UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN BEER DISTRIBUTORS LLC and JOE GARCIA DIAZ	Case 29-CA-115694

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. PROCEDURAL HISTORY OF THE CASE

On October 23, 2013, Joe Garcia Diaz, an individual, filed an unfair labor practice charge against Manhattan Beer Distributors LLC (herein called Respondent) in Case No. 29-CA-115694 alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (herein called the Act) by discharging Diaz because he asserted his right to be represented by his union after Respondent ordered him to take a drug test. [GC Exh. 1(A).][1]

On December 19, 2013, following a merit determination on the allegations raised in the charge, the Acting Regional Director for Region 29 of the National Labor Relations Board (herein called the Board) issued a Complaint and Notice of Hearing in Case No. 29-CA-115694 (herein called the Complaint). [GC Exh. 1(C).] The Complaint alleges, *inter alia*, that Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Diaz because he refused to attend, without union representation, an investigatory interview, which he reasonably believed could result in discipline. [*Id*.]

The case was heard before Administrative Law Judge Steven Davis (herein called the ALJ) on February 19, 2014. [Tr. 1.] The ALJ issued his Decision on May 15, 2014, finding that Respondent violated Section 8(a)(1) of the Act by denying Joe Garcia Diaz his right to union representation during an investigatory interview that he reasonably believed could result in discipline and directing Diaz to immediately submit to a drug test as part of Respondent's investigation into his behavior, despite his request to obtain union representation prior to the test. Nevertheless, the ALJ found that Respondent did not violate the Act by discharging Diaz and dismissed the Complaint insofar as it alleges violations relating to Respondent's discharge of Diaz.

[1] References to the official record of the hearing are abbreviated as follows: "GC Exh." denotes General Counsel's exhibits. "Resp. Exh." denotes to Respondent's exhibits. Citations to the Transcript will appear as "Tr. __," with numbers specifying the particular the page(s) cited in the transcript. References to the ALJ's decision are denoted as "ALJD __:__" with numbers specifying the page(s) and line(s) cited.

II. FACTS

The General Counsel does not take exception to any of the Findings of Fact stated in the ALJ's decision. A brief recitation of the facts of the case, as found by the ALJ, is as follows:

A. Respondent's Business

Respondent is engaged in the non-retail sale and distribution of beverages and delivers beer and other beverage products to retail establishments from its warehouse and distribution facility in Wyandanch, New York. [ALJD 2:7-8.] Employees at Respondent's Wyandanch operation are represented in collective bargaining by Laundry Distribution and Food Service Joint Board, affiliated with Service Employees International Union (herein called the Union). [ALJD 2:11-12.] The Union has entered successive collective-bargaining agreements with Respondent. [*Id*.]

B. Respondent's Drug Testing Policy

The parties' collective-bargaining agreement provides, in relevant part, that "any employee who. . . is impaired by. . . narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances. . . when reporting to work. . . is subject to immediate disciplinary action, up to and including termination of employment." [ALJD 2:30-33.] The contract further permits drug testing of employees other than those employed as drivers "only when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol."[2] [ALJD 2:35-37.] Despite the contract language giving Respondent the right to immediately discharge an employee who is impaired while at work, Respondent's Director of Operations Ron Reif testified that Respondent has no right to discipline the employee without first giving him an opportunity to be tested for substance abuse. [ALJD 2:39-44.]

[2] Section 8.2 of the collective-bargaining agreement permits Respondent to terminate non-probationary employees only for "just cause." [Resp. Exh. 2.]

C. Diaz's Employment and Knowledge of Respondent's Drug Testing Policy

Joe Garcia Diaz began his employment with Respondent in August 2010. [ALJD 2:12.] At the time of his discharge, Diaz was employed as a driver's helper, and in that capacity, he helped Respondent's delivery truck drivers maintain the inventory of products on the truck, assisted in the delivery of the products to customers, and secured the truck while the driver collected payments from the customers. [ALJD 2:14-16.]

Diaz was aware of Respondent's policies against employee drug use, including the possibility that employees may be subject to discipline or discharge for reporting to work under the influence. At the time he was hired by Respondent, Diaz signed a statement acknowledging that "no employee shall report to work while under the influence of. . . drugs. Employees who engage in such conduct will be subject to discipline up to and including discharge." [ALJD 2:23-26.] In addition, Diaz took a pre-employment drug screening test and another such test in December 2012 or early 2013 when he returned to work following a three-month layoff. Prior to the latter drug test, Diaz was told by a Union agent that he would be fired if he failed the test. [ALJD 2:26-28.]

