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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALPHS GROCERY COMPANY and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 324	Case No. 21-CA-039867 **CHARGING PARTY'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT RALPHS GROCERY COMPANY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

On May 28, 2013, Respondent Ralphs Grocery Company ("Ralphs") filed Exceptions to the Honorable Administrative Law Judge Jeffrey D. Wedekind's April 30, 2013, Decision ("Decision"). Ralphs's eleven exceptions take issue with Judge Wedekind's determination that Ralphs violated grocery clerk Vittorio Razi's *Weingarten* right to confer with his union representative prior to submitting to a drug and alcohol test, a test that Razi's store manager ordered as part of an investigation into the cause of Razi's erratic behavior after a particularly grueling work week. Ralphs asserts that Judge Wedekind should have deferred to a May 5, 2012, arbitration award issued by Arbitrator Charles A. Askin ("Arbitration Award"), which determined that the meeting was not an investigatory interview, and consequently that Ralphs did not violate the National Labor Relations Act by refusing to allow Razi to consult with his union representative. The exceptions also take issue with the remedy and the Board's jurisdiction in this matter.

None of these exceptions have merit. The Decision is indistinguishable from applicable Board precedent, *System 99*, 289 NLRB 723 (1988) and *Safeway Stores*, 303 NLRB 989 (1991), which both stand for the unremarkable principle that an investigation into an employee's demeanor at work incorporating a targeted drug and alcohol test is covered by *Weingarten*. Ralphs's exceptions flow from its basic disagreement with Judge Wedekind that Razi had any *Weingarten* rights because, Ralphs asserts, the drug test was not "investigatory." But because the store manager ordered the drug test *as part of her investigation*, Ralphs's argument is facially deficient and its exceptions should be overruled. The Board should adopt the ALJ's decision.

Finally, the Board should not stay the case pending the outcome of *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) *cert. granted,* 12-1281, 2013 WL 1774240 (U.S. June 24, 2013). That decision "conflicts with rulings of at least three other courts of appeals" and the "question remains in litigation." *Bloomingdale's Inc.*, 359 NLRB No. 113 (April 30, 2013). While the case is pending, "the Board is charged to fulfill its responsibilities under the Act." *Id.*

II. PROCEDURAL HISTORY

After Ralphs terminated Razi on May 19, 2011, the Union filed an unfair labor practice charge on July 1, 2011 and a simultaneous grievance under the parties' collective bargaining agreement. On August 19, 2011, the matter was administratively deferred to the parties' grievance-arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). The Union appealed the deferral decision on September 2, 2011, but the appeal was denied on October 28, 2011. The case was submitted to arbitration, and the arbitration hearing was held on February 1, 2012. On May 5, 2012, Arbitrator Charles Askin issued his opinion and award denying the Union's grievance.

Arbitrator Askin concluded that Razi's rights under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), were not violated because the meeting at which the store director repeatedly asked the employee to submit to a drug and alcohol test did not constitute an "investigatory interview" under *Weingarten*. The arbitrator analyzed *Safeway Stores, Inc.*, 303 NLRB 989 (1991) and *System 99*, 289 NLRB 723 (1988), but did not address the Board's conclusion in *System 99* that asking an employee to submit to a drug test is

inherently "confrontative" and calls for an answer "fraught with significance," implicating the employee's right under *Weingarten* to representation prior to deciding whether to submit to the screening. *System 99*, 289 NLRB at 726.

Instead, the arbitrator found that the purpose of the meeting was *not* "to gather independent, additional evidence" about whether the employee was intoxicated or under the influence of drugs, despite the fact that test was requested for precisely that reason. The arbitrator also decided that the meeting did not constitute an investigatory interview because the decision to *test* Razi (not discipline him) had already been made, ignoring the investigatory nature of the test itself or its connection with the investigation into possible drug use. Finally, the arbitrator treated the meeting in the store manager's office and the drug test as three conceptually distinct events: the period before Razi left to make the phone call, Razi's return to the meeting, and the off-site drug test. In the arbitrator's mind, each "meeting" required a separate *Weingarten* analysis.

In November 2012, the Region determined that it would not defer to Arbitrator Askin's decision and issued the complaint. In lieu of a new hearing, the Parties agreed to stipulate to the facts and record under Section 102.35(a)(9) of the Board's Rules and Regulations. On April 30, 2013, Judge Wedekind issued his Decision.

