UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

RALPHS GROCERY COMPANY

and Case 21-CA-039867

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS OF RALPHS GROCERY COMPANY TO THE ADMINSTRATIVE LAW JUDGE'S DECISION

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

TABLE OF AUTHORITIES

Supreme Court Cases

Circuit Court Cases

NLRB Cases

I. INTRODUCTION

On April 30, 2013, Administrative Law Judge Jeffrey D. Wedekind (ALJ) issued his decision in this case, making findings of fact and conclusions of law that:

- The arbitrator's decision that Ralphs Grocery Company (Respondent) had just cause to terminate employee Vittorio Razi (Razi) for insubordinately refusing to immediately submit to a drug and alcohol test without first consulting with a representative of the United Food and Commercial Workers (the Union), was clearly repugnant to the Act, and deferral to the decision was therefore inappropriate;
- By requiring Razi to immediately submit to such a test as part of an investigation into his behavior, notwithstanding his request to exercise his rights under *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975) to consult with his Union representative beforehand, Respondent violated Section 8(a)(1) of the Act; and
- By suspending and subsequently terminating Razi because of his refusal to submit to said test without first consulting with his Union representative, Respondent violated Section 8(a)(1) of the Act.

On May 28, 2013, Respondent filed its exceptions to the ALJ's decisions and brief in support of those exceptions. Respondent essentially argues that the ALJ should have deferred to the earlier arbitrator's decision, and that his factual findings and conclusions contrary to those of the arbitrator were incorrect and not consistent with established Board precedent. Counsel for the Acting General Counsel respectfully submits that the

stipulated record and relevant Board precedent establish that the ALJ's decision is well founded and that Respondent's exceptions are without merit and should be rejected,

II. ISSUES PRESENTED

A. Whether the ALJ was correct in concluding that the Arbitrator's Award was repugnant to the Act and therefore should not be deferred to; and

B. Whether Respondent violated Section 8(a)(1) of the Act by refusing to provide Razi with his *Weingarten* rights, and then suspending and terminating him without affording him the opportunity to confer with his Union representative.

III. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Procedural History

The Union has represented certain employees of Respondent, a major grocery chain, since at least 1941, and recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from March 7, 2011, through March 2, 2014.

Razi is a long-term employee and member of the bargaining unit who 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 Union filed a charge on July 1, 2011, amended it on September 10, 2011, and, following an investigation of the allegations of the charge, 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). The Union appealed the Region's decision to defer, and that appeal was subsequently denied.

On about February 1, 2012, the grievances filed by the Union over Razi's suspension and termination were heard by an arbitrator, who issued his opinion and award (the Award) upholding the termination on May 5, 2012. The Union requested that the Region not defer to the Arbitrator's Award, and, subsequently, the Region issued a complaint and notice of hearing, which alleged that Respondent denied Razi's request for union representation at a meeting that the employee had reasonable cause to believe would result in disciplinary action and instead commenced with the interview; and also that the employee refused to complete the interview without union representation and was suspended and subsequently terminated in violation of Section 8(a)(1) and (3) of the Act.

Thereafter, 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 consisting of the Arbitrator's Award, the transcript of the arbitration hearing, and the briefs of the parties.

B. Razi's Suspension and Termination

Most of the salient facts contained in the arbitration transcript are not in serious dispute. As noted above, Razi, a 25-year employee of Respondent, had worked as a produce manager (a bargaining unit position) since 2003, working a regular shift in

addition to extra hours spent designing and building custom produce displays. (Tr. 191-2; 194; 201).[1]

Razi worked many hours of overtime in the days preceding his termination. (Tr. 210-17). On May 18, 2011, the day of his suspension, he reported for work at about 5:00 a.m. and began his normal tasks. (Tr. 222-3) When Store Director Julie Henselman (Henselman) arrived several hours later that day, she was advised by Assistant Store Manager Ed Maier (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 (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 "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 to meet with Henselman and Maier at around 9:15 or 9:20 a.m. (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 take a drug test. (Tr. 60) Razi immediately asked to speak with his lawyer and a Union

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[1] As previously noted, facts summarized herein are contained in the Transcript and Exhibits of the Arbitration hearing which the parties stipulated to the ALJ. References are cited as "Tr.," followed by the relevant page number.