D. Respondent Initiated an Investigation Concerning Suspected Drug Use by Diaz

Diaz reported to work on June 8, 2013 at or around the start time of his regularly-scheduled shift. [ALJD 2:49, Tr. 39.] Diaz checked the day's work scheduled, and saw that no assignment was listed next to his name. [ALJD 3:1.] Diaz then approached Delivery Manager Roy Small, who was inside the delivery office located at Respondent's Wyandanch facility, and spoke with him from outside the office through an open window, standing about three feet away from Small. [ALJD 3:2-5.] Diaz asked Small why he did not have an assignment. [*Id*.] Small told Diaz that he thought Diaz would be absent from work because Diaz submitted a workplace

injury report the previous day. [ALJD 3:6-7.] Diaz explained that he was healthy and available to work, and Small said he would try to find work for Diaz. [ALJD 3:5, 3:9-10.]

Facility Manager Tony Wetherell was standing inside the delivery office near Small while Diaz and Small spoke. [ALJD 3:2-4.] Towards the conclusion of the conversation between Diaz and Small, Wetherell asked Small if he smelled something. [ALJD 3:33-39.] Small said, "Yes." [*Id*.] Small testified that when Diaz arrived at the delivery office window, he "reeked of the smell of marijuana" and his eyes were glassy and bloodshot. [ALJD 3:28-29.] Despite supposedly making these observations, Small nevertheless told Diaz that he would try to find work for him. [ALJD 3:9-10.]

Wetherell then directed Diaz to come inside the delivery office, where Wetherell asked him a series of questions, including "How are you feeling?" – to which Diaz replied that he was feeling great and ready to work – and "Have you been doing anything stupid?" – to which Diaz replied "No." [ALJD 3:34-39; Tr. 60.] Diaz asked why Wetherell was asking these questions, and Wetherell told him it was because Diaz "smelled a little funny." [ALJD 3:39-40.] Diaz said he did not know what Wetherell was talking about, and Wetherell told Diaz to wait outside the office. [ALD 3:40-42.]

E. Diaz Made a *Weingarten* Request for Union Representation and Respondent Denied the Request

Diaz waited for over one hour, and after seeing that his co-workers had left the facility to perform deliveries, Diaz approached Small and asked whether he should go home. [ALJD 3:44-45, 4:2.] Small replied that Respondent had a work assignment for Diaz, but Diaz first had to take a drug test because Small said Diaz smelled like marijuana. [ALJD 4:2-4.] Diaz then told Small, "I don't have a problem taking the drug test. At this point I just want my shop steward." [ALJD 4:8-12.] Small denied Diaz's request for a shop steward stating, "It's a company issue now. The

shop stewards have nothing to do with it." [*Id*.] Diaz told Small that he did not believe that the shop stewards have nothing to do with it because Diaz was under the impression that a shop steward "had to be there" whenever there was a dispute between an employee and management. [*Id*.] Small dismissively responded, "You just have to take the test." [*Id*.]

Diaz then went outside the facility and called Union shop steward Joe Gonzalez. As he was beginning his phone conversation with Gonzalez, Facility Manager Wetherell drove up to the area where Diaz was standing and told Diaz to get in the car so that Wetherell could drive him to an offsite drug testing facility. [ALJD 4:14-20.] Diaz then repeated to Wetherell what he had said to Small – that Diaz would take a drug test, but not without Union representation. [*Id*.] Wetherell then suggested that Diaz drive himself to the testing facility and stated that he and Diaz would "finish talking there." [*Id*.] Diaz again reiterated his request for Union representation, responding, "Not without a shop steward." [*Id*.]

Diaz continued his phone conversation with shop steward Gonzalez. [ALJD 4:22-28.] He asked Gonzalez to come to the Wyandanch facility to represent him during Respondent's investigation into Diaz's drug use, but Gonzalez told Diaz that he was unavailable to come in that day. [*Id*.] Gonzalez further told Diaz that if he felt strongly that his rights were being violated and he needed Union representation, he should not take the test. [*Id*.]

Shortly thereafter, Small and Wetherell approached Diaz again and asked him whether he was going to submit to the drug test. [ALJD 4:41-44.] Diaz replied, "I feel like my rights are being violated and I don't have a problem taking the test, but I want my shop steward present. Since he's not able to be present, I'm not taking the test." [*Id*.] Small told Diaz that he would be suspended for refusing to take the drug test, and Diaz said that he understood. [ALJD 4-5:46-1.] Small then told Diaz to clock out and go home, and Diaz left the facility. [ALJD 5:2-3.]

F. Respondent's Decision to Terminate Diaz

Later on June 8, 2013, Respondent prepared a series of disciplinary documents describing what occurred with Diaz that morning and expressing Respondent's decision to terminate his employment. These documents, as well as the testimony of Director of Operations Ron Reif, establish that Respondent's reason for discharging Diaz was that he "refused" to submit to a drug test and not because he reported to work under the influence of drugs. One of the disciplinary documents titled "Progressive Disciplinary Report" was signed by Small, Wetherell and shop steward Gonzalez and states that Diaz was discharged because he "refused to go for a drug screening under the reasonable suspicion of substance abuse." [ALJD 5:22-29; Resp. Exh. 5.] In addition, a memorandum with the heading "Termination-of-Employment" prepared by Small and signed by Wetherell and Gonzalez states that Diaz "refused to go for drug testing under the reasonable suspicion of substance abuse." The document's final statement describes how Diaz was told to go for reasonable suspicion drug screening and that "Diaz refused, therefore he has been terminated."[3] [ALJD 5-6:31-14; GC Exh. 4.]