III. FACTS

Vittorio Razi worked as a produce manager at a Ralphs store in Irvine, California

for nearly 24 years. Tr. at 191:25-192:6 (Razi).[1] In addition to his normal job duties, Razi constructed wet racks and slants, which are used to display produce for sale at the store. Tr. at 194:1-195:1 (Razi); UX10. In the three days prior to his termination, Razi worked over 34 on-the-clock hours, not counting the woodworking for the store. UX 3; Tr. at 124:3-10 (Edwards). During this time, Razi told his store manager that he could barely complete the job and was "exhausted" and "dozing off." Tr. at 213:24-214:19 (Razi).

Razi only slept a few hours before beginning his regular shift on Wednesday, May 18, at 5:02 a.m. Tr. at 219:6-11; UX 3. Multiple employees at the store that morning remarked that Razi was behaving oddly. After conducting interviews with Razi's coworkers, the store manager, Julie Henselman, summoned Razi to her office at approximately 9:15 a.m. Tr. at 47:2-6 (Maier). Razi testified that Henselman asked him whether he "did drugs" and whether he was "on drugs." Tr. at 224:7-15 (Razi). Henselman then told Razi that he needed to go take a drug test, and that if he failed to take it, it would be considered an automatic positive result and lead to his termination. Tr. at 59:19-60:8 (Henselman).

Razi had never before heard of anyone being asked to take a drug test at the store.

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[1] Citations to "Tr." are to the transcript of the February 1, 2012, arbitration hearing, which also constituted the trial record under Section 102.35(a)(9) of the Board's Rules and Regulations. "JX" refers to Joint Exhibits at the hearing. "EX" refers to employer exhibits. "UX" refers to union exhibits.

Tr. at 225:23-25 (Razi).[2] He asked Henselman whether he could talk to his union representative or a lawyer. Tr. at 60:23-61:7 (Henselman). Henselman told Razi that he didn't have that right, but eventually agreed to allow him to make a phone call. *Id.*

Razi left the room and went to make his phone call. However, he could not immediately reach his union representative. A few minutes later, Razi received a call on his cell phone from Maria Rodriguez, the store's front end manager, who had been asked by Henselman to track down Razi. Tr. at 127:6-17 (Rodriguez). Rodriguez told Razi that Henselman wanted him to come back to her office. *Id.*

The meeting resumed. Razi told Henselman that he had been unable to reach his union representative. Tr. at 230:14-231:2 (Razi). Henselman continued to insist that Razi was required to take the test, even if he had not had a chance to speak with a union representative. *Id.* Razi continued to insist that he would not take the test without first speaking to his union representative. Tr. at 39:5-13 (Maier). Henselman told Razi that he was suspended pending further investigation, and Razi was subsequently terminated.

IV. DEFERRAL

As Judge Wedekind noted in his Decision, the relevant standards for deferral to an arbitration award are set forth in *Olin Corp.*, 268 NLRB 573 (1984). The Board will defer to an arbitrator's decision if (1) the proceedings appear to have been fair and regular; (2) all parties agreed to be bound; (3) the arbitrator has adequately considered the

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[2] Henselman testified that she had never before asked an employee at Store 748 to submit to a drug or alcohol test. Tr. at 97:1-21 (Henselman).

unfair labor practice issue, i.e., the unfair labor practice issue is factually parallel to the contractual issue and the arbitrator was presented generally with the facts relevant to resolving it; and (4) the arbitrator's decision is not clearly repugnant to the Act, i.e., it is susceptible to an interpretation consistent with the Act. The burden is on the party opposing deferral to establish that deferral is inappropriate.

The Parties agreed that the first three elements of the *Olin* standard are met. However, on the fourth element, Judge Wedekind concluded that the arbitrator's decision was repugnant to the Act. Decision at 2:30-32. Judge Wedekind concluded that *System 99* and *Safeway* were not distinguishable from the present case and, accordingly, that the General Counsel and Union met their burden in establishing that the decision was repugnant to the Act. Decision at 9:31-10:9. Judge Wedekind cited *Weingarten*, 420 U.S. 261, holding that protecting and enforcing an employee's right to union representation at an interview that may put his job in jeopardy "plainly effectuates the most fundamental purposes of the Act." *Id.*

V. ARGUMENT

A. Judge Wedekind's Decision is Consistent with *Weingarten*.

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that individual employees have a right to union representation at an investigatory interview that the employee reasonably believes may result in adverse action. 420 U.S. 251, 256 (1975). The Court held that, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided

'to redress the perceived imbalance of economic power between labor and management.'" *Id.* at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)). While the arbitrator concluded that there was no investigatory interview, Judge Wedekind concluded that Razi had a right to consult with his union representative prior to submitting to the drug test. Decision at 7:15-17.

