offer reinstatement to those employees who were discharged.

FACTS

The Respondent operates a brewery, and the Union represents the Respondent's brewery and draft employees. In spring 1998,[2] during a tour of the Respondent's roof and elevator motors room that was part of a routine inspection, the Respondent found foam pads and cardboard mats, a table, and four chairs. These items led the Respondent to suspect that the room was being used for impermissible purposes, possibly drug activity. The Respondent then installed surveillance cameras on the roof and in the elevator motors room. The Union was not notified of the inspection, the discovery of the items in the elevator motors room, the suspicion of drug use, or the decision to install the cameras.

The camera on the roof became operational on May 17 and remained in place until June 30, when it was removed and surveillance ceased. The camera in the elevator motors room was installed in early June and also remained in place until June 30.

On July 1, the Respondent told the Union for the first time that the Respondent had used the cameras. The Respondent also told the Union that it had reviewed the tapes from the cameras and that a number of employees had been observed engaging in misconduct.

Between July 2 and 7, solely on the basis of information it obtained from observing the surveillance tapes, the Respondent interviewed 18 employees. Prior to the interviews, the Union advised all of these employees that they had already been observed on tape and should be truthful when interviewed.

Sixteen of the 18 employees interviewed were disciplined for misconduct discovered through the surveillance cameras. Five were discharged, four were suspended, and seven were given last-chance agreements and suspensions.

Judge's Decision and Recommended Remedy

The judge found that the Respondent's installation and use of hidden surveillance cameras was a mandatory subject of bargaining. See *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). The judge found that both the rooftop area and the elevator motors room were break or work areas in which employees were permitted to be present. He therefore concluded that the Respondent violated Section 8(a)(5) and (1) by unilaterally installing and using surveillance cameras in those areas. As noted above, I join Chairman Battista in adopting these findings.

To remedy the violation, the judge recommended that the Respondent cease and desist from its unlawful conduct and bargain with the Union, on request, concerning the installation and use of surveillance cameras. The judge denied the General Counsel's request to restore the status quo ante, rescind the discipline, and make the 16 employees whole. My colleagues adopt the judge's recommended remedy. I dissent.

Reinstatement and Make-Whole Relief are the Only Remedies that Will Truly Restore the Status Quo Ante

Section 10(c) of the Act gives the Board broad discretionary power to fashion remedies to effectuate the Act's policies. See *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346 (1953). In exercising its authority under Section 10(c), the Board is guided by the principle that remedial orders should "restor[e] the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Die Supply Corp.,* 160 NLRB 1326, 1344 (1966) (quoting *Royal Plating and Polishing Co.,* 148 NLRB 545, 548–549 (1964), supplemented 152

[1] In addition, I agree with my colleagues that the Respondent violated Sec. 8(a)(5) and (1) by failing timely to respond to the Union's October 5, 1998 information request. I further agree with my colleagues that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to respond to the Union's July 2, 1998 oral information request. Finally, I join my colleagues in denying oral argument.

[2] All dates are in 1998 unless otherwise specified.

NLRB 619 (1965)); see also *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). When an employer has violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment, this guiding principle requires restoring the status quo ante and making employees whole for losses suffered as a result of the unlawful unilateral change. See, e.g., *Detroit News, Inc.,* 319 NLRB 262 fn. 1 (1995) ("it is customary to order restoration of the status quo to the extent feasible"); *Martin Marietta Energy Systems*, 316 NLRB 868 fn. 5 (1995) (Board's "traditional remedial requirements" include making employees whole for losses resulting from respondent's unlawful unilateral changes). Thus, pursuant to the Board's standard remedial principles, employees who have been discharged or disciplined as a direct result of an unlawful unilateral change are entitled to be reinstated and made whole. See, e.g., *Great Western Produce*, 299 NLRB 1004, 1006 (1990) (ordering reinstatement and make-whole relief for employees whose discharges resulted from unilaterally implemented policies); see also *Delta Tube & Fabricating Corp.,* 323 NLRB 856, 863 (1997) (ordering respondent to revoke any warnings or discipline issued to employees pursuant to unilaterally implemented drug testing policy); *Storer Communications*, 297 NLRB 296, 299 (1989) (ordering reinstatement and backpay for employee discharged pursuant to unilaterally implemented drug and alcohol policy).[3] By refusing reinstatement and make-whole relief in the present case, my colleagues have unnecessarily denied 16 employees the only truly effective remedy for the Respondent's unfair labor practice.