Director of Operations Ron Reif, who was not present at the Wyandanch facility on the morning of June 8, testified that he made the ultimate decision to discharge Diaz. [Tr. 139-40; 136-37.] On June 12, Reif informed various Union officials in an e-mail about Respondent's determination to discharge Diaz. In the e-mail, Reif stated that Diaz was discharged for "his refusal to submit to substance abuse testing based on reasonable suspicion." [ALJD 6:16-18; Resp. Exh. 5.] Reif's testimony thus confirmed, and the ALJ found, that Respondent terminated Diaz because of his refusal to submit to a drug test on June 8, 2013. [Tr. 141, ALJD 10:28-29.]

[3] Both the "Progressive Disciplinary Report" and the "Termination-of-Employment" memorandum note that Diaz "reported to work under the influence of a controlled substance," but neither document states that Diaz was terminated for reporting to work under the influence. Instead, each document clearly states that Diaz was discharged for refusing to submit to a drug test on June 8. [Resp. Exh. 5, GC Exh. 4.]

G. Employees Previously Discharged for Refusing to Submit to Drug or Alcohol Testing

The record establishes that three employees, aside from Diaz, were terminated by Respondent after they refused to submit to drug or alcohol screening mandated by Respondent. [ALJD 6:38-47.] In August 2010, driver John Reyes was discharged because he refused to submit to a post-vehicle accident substance abuse test; in November 2010, driver's helper Greg Irving was discharged for refusing to submit to a drug test based on reasonable suspicion; and in August 2013, fork lift operator Felix Marin failed to submit to reasonable suspicion alcohol testing and was fired. [*Id*.] However, Respondent presented no evidence that any of these three employees asked for and were denied Union representation before being required by Respondent to submit to substance abuse testing. [*Id*.] In fact, the evidence establishes that two of the three employees – Marin and Irving – actually had a Union representative present with them during the interview with supervisors in which they were told to take a substance abuse test. [ALJD 7:1-2.]

III. THE ADMINISTRATIVE LAW JUDGE'S DECISION

A. ALJ Found that Respondent Violated the Act by Denying Diaz's *Weingarten* Rights

Based on the foregoing Findings of Fact, as summarized above, the ALJ determined that Respondent directed Diaz to participate in an "investigatory interview" on June 8, 2013 within the meaning of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) when supervisors Wetherell and Small asked Diaz questions about his suspected drug use and ordered him to take a drug test. The ALJ found that when Wetherell asked Diaz if he had been "doing anything stupid," it was an "obvious inquiry" into whether Diaz had been using drugs, and Diaz's *Weingarten* right to Union representation "clearly attached" at that point. [ALJD 8:7-28.] The ALJ found further that this investigatory interview was "inextricably intertwined" with Respondent's request that Diaz submit

to a drug test, and *Weingarten* rights likewise attached when Diaz was ordered to take the drug test. [ALJD 8:37-40, 9:16-18.].

The undisputed evidence established that Respondent had no right to discharge Diaz based merely on the reasonable suspicion of marijuana use, and thus the ALJ properly found that the drug test that Respondent required Diaz to take "was an extension of, and a required part of its investigatory process to determine if he was under the influence of drugs." [ALJD 7:34-36, 9:13-16.] As the ALJ correctly found, Diaz had the right to union representation during this investigatory process because he reasonably believed that he could be disciplined by Respondent as a result of its findings. [ALJD 9:20-25.]

Crediting Diaz's testimony over the conflicting testimony of supervisor Small, the ALJ found that Diaz requested to have a Union shop steward present before submitting to the June 8 drug test. [ALJD 9:26-33.] Respondent denied Diaz's request for Union representation, as the ALJ properly found that the mere phone call Diaz was allowed to make to shop steward Gonzalez was insufficient to satisfy Diaz's request for Union representation. [ALJD 9:35-43.] The ALJ therefore correctly held that Respondent violated Section 8(a)(1) of the Act by denying Diaz's *Weingarten* rights and directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding Diaz's request to obtain Union representation prior to the test. [ALJD 11:20-24.]