The primary conceptual difference between the Arbitration Award and Judge Wedekind's Decision is that, while the arbitrator determined that there was no "investigatory interview," Judge Wedekind ruled that, as in *System 99* and *Safeway Stores*, the "drug test was ordered as part of an investigation into employee conduct." Decision at 7:28-32. The arbitrator's analysis divided the investigatory interview into separate conceptual events: (1) the meeting before Razi left to make a phone call, (2) the meeting after Razi returned, and (3) the drug test. Decision at 5:26-33. Judge Wedekind saw no reason to analyze the events separately. Ralphs now urges the Board to adopt the premise that the meetings were conceptually distinct, and that no "investigation" happened after Razi requested union representation. Ralphs Exceptions at 14.

Ralphs further argues that Judge Wedekind erred by failing to distinguish *System 99* and *Safeway*. However, as Judge Wedekind explained in detail, the cases are not meaningfully distinguishable. They compel the conclusion that Ralphs terminated Razi in violation of his *Weingarten* rights. Decision at 7:15-42.

1. Judge Wedekind Appropriately Did Not Defer to Erroneous Legal Conclusions Reached By the Arbitrator.

Ralphs argues that Judge Wedekind's decision not to defer to various conclusions

reached by the arbitrator was incorrect. However, each of the conclusions Ralphs contends is a "matter of fact" is actually a legal conclusion, because all are premised on the legal assumption that the drug test and the "second meeting" were not investigatory in nature. Indeed, there is no indication that Judge Wedekind disagreed with any of the arbitrator's *factual* findings. What Ralphs characterizes as "factual findings" are actually legal conclusions. And, where the arbitrator's decision is based on a legal framework that is antithetical to the Board's approach, then deferral is not appropriate. See, e.g., *Kohler Mix Specialties*, 332 NLRB 630, 531 (2000); *Columbian Chemicals Co.,* 307 NLRB 592, 592 fn. 1 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993).

For example, Ralphs argues that Judge Wedekind should have deferred to the arbitrator's conclusion that "Ralphs had completed its investigation by the time it ordered Razi to submit to a drug test." Ralphs Exceptions at 12. Ralphs argues that the drug test was not part of the "investigation" into Razi's conduct. *Id.* However, the arbitrator's decision to treat the drug test itself as a separate event from the rest of the investigation is a legal determination, not a factual one. Judge Wedekind determined that the drug test was part of the continued investigation into Razi's demeanor at work on the day in question; there was no real or rational basis to distinguish the drug test from the rest of the investigation. Decision at 7:34-42. In short, Ralphs had not "completed its investigation" because the drug test was *part* of that investigation. The arbitrator's legal conclusion that the investigation was complete at the time the drug test was ordered was completely erroneous.

Ralphs also argues that Razi's refusal to take a drug test "occurred well before a

demand for a union representative was made by Razi." Ralphs Exceptions at 12. That is simply incorrect. The record from the arbitration and trial clearly establishes that Razi requested union representation, and was denied, during the same meeting at which he was ordered to take the drug test. *See* Arbitrator's Award at 10:14-25. There is no basis for Ralphs's contention that the store manager told Razi to submit to a drug test "well before" Razi requested to speak to a union representative, and no basis for arguing that the arbitrator and Judge Wedekind disagreed on this point.

2. Ralphs Conflates the Decision to Require Razi to Submit to a Drug Test With the "Predetermined Discipline" Exception.

Ralphs argues repeatedly that the store manager "simply was not investigating anything when she called [Razi] into her office." Ralphs Exceptions at 13. The arbitrator similarly concluded that when the store manager summoned Razi to her office, her intention "was not to gather any new facts, but to inform him that he was being required to be tested – a decision that was made before the meeting began." Arbitrator's Award at 20:11-14.

