BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNITED STEELWORKERS OF AMERICA, LOCAL 9040	
and	Case 14 No. 43780 A-4614
ALTO-SHAAM, INC.	

Appearances:
Mr. John Cleveland, Staff Representative, United Steelworkers of America, District 32, appearing on behalf of the Union.
Mr. James Schalow, Labor Representative, Alto-Shaam, Inc., appearing on behalf

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the Company respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on May 14, 1990 in Menomonee Falls, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, I issue the following award.

ISSUE

The parties were unable to agree on the issue 1/ so the arbitrator has framed it as follows:

Did the Company's implementation of a drug testing program violate the parties' collective bargaining agreement? If so, what is the appropriate remedy?

1/ The Union states the issue as:

Did the Company violate the agreement, and the NLRA (as amended), when it unilaterally instituted its drug/alcohol program without recognizing its obligation of treating this as a mandatory subject of bargaining? If so, what is the remedy?

While the Company states the issues as:

1. Is it a violation of the labor agreement between the parties for the Company, in order to comply with governmental regulations to remain a defense contractor, to institute a drug program mandated by and in accordance with government directives?

2. Must the Company collectively bargain over illegal and criminal conduct taking place on its premises and justify its position in an arbitration proceeding?

PERTINENT CONTRACT PROVISIONS

The parties' 1987-90 collective bargaining agreement contained the following pertinent provisions:

PREAMBLE

> This Agreement, made and entered into this 8th of July 1987, and effective as of July 8, 1987 between Alto-Shaam, Inc., Menomonee Falls, Wisconsin, its successors or assigns, hereinafter called the "Company", and the United Steelworkers of America on behalf of its Local 9040, hereinafter called the "Union".

. . .

SECTION 2 - RECOGNITION

> 2.1The Company recognizes the Union as the sole and exclusive collective bargaining agent in respect to rates of pay, wages, hours of employment, and other conditions of employment pursuant to the certification of Representation of the National Labor Relations Board dated March 19, 1981, and June 16, 1983, for the collective bargaining unit set forth below:
>
> All production and maintenance employees, excluding office clerical employees, guards and supervisors as defined in the Act at the Company's Menomonee Falls, Wisconsin plant.

. . .

SECTION 4 - MANAGEMENT RIGHTS

> 4.1Except as expressly limited in this Agreement, any and all management functions are specifically reserved to the Company. Said management functions shall include, but are not limited to, management of the Company and the direction of the work force, the right to plan and direct and control all operations, the right to hire and relieve employees from duty because of lack of work or other legitimate reasons, the scheduling of work, the selection of salaried employees, the determination of working hours, work assignment, quality requirements and the right to establish reasonable production requirements, where work shall be done and the number of shifts, the making of reasonable shop rules for the government of the Company and the right to establish or change or introduce new or improved production methods, standards or facilities or utilize suppliers or subcontractors. All said functions are the sole and exclusive prerogative and responsibility of the Company; provided, however, that no rules shall be made which shall have the effect of nullifying any specific provisions of this Agreement. Subject to the other provisions contained in this Agreement, the Company is vested with the right to evaluate the efficiency of the employees and to transfer and promote and the right to demote, to suspend, discharge or discipline any employee for cause.

FACTS

In response to reported instances of drug use on Company property, as well as a Defense Department requirement that it, as a defense contractor have such

a program in place, the Company implemented a corporate drug program. This program, which contains criteria mandated by Defense Department contracts, was unilaterally implemented May 15, 1989 and provides as follows:

ALTO-SHAAM, INC. CORPORATE DRUG POLICY

STATEMENT OF NEED

In response to reported instances of drug use on company premises, in order to reduce accidents and injury in the work place, some reportedly by reason of use of controlled substances, in order to insure the security, and co-worker trust, respect and safety of fellow employees, and in response to an attempt to increase productivity and profit by decreasing absenteeism and tardiness, and in further response to our history of attempting to make in quantity and quality the best product that can be made, Alto-Shaam, Inc. has developed the "CORPORATE DRUG AWARENESS PROGRAM" as hereunder set forth:

THE TESTING PROGRAM

A. PRE-EMPLOYMENT EXAMINATION: All applicants will as part of their pre-employment physical be given an examination that includes, at least, a urine drug screen. An appointment at a medical, or other health center, will be scheduled by the Company. All applicants will be required to consent to such tests and as a condition of employment shall be required to sign a "Urine Drug Screening Form", or such other consent form substantially in accord with the form attached to this document.

B. TESTING OF EXISTING EMPLOYEES: Urine screen tests will be given as part of the physical examination when injury or accident occurs in the work place. In addition, such tests shall be given when there is a suspicion of drug use, an increase in accident or injury rate and severity, as well as observation of abnormal behavior.

C. EXISTING EMPLOYEES ON A RANDOM BASIS: From time to time, and under such conditions as the Company may determine.

EMPLOYER-EMPLOYEE RESPONSIBILITIES

It shall be incumbent upon the safety committee to maintain an alert and report to the Company any suspected violation of this drug policy program. All Company supervisors are further delegated this responsibility.

Employees are advised that the possession, distribution or use of an illegal substance on company premises, or while on company business is prohibited. Compliance with the aforesaid, and the conditions of this "Corporate Drug Policy" are requirements for continued employment with Alto-Shaam, Inc.

Employees are expected to perform their jobs in a safe manner. The use of chemical substances or controlled substances that would interfere with an employee's personal safety, or the safety of others, is prohibited. Employees observing the possession, distribution or use of chemical substances have the responsibility of reporting such violations to the Company.

The employer, in addition to the responsibility for scheduling the tests, will be responsible for determining what actions will be taken against an employee found to have violated this "Corporate Drug Policy". Employees are required to notify the Company within five (5) days of any criminal drug statute conviction.

PENALTIES

Employees possessing, distributing or using an illegal or controlled substance on Company property, or while on Company business, will be subject to discharge.

Employees refusing to submit to a drug screen,

or other drug test, will be considered in violation of their employment agreement and will be subject to personal action up to and including termination.

Employees found through drug screening to have an illegal substance in their system while at work, or on Company business, will be immediately removed from their workstation and shall be subject to personal action up to and including termination.

If convicted of any criminal drug violation, penalties up to and including termination may result.

Any violation of government rules and regulations as to drugs in the workplace will result in penalties up to and including termination.

PROCEDURES

Drug screening will take place at pre-employment exams at a medical or health center of the Company's choice. Appointments will be made by the Company.

Drug screening, when authorized by the Company, will take place as to existing employees at a medical or health center of the Company's choice. These may take place at the time of examination for accidental injury or illness reported on Company premises or at such other time as the Company may schedule such a test.

Employees appearing at the medical site must present at least one form of positive identification, which, if possible should be a photo I.D. or Wisconsin Driver's License.

IMPLEMENTATION

All applicants will receive a copy of the "Corporate Drug Policy" and will be required to read the information presented.

Examinations will be scheduled by the Company.

The medical facility will send all test results to the policy review committee for review.

Drug screen results will be kept confidentially in individual personnel files.

An opportunity to ask questions will be provided. Appointments may be made with policy review committee.

USE OF PRESCRIPTION OR OVER THE COUNTER DRUGS

If you are taking prescribed medicine, or using an over the counter medication, especially a cough syrup or other cold or flu medication, it is your duty to report this to the policy committee and present them with a sample of the medication. Failure to follow this procedure, may result in disciplinary action for such use of such medication.

One of the goals of this policy is to help the employee overcome a problem that may affect their health, safety and performance - substance abuse is a health hazard and therefore, it contributes to sickness, physical and mental problems and increased accident rates.

Helping employees overcome this problem is more important to us than terminating an employee. Therefore, if you feel you could use help, contact the policy committee who will confidentially advise you of available assistance, possible available benefits and help you contact your health care provider.

FAIR WARNING: We will provide a thirty day grace period so you can help yourself. Discuss this program with your wife or family. No penalty will be imposed for trying to help yourself. Failure to do so will certainly result in disciplinary action. WE WILL HAVE A DRUG FREE WORKPLACE.

ALTO-SHAAM, INC.

by _____
Jerry D. Maahs
President

The Union was officially notified that the Company had implemented the above drug program on May 30, 1989. A grievance was immediately filed challenging the Company's unilateral implementation of the drug program and this grievance was eventually processed to arbitration. The Union also filed an unfair labor practice charge with the NLRB alleging that "on or about May 15, 1989, the Employer unilaterally installed a random drug and/or alcohol testing program without the consent or agreement of the Union, and refused to bargain concerning this despite the request of the Union." The NLRB later decided to defer further processing of this charge to arbitration.

POSITIONS OF THE PARTIES

It is the Union's position that the Employer's unilateral implementation of a drug/alcohol testing program violated both the NLRA and the parties' labor contract. In support of its contention that the Company's action violated the NLRA, the Union notes that the NLRB General Counsel determined in September, 1987 that drug/alcohol testing constitutes a mandatory subject of bargaining. The Union further notes that this position was accepted by the full Board in the Johnson Bateman decision, 295 NLRB 26 (June, 1989). Thus, in the Union's view, it follows from these decisions that the Company's actions herein (namely failing to bargain with the Union prior to implementing the instant drug program) violated the NLRA. With regard to the alleged contractual violations, the Union asserts that an act that violates the NLRA must also violate the parties' labor agreement. The Union also relies on the agreement as a whole and particularly the Preamble, Recognition clause, (Section 2) and the Management Rights clause (Section 4) for the proposition that the Employer's unilateral implementation of its drug testing program violated the contract. As a remedy for this alleged contractual and statutory breach, the Union requests the following: (1) a notice rescinding the Company's drug/alcohol testing program and removing all mention of it from Company records; (2) an order directing the Company to return all waiver forms employes may have signed concerning the drug/alcohol program; (3) an order rescinding any and all disciplinary action imposed upon employes for violation of the Company's alcohol/drug program; (4) an order directing the Company to reimburse any employe who suffered a financial loss as a result of the Company's drug/alcohol program; and (5) an order directing the Company to furnish a compliance notice to the Union.

The Company sees the scope of the instant dispute on much narrower terms than does the Union. In the Company's view, the instant dispute does not involve an interpretation of the NLRA. In its opinion the NLRB decisions cited by the Union should have no bearing whatsoever on the disposition of this matter. Instead, the Company sees this dispute as simply being a contract interpretation case. Addressing that point, the Company's position is that its drug program did not violate the parties' labor agreement. In support thereof it notes that the Management Rights clause gives it the right to establish reasonable work rules and, in its view, that is what it did here. The Company asserts that it instituted a drug program to comply with Defense Department regulations that it, as a defense contractor, have such a program in place. It further contends that its drug policy comports with Defense Department guidelines. The Company therefore requests that the grievance be denied. With regard to the Union's proposed remedial action, the Company makes the following responses: (1) it contends that the Arbitrator should not rescind the Company's drug program; (2) it asserts that the waivers referred to by the Union are irrelevant; (3) it submits that no employes have been disciplined under the Company's drug program so there is no disciplinary action to rescind; and (4) it contends that no employes have suffered any financial loss under the Company's drug program so there is nothing to rectify in this regard.

DISCUSSION

This dispute has arisen from the Company's implementation of a corporate drug program applicable to bargaining unit employes. There is no question that the Company implemented the program unilaterally.

In its proposed statement of the issue, the Union asks the undersigned to address both the contractual and statutory aspects of this action. The undersigned will, of course, address the contractual aspects later in this section. However, the statutory aspects present a thorny jurisdictional question. This is because arbitrators differ as to the appropriateness of deciding specific questions of statutory interpretation in an arbitration proceeding. 2/ In this case the Union invites the undersigned to address/decide the parties' statutory obligations under the NLRA, specifically the legality of the Company's refusal to bargain over the instant drug testing program prior to implementation. Like many arbitrators though, I to am

2/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed., page 336.

reluctant to delve into such statutory questions in an arbitration proceeding. In the view of the undersigned, my function herein is to interpret and apply the labor agreement; not to enforce affirmative duties that arise under the NLRA. The latter is considered to be within the expertise of the NLRB. In the absence of either express contract language or a stipulated issue empowering the arbitrator to find and remedy alleged statutory violations, the undersigned declines to decide whether any statutory duty to bargain has been violated. Therefore, it is expressly noted that no ruling is made herein on the underlying refusal to bargain charge which the NLRB deferred to arbitration.

Having so held, attention is turned to the contractual aspects of the Employer's unilateral implementation of its drug program. The parties' collective bargaining agreement does not address the matter of drug testing. Specifically, no contract provision expressly prohibits the Company from implementing a drug testing program. Conversely though, no contract provision explicitly allows the Company to implement such a program. Faced with questions of interpretation from issues that are not addressed in the contract, most arbitrators held that those rights not specifically negotiated away from management by the union remain unfettered and within the control of the employer. 3/ In accordance with this accepted view, the undersigned holds that the Company had the inherent contractual right to implement a drug program provided that in doing so it has not violated any part of the agreement.

In this regard the Union contends that the Company's implementation of the instant drug testing program violated several provisions of the labor agreement, to wit: the Preamble, the Recognition clause (Section 2) and the Management Rights clause (Section 4). Accordingly, each of these sections will be reviewed to determine if they were violated by the Company's unilateral implementation of its drug program.

The first provision at issue is the Preamble to the parties' labor agreement. That clause simply provides that the Company and the Union have entered into the instant labor agreement. On its face, there is nothing whatsoever in this short section that can be read to impinge on the Employer's right to implement a drug testing program. That being the case, it is held that this section was not violated by the Company's actions herein.

The next provision in issue is the Recognition clause wherein the Company formally recognizes the Union as the exclusive bargaining agent for production and maintenance employes at the Company's Menomonee Falls plant. Once again, there is nothing in this section that can be read to impinge on the Employer's right to implement a drug testing program. No particular term in this clause is in issue nor does the Union assert that there has been a misapplication of any term therein by the Company. That being so, this section was not violated by the Company's implementation of its drug testing program.

Attention is now turned to the remaining contractual provision in issue, namely the Management Rights clause. This section provides: "Except as expressly limited in this agreement, any and all management functions are specifically reserved to the Company". This provision then goes on to expressly identify some of those functions, one of which is the right to make "reasonable shop rules for the government of the Company". Again, no particular term in this section is in issue nor does the Union assert that there has been a misapplication of any term therein by the Company. In addition, the Union does not challenge the substance or reasonableness of the drug testing program. Finally, no particular part or aspect of that program or its application to a particular individual is challenged by the Union, nor has the Union shown that the Company has applied the drug program in an inconsistent or unequitable fashion. Given the foregoing, no violation of this section has been shown to exist.

In sum then, it is held that the Company had the contractual right to implement a drug testing program and in doing so it did not violate either the Preamble, the Recognition clause or the Management Rights clause of the parties' labor agreement. Therefore, no contractual violation has been shown to exist. In so finding it is expressly noted though that no decision has been rendered herein on the reasonableness of the Company's drug program (either in whole or in part) inasmuch as that matter exceeds the scope of the instant grievance.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Company's implementation of a drug testing program did not violate the parties' collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 27th day of July, 1990.

By _____

3/ Zack & Bloch, Labor Agreement In Negotiation And Arbitration, BNA Books, 1983, page 56.