B. ALJ Erroneously Found that Respondent Did Not Violate the Act by Discharging Diaz and Thus Erroneously Failed to Order that Respondent Reinstate Diaz

Despite finding that Respondent violated the Act by denying Diaz his *Weingarten* rights and requiring him to submit to a drug test without the Union representation he requested, the ALJ inconsistently determined that Respondent's discharge of Diaz was not unlawful. Specifically, the ALJ found that the "sole reason" for Diaz's discharge was "his refusal to submit to a drug test"

and not his refusal "to submit to a drug test without his union representative being present." [ALJD 10:27-30.] The ALJ acknowledged that Diaz's refusal to take the June 8 drug test "was premised upon the Respondent's denial of his *Weingarten* right to have union representation" but – inexplicably – still concluded that there was no nexus between the denial of Diaz's *Weingarten* rights and his discharge. [ALJD 10:32-34, 11:7-8.]

In making this determination, the ALJ applied *Wright Line*, 251 NLRB 1083 (1980) and found that the General Counsel had failed to meet its "initial burden" of establishing that animus against Diaz's protected activity was a motivating factor in the decision to discharge him. [ALJD 10:35-40.] The ALJ found that Diaz engaged in the protected activity of requesting Union representation during Respondent's investigation into his suspected drug use on June 8 when he reasonably believed that discipline could result, but found insufficient evidence that Respondent bore animus against this conduct. [ALJD 10:42-45.] The Decision cites, as evidence of the lack of unlawful motive on the part of Respondent, the fact that the disciplinary documents prepared in connection with Diaz's termination recite that he was discharged for refusing to take the drug test but do not state that Diaz was terminated because he refused to submit to the test without a Union representative present. [ALJD 10:47-49.] The ALJ further noted Respondent's policy to treat a refusal to take a drug test as the equivalent of a positive test result and concluded that Respondent "reasonably" presumed that Diaz would have failed the June 8 test based on his refusal to submit to the test under the circumstances. [ALJD 10-11:50-1.] Thus, failing to find the discharge unlawful, the ALJ declined to order that Respondent reinstate Diaz and make him whole. However, as illustrated below, the ALJ's findings with respect to Diaz's termination are belied by the record evidence and inconsistent with applicable Board law and the ALJ's own findings.

IV. ARGUMENT

The ALJ Erred By Failing to Find That Respondent Violated Section 8(a)(1) and (3) of the Act By Terminating Joe Garcia Diaz Because He Asserted *Weingarten* Rights and Consequently Failed to Order that Respondent Offer to Reinstate Diaz

The ALJ's conclusion that Respondent's discharge of Diaz had nothing to do with Diaz's assertion of *Weingarten* rights is inconsistent with the ALJ's own findings and at odds with applicable Board law. As set forth fully below, the ALJ misapplied relevant Board precedents to make the erroneous and illogical finding that Diaz's discharge did not violate the Act and further ignored relevant probative evidence of animus establishing the General Counsel's *prima facie* case of an unlawful termination and offered no reasons for ignoring such testimony.

An objective and thorough review of the record, properly analyzed in light of pertinent case law, demonstrates by a preponderance of the record evidence that Respondent terminated Diaz because he insisted upon having Union representation before submitting to the drug test mandated by Respondent on June 8, 2013. The General Counsel therefore urges the Board to overturn the ALJ's findings and conclusions in accordance with the General Counsel's exceptions because the finding that Respondent's discharge of Diaz was lawful under the Act is plainly insupportable and must be reversed.

A. ALJ Misconstrued Applicable Board Precedents

(Exception No. 13-14)

In declining to order a make-whole remedy for Respondent's termination of Diaz, the ALJ relied heavily on two Board decisions, *Taracorp, Inc.*, 273 NLRB 221 (1984) and *System 99*, 289 NLRB 723 (1988). The ALJ, however, misapplied these precedents, as both cases are distinguishable from the instant matter, and neither compels the ALJ's conclusion that Respondent's discharge of Diaz was lawful.

In *Taracorp*, the Board considered a situation in which an employee at a manufacturing plant was ordered to help fix a malfunctioning conveyor belt, and he refused, saying it was not his job. The foreman then told the employee to report the plant manager's office. Once inside the office, the employee asked for a union representative, but the plant manager refused to grant the request and proceeded to question the employee about the conveyor belt incident. After hearing both the employee's and the foreman's explanations, the plant manager terminated the employee for refusing to perform his job. The Board affirmed that the employer violated the employee's *Weingarten* right to have union representation during the meeting in the plant manager's office. However, the Board held that reinstatement and backpay were inappropriate remedies because it was "undisputed" that the employee was discharged for what the employer determined to be a "refusal to perform assigned work," and thus the employer had just cause for the termination. *Taracorp*, 273 NLRB at 223-24. The Board stated that in "typical *Weingarten* cases" the reason for the discharge "is not an unfair labor practice, but some type of employee misconduct. . . [and] there simply is not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." *Id*. at 223.

