

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

RALPHS GROCERY COMPANY

and

Case 21-CA-039867

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL

To the Honorable Jeffrey Wedekind, Associate Chief Administrative Law Judge

Ami Silverman
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
888 So. Figueroa Street, 9th Floor
Los Angeles, California 90017
Tel: (213) 894-5223
Fax: (213) 894-2778
Ami.Silverman@NLRB.gov

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Procedural Posture.....	2
III.	The Facts.....	3
	A. The Suspension and Termination of Vittorio Razi.....	3
	B. The Arbitrator’s Award.....	7
IV.	Argument.....	10
	A. Respondent violated the Act by refusing to allow Razi to confer with his Union representative before and during an interview which could have lead to his discharge and unlawfully suspending and terminating Razi for requesting Union representation at an investigatory interview.....	10
	1. The meeting of May 18 was an investigatory interview to which <i>Weingarten</i> rights attached.....	10
	2. Razi’s termination was motivated, in part, by his requesting union representation at an Investigatory meeting.....	13
	B. Deferral to the Arbitrator’s Awards is inappropriate under current Board standards.....	16
	C. The Board should consider modifying its approach to post- arbitral deferral and adopt a new standard.....	18
V.	Conclusion.....	19

TABLE OF AUTHORITIES

Supreme Court Cases

<i>14 Penn Playa, LLC v. Pyett</i> , 129 S.Ct. 1456 (2009).....	18
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	18
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975).....	1,10

District Court Cases

<i>Bayard v. NLRB</i> , 505 F.2d 342 (D.C. Cir., 1974).....	18
<i>Taylor v. NLRB</i> , 786 F.2d 1516 (11 th Cir. 1986).....	18

NLRB Cases

<i>Aramark Services, Inc.</i> , 344 NLRB 549 (2005).....	17
<i>Baton Rouge Water Works Co.</i> , 246 NLRB 995 (1979).....	10
<i>Collyer Insulated Wire</i> , 192 NLRB 837 (1971).....	2
<i>Key Food Stores</i> , 286 NLRB 1056 (1987).....	17
<i>Olin Corp.</i> , 268 NLRB 573 (1984).....	16
<i>Safeway Stores</i> , 303 NLRB 989 (1991).....	12
<i>Spielberg Mfg. Co.</i> , 112 NLRB 1980 (1955).....	16
<i>Super Valu Stores</i> , 236 NLRB 1581 (1978).....	15
<i>System 99</i> , 289 NLRB 723 (1988).....	10
<i>Taracorp, Inc.</i> , 273 NLRB 221 (1984).....	16
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	16

I. INTRODUCTION

Respondent is a major retail grocery chain in Southern California which has recognized the Union as the representative of certain employees since at least 1941. This recognition has been embodied in a series of collective-bargaining agreement, the most recent of which is effective from March 7, 2011 through March 2, 2014.

Respondent's long-term employee and member of the bargaining unit, Vittorio Razi, herein Razi, was suspended on May 18, 2011, and subsequently terminated on May 19, 2011, for refusing to submit to Respondent's demand for a drug and alcohol test without first conferring with a Union representative. The matter was subsequently grieved under the parties' collective-bargaining agreement, and the termination was upheld by an arbitrator. Counsel for the Acting General Counsel urges that the arbitrator's award should not be deferred to as repugnant to the Act because Razi was denied the opportunity to have union representation at an "investigatory interview in which the risk of discipline reasonably inheres." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, at 262 (1975)

In the alternative, Counsel for the General Counsel is also urging that the Board reconsider its view of the deferral standard in favor of greater protection of employees' rights under the Act , and accordingly modify its approach in Section 8(a)(1) and (3) cases where the arbitrator failed to correctly enunciate of apply the correct statutory principles.

II. PROCEDURAL POSTURE

Upon a charge filed by the Union on July 1, 2011, and amended on September 10, 2011, and after an investigation of the allegations therein, Region 21 of the National Labor Relations Board, herein the Region, deferred further processing of the charge under *Collyer Insulated Wire*, 192 NLRB 837 (1971), by letter dated August 19, 2011. The Union appealed the Region's decision to defer, and that appeal was subsequently denied.

