ANALYSIS OF LEGAL ISSUES CONCERNING RULES GOVERNING THE USE OF CELL PHONES IN THE WORKPLACE

General Framework Under the National Labor Relations Act

Under the National Labor Relations Act, work rules in general, including rules governing the use of cell phones and other electronic communication devices in the workplace, are "mandatory topics of bargaining." Section 8(a)(5) of the National Labor Relations Act usually requires an employer to bargain in good faith prior to implementing such a rule.

In order to fulfill the obligation to bargain in good faith under Section 8(a)(5) with respect to such a rule, an employer must take certain steps. First, prior to implementation, the employer must provide the union with notice of its intention to adopt the proposed rule. Secondly, it must provide the opportunity to discus the proposed work rule, sufficiently in advance of its implementation so as to permit meaningful bargaining over its terms. Third, during discussions over the proposed rule, the Act requires the employer to consider alternatives proposed by the union, discuss points of clarification, and consider potential compromises concerning its provisions, in a good faith effort to reach agreement.

Note that an employer need not secure the union's consent prior to implementing such a rule. Indeed, if the parties have bargained in good faith, and they remain irreconcilably at odds over the employer's proposal, the employer generally has the legal right to implement its rule at the point of a lawful impasse.[1] The rationale of this doctrine is that, while the employer must

[1] Note, however, that even though the employer may lawfully implement its proposed rule at the point of impasse, the union would remain free to assert that the adoption of the rule violated the applicable collective bargaining agreement. That dispute would typically be resolved by the grievance arbitration procedures established by the contract.

bargain in good faith over the adoption of the rule, it should not be prevented from exercising the typical rights of management by virtue of a union's veto power.

Possible Distinctions Over the Bargaining Obligation In Section 8(f) and 9(a) Bargaining Relationships

An 8(f) collective bargaining agreement is one entered into by an employer primarily in the building and construction industry, in the absence of any proof that the union has majority support. In contrast, a Section 9(a) relationship is one where the employer's recognition of the union is based upon some showing that the union has the support of a majority of the employer's employees, either through a National Labor Relations Board supervised election, or a voluntary recognition proceeding, such as a "card check."

Historically, there is support for the proposition that in the context of an 8(f) relationship, the employer's duty to bargain in good faith is very limited, to one of simply observing the terms of the negotiated collective bargaining agreement. If that truly constitutes the sum total of the employer's obligation to bargain in good faith under an 8(f) agreement, an employer party to such an agreement could theoretically implement a prohibition on cell phone usage without bargaining, so long as nothing in the collective bargaining agreement permitted employees to use such devices.

However, it is very doubtful that the current National Labor Relations Board would adopt such a narrow construction of the employer's obligation to bargaining during the term of an 8(f) collective bargaining agreement. For that reason, and others to be discussed later, the preferable course of action is to afford notice and opportunity to bargain over the proposed rule, even if your bargaining relationship is governed by Section 8(f).

In a 9(a) bargaining relationship, the issue is clear. Because rules governing cell phone usage are mandatory topics of bargaining, employers party to a 9(a) relationship must afford notice and opportunity to bargain before implementing such a rule.

Potential Waiver of the Right to Bargain

Although a rule prohibiting the use of cell phones or other electronic communication devices in the workplace constitutes a mandatory topic of bargaining, it is also possible that either party may have waived the right to bargain over such an issue. This issue of waiver can emerge in two very different contexts, with very different results.

For example, in the context of a collective bargaining agreement containing a "zipper" clause, it is conceivable that the employer may not be able to implement such a policy midterm. A "zipper" clause typically recites that the parties recognize that during negotiations for the current collective bargaining agreement, each side had the right to propose anything it wished to concerning mandatory topics of bargaining. It then goes on to provide that each party unequivocally waives any right that it may have to bargain over such issues, during the term of the contract.

How would such a provision prohibit the employer from establishing such a rule midterm? First off, recall that policies concerning the use of cell phones and other electronic communication devices are classic examples of mandatory topics of bargaining. If the applicable collective bargaining agreement contains a zipper clause, that clause would state that because the employer had the opportunity to bargain over the establishment of such a rule during contract negotiations, it has waived its right to bargain over such a rule during the contract term. Since the employer cannot unilaterally adopt such a rule without bargaining with the union, the clause,

would, in effect, prohibit the employer from insisting on bargaining over the provision during the contract term. While nothing would prohibit the union from discussing such an issue if it chose to do so, the employer would have no legal means to compel the union to engage in such discussions.

Note that this principle would not prohibit the employer from restricting the use of cell phones by other, more general means. For example, even if the collective bargaining agreement contained a "zipper" clause, nothing would prohibit the employer from simply reminding employees that during actual working time, they are to be at work, and not engaged in any activity that is inconsistent with that obligation, including the use of a cell phone.

The potential waiver of any right to bargain over such an issue can also work in the opposite manner. There may also be language in the collective bargaining agreement by which the union has waived any right to insist upon bargaining over such a policy. If the union has, in fact, waived any right to insist on bargaining over the adoption of such a rule, the employer would then be legally free to implement such a rule without prior negotiations. Language providing for a waiver of any bargaining right may take a variety of forms, but such waivers are frequently found in a "management rights" provision of the collective bargaining agreement. An example reads as follows:

> "The employer shall have the right to establish, modify, and enforce reasonable rules of conduct in the workplace, and to require employees to observe the same. Upon adoption of any such new or revised rule by the employer, the union shall be furnished a copy for its records."

If such language is found in the current labor agreement, the employer would have a good argument that it need not bargain over such a proposed work rule prior to implementation.