The Board has ordered reinstatement and make-whole relief under circumstances similar to those present here. See *Tocco, Inc.*, 323 NLRB 480 (1997). In *Tocco*, the employer had a pre-existing drug use policy that allowed it to test employees for "cause." The employer unilaterally changed the policy by interpreting "cause" in a way that differed from past practice.[4] Applying its new interpretation of "cause," the employer tested employees it ordinarily would not have tested. Three employees who tested positive were discharged. The judge found, and the Board affirmed, that the employer violated Section 8(a)(5) and (1) by unilaterally changing the policy. The Board's Order required the employer to rescind the unilaterally implemented policy, restore the old policy, and reinstate the discharged employees and make them whole. See id. at 481 fn. 1. Thus, in *Tocco*, the unlawful unilateral change did not alter the respondent's prohibition on drug use or the penalties for violating that prohibition. It altered only the means of detecting drug use. As a result of the unilateral change, the employer discovered drug use that it would not have discovered otherwise. Similarly, in the present case, 16 employees were disciplined or discharged for conduct discovered solely as a result of the Respondent's unfair labor practice. As in *Tocco*, those employees are entitled to reinstatement and make-whole relief.

My colleagues deny that relief. In doing so, they rely on *Taracorp Industries*, 273 NLRB 221 (1984), in which the Board carved out a narrow exception to its traditional reinstatement and make-whole remedy. The Board in *Taracorp* found such a remedy inappropriate in cases involving a Section 8(a)(1) violation of an employee's right to union representation at an investigatory interview. As explained below, *Taracorp* is inapplicable here.

In *Taracorp*, a foreman reported an employee's insubordination to the plant manager. The plant manager then interviewed the employee about the incident. The employee requested union representation during the interview, but the plant manager refused. After the interview, the employee was discharged for insubordination. Pursuant to *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Board found that the employer violated Section 8(a)(1) by denying the employee's request for union representation. However, the Board found that a make-whole remedy was inappropriate "for this or any similar *Weingarten* violation." 273 NLRB at 221. The Board found that in *Weingarten* cases there is "not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." Id. at 223. Therefore, the Board found that a make-whole remedy would contravene Section 10(c) of the Act, which provides that no Board order shall require reinstatement or backpay to an employee if that employee was suspended or discharged for cause.

My colleagues find that the reason for the discipline in the present case, as in *Taracorp*, was misconduct. Therefore, they find an insufficient nexus between the Respondent's unfair labor practice and the reason for the

[3] In *Great Western*, the Board also stated that, as a remedial matter, "a respondent employer may avoid having to reinstate and pay backpay to an employee discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employee even absent that rule or policy." 299 NLRB at 1006. In the present case, however, the employees were disciplined for conduct that was discovered only through use of the unilaterally installed surveillance cameras. Therefore, the Respondent cannot show that it would have disciplined the employees even absent its unlawful unilateral change.

[4] Previously, the employer had determined "cause" based on evidence of possession or use of drugs by a specific employee. The employer unilaterally changed its interpretation of "cause" by performing a unit-wide drug test on the basis of a concern that the plant's overall safety, efficiency, and production were declining.

discipline to justify make-whole relief without contravening Section 10(c).[5]

Concededly, the employees' activities discovered through use of the surveillance cameras included misconduct, some of it serious. In the present case, however, there is a nexus between the unlawful unilateral change and the discipline imposed on the employees that was not present in *Taracorp*. In *Taracorp*, as in a typical *Weingarten* case, the employer had knowledge or suspicion of the disciplined employee's wrongdoing before conducting the interview at which the *Weingarten* violation occurred.