[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) No party disputes that the collective-bargaining agreement between Respondent and the Union did not provide for random drug-testing, and agree that such testing could be conducted pre-employment, post-accident, or based on probable cause. (Tr. 270; 273)

representative, but both Henselman and Maier said no, that Razi did not have the right to contact the Union (Tr. 60; 88; 225) 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 said he was calling his Union representative, and Henselman dismissively waved him out of the room. (Tr. 61; 226)

Razi then stepped outside and attempted to call Union Representative Linda Martinez (Martinez) but had to leave her a voice mail. (Tr. 227-9; 255) After about 15 minutes, Razi was summoned back upstairs to Henselman's office, where he told her and Maier that he had been unable to reach anyone at the Union, and that he would not take the drug test until he heard back. (Tr. 60; 257; 264) 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, but Razi continued to insist on consultation with his Union first. (Tr. 105-6; 230-1; 262-5) After more back-and-forth, Henselman decided to call Senior Labor Relations Representative Edwards again for further guidance, and after advising him that Razi could not get in touch with a Union Representative and thus would not take the drug test, was instructed not to argue with him and to just suspend and then terminate him (Tr. 63; 92-4) Henselman then told Razi he was suspended pending further investigation, and, at his request, showed him her notes of her conversations with other employees about his conduct. (Tr. 63; 96; 224; 230-32; 257-8; 262)

The following day, May 19, 2011, Razi was summoned back to the store by Henselman and was terminated for insubordination for refusing to take the drug test.

The termination notice subsequently issued to Razi stated in pertinent part: "[Razi] was terminated for insubordination and 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."

C. The Arbitrator's Award

A hearing was held before Arbitrator Charles Askin, herein the Arbitrator, on February 1, 2012, and the Arbitrator issued his Award essentially upholding the termination of Razi for cause on May 5, 2012.[3] The Arbitrator discussed the *Weingarten* issue at length, and characterized 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 attached. (Ex.11 p.19) In his analysis of the events of May 18, the Arbitrator 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, and therefore 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 explain his reported behaviors. (Ex.11 at p.19) Rather, according to the Arbitrator, the purpose of the meeting was "simply to inform [Razi] that he was being required to submit to a drug and alcohol screening," since

[3] The Arbitration Award was attached to the parties' Stipulation to the ALJ as Exhibit 11, and all references to the Award are cited herein as Exh. 11, followed by the relevant page number.

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 facts, 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 targeted 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) 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)

As noted above, the Union requested that the Region not defer to the Arbitrator's Award, and the Region agreed and subsequently issued complaint alleging that Razi's termination was unlawful.

D. The ALJ's Decision

The ALJ initially addressed the threshold issue of whether the Board should defer to the Arbitrator's decision, and concluded that it was clearly repugnant to the Act because, *inter alia*, the Arbitrator incorrectly concluded that the meeting at which Razi was suspended was not investigatory in nature. Therefore, the ALJ concluded, the

Arbitrator clearly erred in finding that Razi did not have a right to consult with a Union representative before submitting to a drug test, and also in finding that Respondent was not required to delay the drug test because Razi was unable to contact a Union representative. (ALJD p.7)[4] Finally, the ALJ concluded it was likewise clear that Respondent terminated Razi solely for his refusal to immediately submit to a drug test without first consulting with his Union representative, and no evidence was presented that they would have terminated him in the absence of this refusal, and thus found the discharge to be unlawful. (ALJD p. 9)

IV. STANDARD OF REVIEW

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.

In the instant case, the ALJ correctly concluded that there was 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. However, for the reasons set out in his decision, the ALJ found that the Arbitrator's decision upholding Razi's termination was clearly repugnant to the Act. (ALJD p.2 at 30-33)

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[4] All citations to the ALJ's Decision, JD(SF) -19-13 (April 30, 2013), are referred to as "ALJD," followed by the slip opinion page number.