On about February 1, 2012, pursuant to a grievance filed by the Union, the matter was heard by an arbitrator, who issued his opinion and award upholding the termination on May 5, 2012. Thereafter, the Union requested that the Region not defer to the arbitrator's award. Consequently, on about November 28, 2012, the Region issued a complaint and notice of hearing, which was amended on January 24, 2013. The amended complaint alleged that on about May 18, 2011, Respondent denied a request for union representation at a meeting that the employee had reasonable cause to believe would result in disciplinary action, and commenced with the interview. The amended complaint further alleged that the employee refused to complete the interview without union representation and was suspended and subsequently terminated on May 19, 2011 in violation of Section 8(a)(1) and (3) of the Act.

On about March 13, 2013, the parties entered into a joint motion waiving a hearing and requesting that the Administrative Law Judge issue a decision in this matter without a hearing based solely on a stipulated record. On about March 19, 2013, the

Administrative Law Judge granted that motion and the approved the stipulation of facts submitted by the parties and set a deadline for the filing of briefs.

III. THE FACTS.¹

A. The Suspension and Termination of Vittorio Razi

Vittorio Razi, herein Razi, was hired by Respondent in 1987, and had worked at the Irvine store in a bargaining-unit position as a produce manager since 2003. (Tr. 191-2) He did not work a set shift but generally worked about 48 hours a week, in addition to working extra hours as a designer and woodworker, both at home and in the store, building and installing custom displays for the produce department. (Tr. 194; 201)

The record shows that in the days preceding his termination, Razi worked more than 34 hours between Saturday, May 14, 2011 and Monday May 16, 2011. (Tr. 210-17) He reported for work at about 5:00 a.m. on Wednesday, May 18, 2011, and began his normal tasks. (Tr. 222-3) Store Director Julie Henselman arrived at about 7:14 a.m. that day, and was advised by Assistant Store Manager Ed Maier that Razi was "acting weird," and that he might be under the influence of something. (Tr. 51) She briefly observed Razi and reached the same conclusion, and then spoke with some other employees to gather their impressions of Razi's behavior. (Tr. 53-7; 68-9) Based on both her observations and those of others, Henselman consulted with Bill Edwards, Senior Labor Relations Representative at Respondent's headquarters, who instructed her to send Razi to take a drug test. (Tr. 59; 86) Henselman believed the drug test was

¹ Pursuant to the Stipulation of the parties, the facts summarized herein are derived from the Transcript and Exhibits of the Arbitration hearing held on February 1, 2012, attached to the Stipulation as Exhibit 10 and cited as "TR," followed by the relevant page number.

“for cause” and not random, and that the drug test was part of an investigation into whether Razi was using drugs.² (Tr. 86)

Consequently, Razi was summoned by Henselman at around 9:15 or 9:20 a.m. to her office, where he met with her and Assistant Store Manager Maier. (Tr. 59; 85; 224) Henselman asked Razi if he was on drugs, and, after Razi incredulously asked if she was joking, told him he had to accompany Maier to take a drug test. (Tr. 60) Razi immediately asked to speak with his lawyer and a Union representative. (Tr. 60; 225) Both Henselman and Maier said no, that Razi did not have the right to contact the Union (Tr. 88) Henselman then told Razi that if he did not take the test, it would be an automatic positive and he would be considered insubordinate which could lead to his being fired. (Tr. 60; 93; 225-6) Razi then stood and said he was calling his Union representative, and Henselman dismissively waved him out of the room. (Tr. 61; 226)

Razi stepped outside the front of the store and placed a call on his cell phone to Union Representative Linda Martinez at 9:33 a.m., according to Razi’s telephone records, but was only able to leave her a voice mail to call him back immediately. (Tr. 227-9; 255) Razi then placed a call to a former Shop Steward who had recently retired, Fred Johnson, to seek some guidance on how he should proceed. (Tr. 227) This call was interrupted, however, by a call to Razi from front-end Manager Maria Rodriguez, who had been told by Henselman to tell Razi he was wanted back upstairs in Henselman’s office. (Tr. 60) Razi went back inside the store, stopped to punch out for