Here, in contrast, the Respondent learned of the employees' conduct *solely* through its unfair labor practice. Absent the unlawful installation and use of the cameras, the Respondent had no basis even to question those 16 employees, let alone to discipline them. Under these circumstances, the discipline is a direct result of the Respondent's unfair labor practice, and reinstatement and make-whole relief are appropriate and consistent with Section 10(c). See *Tocco*, supra at 481 fn. 1; *Great Western Produce*, supra at 1006–1007. Therefore, *Taracorp's* narrow exception to reinstatement and make-whole relief does not apply.

Unfortunately, in this case my colleagues have continued a recent trend toward weakening our remedies for unlawful conduct, making them much less effective as a deterrent. See *Georgia Power Co.*, 341 NLRB 577, 578–579 (2004) (Member Walsh, dissenting) (panel majority requires respondent to show that individual discriminatorily denied a promotion "certainly" would have been promoted before requiring respondent to offer the promotion to the discriminatee). Like that case, the only really effective deterrent in this case would be obtained by applying the fundamental remedial principle that Board orders should "restor[e] the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Die Supply*, supra at 1344. The 16 employees in this case were disciplined and discharged solely as a result of the Respondent's unlawful unilateral installation and use of hidden surveillance cameras. Accordingly, I dissent from my colleagues' decision not to order reinstatement and make-whole relief.

[5] In raising the specter of Sec. 10(c) of the Act, which prohibits the Board from ordering reinstatement or backpay for any employee who has been discharged "for cause," my colleagues have invoked a statutory red herring that has no application to this case. As explained below, because the discharges in this case directly resulted from the Respondent's unlawful use of the surveillance cameras, it was the Respondent's unlawful conduct that caused the discharges, and thus, Sec. 10(c) of the Act is not implicated.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Brewers and Maltsers Local Union No. 6, affiliated with the International Brotherhood of Teamsters over the installation and use of surveillance cameras within our facility and other mandatory subjects of bargaining.

WE WILL NOT refuse to respond in a timely fashion to requests for information respecting matters relevant to unit employees.

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

WE WILL, on request, bargain collectively with the Union as the exclusive bargaining representative of our employees with respect to the installation and use of surveillance cameras within our facility and other mandatory subjects of bargaining.

WE WILL, on request, bargain collectively with the Union as the exclusive bargaining representative of our employees by timely providing them with information relevant to unit employees.

ANHEUSER-BUSCH, INCORPORATED

Kathy J. Talbott-Schehl Esq., for the General Counsel.
Dennis C. Donnelly Esq., of St. Louis, Missouri, for the Respondent-Employer.
Arthur J. Martin Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on May 25 and 26, 1999, in St. Louis, Missouri, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 14 of the

National Labor Relations Board on November 23, 1998.[1] The complaint was subsequently amended on May 18, 1999.[2] The complaint, based on an original and amended charge filed by Brewers and Maltsters Local Union No. 6, affiliated with International Brotherhood of Teamsters (the Charging Party or Union), alleges that Anheuser-Busch, Incorporated (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent installed hidden surveillance cameras in the elevator motors room atop Stockhouse 16 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent concerning this conduct and the effects of the conduct. Additionally, the complaint alleges that the Respondent failed and refused to furnish the Union information requested by it on June 30 and October 5. Lastly, the complaint alleges that the Respondent disciplined 16 employees based on information obtained from the use of the hidden surveillance cameras.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the brewing of beer, with an office and place of business in St. Louis, Missouri, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Missouri and has sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since about 1948 and at all material times, the Union has been designated as the exclusive collective-bargaining representative of the brewery and draft employees and has been recognized by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which expired by its terms on February 28. The parties' mutually agreed to extend the agreement for 1 month while they continued to negotiate in an effort to reach a new collective-bargaining agreement. In March 1998, Respondent proffered a final contract offer to the Union that was initially rejected by the membership. A number of lengthy clarification sessions were held between the parties to discuss the agreement but the union membership ultimately rejected the Respondent's final contract offer in July 1998. Accordingly, the Respondent implemented its final contract offer on September 22.

At all material times Mel Harris held the position of assistant brewmaster, David Mulherin served as human resource manager, and William Daugherty is captain of security for Respondent.