Judge Wedekind was not required to defer to this clearly erroneous legal conclusion. *System 99* and *Safeway* establish that an employer's demand that an employee submit to a targeted drug test triggers *Weingarten* rights because the drug test itself can be *part of the investigation*.[3] As *System 99* in particular establishes, "attempts

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[3] While there is some question under the applicable decisional law whether *Weingarten* rights extend to *random, non-investigatory* drug and alcohol testing, the Board has made clear that *targeted*, *investigatory* drug testing falls within the scope of *Weingarten*. As

(Footnote continued)

to get [the employee] to answer the question whether he would take the sobriety test" call for an answer that was "fraught with significance." *System 99*, 289 NLRB at 726. Such a meeting is "confrontative in character, and [the employee's] refusal to accept the invitation to take the sobriety test would be an 'admission' for disciplinary purposes equal in strength to an employee's outright admission of misconduct in a meeting called to investigate whether the employee had engaged in misconduct." *Id.* at 726-27. Thus, whether or not investigatory questions were posed after Razi requested union representation, the employer's demand that he submit to a drug test continued the investigation into Razi's demeanor.

In arguing this point, Ralphs, like the arbitrator, conflates the "predetermined discipline" doctrine with the decision to require Razi to take the test. While "an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision," (*Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979)) *the decision to discipline Razi had not yet been made* at the time of the interview. The purpose of the drug test was to gather additional evidence to support discipline, and Razi's decision to comply with the investigation, or not, is precisely the kind of decision *Weingarten* protects. Razi had the right to speak to a union

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the Board stated in *Safeway Stores, Inc.*, 303 NLRB 989 (1991), a drug test, "standing alone," might not constitute an investigatory interview under *Weingarten*. But where the drug test is "part of an inquiry" into a specific employee's misconduct, an employee has *Weingarten* rights. *Id.*

representative before deciding whether or not to submit to the test.

3. This Case is Indistinguishable from *Safeway* and *System 99*.

The facts in this case are remarkably similar to those in *System 99*, 289 NLRB 723 (1988). In *System 99*, a manager suspected that an employee was under the influence of alcohol after the employee arrived at work. *Id.* at 724. The manager conferred with the assistant vice president, and together they summoned the employee to the manager's office with the intention of asking him to submit to a sobriety test. *Id.* The employer's practice was to treat a refusal to take a requested test as presumptive evidence of intoxication warranting termination. *Id.* The employer did not believe it would be able to sustain a discharge decision based solely on witnesses to the employee's impaired behavior; the employer believed that to sustain a discharge it needed either (1) a positive result on a sobriety test, or (2) the presumption that the employee was intoxicated because he refused to submit to it. *Id.*

When asked to take the test, the employee dodged the issue and ultimately did not take the test. *Id.* at 724-25. The employee stated that he wanted to talk to the chief union steward, but the manager refused to allow it because he "didn't…know when [the union steward] would be in" and he believed that allowing the employee to confer with the steward wouldn't change the result. *Id.* at 725. After the employee continued to refuse the test, he was discharged. *Id.*

The Board upheld the ALJ's conclusion that the employer violated 8(a)(1) and, specifically, that the meeting constituted an "investigatory interview" within the purview of *Weingarten*. *Id.*, n.2. The ALJ found that the employer's "attempts to get [the

employee] to answer the question whether he would take the sobriety test" called for an answer that was "fraught with significance." *Id.* at 726. The meeting was "confrontative in character, and [the employee's] refusal to accept the invitation to take the sobriety test would be an 'admission' for disciplinary purposes equal in strength to an employee's outright admission of misconduct in a meeting called to investigate whether the employee had engaged in misconduct." *Id.* at 726-27.

In this case, the store manager's purpose in summoning Razi to her office was, by her own admission, to *find out* whether Razi was under the influence of drugs or alcohol. Tr. at 86:15-25 (Henselman). Accordingly, an "investigatory interview" took place when Razi was summoned to the store manager's office because the purpose of the meeting was "confrontative" and intended, like the interview in *System 99*, to require Razi to submit to a drug and alcohol screening that would constitute an "admission" for disciplinary purposes. Just as in *System 99*, the employer did not have reasonable cause to discharge Razi for his allegedly erratic behavior alone; it sought conclusive, scientific proof of drug or alcohol use to justify termination.

Judge Wedekind noted that the arbitrator erred by distinguishing *System 99* and *Safeway*. Decision at 7:19-42. As Judge Wedekind noted, "it makes no rational difference" that the employer in *Safeway* was investigating why the employee was not showing up on schedule to perform his work, whereas Ralphs "was investigating why Razi was having difficulty performing his work." Decision at 7:29-32. Likewise, the investigation in *System 99* was "identical" to that in the present case. Decision at 7:38-41. There is simply no meaningful way to distinguish those two cases from the present

case. In both *Safeway* and *System 99*, the Board found that the employee had a *Weingarten* right to representation, as Razi did. For this reason, Judge Wedekind's decision not to defer to the arbitrator was correct.