However, the *Taracorp* Board noted that a make-whole remedy "can be appropriate in a *Weingarten* setting," but only if the employee "is discharged for asserting the right to representation." Id. at 223, fn. 12 (citing *Int'l Ladies' Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 275 (1975)). In *Int'l Ladies' Garment Workers*, the Supreme Court affirmed the Board's holding that the employer violated the Act by discharging an employee who refused to attend an investigatory interview with the company president that could result in discipline without a union representative present during the interview. In that case, the employer repeatedly ordered the discriminatee to enter the company president's office and speak with him alone, but

each time, the discriminatee appeared for the meeting accompanied by a union representative and insisted upon entering the office with the union agent. *Int'l Ladies' Garment Workers*, 420 U.S. at 278-80. The employer terminated the discriminatee for refusing to meet with the company president as directed, and also suspended and discharged the two union representatives who attempted to represent the discriminatee during the interview. *Id*. The Court affirmed the Board's finding that the discriminatee was discharged in violation of the Act for insisting upon her *Weingarten* right to union representation, and the discipline of the union agents who tried to represent her was likewise unlawfully motivated by their protected activity. *Id*. By citing to this case in explaining when a make-whole remedy is appropriate in a *Weingarten* context, the *Taracorp* Board offered *Int'l Ladies' Garment Workers* as the model scenario in which a make-whole remedy is warranted.

In *System 99*, the Board for the first time interpreted *Weingarten* principles as applied to employer-mandated substance abuse testing and affirmed an administrative law judge's finding that the employer violated the Act by denying an employee's request for union representation during a meeting at which the employee was asked to submit to an alcohol sobriety test. The employee had been summoned to the meeting after his supervisor formed an impression that he was intoxicated at work, and management wanted the employee to submit to a sobriety test. At the meeting, the managers repeatedly asked the employee whether he would take a sobriety test and informed him that if he refused the test, he would be terminated. The managers did not believe that their mere suspicions of intoxication constituted just cause for termination, but rather believed that some verification in the form of a sobriety test was needed. An "acting steward" and some other co-workers were present at the meeting to serve as "witnesses" for the employee under investigation. During the meeting, the employee asked to confer with the chief shop steward, who was not present, but this request was denied, as was his request to speak with the acting steward in

private. The employer continued the interview, repeatedly asking the employee whether he would submit to the sobriety test. The employee dodged the question, stating that he may appear intoxicated because of certain medication he was taking, and he neither directly refused to take the test nor assented to it. The employer interpreted the responses as a refusal to take the test, and the employee was terminated.

While the Board affirmed the judge's finding of a *Weingarten* violation in the employer's refusal to grant the employee's request to speak privately with a union representative, it declined to affirm the judge's recommended make-whole remedy for the employee. In a footnote, the Board stated its finding that the employee was terminated "because of the [employer's] belief that he had arrived at work intoxicated, and the [employer's] interpretation of [the employee's] conduct as a refusal to take a sobriety test." *System 99*, 289 NLRB 723, fn. 3. Citing *Taracorp*, the Board held that the employee's request to confer with his union representative "did not form a basis for [his] termination." Id.

Contrary to the ALJ's findings in the present case, neither *Taracorp* nor *System 99* supports the decision that Respondent's termination of Diaz here was lawful. In both of those cases, the employers had a legitimate basis to discipline the employee in question that was unrelated to the employee's assertion of *Weingarten* rights. In *Taracorp*, the employee was terminated for engaging in the separate misconduct of refusing to perform a job assignment, which itself had no relation to his request for union representation during the investigatory interview regarding that misconduct. Similarly, in *System 99*, the employee was discharged because the employer concluded that he had arrived at work intoxicated and interpreted the employee's conduct, neither directly refusing nor assenting to take a sobriety test, as an outright refusal to take the test. Notably, the employee in *System 99* did not condition his willingness to take the sobriety

test on the employer accommodating his *Weingarten* request – he simply declined to answer when the employer asked him to take the test.

Here, however, Diaz's discharge was inextricably intertwined with his request for Union representation. The evidence establishes, and ALJ found, that Diaz was discharged for refusing to take the June 8 drug test, and that refusal was premised upon Respondent's denial of his *Weingarten* request. [ALJD 10:27-34.] Unlike the employees in *Taracorp* and *System 99*, Diaz was not fired because he engaged any separate misconduct, particularly the misconduct of reporting to work under the influence of drugs. In fact, as Director of Operations Ron Reif testified, Respondent did not even have the right to discharge Diaz for substance abuse based solely on the "reasonable suspicion" developed by supervisors Small and Wetherell and could not have disciplined Diaz without affording him the opportunity to undergo drug screening. [Tr. 114, ALJD 2:39-44.] Further, unlike the employee in *System 99*, Diaz explicitly and repeatedly stated that he would take the drug test if he was allowed Union representation and only refused the test because Respondent denied his request. In contrast, the employee in *System 99* never stated that he would take the alcohol sobriety test once he got a chance to speak privately with his shop steward – the employee in that case simply declined to state whether he would take the test, and the employer concluded from his conduct that the employee had come to work intoxicated and was refusing to take a sobriety test. In the instant case, unlike *System 99*, the nexus between Diaz's invocation of *Weingarten* rights and the reason for his discharge is clear and direct.