B. Facts

Respondent anticipated a strike by its employees and began photographing its facility and equipment in late April and early May 1998, since it feared that sabotage might occur. During a routine inspection of the Brewhouse area by one of Respondent's supervisors that included a tour of the elevator motors room atop Stockhouse 16,[3] several six-foot foam pads, hidden in the panel doors which house the elevators' electrical system, were discovered. Also found, were cardboard mats of a corresponding size, as well as a table and four chairs. The supervisor apprised Assistant Brewmaster Harris of his discovery who in turn notified Daugherty in security. After a tour of the penthouse, Daugherty concluded that the presence of these articles suggested that persons were using the room for reasons inconsistent with any work assignment and possibly illegal drug activity might be ongoing. Thereafter, a decision was made to install a camera on the roof inorder to determine who was entering and exiting the penthouse. Accordingly, a technical system outside consultant was retained to erect a hidden surveillance camera in a metal box that was pointed in the direction of the penthouse stairwell leading to the entrance of the elevator motors room. This surveillance camera became operational on May 17 and remained in place until June 30, when it was removed and the surveillance ceased. The camera ran 24 hours a day, 7 days a week. In early June 1998, a second surveillance camera was installed in the interior of the elevator motors room and also remained in place until June 30. Respondent reviewed 30 to 40 hours of tape and determined that 16 employees violated a number of policies, practices, and plant work rules including being at remote areas of the brewery and inhaling or otherwise consuming unlawful drugs.

On July 1, Harris invited Union Secretary-Treasurer Ed Polster to meet in his office. During the meeting, Harris apprised Polster, for the first time, about the installation of the surveillance cameras and that a number of employees were observed on the tapes engaging in prohibitive conduct. Polster strenuously objected to not being informed in advance of the installa-

[1] All dates are in 1998 unless otherwise indicated.

[2] Over the objection of the Respondent, I permitted the amendment of the complaint to add the allegation that on June 30, the Union orally requested information about other hidden cameras, and by letter dated October 5, the Union requested certain items of information. As the amendment is closely related to the underlying issues in the case and the information was needed to properly investigate the grievance and prepare for arbitration for employee Lowell Puryear, it was just and proper to permit the General Counsel to amend the complaint.

[3] The elevator motors room or the penthouse is located atop the roof on the eighth floor of Stockhouse 16, where the brewing and fermenting of beer occurs. To reach the penthouse, an individual exits onto the roof of the eighth floor and walks to a flight of stairs that leads directly to the elevator motors room. Inside the penthouse is a small room that houses the electrical motors and systems that operate the north and south elevators for Stockhouse 16.

tion of the surveillance cameras and was of the opinion that if the Union was informed before the installation, that the underlying issue could have been worked out. Harris told Polster that there was no obligation to bargain about this issue and he planned on scheduling meetings with the 16 employees observed on tape, to which he anticipated that various degrees of discipline would be forthcoming.[4]

On July 2, the first employee investigatory meeting was held in Mulherin's office. In addition to Mulherin and Harris, alternate steward, Don Furrer and Polster, attended on behalf of the Union. Polster again asked why the Union was not notified in advance about the installation of the surveillance cameras and Mulherin replied, "that it was a matter for corporate security." Furrer asked, "whether there were hidden cameras anywhere else," and Mulherin replied, "that there are no others that we were aware of."

By letter dated October 5, the Union requested 14 items of information in connection with the scheduled arbitration of employee Lowell Puryear (GC Exh. 3). By letter dated October 22, the Respondent provided certain information in response to the Union's request. In regard to items 11 through 14, the Respondent apprised the Union that it is still in the process of determining whether there is any additional information responsive to that request (GC Exh. 4). The Respondent provided additional information responsive to items 11 through 14 on May 25, 1999, the first day of the subject hearing.

C. Analysis and Conclusions

1. The surveillance cameras

The General Counsel alleges in paragraph 6 of the complaint that the Respondent installed hidden surveillance cameras in the elevator motors room atop Stockhouse 16, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct and the effects of the conduct.