4. Judge Wedekind's Decision that The Arbitrator Clearly Erred in Finding the Company Was Not Required to Delay the Drug Test is Correct.

Judge Wedekind correctly noted that "[i]t is well established that, when faced with a legitimate request for union representation, an employer is entitled to proceed with the investigatory interview without significant delay only if a union representative is available." Decision at 7:44-8-16 (citing *Las Palmas Medical Center*, 358 NLRB No. 54, slip op. at 14 (2012); *Buonadonna Shoprite*, 356 NLRB No. 115 (2011); *Roadway Express, Inc.,* 246 NLRB 1127, 1129–1130 (1979)). Judge Wedekind also correctly noted that, "[i]f no union representative is available, the employer must either discontinue the interview or offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all (in which case the employer is free to take disciplinary action based on information obtained from other sources)." *Id.* (citing *Consolidated Freightways Corp.,* 264 NLRB 541, 542 (1982); and *Super Valu Stores, Inc.,* 236 NLRB 1581, 1591 (1978)).

The arbitrator, by contrast, simply decided that because drug and alcohol screenings are "time sensitive," the employer is not required to wait "indefinitely" for the employee to make contact with a union representative. Arbitrator's Award at 24:1-8. Following the arbitrator, Ralphs continues to argue in its Exceptions that Razi did not have the right to "indefinitely" delay the drug test. Ralphs Exceptions at 18-21.

However, as Judge Wedekind noted, Razi was not only unable to reach his union representative, there was no evidence that the union representative was available. Decision at 8:18-28. Ralphs gave Razi *a few brief minutes* to make contact before continuing to insist that he submit to the drug test. There is no indication that Razi attempted to delay the test unreasonably or "indefinitely" and, in fact, he was able to reach his union representative a short time after he was terminated. Tr. at 223.

Nor, contrary to Ralphs's contention, was any showing made that another union representative was available. Judge Wedekind correctly concluded that Maria Rodriguez, the store's front-end manager, was unsuited to act as the *Weingarten* representative, not only because she did not possess the requisite training but also because she was in the process of carrying out an order from the store director to seek out Razi and return him to the manager's office. Decision at 8:30-9:12. Finally, the arbitrator's decision on this point is not a factual conclusion, it was an erroneous legal conclusion to which Judge Wedekind owes no deference. *Kohler Mix Specialties*, 332 NLRB 630, 531 (2000).

5. Ralphs Terminated Razi Solely Because He Refused to Submit to the Drug Test Without First Speaking with His Union Representative, Not Because Of Any Pre-Meeting Conduct.

The termination notice, in evidence as Employer Exhibit 3 to the arbitration, states that Razi was terminated "for insubordination and refusal to take a drug test." EX 3. The notice states that Mr. Razi "refused to take a drug test, which is [] insubordination, and an automatic 'positive' drug test result." *Id.* However, Ralphs now states in its Exceptions brief, that it terminated Razi partially based on "*other evidence of his intoxication.*" Exceptions at 21. Essentially, Ralphs urges the Board to find that even if Razi was

terminated for insubordination, his termination was justified on other grounds, namely Razi's observed behavior earlier in his shift.

As Judge Wedekind noted:

> [I]t is…clear, as the arbitrator found, that the Company terminated Razi because he refused to immediately submit to a drug test without first consulting his union representative. There is no mention whatsoever in the Company's termination report of Razi's observed behavior or conduct before or during the meeting, and no finding, apart from his refusal to take the drug test (which was considered an automatic positive test result), that he was under the influence of intoxicants or drugs (even though that was specifically listed as a possible basis for immediate termination on both the termination form and the posted rules and regulations). See ER Exhs. 1 and 3. See also Edwards' testimony, Tr. 119 (Razi "was terminated for insubordination, not for being under the influence").

Decision at 9:14-22.