The facts of the present case are much more comparable to the facts of *Int'l Ladies' Garment Workers* and another case, *Safeway Stores, Inc.*, 303 NLRB 989 (1991), in which the Board again considered the applicability of *Weingarten* principles in the context of an employer-mandated drug test. In *Safeway*, the employer believed that an employee's excessive absences were possibly related to drug abuse and ordered the employee to take a drug test. The employee

requested to have a union representative present, but the employer denied his request, insisting that he take the drug test immediately. The employee refused to submit to a drug test without union representation, and the employer suspended and subsequently terminated his employment. The Board affirmed the judge's finding that the employer violated the Act not only by refusing the employee's request for union representation, but also by suspending and terminating him. In affirming a make-whole remedy, the Board concluded that the employer's original decision to suspend the employee "encompassed not only a simple refusal to take a drug test, but also [the employee's] reasonably foreseeable request for union representation at the meeting in which the test would be administered. . . ." *Id*. The Board, therefore, held that under these circumstances, "the suspension cannot be divorced from [the employee's] assertion of *Weingarten* rights, and it is unlawful just as is the discharge." Distinguishing *Taracorp*, the *Safeway* Board found that the nexus between the suspension and discharge and the employee's exercise of his statutory right to union representation was "clear." *Id*. at 990.

Here, as in *Safeway* and *Int'l Ladies Garment Workers*, Respondent terminated Diaz explicitly because he refused to submit to an investigatory interview without union representation. Like the discriminatee in *Int'l Ladies Garment Workers*, Diaz was steadfast in his assertion of *Weingarten* rights and refused to submit to Respondent's investigatory interview, which included the drug test, unaccompanied by a Union representative. That conduct led directly to his discharge. Thus, just like the discriminatee in *Int'l Ladies Garment Workers*, who was terminated for refusing to meet with the company president alone, Diaz was terminated for refusing to undergo the drug test alone, without union representation. Similarly, the discriminatee in *Safeway*, like Diaz, requested union representation before submitting to an employer-mandated drug test and refused to undergo the test because the employer denied his request for representation. As was the case in *Safeway*, Respondent's discharge of Diaz "cannot be divorced from" his assertion

of *Weingarten* rights, and the connection between Diaz's invocation of these protected rights and the discharge is clear, just as it was in *Safeway*.

The weight of the evidence appropriately applied to the relevant precedents establishes that Respondent's termination of Diaz was unlawfully motivated by his insistence upon having Union representation in connection with Respondent's investigation of his suspected drug use on June 8. The ALJ erred by misapplying *Taracorp* and *System 99* to conclude that the discharge was lawful, when *Safeway* and *Int'l Ladies Garment Workers*, which are more highly analogous, are the controlling precedents in this case. A make-whole remedy is appropriate here, and the ALJ's decision not to order a make-whole remedy must be reversed.

B. ALJ Drew a False Distinction Between Diaz's Refusal to Submit to a Drug Test without Union Representation from His Refusal to Submit to the Drug Test

(Exception Nos. 1-3, 10)

Central to the ALJ's finding that Respondent's termination of Diaz did not violate the Act is the ALJ's conclusion that the reason for the discharge was Diaz's refusal to submit to a drug test and not his refusal to submit to a drug test without a Union representative present. However, this is false distinction, wholly unsupported by the record evidence and logically inconsistent with the ALJ's other findings.

Diaz did not "refuse" to take a drug test. Instead, the record is clear that Diaz repeatedly stated that he would indeed submit to the drug test, but he wanted to have a Union representative present; at various times on June 8, Diaz told Small and Wetherell that he did not have a problem taking a drug test, but he wanted to have a shop steward present, that he would not go to the drug testing facility without a Union representative, and that he would take the test if, and only if, a shop steward was there with him. [Tr. 64, 69, 71.]. Thus, the ALJ correctly found that Diaz's "refusal" to take the June 8 drug test "was premised upon" Respondent's denial of his *Weingarten* right to have Union representation. [ALJD 10:32-34.] Diaz therefore did not simply "refuse" to

submit to a drug test. Rather, he insisted upon exercising his *Weingarten* rights and refused to take the drug test without a Union representative present. Diaz's "refusal" to take the drug test was thus inextricably intertwined with his assertion of *Weingarten* rights. The ALJ's distinction between Diaz's refusal to submit to the test and his refusal to submit to a test without Union representation is erroneous and contradicts his finding that the refusal "was premised upon" Respondent's denial of his *Weingarten* rights.

