

Nos. 15-2845, 15-3099

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANHATTAN BEER DISTRIBUTORS LLC

Petitioner, Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent, Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

MICHAEL ELLEMENT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2949
(202) 273-3847

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Manhattan Beer Distributors, LLC (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued against the Company on August 27, 2015, and reported at 362 NLRB No. 192. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section

10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over the Board’s application pursuant to Section 10(e) of the Act, because the Board’s Order is final and the unfair labor practices occurred in Wyandanch, New York. The Company’s petition and the Board’s cross-application were timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board’s reasonable finding that the Company violated Section 8(a)(1) of the Act by denying employee Joe Garcia Diaz his right to union representation during an investigatory interview, and instead continuing the investigatory interview and immediately directing Diaz to submit to a drug test, and by discharging Diaz because he asserted his right to representation.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a complaint issued by the Board’s General Counsel, pursuant to a charge filed by Joe Garcia Diaz. Following a hearing, an administrative law judge issued a decision finding that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by denying Diaz his right to union representation at an investigatory interview that he reasonably believed might result in discipline, and by directing him to immediately

submit to a drug test as part of its investigation into his conduct, notwithstanding his request for union representation prior to the test. (SPA 15.)¹ Both the General Counsel and the Company filed exceptions to the judge's decision. On August 27, 2015, the Board affirmed the judge's decision regarding the violation found, and additionally found the Company violated Section 8(a)(1) by discharging Diaz for exercising his right to representation. (SPA 4.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company operates a beer-delivery operation servicing retail establishments. (SPA 10.) It employs about 90 workers at its Wyandanch, Long Island location. (SPA 10; JA 45, 116.) The Company's truck drivers and helpers are represented by the Laundry Distribution and Food Service Joint Board, SEIU ("the Union"). (SPA 10; JA 54, 115.)

The collective-bargaining agreement between the Company and the Union provides for routine drug tests at the start of employment or upon return from layoff as well as provisions related to unscheduled employee drug testing. The Company may test employees, other than those involved in accidents, only upon

¹ "SPA" refers to the Special Appendix filed by the Company on January 15, 2015. Citations to the Joint Appendix appear as "JA." Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

“reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol.” (SPA 10; JA 298.) Employees may be subject to immediate discipline or termination should they report to work under the influence of drugs. (SPA 10; JA 122, 297-98.) However, the Company’s policy is that it has no right to discipline any employee for drug or alcohol use without first giving the employee an opportunity to be tested. (SPA 10; JA 124, 147-48.) Pursuant to that policy, “the employee has the right to be drug tested. [The Company] never take[s] that away from an employee” because the right to be tested “is intended for the benefit of the employee.” (SPA 10; JA 124-25.) If there is a reasonable suspicion of drug use, the Company asks the employee to submit to an off-site drug test. (SPA 10; JA 115.) If an employee refuses to submit to a drug test, the Company may consider that refusal the equivalent of a positive test result and discharge the employee. (SPA 11 at n.3; JA 143-44.) Delivery Manager Roy Small is responsible for administering the drug-testing policy and has attended training in relation to drug testing, including whether reasonable suspicion exists that an employee is under the influence of drugs. (SPA 10; JA 156.)

Diaz worked for the Company from August 2010 until June 2013, with the exception of a 3 month lay-off beginning in November 2012. (SPA 10; JA 45, 48.) He worked in a variety of positions, most recently as a driver’s helper. (SPA 10; JA 45-46.) In that capacity he assisted drivers with customer deliveries—

maintaining the inventory, helping unload products, and watching over the products while the driver collected money from customers. (SPA 10; JA 45, 49.) Diaz was a member of the Union and had served as a shop steward as recently as spring 2012. (SPA 10; JA 56.)