² Edwards agreed, based on what Henselman told him, that Razi appeared to be exhibiting signs of impairment and that Respondent therefore had the right to test him for drugs. (Tr. 116) Union Field Representative Chuck Adinolfi confirmed that the collective-bargaining agreement between Respondent and the Union did not provide for random drug-testing, but that such testing could be conducted pre-employment, post-accident, or based on probable cause. (Tr. 270; 273)

lunch, and proceeded back upstairs but Rodriguez did not accompany him.³ (Tr. 229; 258-9) It was now about 9:40 a.m. according to the punch out, and Razi had been outside for about 10 or 15 minutes (Tr. 88-9; 121; 230; 256)

When Razi returned to Henselman's office, she told him that he had been allowed to make his call to the Union, but Razi explained that Union Representative Martinez has not returned his call and said he would not take the drug test until he heard back from her. (Tr. 257; 264) The conversation continued in this vein for a while, and Henselman repeated several times that if Razi did not take the test, it would be an automatic positive and he would be considered insubordinate and could be fired. (Tr. 105-6; 230-1; 262-5)

After Razi continued to express incredulity at the situation, Henselman decided to call Senior Labor Relations Representative Edwards again for further guidance, and after telling him that Razi could not get in touch with a Union Representative and so would not take the drug test, was instructed not to argue with him and just suspend and then terminate him (Tr. 63; 92-4) Razi insisted on speaking with Edwards, but Henselman just hung up and then told Razi he was suspended pending further investigation (Tr. 63; 230-32; 262) At this point, Razi finally asked why she thought he was on drugs, and she showed him a piece of paper with some handwritten notes describing his trouble with the computer, his fidgety and jerky hand motions, and other incidents described by his coworkers. She then told him to leave the premises or she

³ Apparently, Maria Rodriguez is a shop steward at this facility. The chief steward, Joe Terranova, had already completed his shift and had gone home shortly before Razi was summoned by Henselman the morning of May 18. (Tr. 164; 257-8; 278; 281)

would call the police (Tr. 96; 224; 257-8) This portion of the meeting lasted about 10 or 15 minutes. (Tr. 256)

Upon leaving the store, Razi once again placed a call to Union representative Martinez but was again unable to reach her. Finally, about 10:34 a.m., Martinez called Razi back and they spoke for about 20 minutes. Razi asked if the company had the right to suspend him for refusing to take the test, and Martinez said yes and then told Razi to go ahead and take the test and the Union would file a grievance on his behalf. (Tr. 233) On his way home, Razi stopped by Respondent's San Clemente store ostensibly to speak with District Manager Gabe Navarette and also to tell him that he wanted to take the drug test as advised by the Union, but Navarette had apparently already been contacted by Henselman, and told Razi he had to leave the store and suggested he talk to the Union. (Tr. 234, 236)

The following day, May 19, 2011, Razi was contacted by Henselman to come into the store that afternoon but would not tell him why. Razi subsequently met with Henselman and Loss Prevention Manger Haynes and was told by Henselman that he was being terminated for insubordination for refusing to take the drug test.⁴ Razi offered to take the drug test, but both Henselman and Haynes said it was "too late." Razi was escorted out by Haynes, stating that he would see Respondent "in court." (Tr. 238) Prior to being terminated, Razi had received only two or three warnings in 24 years – none related to drugs or alcohol. (Tr. 248) The termination notice subsequently issued to Razi stated in pertinent part: "[Razi] was terminated for insubordination and

⁴ Edwards confirmed that Razi was terminated for insubordination, and not for being under the influence.

refusal to take a drug test. [] He also refused to take a drug test, which is also insubordination, and an automatic 'positive' drug test result.”