The Respondent argues that the subject of the installation of hidden surveillance cameras is not a mandatory subject of bargaining as the situs of installation is not a designated work or break area. Therefore, it opines that there was no obligation to notify the Union in advance of the surveillance camera installation or to engage in collective-bargaining negotiations. Respondent further argues that the elevator motors room is a remote location atop the roof of Stockhouse 16 and is a restricted area limited only to employees who are assigned to lock out and tag out the elevator operating system. Indeed, there is a sign on the elevator motor operations door that states "Warning Equipment Inside, Starts Automatically, Danger, Authorized Personnel Only."

There is no dispute that two hidden surveillance cameras were installed without advance notice to the Union and without an opportunity for the Union to request negotiations. Indeed, Mulherin testified that he did not notify the Union on or before May 17, when the first surveillance camera was installed on the eighth floor roof of Stockhouse 16. The Board in *Colgate-Palmolive Co.,* 323 NLRB 515 (1997), has addressed this issue and held that an employer's installation and use of hidden surveillance cameras is a mandatory subject of bargaining. It is a matter germane to the working environment and not among those managerial decisions that lie at the core of entrepreneurial control. The Board further found that the installation of surveillance cameras is analogous to physical exams, drug/alcohol testing requirements, and polygraph testing, all of which are employer investigatory tools or methods to ascertain whether any employees engaged in misconduct and all of which are mandatory subjects of bargaining. In that case, the Board held that since the installation and use of cameras has the potential to affect employees continued employment whose actions are being monitored, the use of cameras in a restroom and fitness center raised privacy concerns that add to the potential effect on employees working conditions.

The Respondent defends its conduct on the basis that the roof on the eighth floor atop Stockhouse 16 is not a defined break area and the elevator motors room is not a work area or a designated break area. Contrary to this argument, I find for the following reasons that both the eighth floor roof area atop Stockhouse 16 and the elevator motors room are break and/or work areas in which employees are permitted to be present.

The evidence establishes that employees at the Respondent are not required to take fixed lunches or breaks. Likewise, no permission is required from a supervisor to take lunch or engage in a break. The parties' past practice permits that the lunch break may be taken between the 4th and 5th hour of the workday. Polster credibly testified that while there are designated lunch and break areas such as the locker rooms in Building 174, the picnic area in the alley between Stockhouse 14 and 16 and the breakroom behind the control room on the fifth floor of Stockhouse 16,[5] other areas have routinely been used by employees for break and lunch areas. In this regard, due to the cool temperatures on floors one to five and the warm temperatures on floors six to ten of Stockhouse 16, a longtime practice has developed that employees go out on the fire escapes or the roofs of the upper floors (roofs on floors six, seven, and eight of Stockhouse 16) to take a break or smoke a cigarette. Indeed, employees Kenkel, Furrer, Renderer, Bradshaw, and Wiese all

[4] Between July 2 and August 1998, 16 employees were disciplined. Employees' Don Graul, Elijah Johnson, Keith Kasal, William "Mike" Koob, and Lowell "Greg" Puryear were discharged. Employees Ray Reiser, Gary Sabourin, Tim Schnurbusch, and Charlie Zalavdek were suspended and employees James Ahlemeyer, Fred Bishop, Fred Duing, Dennis Meyer, Bob Piva, Ed Sabourin, and Gary Wuertz were issued a last chance agreement (R. Exhs. 19–34). The Union filed individual grievances on behalf of all the employees and the parties' proceeded to arbitration on three of the discharge grievances involving employees Graul, Johnson, and Puryear. Each of the three arbitrators independently issued decisions sustaining the discharges (R. Exhs. 19, 20, and 23). It was further agreed by the parties to defer the remaining two-discharge arbitrations until the completion of the subject unfair labor practice case. In each of the three cases that proceeded to arbitration, the refusal to bargain issue was not addressed. Rather, each of the arbitrators deferred to the Board's jurisdiction concerning this matter.