In this regard, the "clearly repugnant" standard contemplates that the arbitrator's award be "palpably wrong," i.e., not susceptible to any interpretation consistent with the Act. However, it 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 examining the repugnancy of arbitrator awards under the *Olin/Spielberg* framework, *supra*, the Board generally finds deferral inappropriate when the precipitating event causing an employee's discharge was his or her protected concerted activities and the arbitrator upheld contractual sanctions based on that conduct.[5] In the instant case, the ALJ correctly concluded that the Arbitrator's award was repugnant because it upheld Respondent's decision to discharge Razi for his protected concerted activity in asserting his *Weingarten* rights, and is therefore inconsistent with established relevant Board precedent.

Respondent argues that the Board must defer to the factual findings of the Arbitrator absent facial error. However, despite Respondent's assertion to the contrary, the ALJ did rely upon the factual record created at the arbitration hearing, and based his summary of the relevant facts in his decision solely on that record. In fact, the ALJ correctly noted that the facts cited in his decision were

> "a summary of the factual findings made by the arbitrator based on the admissions and credited evidence presented at the hearing. See *Louis G. Freeman Co.*, 270 NLRB 80, 81 (1984)([U]nless an examination of the record evidence before the arbitrator reveals facial error in the arbitrator's factual findings," the determination of whether the arbitrator's decision is clearly

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

repugnant to the Act 'should be based on the facts [the arbitrator] has found on that record." (ALJD p.3 at fn. 8)

After a detailed analysis of the record created at the arbitration hearing and the Arbitrator's Award, the ALJ correctly concluded that the Award was totally inconsistent with Board precedent, and could not reasonably be interpreted consistent with the fundamental purposes of the Act under *Weingarten, supra*, and therefore appropriately declined to defer to that Award.

V. ARGUMENT

A. The ALJ did not err in refusing to defer to the Arbitrator's factual findings by failing to differentiate between events before and after Razi asked for Union representation

Respondent contends that the ALJ erred in concluding, contrary to the Arbitrator's findings, that no "investigation" took place after Razi invoked his right to speak with his Union representative, that Razi was terminated for refusing to submit to a drug test, and that Razi was requested to submit to a drug test "as part of its investigation into his conduct. (Respondent's Exceptions 1, 2, and 5)

Respondent relies upon the Arbitrator's conclusion that Razi was summoned to Henselman's office on May 18 not so that Respondent could gather facts regarding his behavior, but so Respondent could inform him that he was being required to submit to a drug test – a decision that had been made before the meeting began. Respondent further asserts that even if the initial portion of the meeting were investigatory – assuming *arguendo* that Respondent did ask Razi if he was on drugs – no investigatory

questions were asked after Razi asked for Union representation. Thus, according to the Arbitrator, Respondent did not violate the Act because it did not continue to "interview" Razi after he invoked his *Weingarten* rights. In fact, Respondent asserts, the only question asked of Razi was whether he would submit to the drug test on threat of termination.

In concluding, contrary to the Arbitrator, that the meeting of May 18 was an investigatory meeting to which *Weingarten* rights attached, the ALJ properly distinguished the cases relied upon by the Arbitrator. Specifically, he rejected the Arbitrator's reliance on *System 99*, *supra*, to support his conclusion that the meeting of May 18 was not investigatory because Respondent's statements to the employee about the drug test were not framed as actual "questions." (ALJD p.7 at 20) The ALJ notes that the Board in *System 99* referred to the request to take a drug test as an "implicit question" because it was based on suspicion of substance abuse. Thus, the ALJ properly concluded that an employer need not ask explicit questions in order to show that a meeting was investigatory in nature.

Respondent argues in its exceptions, in tacit agreement with the Arbitrator's award, that an employee has no Section 7 right to union representation at a meeting held solely for the purpose of informing an employee of a previously-made disciplinary decision.[6] However, this circular reasoning was properly rejected by the ALJ, since a decision to order an employee to submit to a drug test clearly is not akin to announcing a disciplinary action, such as suspension or discharge. Rather, in the instant case, Razi was asked to submit to the test after observations of his conduct, and was told he would

[6] *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979).

be disciplined only if he refused to submit to the test. Thus, the facts in the record do not support the Arbitrator's application of the "predetermined discipline" doctrine, as Respondent urges.