B. The Arbitrator's Award

A hearing was held before Arbitrator Charles Askin, herein the Arbitrator, on February 1, 2012, where the parties had the opportunity to examine and cross-examine witnesses and to introduce exhibits; both parties filed post-hearing briefs with the Arbitrator. On about May 5, 2012, the Arbitrator issued his decision essentially upholding the termination of Razi for cause.⁵

The Arbitrator discussed the *Weingarten* issue at length, characterizing the primary question of whether Razi's rights were violated as one of whether the “two meetings” on May 18, 2011, were “investigatory interviews” to which Weingarten protections attach. (Ex.11 p.19) In his analysis of the events of May 18, he concluded that after Razi said he wanted to confer with the Union, Henselman did not ask him any further questions “of an investigatory nature” other than whether he would agree to submit to a drug and alcohol screening. Thus, the Arbitrator concluded, these “questions” were merely inquiries about whether Razi was going to comply with Respondent's directive that he submit to the testing. (Ex.11 at p.19) Thus, according to the Arbitrator, the purpose of the May 18 meeting[s] was not investigatory, since Razi was not summoned so further observations could be made of his conduct or so he could be asked questions to support the reported behaviors. Rather, according to the Arbitrator, the purpose of the meeting was “simply to inform [Razi] that he was being

⁵ The Arbitration Award is attached to the parties' Stipulation as Exhibit 11, and all references to the Award are cited herein as Exh. 11, followed by the relevant page number.

required to submit to a drug and alcohol screening,” since Henselman had already conducted a reasonably extensive investigation into [Razi’s] conduct that morning before she called him to her office.” (Ex.11 at p.20) Thus, the Arbitrator reasoned, by the time of the meeting, Henselman had already made the decision to compel Razi to submit to the test, and her intention in summoning him was not to gather any new fact, but merely to inform him he was being required to be tested – a decision that was made before the meeting began. Accordingly, the Arbitrator concluded based on the foregoing analysis that the meeting[s] on May 18 “do not appear to satisfy the legal requirement of “investigatory interviews” that trigger entitlement to *Weingarten* rights. (Ex.11 at p.20)

Furthermore, the Arbitrator distinguished the cases cited by the Union to support its contention that the May 18, 2011 meeting was investigatory in nature, to wit: *Safeway Stores, Inc.*, 303 NLRB 989 (1991), and *System 99*, 289 NLRB 723 (1988).in that they did not apply to a suspicion based on contemporary observation, that an employee was under the influence of drugs or alcohol at the time of the meeting. (Ex.11 at p.21) Thus, the Arbitrator was not persuaded that Board precedent supported the Union’s contention that targeting drug testing of the type in the instant case based upon reasonable suspicion constituted an “investigation” that triggers the application of *Weingarten* rights. (Ex.11 at p.21) Rather, the Arbitrator concluded that Razi was terminated for failing to comply with a direct order to submit to a drug test. (Ex.11 at p.23)

Moreover, the Arbitrator noted that drug and alcohol screening of the type at issue in the instant case are time sensitive in that a delay in the screening process

could compromise the results, and concluded that Respondent was not obligated to wait “indefinitely” until Razi was able to reach a Union representative when it possessed reasonable suspicion that Razi was impaired and was entitled to require his submission to a drug test “in a timely manner to ascertain whether its suspicions were verified.” (Ex.11 at p. 24)

Having disposed of the *Weingarten* issue, the Arbitrator then concluded that Razi was properly terminated for insubordination because he was given a clear, direct, and reasonable order, the consequences of failing to comply were clearly communicated to him, and he willingly disobeyed the order. (Tr. 11 at p.24)⁶ The Arbitrator further concluded that the disciplinary penalty of termination was reasonable, notwithstanding Razi’s lengthy employment history, since he was insubordinate in response to “multiple mandatory directives that he submit to a drug and alcohol test” and he “persistently, repeatedly, and adamantly refused to comply with the order” for an hour or more. (Ex.11 at p.25) Based on the foregoing, the Arbitrator held that Respondent had just cause to terminate Razi, and denied the grievance. (Ex. 11 p. 26)

After the Arbitrator forwarded a copy of his Award to the Region, the Union argued that the Region should not defer to the Award. Respondent took the opposite position, and after consideration of the issues, the Region agreed with the Union and issued complaint and notice of hearing alleging that Respondent had violated Razi’s *Weingarten* rights. (Ex. 3 and 5)

⁶ The Arbitrator based his conclusion that the order to take the drug test was “reasonable” because Respondent had sufficient reason for suspicion that Razi may have been under the influence of drugs while on duty, based on personal observation and the reports gleaned from other employees at the facility.