[5] Between May 17 and June 30, the breakroom on the fifth floor was being remodeled and was not available for employee use. Although the breakroom is available for all employees working in Stockhouse 16, the control room employees mainly use it. Smoking is not permitted in the fifth floor breakroom or in the locker breakroom in Building 174.

credibly testified that they have regularly taken their breaks on the roofs of Stockhouse 16 without any prohibition from Respondent. Likewise, several of these individuals testified that on occasion, supervisors of Respondent have also used the roof areas to take their break. The evidence also establishes that the roofs on Stockhouse 16, including the eighth floor roof, have been used by employees and their families on the July 4 holiday to watch local air shows and the fireworks. Moreover, Harris testified that there is no sign on the doors exiting to the roof area prohibiting employees from taking their breaks on the roofs, that employees often use the roofs of Stockhouse 16 to take breaks and smoke cigarettes and he has never given any instructions to employees or posted notices that employees were not to go out on the Stockhouse roofs. Lastly, a number of employees credibly testified that trash receptacles are provided on each roof of Stockhouse 16, and they have been assigned the job of cleaning the roof top areas.

Under these circumstances, and contrary to Respondent's argument, I conclude that the roof areas have become designated break areas, and when Respondent unilaterally installed a hidden surveillance camera on the roof of the eighth floor of Stockhouse 16, without notifying the Union and giving it an opportunity to negotiate, Section 8(a)(1) and (5) of the Act has been violated.[6] Indeed, I find that the installation of the hidden surveillance camera on the eighth floor roof is not unlike the installation of a camera in the fitness room, as found violative by the Board in *Colgate-Palmolive.*

In regard to the installation of the hidden surveillance camera in the interior of the elevator motors room, I also find that this was violative of the Act for the following reasons. Kenkel credibly testified that the lockout and tagout procedure for the elevator control system in the eighth floor penthouse has been in effect for at least the last 8 years.[7] For this purpose, employees represented by the Union have regularly been assigned this job at least once a month for 1-hour per day (GC Exh. 17). On occasion, employees have been disciplined for failing to complete the procedure. Indeed, the tapes compiled by the two surveillance cameras, revealed that employees Bradshaw and Wiese were observed completing this assignment on May 25, and were not disciplined for their actions. Moreover, the Respondent has issued no instructions, either orally or in writing, prohibiting employees from going into the unlocked elevator motors room or ever told employees that the room could not be used as a break area. Under these circumstances, I conclude that the elevator motors room is a designated work area used at least once a month by employees to complete work assignments. Therefore, when Respondent unilaterally installed a surveillance camera in the interior of the elevator motors room without negotiating with the Union, it violated Section 8(a)(1) and (5) of the Act. Likewise, I find that since the Respondent never issued any instructions to employees that the unlocked elevator motors room could not be used as a break area, it became an extension of the roof area.[8]

2. Requests for information

The General Counsel, in paragraph 7(A) of the amendment to the complaint alleges since about June 30, the Union orally requested that Respondent furnish the Union with information about whether other hidden cameras had been or might be installed throughout the Brewery complex that might surveil bargaining unit employees.

The evidence establishes that in the July 2 meeting attended by Harris, Mulherin, Polster, and Furrer, the Union orally asked whether there were other hidden surveillance cameras. I find that Mulherin immediately responded to this question by stating that, "there are no others that we are aware of."

Under these circumstances, I find that the Respondent did respond orally to the request for information raised by the Union at the July 2 meeting. Therefore, I conclude that the Respondent did not violate the Act as alleged by the General Counsel in paragraph 7(A) of the complaint.

The General Counsel further alleges in paragraph 7(B) of the complaint that since October 5, the Union, by letter requested that Respondent furnish the Union with information concerning documents related to or reflecting any monitoring of bargaining unit employees in the Brewery complex by any electronic, photographic or remote means, and any documents related to or reflecting any surveillance of bargaining unit employees in the St. Louis Brewery complex.

The evidence discloses that in its October 5 letter, the Union requested 14 items of information in order to carry out its responsibility under the parties' collective-bargaining agreement and to properly prepare a grievance concerning the discipline of a bargaining unit employee. By letter dated October 22, the Respondent replied to the Union's requests for information for items 1 through 10. In regard to items 11 through 14, while the Respondent provided certain information, it stated in the letter that it is still in the process of determining whether there is any additional information responsive to request numbers 11 through 14. The allegations alleged in paragraph 7(B) of the complaint parallel items 12 and 13 in the October 5 letter. It was not until May 25, 1999, on the first day of the hearing, that the Respondent provided the Union with the information responsive to items 12 and 13 in the October 5 letter.