Moreover, the ALJ rejected the Arbitrator's reading of *Safeway Stores*, *supra*, finding that the basis for Respondent's May 18 investigatory meeting had no rational distinction from that case. (ALJD p. 7 at 28) Thus, by relying on established Board precedent that an investigatory interview need not consist of explicit questions, the ALJ properly rejected the Arbitrator's contrived characterization of the meeting as two separate meetings, and rather concluded – based upon the identical facts in the record – that Razi was entitled to consult with a Union representative before submitting to a drug test. The ALJ properly found that the Arbitrator's arbitrary bifurcation of the May 18 meeting was not supported by the facts in the record, and therefore Respondent's Exceptions 1, 2, and 5 should be rejected.

B. The ALJ did not err by not deferring to the Arbitrator's application of Board precedent

Respondent asserts that the ALJ erred in declining to defer to the Arbitrator's interpretation of Board precedent (Respondent's Exception 3). Specifically, the ALJ rejected the Arbitrator's narrow reading and distinction of *System 99* and *Safeway Stores*, *supra*, and concluded that they were more factually and legally consistent with the instant case then the Arbitrator held. As discussed above, the ALJ properly read *System 99* to say that questioning of an employee need not be explicit in order to be investigatory in nature. (ALJD p. 7 at 20-26) Moreover, the ALJ further properly rejected the Arbitrator's narrow reading of *Safeway Stores*, and found that the drug test

in that case, like that in the instant case, were ordered as part of an inquiry into employee conduct and demeanor (as opposed to random testing) and was therefore investigatory.

Furthermore, in closely comparing the facts of each case, the ALJ not only failed to find any real or rational basis for the distinctions made by the Arbitrator, but also concluded that neither *System 99* nor *Safeway Stores* could be distinguished in their entirety, as the Arbitrator did, since the instant case had elements of both cases. The ALJ also properly noted that the Board concluded in both *System 99* and *Safeway Stores* that a violation of the Act had taken place by the respective employers' refusal to allow their employees to consult with the union representative. Thus, as the ALJ noted, logic would dictate that Respondent likewise violated the Act as alleged.

For these reasons, Respondent's Exception 3 should be rejected.

C. The ALJ did not err in finding that Respondent was required to delay Razi's drug test until he could obtain knowledgeable Union representation

Respondent asserts that the ALJ erred in concluding the Arbitrator was wrong to find that Respondent was not required to delay the drug and alcohol test indefinitely (Respondent's Exception 4) . In this regard, the ALJ found that the Arbitrator "clearly erred in finding that [Respondent} was not required to delay the drug test because Razi was unable to reach his Union representative." (ALJD p. 7 at 44-45)

In the instant case, the ALJ correctly concluded that Razi was unable to reach a knowledgeable union representative, and that the Arbitrator made no finding to the

contrary. (ALJD p. 8 at 18) The ALJ further noted that it was well established that, when faced with a legitimate request for union representation, an employer is entitled to proceed with the investigatory interview only if a qualified union representative is available.[7] If no union representative is available, an employer must either discontinue the interview or offer the employee the choice of continuing the interview without union representation or having no interview at all, in which case the employer can proceed with disciplinary action based on information from sources other than the interview. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982). However, the record developed at the arbitration revealed that Respondent exercised neither of those options, since Respondent concedes that Razi was discharged for insubordination for refusing to submit to the drug test, and not for any other reason.

Consequently, the ALJ found, consistent with his conclusion that the meeting in question was an investigatory meeting, that Respondent was not privileged to continue with the meeting and to suspend and discharge Razi for refusing to submit to the test without conferring with his Union representative.[8] Thus, Respondent's Exception 4 must be rejected.

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[7] *See e.g., Las Palmas Medical Center*, 358 NLRB No. 54, slip op. at 14 (2012).

[8] Likewise, the Arbitrator's conclusion that Respondent's insistence on the test notwithstanding the availability of a Union representative was" reasonable" is not supported by the facts or Board law. Respondent continues to argue in its Exceptions that time was of the essence, even while conceding that Razi had been at work more than 5 hours by the time he was requested to take the drug rest, suggesting that such a test might well have been futile anyway.

D. The ALJ did not err in refusing to find that the Respondent had good cause for terminating Razi and in ordering reinstatement and backpay

Respondent asserts that the ALJ erred in concluding that the Arbitrator's decision that Respondent had good cause to terminate Razi was repugnant to the Act. (Respondent's Exceptions 6, 7, 8, and 9). Respondent specifically asserts in its Exceptions that "cause" effectively means the absence of a "prohibited reason."