IV. ARGUMENT

A. Respondent violated the Act by refusing to allow Razi to confer with his union representative before and during an interview which could have led to his discharge and unlawfully suspending and terminating Razi for requesting union representation at an investigatory interview

It is well settled that employees in a unionized workplace may request the presence of a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975) Generally, *Weingarten* rights apply only to fact-finding interviews, as opposed to announcements of predetermined discipline. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) Also, to secure the right to consult a union representative, the employee must reasonably believe that the investigation at issue will result in disciplinary action and must then expressly request Union representation. *Weingarten*, 420 U.S. at 257.

1. The meeting of May 18 was an investigatory interview to which *Weingarten* rights attached

The Board has not specifically addressed the issue of whether a drug test is *per se* investigatory. However, two cases have dealt with scenarios similar to that in this case and provide instructive analytical frameworks.

In *System 99*, 289 NLRB 723 (1988), a union employee was summoned to a meeting after his supervisor formed an impression that he was intoxicated where management intended to ask him to submit to a drug test, and, if he refused, to terminate him. The managers admitted that they did not believe their suspicions of intoxication were good cause for termination, but that some verification in the form of a sobriety test was needed. After the employee's initial reticence, the managers

continued to insist he submit to the test and reminded him of the consequences of his refusal. An “acting steward” and some other employees were present as “witnesses” during this exchange. After about 30 minutes, the employee asked to confer with the chief shop steward, which request was denied, as well as a request to talk to the acting steward outside. Thereafter, the employee was terminated for refusing to submit to the sobriety test. In concluding that the meeting was investigatory in nature and that the employer violated the Act by denied the employee his Weingarten rights, the administrative law judge found that the demand to take a drug test was “investigatory” in nature, inasmuch as the employer conceded it could not terminate the employees based on mere observation or suspicion: rather, it needed proof in the form of with positive test results or a refusal to be tested that could be deemed an admission.

In analyzing the forgoing facts in *System 99, supra*, the administrative law judge stated:

Weingarten makes clear that an employee who is asked to answer questions in an interview about this suspected misconduct is entitled to insist on union representation at such a meeting and that he is further insulated for discipline for refusing to participate if the employer refuses his demand for such representation. Where, as here, an employee is advised by his employer – and therefore he ‘reasonably believes’ – that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of a representative before deciding what he will do. 289 NLRB at 727.

Moreover, the administrative law judge concluded that when confronted with the employer’s “either/or” ultimatum – take the test or be fired – the employee’s request for union representation was an appropriate invocation of his interests under Section 7 of the Act that *Weingarten* was intended to protect.

Safeway Stores, 303 NLRB 989 (1991), provides additional guidance on this issue. Although the Board therein declined to pass on the administrative law judge's apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*, it did conclude that inasmuch as the test was part of an inquiry into the employee's attendance record, the employee was entitled to invoke his rights to union representation at the meeting where the drug test was ordered.

In *Safeway*, supra, the employer argued that the meeting was not investigatory because the sole purpose of the meeting was merely to instruct the employee to submit to the drug test and there was no interrogation, factual or discretionary determination to be made during the discussion and hence no union representative was needed. With regard to this assertion, the administrative law judge noted:

[Respondent] appears to take the position that because supervisors did not personally intend to interrogate [the employee] about his drug use but were going to secure his consent to take a drug test... that [he] had no right to union representation under Section 7 of the Act. This argument lack merit...inasmuch as the purpose of an employer's investigatory interview concerning the use of drugs and the possible adverse effects of such an interview on an employee's employment are the same regardless of whether the employer's interrogation of the employee during the interview is done personally by supervision or by means of a drug test. 303 NLRB at 995.