[6] Contrary to Respondent's argument that the first surveillance camera solely was focused on the stairway leading to the penthouse, the testimony disclosed that the camera filmed employees entering the stairwell and the area behind and around the stairwell. Indeed, the camera filmed employee's Vince Salih and Bobby Arnold while they were on the roof, but they were not disciplined because Harris did not believe they had done anything wrong. Thus, contrary to the Respondent's reliance on the finding by the administrative law judge in *Quazite Corp.,* 315 NLRB 1068, 1076 (1991), employees in the subject case were being monitored as they went about their daily tasks in the workplace.

[7] As part of the lockout and tagout procedure, employees shut down the elevators in order to clean out the basement elevator pits, shafts, and cabs.

[8] As found by Arbitrator Malamud, employee Lowell Puryear credibly testified that when he worked on the labor gang and was assigned to Stockhouse 16, he took breaks in the elevator penthouse (E. Exh. 23, item E). The arbitrator further found that the roof area is frequently used by employees who want to take a breather to smoke a cigarette or to warm up and that the elevator penthouse is not an area that was off limits to employees.

The obligation under Section 8(a)(1) and (5) of the Act on the part of an employer to supply the statutory bargaining agent with relevant information concerning matters to be negotiated is well and long established. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). Unreasonable delay in furnishing such information is as much a violation of the Act as a refusal to furnish any information at all. *Bundy Corp.* 292 NLRB 671 (1989) (violation of Act to ignore or delay supplying the Union with necessary information for 2-1/2 months).

In the subject case, the Respondent's approximately 8-month delay in providing items 12 and 13 is unreasonable and contravenes the principles of collective bargaining. Respondent offered no credible excuse in the record for its delay in providing the requested information.

Under these circumstances, I find by failing to provide the Union the information in a timely fashion, Respondent violated Section 8(a)(1) and (5) of the Act.

2. The discipline

The General Counsel alleges in paragraph 8 of the complaint that since about July 1, Respondent has disciplined 16 employees, based on information obtained from the use of the hidden surveillance cameras. As part of the remedy for refusing to give advance notice to the Union and negotiate over the unilateral installation of the surveillance cameras, the General Counsel seeks to rescind all of the discipline visited on the 16 employees.

To support this argument, the General Counsel relies on cases cited in its posthearing brief[9] and *Tocco, Inc.,* 323 NLRB 480 (1997), wherein the Board held that by changing its drug testing policy and testing employees that resulted in the discharge of three unit employees without notifying and bargaining with the Union, the Employer violated Section 8(a)(1) and (5) of the Act. As part of the remedy for the unfair labor practices, the Board ordered the three employees to be reinstated and made whole for any loss of earnings and other benefits suffered as a result of being discharged pursuant to the unlawfully implemented drug testing policy.

The Respondent initially argues that prior to the filing of the subject unfair labor practice charges in September 1998, the Union filed 16 individual grievances under the parties' collective-bargaining agreement challenging the discipline that was visited on each of the employees. Three of the 16 grievances involving employees Graul, Johnson, and Puryear were arbitrated and independent decisions were rendered by three separate arbitrators (R. Exhs. 19, 20, and 23). The remaining two-discharge arbitrations have been deferred by agreement of the parties until the completion of the subject unfair labor practice case.

Although the Respondent has not specifically requested that the discipline portion of the subject case be deferred under the Board's *Dubo* and *Spielberg* policies,[10] I am of the opinion that the Board should consider such a procedure. Here, the three arbitrators refused to address the refusal to bargain issues concerning the installation of the surveillance cameras and the refusal to provide information allegations, instead deferring to the Board's jurisdiction. Rather, the sole issue presented to the arbitrators was whether the discipline imposed on the three discharged employees was just and proper under the parties' agreement and under established plant rules, regulations, and policies in effect prior to the alleged misconduct. The Charging Party, herein, made an election prior to the filing of the subject unfair labor practice charges and should be compelled to proceed in that forum rather then receiving two bites of the apple.