B. Diaz is Discharged After Refusing to Submit to an Investigatory Drug Test Without Representation

While working on June 7, 2013, Diaz was injured and filed an incident report. (SPA 1, 10; JA 65.) The next day, Diaz reported to work and went to the office to learn his assigned route for the day. (SPA 1, 10; JA 63.) There was no route next to Diaz's name on the assignment list posted on the office window, just the notation "workers compensation." (SPA 10; JA 64.) Through the window, Diaz saw Small and Facility Manager Tony Wetherell. (SPA 10; JA 64.) Diaz opened the office window and asked Small why he had been placed on "workers compensation," adding that he was ready to work. (SPA 10; JA 65.) Small replied that, because Diaz submitted an incident report the previous night, he assumed that Diaz would not be at work due to a workers-compensation claim. (SPA 10; JA 65.)

During that interaction, Small thought that Diaz smelled of marijuana, and that Diaz's eyes were glassy and bloodshot. (SPA 1, 10; JA 173.) Wetherell, who was standing nearby, asked Diaz to come inside the office. (SPA 1; JA 69.)

Wetherell asked about Diaz's injury the day before and about how Diaz was

feeling. (SPA 1, 10; JA 69-70.) Diaz said he felt great, and was ready to work. (SPA 10; JA 70.) Wetherell asked Diaz if he “was doing anything stupid” and commented that Diaz smelled “a little funny.” (SPA 1, 11; JA 70.) Diaz answered that he did not know what Wetherell meant. (SPA 11; JA 70.) Wetherell then instructed Diaz to wait outside the office. (SPA 11; JA 71.)

Diaz waited for over an hour as other employees received their routes for the day, repeatedly asking if he would be assigned a route. When Diaz asked if he should go home for the day, Small replied that he had a route for Diaz, but that Diaz would have to take a drug test first because he smelled like marijuana. (SPA 1, 11; JA 72-73.) Diaz told Small that he did not have a problem taking a drug test, but that he wanted his shop steward present first. (SPA 1, 11; JA 74.) Although Diaz had previously served as a shop steward, he had no experience with the Company’s unscheduled drug testing policy. (SPA 10; JA 58.) Small answered that “it’s a company issue now. The shop stewards have nothing to do with it.” (SPA 11; JA 75.) Diaz protested that he was entitled to have his steward present. (SPA 11; JA 75.) Small replied “you just have to take the test.” (SPA 11; JA 75.)

Diaz then left the office area and called assistant shop steward Joe Henry. (SPA 1, 11; JA 75.) When Henry did not answer, Diaz called shop steward Joseph Gonzalez and began to explain the situation. (SPA 1, 11; JA 75.) While Diaz was on the phone with Gonzalez, Wetherell drove up in his car to the area where Diaz

was standing. (SPA 1, 11; JA 75.) Ignoring Diaz's earlier requests for a union representative, Wetherell instructed Diaz to get into the car so that Wetherell could take him for his drug test. (SPA 1, 11; JA 76.) Diaz replied that he would not take the test without a shop steward. (SPA 1, 11; JA 76.) Wetherell then told Diaz he could drive himself to the test and that they would "finish talking there." (SPA 2, 11; JA 77.) Diaz refused, saying "not without a shop steward." (SPA 1, 11; JA 77.)

Diaz asked Gonzalez to accompany him to the drug test, or at least provide him with a copy of the new collective-bargaining agreement, which had just recently been signed. (SPA 11; JA 77.) Gonzalez replied that it was his day off and that he could not accompany Diaz, and did not have the new contract with him. He told Diaz that if he felt strongly that his rights were being violated and that he needed a representative, he should not take the test. (SPA 11; JA 78.)

When Diaz returned to the office, Small asked him what Gonzalez said and Diaz refused to give him any information. Small then called Gonzalez and reported that he was going to take Diaz to a drug test because he had a reasonable suspicion that Diaz used marijuana; Gonzalez replied "I understand. Do what you have to do." (SPA 11; JA 173.)

After the call, Small again asked Diaz to take a drug test. (SPA 1, 11; JA 79.) Small told Diaz that a refusal to take the test would be treated as a positive

result, potentially resulting in Diaz's termination. (SPA 1, 11; JA 175.) Diaz told Small and Wetherell that, although he had no problem taking the test, he felt his rights were being violated because his shop steward was not there, remarking "[s]ince he's not able to be present, I'm not taking the test." (SPA 1, 11; JA 79.) Small continued asking Diaz to take the test. (SPA 11; JA 69-60.) Small then asked: "do you understand by refusing to take the drug test you're going to be suspended?" (SPA 11; JA 80.) Diaz said he did, and repeated that he had no problem taking the drug test under appropriate circumstances. (SPA 11; JA 80.) Small told Diaz to clock out and go home. (SPA 11; JA 81.)