Based on the foregoing cases, the evidence in the instant case clearly demonstrates that the meeting of May 18, 2011, at which Razi was suspended was an investigatory meeting to which *Weingarten* rights attached. First, the meeting begins with Henselman asking Razi is he is on drugs, and then asking him to submit to a drug test. Henselman herself admitted that the requested test was part of an investigation into whether Razi was on drugs. Thus, it appears that, like the manager in System 99, Henselman did not believe that she could discipline Razi based on observation alone, but obviously felt she

needed proof in the form of either a positive test result or an implied admission in the form of a refusal.

The Arbitrator seems to conclude that the meeting of May 18 was actually two meetings, separated by the 10 or 15 minutes when Razi attempted to contact a Union representative, and then concludes that the “second” meeting was not investigatory since Henselman asked no questions of Razi except whether he would rather take the test without Union representation or be terminated. The Arbitrator further concluded that the “second” meeting was not investigatory because the decision to terminate Razi had already been made. This tortuous reading of the facts is not supported by the testimony, however, which shows that this was in fact one meeting – no facts had changed between the first part and the second except that Razi was allowed to call the Union and was unable to reach anyone. Also, the facts are clear that the decision to terminate Razi was not made until well into the later part of the meeting when Henselman advised her supervisor that Razi was refusing to take the drug test and insisting on consulting with the Union and was told to just terminate him. Thus, the determination was not *fait accompli* as the Arbitrator suggests, but was based on Razi’s insistence on exercising his *Weingarten* rights.

2. Razi’s termination was motivated, in part, by his requesting union representation at an investigatory meeting

Respondent admitted that it did not believe that Razi was entitled to union representation at the meeting of May 18, 2011, and on that basis it initially refused to allow him to contact the Union. After briefly capitulating, Respondent allowed Razi only 10 or 15 minutes to call someone, and when his efforts proved unsuccessful, continued

with the investigatory meeting. Razi, however, continued to insist on exercising his *Weingarten* rights and did not accept Respondent's Hobson's Choice of either submitting to the test or being terminated. As noted in *System 99, supra*:

[I]t is commonplace for employers to tell employees that their 'rights' in a given situation are limited to a single set of alternatives. And it is equally a phenomenon common to industrial life that employees will mistrust such 'either/or' statements as correctly expressing their legal or contractual options. It is therefore evident that, as an exercise of the Section 7 rights of employees to engage in mutual aid and protection, an employee may wish to consult with an employee representative before accepting an employer's ultimatum, and, being denied that request, that he may wish to 'dummy up' in the face of further attempts to question him. 289 NLRB at 727.

In the instant case, there is no dispute that Razi did not unequivocally refuse to submit to the requested drug test, but only refused to do so until he was able to confer with a Union representative about his rights: Henselman acknowledges this in her second call to Senior Labor Relations Representative Edwards where she tells him that Razi could not contact the Union and therefore would not take the test. Edward tells her to just terminate him. Thus, Razi's insistence on exercising his *Weingarten* rights resulted in his termination.⁷

Moreover, Respondent provides no rationale for refusing to delay a final decision until such time as Razi can confer with a Union representative. The Board in *Safeway Stores, supra*, found that in the absence of a union steward at the facility at the time of the interview, the respondent therein was obligated to respect the employee's request

⁷ Razi testified at the arbitration hearing that when he spoke to the Union after his suspension and was told to submit to the drug test and then grieve, he attempted to contact the District Manager to advise his of his capitulation but was rebuffed.

for assistance, even if it meant delaying the interview and the requested drug test. 303 NLRB at 996.⁸

Although Respondent suggests in its arguments to the Arbitrator that time was of the essence, the fact remains that Razi had been at work more than 4 hours on May 18 before he was summoned to meet with Henselman. Moreover, Henselman took more than two hours after she arrived at the store to personally observe and gather information on Razi before even arranging the meeting. The entire meeting lasted only about 20-25 minutes, and it strains credulity to suggest that any evidence would be further eroded by the allowing a few more minutes for Razi to attempt to contact someone at the Union.