The Respondent further argues, relying on the Board's decision in *Taracorp Industries,* 273 NLRB 221 (1984), and in effect based on cases such as *Marshall Durbin Poultry Co.,* 310 NLRB 68 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *John Cuneo, Inc.* 298 NLRB 856, 857 (1990), that if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. Here, the Respondent learned of the unprotected conduct between May 17 and June 30, pursuant to the tapes made by the hidden surveillance cameras. Thus, Respondent opines, that not only is reinstatement inappropriate, but backpay is also not warranted as knowledge of the unprotected conduct was obtained prior to the effectuation of the discipline on the 16 employees.

In my opinion, the Respondent's argument has merit. Thus, it is not consistent with the policies of the Act or public policy generally to reward such parties who engage in unprotected conduct. In the subject case, the Respondent has established plant rules prohibiting employees to be away from their work area for extended periods of time and written policies and prohibitions against employees using drugs on the premises.[11] In my view, the conduct engaged in by the 16 employees violated established plant rules and regulations and should not be undone solely because the Respondent did not notify or engage in negotiations with the Union prior to the installation of the surveillance cameras. In this regard, when an employee brings drugs to the workplace, the employee expands the problem to other employees and violates the Employer's rules and policies against drug use in the workplace.

The logic of this argument is also not unlike the Board's holding in *Taracorp,* where it held that Section 10(c) of the Act precludes an order reinstating an employee who was discharged for insubordination notwithstanding the fact that the employer violated the employee's *Weingarten* rights prior to the discharge. Here, the alleged failure to bargain allegation like the alleged *Weingarten* violation, is not itself the basis for the disciplinary action visited on the employees. Rather, the illegal misconduct engaged in by the employees caused their terminations or suspensions. Consequently, because the discipline was based on "just cause," Section 10(c) of the Act prohibits the

[9] See pp. 35 and 36 of the General Counsel's posthearing brief.

[10] *Dubo Mfg. Corp.,* 142 NLRB 431 (1963), 148 NLRB 1114 (1964), enfd. 353 F.2d 157 (6th Cir. 1965), and *Spielberg Mfg. Corp.,* 112 NLRB 1080 (1955).

[11] In February 1996, Respondent rewrote its drug abuse policy. It was distributed to all employees and training sessions were held to explain the policy. Employees were informed that anyone violating the policy is subject to disciplinary action, up to and including termination (R. Exh. 11).

entry of an order requiring reinstatement or backpay regarding the 16 employees. See also, *Postal Service,* 314 NLRB 227 (1994), and *Page Litho, Inc.,* 313 NLRB 960, 962 (1994).

Accordingly, in the particular circumstances of this case, I would not rescind the discipline visited on the 16 employees as a result of their misconduct uncovered from reviewing the tapes from the surveillance cameras. As I discussed earlier in the decision, however, I would recommend that the Board consider deferring the issue of the discipline to the parties' established grievance-arbitration machinery.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent's use of hidden surveillance cameras is a mandatory subject of bargaining.
4. By failing and refusing to notify and bargain with the Union prior to the installation of surveillance cameras, the Respondent has violated Section 8(a)(1) and (5) of the Act.
5. Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to timely or completely respond to the Union's October 5, 1998, request for relevant information.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully failed and refused to notify and bargain with the Union over the subject of surveillance cameras, it shall be ordered to meet and bargain collectively with the Union in good faith concerning conditions of employment related to its use of surveillance cameras.

The Respondent shall also be directed to respond to the Union's information request in a timely fashion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Anheuser-Busch, Incorporated, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Brewers and Maltsters Local Union No. 6, affiliated with International Brotherhood of Teamsters with respect to the installation and use of surveillance cameras and other mandatory subjects of bargaining.

(b) Failing and refusing to respond in a complete and timely fashion to requests for information respecting matters relevant to unit employees.

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

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

(a) On request, bargain collectively with the Union as the exclusive bargaining representative of the Respondent's employees with respect to the installation and use of surveillance cameras and other mandatory subjects of bargaining.

(b) On request of the Union, respond in a timely and complete fashion to the information it requested on October 5, 1998.

(c) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."[13] Copies of the notice on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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