Drawing this false distinction enabled the ALJ to view Diaz's termination through a lens of lawfulness that does not exist. The ALJ cited Respondent's policy of treating a refusal to take a drug test as the equivalent of a positive test result [ALJD 10:49-51], but such a policy cannot lawfully be applied to a refusal to take a test that is "premised upon" the denial of an employee's *Weingarten* rights. It is likewise inappropriate to compare Diaz to other employees who refused to submit to substance abuse testing but were not denied a request for union representation, as drawing that comparison effectively disregards Diaz's assertion of *Weingarten* rights. The ALJ's finding that Respondent "reasonably" concluded that Diaz would have failed the drug test on June 8 because he refused to submit to the test without Union representative present essentially penalizes Diaz for insisting on his right to have union representation. It is a holding that permits an employer to assume an employee engaged in misconduct simply because the employee asked for union representation during an investigatory interview. Such a holding eviscerates the employee protections established by *Weingarten* and renders employees' *Weingarten* rights virtually meaningless. Respondent could not "reasonably" or lawfully conclude that Diaz would have failed his drug test based on his "refusal" to take the test because his refusal to take the test was inextricably linked to his demand for Union representation. Thus, to the extent the evidence establishes that Respondent terminated Diaz because he refused to take the June 8 drug test – and the ALJ found that it did – then the evidence establishes that Respondent terminated Diaz because

he asserted his *Weingarten* rights. They are one and the same. Therefore, the ALJ's finding that Diaz was discharged for refusing to submit to a drug test but not for refusing to take the drug test without union representation is in error and must be reversed.

C. ALJ Ignored Evidence Establishing Respondent's Animus and Failed to Shift the *Wright Line* Burden of Persuasion to Respondent

(Exception Nos. 4-12)

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[4] The employer's unlawful motive need not be the <u>*only*</u> motivation for the adverse employment action, as an unfair labor practice is established once it is demonstrated that unlawful considerations played <u>*any*</u> role in the employer's decision. *Transportation Management*, 462 U.S. at 398-99.

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee –

[4] The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was <u>a</u> motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was <u>a</u> motivating factor in the discipline.

includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC,* 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966);

Cincinnati Truck Center, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

In the present case, the ALJ, applying the *Wright Line* test, concluded that a preponderance of the evidence does not establish that Respondent's hostility toward Diaz's protected activity was a motivating factor in his discharge. [ALJD 10:35-40.] Although the ALJ found that Diaz had engaged in the protected concerted activity of requesting Union representation during Respondent's June 8 investigatory interview that he reasonably believed could result in discipline, that *Weingarten* rights attached, and that Respondent violated Diaz's *Weingarten* rights by denying him Union representation, the ALJ determined that "it has not been proven that the Respondent bore animus against such protected activity." [ALJD 10:42-45.] Contrary to the ALJ's finding, ample evidence in the record establishes Respondent's animus.

The evidence shows that on June 8 when supervisor Small told Diaz that he must take a drug test before Respondent would dispatch him to a work assignment, Diaz immediately requested Union representation, stating that he did not "have a problem taking the drug test" but "just wanted my shop steward." [Tr. 64.] Small's response to Diaz establishes that Respondent was displeased with Diaz's request to meet with a Union shop steward before submitting to a drug test and clearly did not want to accommodate the request. Small denied Diaz's request, stating,

"It's a company issue now. The shop stewards have nothing to do with it." [Tr. 64-65.] Small's statement is telling evidence establishing the animus that Respondent held towards Diaz's invocation of *Weingarten* rights. The ALJ ignored this evidence.

Small further demonstrated his contempt for Diaz's request for representation when Diaz thereafter tried to explain that a shop steward was supposed to be present during disputes between employees and management, and in response, Small told Diaz that he "just got to take the test." [*Id*.] Small's dismissive response to Diaz's request for Union representation constitutes critical evidence of Respondent's animus, which again was ignored by the ALJ. The Board has long held that such lawful employer statements may "be considered as background evidence of animus" against employees' protected activities. *Tim Foley Plumbing Serv., Inc.*, 337 NLRB 328, 329 (2001); *Lampi LLC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001); see also *Brink's, Inc.*, 360 NLRB No. 136, slip op. at p. 1, fn. 3 (Jun. 25, 2014) (disavowing administrative law judge's statement that it is necessary to establish an independent violation of Section 8(a)(1) in order to find anti-union animus). Nevertheless, the ALJ, without explanation, ignored this evidence and incorrectly concluded that Respondent harbored no animus against Diaz's protected activity.

The evidence further establishes that Diaz's exercise of *Weingarten* rights was a motivation in Respondent's decision to terminate him. The record is replete with evidence – including the testimony of Director of Operations Ron Reif, who made the final decision to discharge Diaz, and disciplinary documents describing the termination – that Respondent discharged Diaz for refusing to take a drug test. [Tr. 141; GC Exh. 4, Resp. Exh 5.] Yet, as explained above, Diaz's "refusal" to take the June 8 drug test cannot faithfully be separated from his *Weingarten* request for Union representation. The record evidence establishes, as the ALJ found, that Diaz repeatedly said that he would take the drug test on June 8 if he had a Union

representative present. His "refusal" to take the test was therefore conditioned upon Respondent's denial of his request for representation. Thus, there is a clear, inextricable connection between Diaz's invocation of *Weingarten* rights and Respondent's decision to terminate him, and the ALJ's conclusion that "the General Counsel has failed to establish a sufficient nexus between the denial of Diaz' *Weingarten* rights and his discharge" [ALJD 11:7-8] is plainly in error.