Moreover, the unavailability of a Union representative during the May 18 meeting is due in large part to Respondent's delay and intransigence. Respondent admitted that it initially told Razi he was not entitled to consult with the Union before accepting the ultimatum regarding the drug test. By the time Henselman summoned Razi to her office after 9:00 a.m. – two hours after she arrived at the store – the chief union steward had already finished his shift and gone home. Had Respondent properly understood Razi's *Weingarten* rights, it might have advised the chief steward that he would be needed at an investigatory meeting and thus he would have been available for Razi to consult and make an informed decision. Furthermore, Razi was not able to consult front-end manager Maria Rodriguez in her capacity as a shop steward, since she had already

⁸ See also *Super Valu Stores*, 236 NLRB 1581 (1978). This issue was also addressed by the Administrative Law Judge in *System 99*, *supra*, but the Board declined to pass on the issue of whether the employer was obligated to wait as long as an hour for a union steward, during which time the result of any test might be rendered useless, because the Judge had already concluded that the employer was obligated to provide the employee the opportunity to consult with the union once he asserted his *Weingarten* rights. 289 NLRB at 727.

been co-opted by Respondent to summon him back to the meeting and was later implicated in the accusation that Razi had punched out in derogation of a direct order from Rodriguez. Under such circumstances, created by Respondent, it would have been clearly inappropriate for Razi to then ask Rodriguez to represent him in an investigatory meeting. Thus, Respondent left Razi no choice but to attempt to reach a Union representative by telephone, and then terminated him for not being able to reach anyone during the very short time allowed. When Razi continued to insist on his right to Union consultation, he was terminated.⁹

B. Deferral to the Arbitrator's Award is inappropriate under current Board standards

Deferral to the Arbitrator's Award is inappropriate because his decision is clearly repugnant to the purposes of the Act. Under the Board's current and longstanding standards established in *Spielberg Mfg. Co.*, 112 NLRB 1980 (1955) and *Olin Corp.*, 268 NLRB 573 (1984), the Board will defer to arbitral awards if: (1) all parties agree to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not clearly repugnant to the purposes and policies of the Act.

The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act. However, it

⁹ It is axiomatic that Razi is entitled to full reinstatement and backpay, inasmuch as there is no evidence that he was terminated for cause. In this regard, Respondent does not contend that Razi was terminated for actually being under the influence while at work: rather, Razi was terminated for asserting his statutory rights during an investigatory meeting. See, for example, *System 99, supra*, 289 NLRB at 723, fn. 3; *Taracorp, Inc.*, 273 NLRB 221 (1984)(insufficient nexus between the denial of representation at the interview and the termination). Moreover, the General Counsel having established a prima facie case of retaliation, the Employer cannot meet its burden of showing that it would have terminated Razi notwithstanding his protected activity. *Safeway Stores, supra*, 303 NLRB 989 at 989; *Wright Line*, 251 NLRB 1083, 1089 (1980)

does not require that an arbitrator's award be totally consistent with Board precedent, nor does the arbitrator need to "decide a case the way the Board would have decided it." *Aramark Services, Inc.*, 344 NLRB 549, 549 (2005).

In the instant case, there is no dispute that the proceedings were fair and regular or that all parties agreed to be bound. Moreover, the contractual issue presented was factually parallel to the unfair labor practice issue. Also, the Arbitrator was for the most part presented with the facts relevant and necessary to resolving the unfair labor practice. Thus, the only remaining question is whether the Arbitrator's decision was clearly repugnant to the Act.

In examining the repugnancy of arbitrator awards under the *Olin/Spielberg* framework, *supra*, the Board generally finds deferral inappropriate when the precipitating event causing an employees' discharge was his or her protected concerted activities and the arbitrator upheld contractual sanctions based on that conduct.¹⁰ In the instant case, the Arbitrator's award is repugnant because it upholds Respondent's decision to discharge Razi for his protected concerted activity in asserting his Weingarten rights and is therefore inconsistent with relevant Board precedent.

Therefore, the Arbitrator's award is not susceptible to any interpretation that is consistent with the Act and thus fails to satisfy the *Olin/Spielberg* deferral standard *supra*. Based thereon, General Counsel urges that the Arbitrator's award not be deferred to.

¹⁰ See, e.g., *Key Food Stores*, 286 NLRB 1056, 1057 (1987) (no deferral to "clearly repugnant" award where the arbitrator found that an employees' protected concerted activities were insubordinate).