Potential Claims that the Adoption of the Rule is in Violation of the Collective Bargaining Agreement

Fulfilling any potential bargaining obligation over the adoption of such a rule is just one aspect of this issue. It should also be recognized that the union may assert that the implementation or enforcement of a work rule prohibiting the use of cell phones is also in violation of the labor agreement. Such a claim would be brought under the grievance arbitration procedures of the collective bargaining agreement. Such an issue could arise in two distinct contexts.

A grievance Contending that the Implementation of the Rule Violates the Collective Bargaining Agreement

In the realm of neutral third-party arbitration, it is a well accepted principle that a collective bargaining agreement sets forth restrictions upon the actions that an employer might otherwise take. This doctrine begins with the proposition that prior to the collective bargaining agreement, the employer could essentially run the workplace as it saw fit, and that the purpose of the collective bargaining agreement is to set forth restrictions upon the otherwise unfettered rights that management possessed. Under this doctrine, if a particular activity is not restricted by a provision in the collective bargaining agreement, it follows that management retains the right to take that action.

It may be safely assumed that very few collective bargaining agreements in the sheet metal industry expressly address the issue of cell phone use in the workplace – one way or the other. Consequently, in the absence of a provision protecting the right of employees to use cell phones at the workplace, application of this general principle would suggest that the employer does not violate the collective bargaining agreement, by simply adopting such a policy.

However, there are substantial reasons to be cautious about any strategy that is based upon this principle.

First, it is probably a fair statement that most locals in the sheet metal industry do not accept the basic premise that if the contract doesn't prohibit something, the employer is free to do it. In fact, there have been grievances presented to the National Joint Adjustment Board, where the local union has argued that the contract did not authorize the employer do a particular act, and therefore, the employer was not free to take that action without the blessings of the union.

Secondly, it must also be recognized that even principles that have broad acceptance in the realm of third-party neutral arbitration may have little persuasive impact upon the National Joint Adjustment Board. It is likely a fair statement that the union members of the National Joint Adjustment Board views a collective bargaining agreement as something spelling out the rights of both parties. Consequently, if the employer wishes to restrict cell phone use, their view would likely be that the employer should negotiate a provision into the collective bargaining agreement that expresses that restriction.

Contractors will have little difficulty in convincing the management members of the National Joint Adjustment Board that a rule restricting cell phone usage in the workplace is both

reasonable, and necessary. However, it must be recognized that if that contractor fails to persuade the union members of the National Joint Adjustment Board of that fact, a deadlock may result. In such a context, the local union is free to strike in support of its position.

These realities suggest that in the absence of contract language clearly allowing the employer to adopt such a rule, the better course of action is to provide the local union with a draft of any contemplated policy prior to implementation, and be willing to engage in open discussions with the union about the contents of the rule. If the local union can be persuaded to agree to the employer's proposal, or at least not to object to it, there is a greatly reduced potential for the local union to challenge the policy under the grievance arbitration procedures of the collective bargaining agreement.

A Grievance Challenging Discipline Imposed Upon an Employee for Violation of the Policy

Apart from a general challenge to the implementation of such a rule, it should also be recognized that the collective bargaining agreement may allow the union to challenge such a policy in a collateral manner. For example, if the collective bargaining agreement requires "just cause" for discipline, and an employee is fired for violation of a rule prohibiting cell phone usage, the union may challenge the reasonableness of such a rule through the grievance arbitration procedures of the contract.

In such a context, the employer would likely be called upon to establish issues such as the reasonableness of the rule, the employee's knowledge of the rule, the employee's knowledge of the consequences for violating it, the consistency of its enforcement, and whether the rule was actually discussed with the union as collective bargaining representative. This reality

underscores that in many settings the preferred strategy is to discuss such a preferred rule with the union prior to implementation, so that if an arbitration challenge follows, the employer is in a better position to have the rule sustained. Such discussions might also prevent the issue from rising to the level of a grievance.

Sample Contract Language

The process of adopting such a rule can be simplified through appropriate contract language. Two different samples are provided that may be useful to local Chapters. The first is contract language focusing upon the narrow issue of cell phone and electronic communication device usage. It provides:

> "The union recognizes that the employer may establish, modify, and enforce reasonable rules governing employee use of cell phones and other electronic communication devices in the workplace. The union shall be provided a copy of such work rules upon implementation."

The advantage of this approach is that is has the narrow focus of cell phone usage, with the result that it may be easier to obtain during negotiations. While a provision granting the employer broad authority to establish a range of work rules may be more desirable, it is precisely for that reason that it may be strongly resisted by the local union.

An example of a broader provision addressing a wide range of issues, is as follows:

> "The union recognizes that the employer may establish, modify, and enforce reasonable rules governing employee conduct at the workplace. Such rules may govern issues such as appearance, conduct on the job, maintaining reasonable standards of quality and productivity, absenteeism, observance of government and user/owner rules and regulations, and other similar issues. The union shall be provided with a copy of any new or modified rules upon implementation."

While this provision gives the employer great latitude in establishing work rules on a number of issues, it may be resisted for precisely that reason. As a consequence, it may be necessary to fall back to the previous language which focuses on cell phones and other electronic communication devices.

Sample Work Rules Prohibiting Cell Phone Usage in the Workplace

This is no particular magic in drafting a work rule that prohibits cell phone usage in the workplace. The following is a sample that may be used:

> "Employees are strictly prohibited from using any cell phone or other electronic communication device during working time. This prohibition is absolute. It prohibits the making of or receiving of any telephone calls, and the transmission of, or accessing of any text messages, e-mail, or other similar form of communication,

during working time. Working time includes any time that you are operating any vehicle while on company business.

You are permitted to use cell phones and electronic communication devices only while on a recognized rest or lunch break, and only while you are in a designated non-working area where employees are permitted to take breaks.

Violation of this policy shall result in disciplinary action, up to and including discharge from employment."