Judge Wedekind is correct and the Board should decline Ralphs's invitation to substitute a new reason for Razi's termination beyond that stated expressly by the employer when it made the decision to terminate. The termination notice says nothing about "other evidence" of intoxication and it is clear that Razi was terminated for his refusal to take the test alone, which Ralphs considered "insubordination" and an "automatic positive." EX 3. The notice has two boxes checked as reasons for discharge: (1) "insubordination, unco-operative" and (2) "[r]efused to submit to drug test." EX 3. There is nothing on the termination notice about "other evidence" of intoxication. And contrary to Ralphs's contention, there is nothing to suggest that the arbitrator considered other evidence beyond the employer's stated reasons for termination. Indeed, the arbitrator specifically noted that "the Employer did not draw any conclusions about [Razi's] intoxication from his comportment at the meetings that were then used as a basis

for his termination. Instead, he was terminated for failing to comply with a direct order." Arbitration Award at 23:22-26. The arbitrator repeatedly noted that Razi was terminated for insubordination, and did *not* address whether Ralphs had the right to terminate Razi based on reasonable suspicion of drug or alcohol use. *See, e.g.,* Arbitration Award at 18. Ralphs's attempts to reconstitute the reason for termination, and to re-characterize the arbitrator's decision as something other than it is, are misleading and incorrect.

6. A Make-Whole Remedy is Appropriate.

Ralphs argues circularly that Razi should not be made whole because he committed insubordination, including clocking out for lunch before returning to the meeting in the manager's office. Ralphs Exceptions at 23-25. But Ralphs's position presupposes that Razi had no *Weingarten* right to refuse to proceed with the drug test before consulting his union representative. Because he had that right, he did not commit insubordination. Furthermore, both the arbitrator and Judge Wedekind noted that Razi's decision to clock out before returning to the meeting was not insubordinate and "did not warrant any disciplinary action" both because the instruction was given by a bargaining unit employee, not a manager, and because there was no evidence of a clear instruction not to punch out for lunch. Arbitrator's Award at 18-23-19:5; Decision at 5:11-16.

Ralphs's contention that Razi should have informed his manager that he was unable to reach his union representative is also meritless. In fact, Razi testified during the arbitration that he *did* inform his manager that he was not able to reach the union representative. Tr. at 230:14-21 (Razi). The store manager commented, "Well, we let you make the call," – evidencing that Ralphs believed it did not need to wait for the union

representative, it only had to wait a few minutes to allow Razi to *try to reach her*. Finally, contrary to Ralphs's assertion that Razi "never asked for a specific period of time to further attempt to contact his representative," Razi testified that he told the store manager he was "waiting for [his union representative] to call back." *Id.*

Because Razi was terminated solely for his refusal to take the drug test before he was allowed to speak to his union representative, in violation of his *Weingarten* rights, reinstatement plus back pay is the appropriate remedy. *Safeway Stores*, 303 NLRB 989, 990 (1991); *Wal-Mart Stores, Inc*., 351 NLRB 130, 133 (2007); *Provider Services Holdings, LLC*, 356 NLRB No. 181 (2011).

B. The Board Has Jurisdiction.

Ralphs argues that the Board does not have jurisdiction over this dispute in light of the D.C. Circuit's decision in *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) *cert. granted,* 12-1281, 2013 WL 1774240 (U.S. June 24, 2013). But, as the Board recently determined, that decision "conflicts with rulings of at least three other courts of appeals" and the "question remains in litigation." *Bloomingdale's Inc.*, 359 NLRB No. 113 (April 30, 2013). While the case is pending, "the Board is charged to fulfill its responsibilities under the Act." *Id.*

VI. CONCLUSION

Judge Wedekind correctly decided that Ralphs violated Section 8(a)(1) of the Act when it discharged Vittorio Razi for refusing to take a drug test before he was allowed to consult his union representative, in violation of his *Weingarten* rights. The arbitrator's decision was repugnant to the Act because he determined, without any reason, that the

drug test was not "investigatory" even though it was ordered specifically to obtain information about whether Razi was under the influence of drugs or alcohol, as part of the employer's investigation into potential drug and alcohol use by Razi. Ralphs's exceptions – which essentially seek to reargue the case – are meritless. Accordingly, the Union respectfully submits that the ALJ's findings, rulings, and conclusions should be affirmed.

DATED: July 11, 2013

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STATEMENT OF SERVICE

I hereby certify that a copy of Charging Party's Answering Brief in Response to Respondent Ralphs Grocery Company's Exceptions to Administrative Law Judge's Decision was submitted by e-filing to the Division of Judges of the National Labor Relations Board on July 11, 2013.

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

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