C. The Board should consider modifying its approach to post-arbitral deferral and adopt a new standard

In the alternative to the foregoing argument, General Counsel urges that the Board consider modifying its approach to post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases.

Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and to protect employees from discharge of other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution agreement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights whenever employees and unions agree to a grievance arbitration process.¹¹

Recent Supreme Court precedent concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements hold that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates such issues in a manner consistent with applicable statutory principles and precedent. *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456, 1469-71 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). General

¹¹ E.g., *Taylor v. NLRB*, 786 F.2d 1516, 1521-2 (11th Cir. 1986) ("by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, Olin Corp. gives away too much of the Board's responsibility under the NLRB."); *Bayard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference.)

Counsel argues that this precedent and its rationale are compelling in determining the appropriate degree of deference that the Board should give arbitral awards.¹²

Under this proposed new approach, the party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should, as under the *Olin/Spielberg* standard, defer to the arbitrator's award unless it is clearly repugnant to the Act

Thus, applying this new approach, General Counsel urges that the Board should not defer to the Arbitrator's Award upholding Razi's discharge. Although the parties presented the statutory issue at the arbitration, the Arbitrator failed to correctly enunciate or apply the correct statutory principles as argued *supra*. For this reason and also because, as discussed above, the Arbitration Award is clearly repugnant to the Act, the Award is not entitled to deference under this proposed standard.

V. CONCLUSION

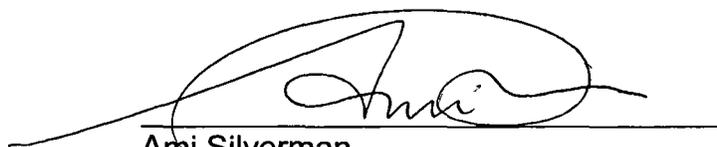
The record as a whole demonstrates that the meeting of May 18, 2011, was an investigatory interview into the behaviors reported to Respondent regarding its employee Vittorio Razi, and that the request for him to take a drug test was part and parcel of the fact-finding process of that interview and was inseparable from the inquiry into Razi's conduct. Based thereon, Razi was clearly entitled to consult with the Union

¹² General Counsel respectfully requests the Administrative Law Judge take administrative notice of General Counsel Memorandum 11-05 dated January 20, 2011, entitled *Guidelines Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3)*, and the comprehensive arguments set forth therein.

before continuing with the meeting. Respondent admitted that it did not believe Razi had such a right, but nevertheless allowed him a short time to try to reach a Union representative. After Razi was unsuccessful at securing a representative, Respondent continued with the investigatory meeting and presented Razi with the choice of taking the drug test without prior consultation with the Union, or having his refusal to do so be construed as insubordination and an assumed positive result for which he would be terminated. After Razi continued to insist on his *Weingarten* rights, Respondent suspended and terminated him in violation of Section 8(a)(1) and (3) of the Act.¹³

The Arbitrator's Award upholding the termination should not be deferred to because it is clearly repugnant to the Act under current Board precedent. General Counsel urges that the Board consider a revised standard of deferral that gives more deference to the statutory rights of employees, and argues that deferral under this proposed standard would likewise be inappropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ami", is written over a horizontal line. The signature is fluid and cursive.

Ami Silverman,
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21

DATED at Los Angeles, California, this 23rd day of April, 2013

¹³ In addition to the standard make-whole remedies, including reinstatement, General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination, and that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

STATEMENT OF SERVICE

I hereby certify that a copy of **Brief of Counsel for the Acting General Counsel** was submitted by e-filing to the Division of Judges of the National Labor Relations Board on April 23, 2013.

The following parties were served with a copy of said documents by electronic mail on April 23, 2013:

Timothy F. Ryan, Attorney at Law
Morrison & Foerster LLP
tryan@mofo.com

Aurora V. Jaiser
Morrison & Foerster LLP
akaiser@mofo.com

Joshua F Young, Attorney At Law
Gilbert & Sackman
jyoung@gslaw.org

Respectfully submitted,


Ami Silverman, Counsel for the Acting
General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 23rd day of April, 2013.