By failing to consider the preponderance of evidence establishing that Respondent's hostility toward Diaz's invocation of *Weingarten* rights contributed to its decision to discharge him, the ALJ also erroneously failed to shift the burden of persuasion to Respondent under *Wright Line*. Once the *Wright Line* burden shifts to Respondent, as is necessary here, the evidence does not support Respondent's affirmative defense that it would have terminated Diaz even in the absence of his protected activity. In this regard, the record establishes that Respondent did not have just cause under its collective-bargaining agreement with the Union to terminate Diaz for reporting to work under the influence of drugs based solely on the "reasonable suspicion" of drug use developed by supervisors Small and Wetherell. In fact, Director Reif credibly testified that Respondent had *no right* to discipline an employee for suspected substance abuse without first giving him an opportunity to be tested. [ALJD 2:39-44, Tr. 114.] Therefore, as the ALJ found, the drug test Respondent ordered Diaz to take was "a required part" of its investigation into whether Diaz reported to work under the influence, and Respondent could not have discharged Diaz for substance abuse. [ALJD 7:34-36, 9:13-16.] Thus, the only reason for the termination supported by the record evidence was Diaz's refusal to submit to the drug test as directed by Respondent on June 8, which again cannot be separated from his invocation of *Weingarten* rights.

To support his conclusion that Diaz's assertion of *Weingarten* rights had nothing to do with his termination, the ALJ relied on the disciplinary documents prepared by Respondent in connection with Diaz's discharge, which make no reference to his request to have Union

representation before submitting to the June 8 drug test. [ALJD 10:47-49.] The ALJ's reliance on this evidence is utterly misplaced. In relying on the absence of an admission in the disciplinary documents that Respondent discharged Diaz for refusing to submit to a drug test without a union representative present, the ALJ, in effect, concluded that no unlawful motivation exists simply because the employer did not state its unlawful motive in its disciplinary records. The Board, however, does not require the General Counsel to show that an employer explicitly stated an unlawful purpose in its disciplinary documents. Yet the ALJ's finding suggests, without any basis in fact or law, that such an admission is a prerequisite for finding an unfair labor practice. Of course there is no such prerequisite – otherwise hardly any unfair labor practice would ever be found – and the ALJ's reliance on this evidence is again plain error.

The ALJ also erred in his reliance on Respondent's attempt to analogize Diaz's termination to the discharges of three other employees who refused to undergo substance abuse testing. This evidence does not prove that Respondent would have terminated Diaz in the absence of his protected activity because the other discharges cited by Respondent are not comparable to the situation with Diaz. Respondent failed to produce any evidence that any of the three other discharged employees made a request for union representation, or that their request was denied. [Tr. 125-133, 145-49; Resp. Exh. 7-9.] In fact, the evidence establishes that both employees Felix Marin and Greg Irving had a Union representative present with them when Respondent ordered them to submit to drug or alcohol screening, and they each declined to submit to the respective tests regardless. [*Id*.] Further, no evidence in the record even suggests that the third supposedly similarly-situated employee, John Reyes, ever requested to have union representation. [*Id*.] Thus, the discharges of these other employees are not analogous to Respondent's discharge of Diaz, and the ALJ erred in relying on this evidence. In sum, the preponderance of the evidence does not establish that Respondent would have discharged Diaz notwithstanding his assertion of

Weingarten rights. Instead, the evidence establishes that Diaz's protected activity was a key motivating factor in his termination. Accordingly, the ALJ's contrary finding must be overturned.

IV. CONCLUSION

Based on the entire record, a preponderance of the credible, probative evidence clearly supports the conclusion that Respondent discharged Diaz because he asserted his *Weingarten* right to have union representation during an investigatory interview that could lead to discipline, in violation of Section 8(a)(1) and (3) of the Act as alleged in the Complaint. The General Counsel therefore urges that the Board sustain the General Counsel's Exceptions in their entirety, reverse the ALJ's conclusions of law insofar as they do not find unlawful Respondent's discharge of Diaz, and modify the ALJ's Order with an appropriate Order requiring that Respondent: cease and desist from its unlawful conduct; offer Diaz reinstatement to his former position, without prejudice to seniority or other rights or privileges to which he would have been entitled; make Diaz whole for any losses he suffered as a result of Respondent's unlawful conduct; and post appropriate notices in which employees are assured of their Section 7 rights, as well as any other remedy the Board deems appropriate.

Respectfully submitted,

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