Later that day, the Company discharged Diaz. (SPA 1; JA 82.) The Company prepared two disciplinary documents—a "Progressive Disciplinary Report" and a "Termination of Employment" memo. Both specified as the reason for Diaz's termination: "refused to go for a drug screening under the reasonable suspicion of substance abuse." (SPA 1 n.4; JA 264, 313.) The Company additionally sent an email to certain union officials, stating the reason for the discharge was Diaz's "refusal to submit to substance abuse testing based on reasonable suspicion." (SPA 1, 12; JA 312.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Hirozawa and McFerran; Member Johnson, dissenting) found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by continuing an investigatory interview which Diaz reasonably believed could result in discipline after Diaz requested union representation and by directing him to immediately submit to a drug test as part of its investigation, notwithstanding his request for union representation. Reversing the judge, the Board (Members Hirozawa and McFerran; Member Johnson, dissenting) also found that the Company violated Section 8(a)(1) of the Act by discharging Diaz because of his refusal to submit to a drug test without representation. (SPA 4.)

To remedy those unfair labor practices, the Board's Order requires the Company to cease and desist from: requiring employees to submit to a drug test as part of an investigation into their conduct, notwithstanding their requests for union representation at the investigatory interview; discharging employees because of their refusal to submit to such a drug test without such representation; and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (SPA 5.)

Affirmatively, the Order requires the Company to offer Diaz full reinstatement, make Diaz whole for any loss of earnings and other benefits suffered as a result of

the discrimination against him, remove from its files any reference to Diaz's unlawful discharge, and post a remedial notice. (SPA 5.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated section 8(a)(1) of the Act by continuing an investigatory interview after Diaz requested union representation, by requiring him to submit to an immediate drug test notwithstanding his repeated requests for representation, and by discharging him because he refused to take the drug test without representation.

It is well established that employees have a right to request union representation during an investigatory interview, which the employee reasonably fears may result in discipline. An employer violates Section 8(a)(1) of the Act when it denies requested representation and forces an employee to continue an interview unrepresented. The right to representation applies in a variety of circumstances, and generally demands the presence of a representative who is capable of actively assisting the employee during the interview. Specifically, as it relates to this case, employees have a right to meaningful union representation prior to taking a required investigatory drug test.

The Company's interview and demand for a drug test was an investigatory interview, and Diaz was entitled to representation because he reasonably believed the encounter could lead to discipline. Diaz repeatedly requested representation,

which the Company disregarded. Diaz stated more than once that he was willing to take the drug test, so long as he was granted his representation rights first. The Company unlawfully continued its investigatory interview by indicating that questioning would resume at the drug testing site, and by ordering Diaz to submit to the test before his representative was present. The Company thereby violated Section 8(a)(1) of the Act. Further, the Company violated Section 8(a)(1) of the Act by discharging Diaz because his discharge was inextricably linked to his assertion of his right to union representation.

The Company's claim that its questioning of Diaz and the demand that he take a drug test was not an investigatory interview is unsupported by the record. Diaz was directly confronted by two supervisors who questioned him about his actions, ordered that he take a drug test, and indicated that questioning would continue at the drug testing site. This was clearly an investigatory interview, entitling Diaz to representation. The Company's argument that Diaz's brief phone conversation with his union representative satisfied his right to representation fails. Established law makes clear that a representative is entitled to be present and provide active assistance during the interview. As the Board found, Diaz's union representative could have provided valuable assistance here if physically present, including witnessing the interaction between Diaz and management, offering another view of Diaz's condition, providing Diaz with a copy of the collective

bargaining agreement, and ensuring that the Company followed proper testing protocol. Lastly, the Company's argument that the Board's ordered remedy is improper lacks merit. Backpay and reinstatement are appropriate remedies in the instant case because Diaz's discharge was inextricably linked to his assertion of his representation rights.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. G & T Terminal Packing Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*—as the Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988).

"[T]his court reviews the Board's legal conclusions to ensure that they have a reasonable basis in law. In so doing, we afford the Board 'a degree of legal leeway.'" *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *see also Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir.1992)

(“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). Accordingly, this Court will only reverse the Board’s legal determinations if they are arbitrary or capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008).

Indeed, the Board’s legal conclusions “based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” *Caval Tool Div.*, 262 F.3d at 188. In particular, the legal conclusion that Section 7 of the Act protects employee activities “implicates the Board’s expertise in labor relations.” *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)). Accordingly, it is entitled to “considerable deference.” *NLRB v. The Staten Island Hotel*, 101 F.3d 858, 861 (2d Cir. 1996); *Ewing v. NLRB*, 861 F.2d 353, 357 (2d Cir. 1988) (“Unless unreasonable or inconsistent with the Act, we may not replace the Board’s determination with our own.”).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CONTINUING AN INVESTIGATORY INTERVIEW AFTER DIAZ REQUESTED UNION REPRESENTATION AND INSTEAD REQUIRING AN IMMEDIATE DRUG TEST; AND BY DISCHARGING DIAZ BECAUSE HE EXERCISED HIS RIGHT TO REPRESENTATION

A. Employees Have a Right to Union Representation during Investigatory Questioning; an Employer’s Denial of Requested Representation while Continuing Questioning Unlawfully Impairs That Right

Section 7 of the Act affords employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court forcefully approved the Board’s construction of Section 7 of the Act, 29 U.S.C. § 157, as creating “a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline” 420 U.S. 251, 256 (1975). Likewise, the Court endorsed the Board’s clear guidelines that “shaped the contours and limits of the statutory right.” *Id.* In doing so, the Court ensured both that employees are able to determine what they must do to invoke the

right to a representative, and what options are available to an employer once that right is properly invoked.

Unquestionably, an employee's right to engage in Section 7 activity includes the right to request union representation in an investigatory interview that the employee reasonably believes will result in disciplinary action. *Weingarten*, 420 U.S. at 256-60; *accord U.S. Postal Serv. v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992). An "investigatory" interview is defined as one where the "employee reasonably believes the investigation will result in disciplinary action." *Weingarten*, 420 U.S. at 257; *accord Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 881 (7th Cir. 2011) (employee has a right to request representation where he has "an objectively reasonable belief he might be subjected to punishment" during an interview). Requiring an employee to attend such an interview alone "perpetuates the inequality [of bargaining power] that the Act was designed to eliminate," and creates the potential that an employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262. As the *Weingarten* Court explained, the Board's construction of the Act permitting representation at an investigatory interview "effectuates the most fundamental purposes of the Act," which "declares that it is the goal of national labor policy to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of

their own choosing, for the purpose of . . . mutual aid or protection.” *Weingarten*, 420 U.S. at 261-62 (quoting 29 U.S.C. § 151).

The Court additionally noted that a union representative’s “presence” at an investigatory interview safeguards not only the rights of the particular employee interviewed, but also the interests of the entire bargaining unit, by ensuring that the employer does not initiate or continue a practice of unjust punishment. *Id.* at 259-60. Moreover, the representative’s presence assures other employees that they may similarly exercise their right to union representation when interviewed. *Id.* at 261. Lastly, the Court noted that the presence of a union representative benefits the employer because the representative can assist the employee in articulating relevant facts, thereby saving the employer investigation time. *Id.*

The right to a *Weingarten* representative attaches in a variety of investigatory settings. For example, it attaches when an employee is being questioned about absences, *Good Hope Refineries*, 245 NLRB 380, 383 (1979), misuse of company time and equipment, *Pac. Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 136 (9th Cir. 1983), *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 620 (7th Cir. 1982), or drug or alcohol use, *Ralphs Grocery Co.*, 361 NLRB No. 9, 2014 WL 3778350 at *1 (July 31, 2014). More specifically, as it relates to the instant case, an employee has a right to request representation when his employer orders an investigatory drug test in furtherance, or as a continuation, of a disciplinary

investigation; and if the employer insists the employee submit to the test, the employee has a right to the presence of a representative prior to agreeing to take the test. *Ralphs Grocery*, 2014 WL 3778350 at *1; *Safeway Stores*, 303 NLRB 989, 989 (1991); *System 99*, 289 NLRB 723, 726 (1988). That is true even if securing representation may cause some delay in administering the test. *Ralphs Grocery*, 2014 WL 3778350, at *2; *see also Consol. Freightways Corp.*, 264 NLRB 541, 542 (1982). Representation is critical prior to investigatory drug tests because, like verbal questioning, investigatory drug tests carry the risk of an adverse employment action, and manifest the inequality in bargaining power that *Weingarten* seeks to alleviate. *Weingarten*, 420 U.S. at 262; *accord Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 275 (4th Cir. 2003) (employee disadvantaged when confronted alone by employer).

If an employee requests union representation when confronted with an investigatory interview, he is entitled to the “active assistance” of the union representative if the interview continues. *Howard Indus., Inc.*, 362 NLRB No. 35, 2015 WL 1308545, at *2 (Mar. 23, 2015) (internal citations omitted); *accord NLRB v. Texaco, Inc.*, 659 F.2d 124, 126 (9th Cir. 1981). The representative is permitted to be physically present at an investigatory interview, and may not be relegated to the role of a mere silent observer. *Smith’s Food & Drug Centers, Inc.*, 361 NLRB No. 140, 2014 WL 7189160 at *3 (Dec. 16, 2014); *Barnard College*,

340 NLRB 934, 935 (2003). The representative “may speak for the employee he represents,” *Pac. Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983), and aid “the employee in his effort to vindicate himself.” *NLRB v. Sw. Bell Tel. Co.*, 730 F.2d 166, 172 (5th Cir. 1984).

Just as an employee has a right to representation, the Supreme Court recognized that an employee’s exercise of this right “may not interfere with legitimate employer prerogatives” such as imposing discipline for employee misconduct. *Weingarten*, 420 U.S. at 258. Accordingly, when an employee asserts his *Weingarten* right to representation during an investigatory interview, the employer may lawfully proceed in one of three fashions. It may: (1) grant the employee’s request for representation; (2) give the employee the option of proceeding with the interview without representation; or (3) discontinue the interview and make a disciplinary decision based on the information already available or obtained through other means. *Weingarten*, 420 U.S. at 258-59; *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 148 (3d Cir. 1991). “Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented.” *Washoe Med. Ctr., Inc.*, 348 NLRB 361, 367 (2006) (citations omitted).

Here, the Company violated Section 8(a)(1) of the Act when it ignored the Board's clear *Weingarten* rule by ignoring Diaz's repeated requests for a union representative, refusing to postpone its inquiry for a reasonable period of time so that he could obtain representation, and instead continuing the investigatory interview and requiring him to decide immediately whether to submit to an investigatory test or face discipline.

B. The Company Unlawfully Continued Questioning Diaz, and Required That He Submit to a Drug Test as Part of An Investigation into his Conduct, Notwithstanding His Request for Representation

The Board, applying the settled rule explained above, reasonably found in the circumstances of this case that the Company's interview was investigatory and that Diaz requested, but was denied, union representation. The Company unlawfully continued its investigatory interview after denying Diaz his requested union representation. Accordingly, the Board found that the Company violated Section 8(a)(1) of the Act.

1. The Company's questioning of Diaz and demand for a drug test was an "investigatory interview" because Diaz would reasonably believe that it could lead to discipline

The Company's questioning of Diaz on June 8 was an investigatory interview within the meaning of *Weingarten* because Diaz had a reasonable belief that discipline might result based on his interaction with Small and Wetherell.

Weingarten, 420 U.S. at 257-58; *Ralphs Grocery*, 2014 WL 3778350 at *1-2.

During initial questioning, Wetherell insinuated that Diaz had been involved in misconduct, remarking that Diaz “smelled a little funny” and asking Diaz if he had done anything “stupid.” (SPA 1, 11; JA 70.) As the Board found, this questioning was specifically calculated to have Diaz admit he used drugs. (SPA 13.) Small thereafter ordered Diaz to take a drug test because Diaz smelled like marijuana. (SPA 1, 11; JA 73.) However, because the Company’s policy did not allow discharges for mere suspicion of drug use, a drug test was the required next step in the Company’s investigation. (SPA 10; JA 124-25.) Diaz was aware that a positive drug test could result in discipline, based on Company policy. (JA 59-61.) Small reiterated the policy to Diaz, telling him that failure to submit to a drug test would result in a presumed positive result and potentially lead to his discharge. (SPA 1, 11; JA 175.) In the circumstances, Diaz reasonably believed that discipline could result from further questioning or examination and, accordingly, had a right to request representation. *Weingarten*, 420 U.S. at 252-53; *System 99*, 289 NLRB at 726 (1988).

The Company agrees that an employee’s *Weingarten* rights attach at an investigatory interview where the employee reasonably believes the investigation may result in disciplinary action. (Br. 8.) It further concedes that “a confrontation with management during which an employee must decide whether to *agree* to take an offered test triggers a *Weingarten* right to consult a representative.” (Br. 11.)

However, the Company goes on to make several flawed arguments (Br. 8-11) in an attempt to establish that no investigatory interview took place here.

First, the Company contends (Br. 11) that no “confrontation” took place between Diaz and management. This ignores the sequence of events leading to the demand that Diaz submit to the drug test. As already described above, Diaz was directly confronted by Small and Wetherell after the two suspected him of using marijuana. The two questioned him about his odor and his actions. (SPA 1, 11; JA 70.) When Diaz requested representation, Small replied: “you just have to take the test.” (SPA 11; JA 75.) Moreover, after Diaz requested representation—and while he was seeking to secure representation—Wetherell indicated that he and Diaz would proceed to the drug test location where the two would “finish talking there.” (SPA 2, 11; JA 77.) Diaz was therefore forced to decide, without union representation, “whether to *agree* to take an offered test” and continue speaking with management. (Br. 11.) This clearly was confrontational, and constituted an investigatory interview under *Weingarten*.²

² Because the Company did not grant Diaz’s request for a representative to assist him as he decided whether to submit to the drug test, he never had occasion to request representation at the off-site testing facility during the test itself. Thus, the Company’s repeated suggestion (Br. 19-20) that representation would be inappropriate at the test ignores the source of the violation—denying Diaz the right to representation during an investigatory interview and instead requiring him to immediately decide whether to submit to the test.

The Company next attempts to establish that no investigatory interview took place by analogizing investigatory drug testing to non-investigatory physical examinations for which *Weingarten* rights do not attach. (Br. 11) (citing *United States Postal Service*, 252 NLRB 61 (1980)). The analogy fails. Unlike the “fitness for duty” examinations at issue in *United States Postal Service*—which were not connected to any specific ongoing investigations and were not calculated to discipline employees for past misconduct—the drug testing here was in direct response to an ongoing and active investigation into Diaz’s alleged misconduct. *See Safeway Stores*, 303 NLRB at 989 (declining to hold that every employer-ordered drug test demands representation, but holding that representation is required where testing is ordered pursuant to an ongoing investigation that could lead to discipline); *System 99*, 289 NLRB 723, 723 n.2 (1988) (distinguishing fitness for duty examinations from investigation that included employer ordered drug testing).³

Lastly, the Company argues that the drug test “could not lead to discipline” but “only could exculpate” Diaz, suggesting that the decision to discipline Diaz

³ Likewise, the Company’s reference (Br. 11) to *Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997), is misplaced. That case dealt with a bargaining dispute, not *Weingarten* rights. Regardless, the Board’s description of drug tests as “investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct,” *Id.* at 515, *supports* the Board’s decision in the instant case. Consistent with that description, the Board held here that the Company’s demand that Diaz submit to a drug test constituted an “investigatory” interview triggering Diaz’s *Weingarten* rights.

had already been made or that Diaz would be automatically discharged no matter what path he chose. (Br. 12). This argument fails in light of the testimony. No testimony supports the Company's contention (Br. 12) that Small and Wetherell immediately decided to discharge Diaz after observing his appearance, and offered Diaz the drug test only as a courtesy to exonerate himself. To the contrary, the Company intended to use the drug test results in making its decision on whether Diaz would return to work. At no time during the investigation did Small or Wetherell tell Diaz that he was going to be discharged for suspected drug use. Rather, they told Diaz he had to take the test before returning to work and that failure to take a drug test would be treated as a positive result, potentially resulting in his termination. (SPA 1, 11; JA 175.) The Company therefore planned to use the drug test to determine if Diaz was under the influence, consistent with Company policy that did not permit a discharge for drug use until after an investigatory drug test was ordered. (SPA 10; JA 124-25.) No evidence suggests that a discipline decision was already made at the time Smith ordered Diaz take the test. As such, Diaz reasonably believed that the interview could result in his discipline, and the Board's finding that it was an investigatory interview is well founded.

Indeed, the two documents prepared after Diaz's termination support the Board's finding. Both state that the Company terminated Diaz for "refus[ing] to

go for a drug screening under the reasonable suspicion of substance abuse.” (SPA 1 n.4; JA 264.) An email to union officials similarly stated that the failure to submit to the drug test led to the discharge. (SPA 1, 12; JA 312.) Thus, the Company sought to use the drug test results in making its disciplinary decision and the discussion with Diaz about that test constituted an investigatory interview to which Diaz’s right to representation under *Weingarten* attached.

At the very least, the Company ordered the test to support its eventual disciplinary decision. *Weingarten* rights apply equally where an employer has already made a preliminary discipline determination, but seeks additional “facts or evidence in support of” its decision. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979); accord *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1395 (5th Cir. 1983); *ITT Lighting Fixtures v. NLRB*, 719 F.2d 851, 853 (6th Cir. 1983). As the Board held in *System 99*, where an employer suspects an employee of intoxication but lacks enough evidence under its internal policies to make a discharge decision, and seeks to confirm its suspicions through testing, the employee is entitled to representation prior to deciding whether to take the test. 289 NLRB at 726. Thus, Diaz’s *Weingarten* rights had attached.

2. The Company unlawfully continued its investigatory interview after Diaz requested union representation

Immediately after Small told him that he would have to take a drug test, Diaz stated that he was willing to take the test but requested *Weingarten*

representation. (SPA 1, 11; JA 74.) When Diaz requested his *Wiengarten* representative and declined to proceed without representation, the Company was left with only two permissible paths under *Weingarten* principles. It could have either granted the request for representation or ended the interview. It did neither. Instead, substantial evidence supports the Board's finding (SPA 2) that Small and Wetherell insisted on continuing the investigatory interview without a representative present, a textbook *Weingarten* violation. *Weingarten*, 420 U.S. at 261-62.

Specifically, after Diaz requested representation, Small told Diaz "it's a company issue now. The shop stewards have nothing to do with it." (SPA 11; JA 75.) When Diaz protested that he was entitled to have his steward present, Small replied "you just have to take the test." (SPA 11; JA 75.) Thereafter, while Diaz was on the phone with his shop steward, trying to secure representation, Wetherell instructed Diaz to get into his car so that Wetherell could take him for his drug test, and said the two would "finish talking there," indicating that the investigatory questioning would continue at the drug-testing location. (SPA 1-2, 11; JA 76-77.) After that exchange, Diaz returned to Small's office. Diaz continued to request union representation, but Small further pressed Diaz and issued an ultimatum: take the test or the Company would assume he tested positive. (SPA 1, 11; JA 175.) Small made clear this could lead to Diaz's termination. (SPA 1, 11; JA 175.) Diaz

indicated more than once that he had no problem taking the drug test, but that he wanted representation first. (SPA 1, 11; JA 79-80.) The Company disregarded the request, eventually sending Diaz home and discharging him later that same day for “refusal to go for a drug screening under the reasonable suspicion of substance abuse.” (SPA 1, 12; JA 81-82, 264.) In the circumstances, substantial evidence supports the Board’s finding that the Company violated Diaz’s *Weingarten* rights, and Section 8(a)(1) of the Act, by continuing the investigatory interview, and demanding that he agree to submit to a drug test, without his representative present.

Contrary to the Company’s claim (Br. 14-15), