No. 07-1423

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BREWERS & MALTSTERS, LOCAL UNION NO. 6, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

ANHEUSER-BUSCH, INC.

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Statute:

National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.):

GLOSSARY

1. A.....The Joint Appendix filed by the parties in this case
2. Act .....National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
3. Board .....National Labor Relations Board
4. Company .....Anheuser-Busch, Inc.
5. Br.....The Company's Opening Brief to this Court
6. Union .....Brewers and Maltsters, Local Union No. 6, Affiliated with the International Brotherhood of Teamsters

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JURISDICTIONAL STATEMENT

This case is before the Court on a petition filed by Brewers and Maltsters, Local Union No. 6, affiliated with the International Brotherhood of Teamsters ("the Union") for review of the Supplemental Decision and Order issued by the National Labor Relations Board ("the Board") in *Anheuser-Busch, Inc.*, 351 NLRB

No. 40, 2007 WL 2948434 (Sept. 29, 2007). (A 1-13.)[1] Anheuser-Busch, Inc. ("the Company"), which was the respondent before the Board, has intervened on the Board's behalf. The Order is final with respect to all parties.

The Board had subject matter jurisdiction over the underlying unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this review proceeding under Section 10(f) of the Act (29 U.S.C. § 160(f)) because the Union, which was the charging party below, is aggrieved by the Board's Order. The Union's petition for review was timely filed on October 19, 2007; the Act imposes no time limit on the initiation of a review proceeding.

STATEMENT OF THE ISSUE

Whether the Board acted within its broad remedial discretion in declining to order a make-whole remedy that would have rescinded the discipline imposed on the employees whose misconduct was detected by hidden surveillance cameras that the Company installed and used in violation of Section 8(a)(5) and (1) of the Act.

RELEVANT STATUTORY PROVISIONS

All relevant provisions of the Act are contained in the attached statutory addendum.

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[1] Record citations are to the Joint Appendix, and are abbreviated as set forth in the Glossary. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

STATEMENT OF THE CASE

The Supplemental Decision and Order currently under review results from the Board's acceptance of this Court's remand in *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005). In that opinion, the Court upheld the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally installing and using hidden surveillance cameras without providing the Union with notice and an opportunity to bargain, and by failing to respond adequately to one of the Union's information requests. *See* 414 F.3d at 41-46. However, regarding the Board's remedial determination that a make-whole remedy was not appropriate for the 16 employees who were disciplined for misconduct detected by the cameras, the Court held that "[b]ecause the Board failed to distinguish adequately its prior decisions that support ordering make-whole relief, a remand is necessary so the Board can apply, distinguish adequately, or overrule those precedents." *Id.* at 48.

Consistent with the Court's instruction, the Board on remand reexamined (A 1-13) whether a make-whole remedy was appropriate for the 16 disciplined employees, and reviewed the two prior cases that the Court determined were contrary to the Board's initial decision: *Tocco Inc*., 323 NLRB 480 (1997), and *Great Western Produce, Inc*., 299 NLRB 1004 (1990). The Board, in a three-two decision, reaffirmed (A 2-3) its prior finding that a make-whole remedy was

inappropriate on the facts of this case, and overruled *Tocco* and *Great Western*, to the extent that they are inconsistent with this finding. The facts relevant to the Board's finding are detailed below, followed by summaries of the Board's initial decision, the Court's opinion, and the Board's Supplemental Decision and Order.

I. STATEMENT OF FACTS

The relevant facts are set forth in the Court's opinion, *Brewers and Maltsters*, 414 F.3d 36, and are summarized here as follows. The Company brews and distributes beer at its facility in St. Louis, Missouri. *Id.* at 39. In May 1998, it installed two hidden surveillance cameras positioned to monitor an elevator motors room on the roof of the building and the staircase leading up to the roof. *Id.* The Company knew employees used the roof and the elevator motors room as break areas, and was concerned that they were using those areas for activities inconsistent with their work assignments and possibly for drug use. *Id.* The Company operated the cameras continuously for about 6 weeks, and collected video footage revealing 16 employees engaged in misconduct. *Id.* That misconduct included smoking marijuana, urinating on the roof, sleeping, and being absent from assigned work areas for extended periods. *Id.*

On June 30, the Company removed the hidden surveillance cameras. *Id.* The next day, the Company informed the Union, for the first time, that it used the cameras and captured instances of employee misconduct. *Id.* The Union objected

that it had not been informed by the Company prior to the installation and use of the cameras. *Id.* In July and August, the Company conducted individual investigatory interviews with the employees, and each employee admitted engaging in the misconduct. *Id.* at 40. The Company disciplined the 16 employees, discharging 5 for violating the drug-use policy, giving 7 last-chance agreements for leaving assigned work areas for extended periods, sleeping, and urinating on the roof, and suspending 4 for leaving assigned work areas for extended periods. *Id.*

The Union filed grievances on behalf of the disciplined employees, as well as an unfair labor practice charge. *Id.* On October 5, the Union requested information relevant to investigating the grievances and preparing for arbitration. *Id.* For 6 months, the Company refused to provide information responsive to the Union's request, and finally complied at the unfair labor practice hearing. *Id.*

II. THE BOARD'S INITIAL DECISION

After an investigation of an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally installing hidden surveillance cameras and disciplining 16 employees as a result of information obtained from those cameras, and by failing to provide information requested by the Union. *Anheuser-Busch, Inc.*, 342 NLRB 560, 564-

65 (2004). After a hearing, the administrative law judge issued a decision finding that the Company committed unfair labor practices by unilaterally installing and using the cameras, and by refusing to respond to the Union's October 5, 1998 information request in a timely manner. *Id.* at 564-69. The judge, however, did not recommend ordering make-whole relief that would rescind the discipline imposed on the 16 employees, explaining that "it is not consistent with the policies of the Act or public policy generally to reward [employees] who engage in unprotected conduct." *Id.* at 568.

On review, the Board (Chairman Battista and Member Walsh, Member Schaumber dissenting), in agreement with the administrative law judge, found that the Company violated 8(a)(5) and (1) of the Act by unilaterally installing and using the hidden surveillance cameras. *Id.* at 560-61. The Board also unanimously found that the Company violated Section 8(a)(5) and (1) by failing to timely respond to the Union's October 5, 1998 information request. *Id.* at 560.

As to the remedy, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting), in agreement with the administrative law judge, found that it was inconsistent with the policies of the Act to order rescission of the discipline imposed on the employees whose misconduct was detected by the hidden surveillance cameras. *Id.* at 561. Relying on *Taracorp Industries*, 273 NLRB 221 (1984), the majority found that Section 10(c) of the Act (29 U.S.C. §

160(c)) precluded make-whole relief even when employee misconduct is discovered through unlawful means. *Id.* The Board distinguished *Tocco, Inc.*, 323 NLRB 480 (1997), and *Great Western Produce, Inc.*, 299 NLRB 1004 (1990), in which the Board had ordered that employee discipline for misconduct be rescinded, because those "cases involved an unlawful unilateral change in a rule regulating employee conduct," and "discipline of an employee for violating that rule," rather than a unilateral change in the method for detecting misconduct. *Id.* Therefore, the Board concluded that, "[a]s in *Taracorp*, we find an insufficient nexus in the instant case between the [Company]'s unlawful installation and use of the cameras and the employees' misconduct to warrant a make-whole remedy." *Id.*

III. THE COURT'S OPINION

The Company filed a petition for review challenging the Board's unfair labor practice findings, and the Union petitioned for review of the Board's remedial determination not to order rescission of the discipline imposed on the employees whose misconduct was detected by the hidden surveillance cameras. Denying the Company's petition, the Court (then-Chief Judge Ginsburg, and Judges Sentelle and Rogers) upheld the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally installing and using hidden surveillance cameras without providing the Union with notice and an opportunity to bargain, and by failing timely to respond

to the Union's October 5, 1998 information request. *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41-46 (D.C. Cir. 2005).

However, regarding the Board's remedial determination that a make-whole remedy was inappropriate under the facts of this case, the Court (Judge Sentelle dissenting) granted the Union's petition and remanded. *Id.* at 46-49. Noting that "Section 10(c) [of the Act] does not expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but-for its own unlawful action" (*id.* at 47), the Court held that "[t]he Board, of course, 'may fill interstices with a reasoned approach'" (*id.*, omitting citations), and "determine, based on policies consistent with the Act, whether [a make-whole remedy] is not appropriate." *Id.* at 48. The Court concluded, however, that "the Board ha[d] not adopted [such] a reasoned approach because it has failed to distinguish adequately its prior decisions." *Id.* at 47.

Specifically, the Court concluded that the Board's decision was "inconsistent with its approach in *Great Western*," and that, with regard to *Tocco*, "the Board has treated like situations differently," and that both were cases like this one because they involved a unilateral change in the method for detecting misconduct. *Id.* at 47-48. The Court therefore "remanded the case to the Board to address the appropriate remedial order for the disciplined employees," and with

regard to *Tocco* and *Great Western*, "apply, distinguish adequately, or overrule those precedents." *Id.* at 48.

IV. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

The Board accepted the Court's remand, invited the parties to file position statements, and reexamined (A 1-13), based on policies consistent with the Act, whether make-whole relief was an appropriate remedy in this case. On September 29, 2007, the Board (Chairman Battista and Members Schaumber and Kirsanow, Members Liebman and Walsh dissenting) issued its Supplemental Decision and Order. The Board reaffirmed (A 1-7) its prior finding that a make-whole remedy in this case was inappropriate, and overruled its *Tocco* and *Great Western* cases. Specifically, the Board concluded (A 2-3) that "Section 10(c) [of the Act] precludes the Board from granting a make-whole remedy on the facts of this case," and overruled (A7) its *Tocco* and *Great Western* cases, "to the extent that those decisions hold that Section 10(c) does not limit the Board's authority to grant a make-whole remedy where an employer disciplines an employee for cause, but the cause is uncovered through unilaterally and unlawfully implemented means."

SUMMARY OF ARGUMENT

The Board acted well within its broad remedial discretion in determining that a make-whole remedy was inappropriate in this case. In sending this issue back to the Board, the Court instructed the Board "to address the appropriate

remedial order for the disciplined employees," and with regard to *Tocco* and *Great Western*, "apply, distinguish adequately, or overrule those precedents." 414 F.3d at 48. Complying with the Court's instructions, the Board presented a reasoned basis for its interpretation of Section 10(c) in support of its determination not to issue a make-whole remedy in this case, and overruled *Tocco* and *Great Western*, to the extent that those cases were inconsistent with that interpretation.

Specifically, the Board explained that its interpretation of Section 10(c) is consistent with the meaning of "for cause," as interpreted by the Board and the Supreme Court, as well as Section 10(c)'s legislative history, which demonstrates Congress' intent to preclude the Board from providing a make-whole remedy to employees who were disciplined for misconduct, rather than for protected activities. The Board also found that its statutory interpretation was consistent with other Board and court cases interpreting Section 10(c) in the context of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and is in line with the policy concern that employees who engage in misconduct, and who receive the appropriate discipline for that misconduct, should not benefit through a windfall award of reinstatement and backpay. Here, the Board concluded that the discipline imposed on the 16 employees was not imposed for a prohibited reason, but rather for serious, admitted violations of lawfully established work rules. The discipline therefore was "for

cause," and it would be inappropriate to issue a make-whole remedy that ordered reinstatement and backpay.

The Union's challenges to the Board's remedial determinations fail to show that the Board abused its discretion. In contending, for example, that the Board failed to order the necessary complete relief to remedy the Company's unfair labor practice, the Union misunderstands the Board's remedial powers under Section 10(c) of the Act. That subsection provides that the Board shall issue a cease-and-desist order when an unfair labor practice is found, but leaves to the Board to determine, in its discretion, the type of affirmative relief, if any, that will appropriately remedy the unlawful conduct. Likewise there is no merit to the Union's claim that the Board's chosen remedy will not deter the Company from violating its bargaining obligation in the future. Here, in addition to entering a cease-and-desist order, the Board affirmatively required the Company to bargain with the Union on all mandatory subjects, and if the Company subsequently violates that affirmative order, it will be subject to contempt sanctions, which are a strong deterrent to committing future violations.

Utterly mistaken is the Union's contention that Section 10(c)'s "for cause" provision is wholly inapplicable to Section 8(a)(5) bargaining violations, because that claim is contrary to law and legislative history. The Union similarly fails in its attempts to distinguish the *Weingarten* cases cited by the Board. Accordingly, the

Board properly exercised its broad remedial discretion in responding to the Court's remand in this case, and the Union has failed to provide any basis for disturbing the Board's decision.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DECLINING TO ORDER A MAKE-WHOLE REMEDY THAT WOULD HAVE RESCINDED THE DISCIPLINE IMPOSED ON THE EMPLOYEES WHOSE MISCONDUCT WAS DETECTED BY THE HIDDEN SURVEILLANCE CAMERAS

A. Applicable Principles and Standard of Review

The Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), Congress granted the Board the authority, upon finding a violation of the Act, to order an employer "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). That authority is subject only to the limitation that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.*

The Supreme Court has "repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Moreover, "[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n.32 (1969). *Accord Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 104 (D.C. Cir. 2000). The authority to fashion remedies under the Act "'is for the Board to wield, not for the courts.'" *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

The Court's review is therefore limited to determining whether the Board has abused its discretion in ordering its chosen remedial provision. *See Frazier Indus. Co., Inc. v. NLRB*, 213 F.3d 750, 759-60 (D.C. Cir. 2000); *O'Dovero v. NLRB*, 193 F.3d 532, 535 (D.C. Cir. 1999). Ultimately, the Board's choice of remedy "should stand unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord O'Dovero*, 193 F.3d at 537-38.

Moreover, the Board's interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984). *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123-24 (1987). Accordingly, where, as here, the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board's reasonable interpretation of the Act, and "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 & n.6 (1977)). *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). It is also well settled that the Board may change its view of substantive law so long as its interpretation does not conflict with the Act, and it provides a "reasoned analysis" for changing its view. *United Steelworkers of America, Local Union 14534 v. NLRB*, 983 F.2d 240, 244-45 (D.C. Cir. 1993) (citing cases). *Accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

B. The Board Reasonably Clarified Its Rationale for Reaffirming Its Conclusion that a Make-Whole Remedy Would Be Inappropriate on the Facts of this Case, and Overruled *Tocco* and *Great Western* on that Basis

The Board thoroughly undertook the analysis that the Court required, and reasonably reaffirmed its earlier conclusion not to order make-whole relief in this

case. As shown at pp. 7-8, the Court held that Section 10(c) of the Act does not expressly address the precise issue of whether the Board shall or shall not order a make-whole remedy on these facts, and that therefore the Board can fill that interstice with a reasoned approach based on policies consistent with the Act. *See Chevron*, 467 U.S. at 843, and cases cited at pp. 13-14. The Court, however, concluded that the Board had failed to adopt a reasoned approach because it had distinguished inadequately its prior decisions in *Tocco* and *Great Western*. *See* 414 F.3d at 47-48. For that reason, the Court remanded the remedial issue to the Board with the instruction that the Board must reassess whether a make-whole remedy should be ordered, and "apply, distinguish adequately, or overrule" those cases. *Id.* at 48.

On remand, the Board (A 1-7) reexamined the issue in light of the Court's decision, clarified its rationale for concluding that Section 10(c) precludes a make-whole remedy on the facts of this case, and overruled *Tocco* and *Great Western* on that basis. As a preliminary matter, the Board noted that, in undertaking this analysis, "we now accept the [C]ourt's invitation to 'fill [Section 10(c)'s] interstices with a reasoned approach' and explain why we find that Congress intended Section 10(c)'s prohibition of a make-whole remedy to apply in such cases," which involve discipline for conduct unprotected by the Act. (A 4, quoting 414 F.3d at 47.) In clarifying its rationale, the Board explained (A 3-6) that its

interpretation of Section 10(c), as applied in this case, is consistent with the meaning of Section 10(c)'s phrase "for cause," as interpreted by the Board and the Supreme Court, and as demonstrated by legislative history. The Board also explained (A 3-4) that its interpretation was consistent with Board and court cases interpreting Section 10(c) in the context of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

With regard to Section 10(c)'s phrase "for cause," the Board noted (A 4) that Congress did not explicitly define the term, but that the Board and Supreme Court have held that discipline for cause, within the meaning of that subsection, "refers to discipline that is not imposed for a reason that is prohibited by the Act." Relying on *Taracorp*, the Board explained (A 4) that it had previously held that "cause," in the context of Section 10(c), effectively means the absence of a prohibited reason, because it is well settled under the Act that an employer may "discharge for good cause, bad cause, or no cause at all," subject to "one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids." 273 NLRB at 222 n.8 (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)) (internal quotation marks omitted).

Consistent with that view, the Board noted (A 4) that the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), held that the legislative history of Section 10(c) shows that it was designed to preclude the

Board from reinstating an individual who had been discharged for misconduct. For emphasis, the Board quoted (A 4-5) the Supreme Court's discussion of the "for cause" provision from *Fibreboard*:

> The House Report states that [Section 10(c)] was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Id. at 217 n.11. As the Board explained (A 5), that portion of legislative history relied on by the Supreme Court also "affirmatively shows that the impetus for Section 10(c)'s prohibition on making whole employees disciplined for cause was Congress' belief that the Board had overstepped its authority and interfered with legitimate management disciplinary prerogatives." Accordingly, it was Congress' intent to preclude the Board from providing a make-whole remedy to employees who were disciplined for cause.

In contrast, the Board noted (A 5) two types of violations of the Act for which the Board is authorized, beyond any doubt, to order reinstatement and backpay as a remedy under Section 10(c) of the Act. The first is where an employer's discipline of employees "is motivated by [their] protected activity,"

and therefore the discipline is "unlawful under Section 8(a)(1) and/or (3), and is not 'for cause.'" (A 5.) Second, as the Board noted (A 5), an employer's discipline of employees is unlawful under Section 8(a)(5) and is not "for cause," where, as in *Fibreboard*, an employer has unilaterally subcontracted unit work and laid off unit employees, because the unlawful subcontracting was the reason for the layoffs. *See* 379 U.S. at 215-17. Indeed, in *Fibreboard*, the Supreme Court rejected the employer's assertion that Section 10(c) barred a make-whole remedy under those circumstances, holding that "[t]here is no indication . . . that [Section 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems *directly* from an unfair labor practice as in the case at hand." *Id.* (emphasis added).

The Board further explained (A 5) that Section 10(c)'s legislative history does not reflect congressional concern regarding the employer's method for detecting the employee's misconduct, and therefore "the meaning of the phrase 'for cause' does not include an inquiry into the source of the employer's knowledge of the misconduct." In contrast, the Board noted (A 4) that, although such an inquiry may be relevant to an arbitration, it is not relevant under the Act. Indeed, as the Board made clear in *Taracorp*, "[i]t is important to distinguish between the term 'cause' as it appears in Section 10(c) and the term 'just cause,'" which "encompasses principles such as the law of the shop, fundamental fairness,

and related arbitral doctrines." *Taracorp*, 273 NLRB at 222 n.8. *See* Elkouri & Elkouri, *How Arbitration Works* 974 (6th ed. 2003) ("'[c]ause' as used in Section 10(c), should not be confused with 'just cause' as that term is used by arbitrators"); *Communication Workers of America, Local 5008 v. NLRB*, 784 F.2d 847, 850 (7th Cir. 1986) ("cause," as used in Section 10(c), "means misconduct"). Rather, as the Board clarified, "cause" in the context of Section 10(c), effectively means "the absence of a prohibited reason." (A 4, quoting *Taracorp*, 273 NLRB at 222 n.8).

Here, the Board found (A 4, 5) that the discipline imposed on the 16 employees was not imposed for a prohibited reason, but rather for "serious, admitted violations of lawfully established work rules," which constituted discipline for cause. Moreover, the Board stated (A 6) that, even if the Board had authority to grant a make-whole remedy, it would exercise its discretion to deny it under these circumstances, given the compelling policy consideration that "employees who engage in misconduct, and who receive the appropriate discipline for that misconduct, should not benefit . . . through a windfall award of reinstatement and backpay." Accordingly, the Board reasonably concluded (A 5) that it was precluded under Section 10(c) from ordering make-whole relief for the disciplined employees.

The Board also drew (A 3) support from analogous cases in the *Weingarten* context. Under *Weingarten*, employees have the right to request the presence of a union representative at an investigatory interview that they reasonably believe will

result in discipline. *See* 420 U.S. at 963-65. In turn, an employer violates Section 8(a)(1) the Act (29 U.S.C. § 158(a)(1)) if it denies the employee's request and conducts the interview without the union representative. *Id.* at 965. To remedy a *Weingarten* violation, the Board will order the employer to comply with a cease-and-desist order, and post a remedial notice. *Id.* at 961. *Accord Bernard College*, 340 NLRB 934, 936 n.12 (2003).

The Board, however, will not require the employer to rescind discipline or pay backpay to an employee who was disciplined as the result of such an unlawfully conducted interview, because it is the Board's settled policy that the discipline is "for cause" within the meaning of Section 10(c) of the Act, and therefore a make-whole remedy is inappropriate for such a violation. *Taracorp Indus.*, 273 NLRB 221, 221 (1984). In *Taracorp*, the Board therefore established the policy that, in *Weingarten* cases, if an employee is discharged "for cause," and that discharge is "not, itself, an unfair labor practice," the Board will not order reinstatement and back pay simply because the employer denied the employee his or her *Weingarten* right. *Id.* at 223-24. The Board's *Taracorp* policy was endorsed by the Seventh Circuit in *Communication Workers of America, Local 5008*, 784 F.2d at 852-53, as "a reasoned approach."

Here, the Board relied (A 3) on *Taracorp*, and a series of court decisions under *Weingarten* that preceded *Taracorp*, noting (A 3) that those cases

demonstrate that the Board and reviewing courts are in agreement that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview.[2] As the Seventh Circuit held in affirming the Board's *Taracorp* policy, "[c]ertainly if an employee is 'discharged for cause' the Board's hands are tied," and Section 10(c) precludes reinstatement. *Communication Workers of America, Local 5008*, 784 F.2d at 850. Indeed, as the Board noted (A 3), every circuit court that has decided the issue has affirmed this conclusion.

By analogy, the Board found (A 3) that, because Section 10(c) precludes a make-whole remedy where the employer learns of employee misconduct through an unlawful investigatory interview, "it follows that Section 10(c) also precludes such a remedy where, as here, the employer learns of the misconduct through unlawfully installed hidden surveillance cameras." Describing why those two circumstances can appropriately be treated the same, the Board explained (A 3)

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[2] *See Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 137-38 (9th Cir. 1983) (under Section 10(c), "reinstatement and backpay was beyond the authority of the Board," because, despite the employer's *Weingarten* violation, the employee was discharged "for cause"); *General Motors Corp. v. NLRB*, 674 F.2d 576, 577-78 (6th Cir. 1982) (where an employee is discharged "for cause," Section 10(c) "precludes an order of backpay and reinstatement"); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981) ("the Board lacks the power to order reinstatement or backpay for employees discharged for theft of company property"); *NLRB v. Potter Elec. Signal Co*., 600 F.2d 120, 123-24 (8th Cir. 1979) (where employees are discharged "for cause," rather than for insisting on their *Weingarten* right, reinstatement and backpay is inappropriate).

that "[i]n each situation, the employer acquires facts relating to the misconduct through unlawful means," and "the reason for the discipline is not that the employee engaged in union or other protected concerted activities."[3] (A 3.)

Moreover, the Board emphasized (A 3) that, in both situations—the *Weingarten* context and the circumstances here—"the employee is disciplined for actions the employer considers to be misconduct," and therefore the discipline is for cause. To illustrate that point, the Board quoted (A 3 n.11) the Eighth Circuit's explanation in *Montgomery Ward*, 664 F.2d at 1097: "[T]he employees effected their own discharge [by] stealing and the [*Weingarten*] violation was simply incidental to the investigation which preceded the firing." *See also Potter Elec. Signal Co.*, 600 F.2d at 123 ("the employees were discharged for a fight that resulted in shutting down the production line," and the *Weingarten* violation was "only incidental to the investigation"). Similarly, the Board stated (A 3 n.11) that "the employees here effected their own discharge and discipline by using illegal

[3] In contrast, an employee who is disciplined "for asserting the right to representation" in an investigatory interview is entitled to a make-whole remedy. *Taracorp*, 273 NLRB at 223 n.12. Moreover, where an employer acts with union animus, and the Board finds that "the investigation itself was unlawfully motivated" under Section 8(a)(3) of the Act, the Board will order a make-whole remedy, because of the "clear and direct connection between the employer's unlawful conduct and the reason for the discipline." *Preferred Transport., Inc.*, 339 NLRB 1, 3 (2003) (distinguishing *Taracorp*, noting that it dissimilarly involved an employer's "procedural unfair labor practice"), *pet. for review dismissed*, 2003 WL 22705746 (D.C. Cir. 2003) (Nos. 03-1149 & 03-1174).

drugs on the [Company]'s premises and engaging in other misconduct in clear violation of established work rules."

Based on the foregoing reasoned analysis, the Board considered (A 6-7) the Court's instruction that the Board, on remand, must "apply, distinguish adequately, or overrule" its prior decisions in *Tocco* and *Great Western*. 414 F.3d at 48. As shown at p. 7, the Board in its initial decision distinguished its granting of a make-whole remedy in *Tocco* and *Great Western*, from its denial of that remedy here. Specifically, the Board found that the unilateral changes in *Tocco* and *Great Western* were changes in the employers' misconduct standards, while the unilateral change here was instead a change in the Company's method for detecting misconduct. *See* 342 NLRB at 561. On appeal, the Court rejected that distinction, and held that the unilateral changes in *Tocco* and *Great Western*, like the one here, were changes in the employer's method for detecting misconduct. *See* 414 F.3d at 47-48.

On remand, the Board found (A 6-7) *Tocco* and *Great Western* inconsistent with its interpretation and application of Section 10(c) in this case, and thus overruled them. As the Board explained (A 7), "we interpret Section 10(c) to preclude the Board from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means." Finding that *Tocco* and *Great Western* stand in contrast to the

rationale applied here, the Board overruled (A 6, 7) those cases "to the extent that [they] hold that Section 10(c) does not limit the Board's authority to grant a make-whole remedy where an employer disciplines an employee for cause, but the cause is uncovered through unilaterally and unlawfully implemented means."

Accordingly, the Board properly undertook the Court's remand instructions by reexamining and clarifying its rationale for concluding that Section 10(c) of the Act precludes a make-whole remedy in this case, and by overruling its prior precedents *Tocco* and *Great Western* on that reasoned basis.

C. The Union's Challenges to the Board's Exercise of Its Remedial Discretion in this Case Are Meritless

None of the Union's challenges to the Board's Supplemental Decision demonstrates that the Board abused its discretion in exercising its remedial authority in this case. For instance, the Union contends (Br 22-27) that the Board, in declining to order a make-whole remedy, "failed to meet its obligation under the Act" (Br 22), because a make-whole remedy is necessary to afford complete relief for the Company's unfair labor practice. That contention misconceives a fundamental principle of the Act's remedial scheme, which, as this Court has repeatedly recognized, and reiterated in its opinion here (see 414 F.3d at 46): "The Act does not require the Board to 'order that which a complaining party may regard as "complete relief" for every unfair labor practice.'" *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (quoting *Shepard v.*

NLRB, 459 U.S. 344, 352 (1983)). Indeed, if there were any truth to the Union's contention, the Court would not have instructed the Board that one option on remand would be to overrule *Tocco* and *Great Western*.

Rather, the Act grants the Board discretion in its remedial authority, and court review is limited to determining whether the Board has abused its discretion in ordering its chosen remedial provision. *See Frazier Indus. Co., Inc.*, 213 F.3d at 759-60, and cases cited at p. 13. As the Seventh Circuit has aptly explained it in endorsing *Taracorp*, "Section 10(c) requires the Board to order violators to 'cease and desist' from their unlawful conduct, but it leaves in the Board's charge the selection of any 'affirmative action' that will 'effectuate the polices of' the statute." *Communication Workers Local 5008*, 784 F.2d at 852.

Moreover, since the infancy of the Act, the Board has frequently exercised its discretion to withhold a make-whole remedy when, in its judgment, "it would not effectuate the policies of the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941) (citing *Thompson Cabinet Co.*, 11 NLRB 1106, 1117 (1939)). *Accord Precoat Metals*, 341 NLRB 1137, 1138-39 (2004) ("the Board has, at times, decided not to grant [reinstatement and backpay] remedies where doing so would not effectuate the policies of the Act") (collecting cases). And the Court here recognized that same principle. *See* 414 F.3d at 48. Therefore, although affirmative remedies such as "reinstatement and back pay are the Board's usual

remedies," given the Board's discretion to tailor remedies to the facts of particular cases, "[t]he historical practice is not so uniform." *Communication Workers Local 5008*, 784 F.2d at 853.

There is also no merit to the Union's claim (Br 24-26) that the Board's remedy will not deter the Company from violating its bargaining obligation in the future. The Board, in addition to entering a cease-and-desist order, affirmatively required the Company to bargain collectively with the Union, upon request, regarding the installation and use of hidden surveillance cameras, as well as other mandatory subjects of bargaining. (*See* A 6 n.19, 7.) Thus, all the Union need do to test whether the Company is resolved to continue to violate the Act is to demand bargaining. And, should the Company refuse, it will be subject to contempt sanctions. Without a doubt, this will discourage future violations.

Indeed, the Seventh Circuit came to the same conclusion in *Communication Workers Local 5008*, 784 F.2d 847. There, the court explained that *Taracorp* "sets up a graduated approach to remedies," with repeat violations "handled more harshly than isolated violations," and leading to a citation for contempt of court, which "few employers wish to incur." *Id.* at 852. Accordingly, the Union's claim (Br 24) that, "there are no consequences to the [C]ompany for breaking the law," is mistaken.

Taking a different tack, the Union asserts (Br 13-18, 29-30) that the "for cause" provision of Section 10(c) of the Act is wholly inapplicable to Section 8(a)(5) bargaining violations. That claim is patently incorrect. Although there obviously would be fewer "for cause" issues arising in Section 8(a)(5) cases, than in Section 8(a)(3) cases which typically involve some type of discipline, the Board has long applied *Taracorp*'s "for cause" principles in Section 8(a)(5) cases where it is appropriate to do so under the facts of the case. For example, in *Redway Carriers, Inc.*, 274 NLRB 1359 (1985), the Board found that the employer violated Section 8(a)(5) by discharging two employees without affording them the pretermination hearings required under the collective-bargaining agreement. *Id.* at 1359 n.4. Citing *Taracorp*, the Board found that the judge erred in ordering reinstatement and backpay for the discharged employees, finding "it inappropriate to order make-whole relief where the employees' discharges were not in themselves unlawful, but the violations occurred solely in the procedures by which the discharges were carried out." *Id.*

Similarly, in *Page Litho, Inc.*, 313 NLRB 960 (1994), where the employer violated Section 8(a)(5) of the Act by failing to notify the union of job openings as required under the collective-bargaining agreement, the Board declined to order make-whole relief to the employees who were not hired due to the employer's unfair labor practice. *Id.* at 962. As the Board explained, "[h]ere, as in *Taracorp*,

there is not a sufficient nexus between the violation committed—failure to notify—and the failure of particular individuals to be hired." *Id.* Moreover, the Board found a make-whole remedy inappropriate in that case because there was no discriminatory treatment alleged under Section 8(a)(3), and the employer's Section 8(a)(5) violation was remedied by ordering "[r]estoration of the status quo ante," which under those circumstances, "merely require[d] the [employer] to notify the [u]nion of job openings." *Id.* Likewise, the Board here fully restored the status quo ante by requiring the Company to cease and desist from the unfair labor practice conduct found, to bargain with the Union over any future use of hidden surveillance cameras and other mandatory subjects of bargaining, and to post a remedial notice to employees. (A 6 n.19, 7.)

These Section 8(a)(5) cases, in which the Board applied the principles of *Taracorp* to determine that make-whole relief was inappropriate, also demonstrate that the Union's claim (Br 19-22) that *Taracorp* has no application to Section 8(a)(5) violations is incorrect. Nor is the Union correct in arguing (Br 20-22) that *Taracorp*'s discussion of policy concerns relevant to *Weingarten* violations renders it wholly inapplicable outside the *Weingarten* context. To the contrary, as shown at pp. 16-21, the Board here relied on *Taracorp*'s important holdings on the meaning of Section 10(c)'s phrase "for cause," which is not limited to discipline resulting from unlawfully conducted investigatory interviews. As the Board in

Taracorp explained, in rendering its decision it relied on "the specific remedial restriction contained in Section 10(c), the general remedial framework of the Act," and policy concerns "*independent* of those restrictions." 273 NLRB at 221. *See Communication Workers Local 5008*, 784 F.2d at 850, 851 ("The Board's decision in *Taracorp* rests principally on its construction of . . . [Section] 10(c) . . . ."; its policy discussion was "an independent ground" for its decision"). Thus, the Union's attempts (Br 20-22) to distinguish *Taracorp* fail.

The Union also misses the mark in asserting (Br 19-20) that *Weingarten* cases, such as *Taracorp*, are distinguishable from this one because, in "a typical *Weingarten* case," it claims, the employer has "already suspected" misconduct. As the Board explained (A 3), "the *Taracorp* Board's holding did not turn on the presence of an untainted source," and instead relies heavily on Section 10(c)'s prohibition against making whole employees who have been discharged for cause. Similarly, the Board noted (A 2) that the court decisions in *Pacific Telephone & Telegraph*, 711 F.2d at 137-38, *Montgomery Ward*, 664 F.2d at 1097, and *Potter Electric Signal*, 600 F.2d at 123-24, all of which, as shown at p. 21 n.2, held that Section 10(c)'s "for cause" provision barred make-whole relief for a *Weingarten* violation, do not even refer to an untainted information source, but "instead rely solely on Section 10(c) in denying a make-whole remedy." Further, the Board stated (A 2) that, in other *Weingarten* Board decisions issued soon after *Taracorp*,

the Board relied on Section 10(c) in denying a make-whole remedy "even though the employer would not have discharged the employee absent the information obtained through the unlawful interview." *See Illinois Bell Telephone Co.*, 275 NLRB 148 (1985), *enforced sub. nom., Communication Workers of America, Local 5008 v. NLRB*, 784 F.2d 847 (7th Cir. 1986); *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984), *enforced mem.*, 785 F.2d 316 (9th Cir. 1986).

The Union does not further its position by suggesting (Br 15-16) that those portions of Section 10(c)'s legislative history cited by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-02 n.6 (1983), in its discussion of Section 8(a)(3) "mixed motive" cases, indicate that the "for cause" provision is *only* applicable to Section 8(a)(3) cases. That is not the full extent of the legislative history, which contains strong statements to contrary. For example, the Conference Committee's report, which indeed is the final word on the subject, aptly explained that Section 10(c)'s "for cause" provision "of course, applies with *equal force* whether *or not* the acts constituting the cause for discharge were committed in connection with a concerted activity." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39 (1947) (emphasis added). Moreover, the Committee explained that the "for cause" provision was meant to clarify that the Board was not to address the type of remedial question undertaken in *Berkshire Knitting Mills*, 46 NLRB 955, 1002-04 (1942), *enforced*, 139 F.2d 134 (3d Cir. 1943), where "the Board attempted

to distinguish between what it considered major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement." H.R. Conf. Rep. No. 510, at 39. Accordingly, Congress broadly provided that employees who engaged in *any* form of "improper conduct" were "not [to] have any immunity under the [A]ct," and were to be "subject to discharge without right of reinstatement." *Id.* at 59.

The Union oddly claims (Br 12-13, 28-29) that "the Board did not have the authority on remand to re-determine a statutory issue" that this Court "considered and rejected." The Union relies on, and apparently misunderstands (Br 13), the Court's statement that "Section 10(c) does not expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but-for its own unlawful action." *See* 414 F.3d at 47. That statement simply concludes that, under the first step of *Chevron*, 467 U.S. 837, the plain terms of Section 10(c) do not answer the precise issue presented, and therefore the Board may interpret that provision under step two of the *Chevron* test, and its reasonable interpretation is to be upheld. *See Chevron*, 467 U.S. 837, and cases cited at pp. 13-14.

As noted previously, the Court specifically instructed the Board on remand "to address the appropriate remedial order for the disciplined employees," and with regard to *Tocco* and *Great Western*, "apply, distinguish adequately, or overrule

those precedents." *Id.* at 48. Under those instructions, no particular outcome among those possibilities was foreclosed. Moreover, as shown at pp. 14-24, the Board fully complied with the terms of the Court's remand, presented a reasoned basis for its interpretation of Section 10(c) in this case, and on the basis of that interpretation, properly overruled *Tocco* and *Great Western*, to the extent that they were inconsistent with the Board's view applied here.[4] Accordingly, the Board properly exercised its broad remedial discretion in responding to the Court's remand in this case, and the Union has failed to provide any basis for disturbing the Board's Supplemental Decision.

[4] To the extent that the Union cites (Br 30-31) other cases that might be read in line with *Tocco* and *Great Western*, the Board's Supplemental Decision will supply to future litigants any guidance necessary in this area.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying in full the Union's petition for review.

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April 2008

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner	)	No. 07-1423
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	Board Case No. 14-CA-25299
and	)	
ANHEUSER-BUSCH, INC.	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,675 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 23rd day of April 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner	)	No. 07-1423
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	Board Case No. 14-CA-25299
and	)	
ANHEUSER-BUSCH, INC.	)	
Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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