There is no dispute, and the Arbitrator and the ALJ do not disagree, that Razi was terminated because he refused to submit to a drug test after being unable to first confer with his Union representative. The ALJ even cites Respondent's opening argument at the arbitration hearing that but for Razi's refusal to take the test, the parties would not be appearing before the Arbitrator. Respondent's own witnesses concede that Razi was terminated for insubordination for refusing to submit to the test, and not for being under the influence; even Razi's termination notice confirms that he was terminated solely for insubordination for refusal to take the test. (ALJD p. 9 at 14-29)

Based thereon, and after having correctly concluded that the meeting was an investigatory one to which *Weingarten* rights attached, the ALJ properly concluded that there was sufficient "nexus" between Razi's statutory right to Union representation and his discharge. *Safeway Stores, supra*, at 990. Thus, the ALJ's conclusion that Razi was entitled to both reinstatement and backpay was appropriate, since Respondent cannot show that Razi was terminated for cause. Therefore, Respondent's Exceptions 6, 7, 8, and 9 must be rejected.

E. The Board may assert jurisdiction over this matter

Respondent urges that under the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Board does not have jurisdiction over this matter. (Respondent's Exception 11)[9] Based thereon, Respondent requests a stay of this proceeding pending a resolution in favor of the Board of its appeal of *Noel Canning* before the U.S. Supreme Court or until such time as a constitutionally valid quorum is appointed. Respondent's arguments in this regard are without merit.

Although Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were appointed during an intrasession recess contrary to *Noel Canning*, the Supreme Court has granted the Board's petition for certiorari in *Noel Canning*. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); and *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the

[9] The Exception is variously referred to in Respondent's Brief in Support of Exceptions as number 9, even though it is listed as number 11, and there does not appear to be any Exception 10. It will be referred to herein as Exception 11.

validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act." [10]

Indeed, the Board's experience in the analogous situation prior to the *New Process* decision supports the Board's judgment that it should continue to adjudicate pending cases while the challenges to its authority are being adjudicated. In fact, of some 550 decisions issued by the two-member Board prior to issuance of the Supreme Court's decision in *New Process Steel*, only about 100 were impacted by that decision. Further, nearly all of the remaining matters decided by the two-member Board were closed under the Board's processes with no review required. *See* Background Materials on Two-Member Board Decisions, http://www.nlrb.gov/news-outreach/backgrounders/background-materials-two-member-board-decisions (last visited March 25, 2013). Accordingly, Respondent's Exception 11 is without merit and there are no grounds to stay further action in this matter.

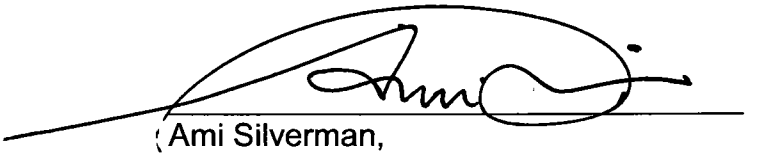
VI. CONCLUSION

The record and established Board precedent provide abundant support for the ALJ's refusal to defer to the Arbitrator's Award and conclusions that Respondent violated Section 8(a)(1) of the Act by requiring its employee Vittorio Razi to submit to a drug test as part of an investigation into his behavior, notwithstanding his request to consult with a Union representative, and for suspending and terminating him because of his refusal to submit to the test without first consulting with his Union.

[10] The Third Circuit's decision in *New Vista* should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

Accordingly, it is respectfully submitted that the ALJ's rulings, findings, and conclusions be affirmed and that Respondent's exceptions be rejected.

Respectfully submitted,



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

DATED at Los Angeles, California, this 11th day of July, 2013

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Limited Cross-Exceptions to the Administrative Law Judge's Decision and Argument in Support of Limited Cross-Exceptions** was submitted by e-filing to the National Labor Relations Board on July 11, 2013.

The following parties were served with a copy of said documents by electronic mail on July 11, 2013.

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

Aurora V. Kaiser, Attorney at Law
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 11th day of July, 2013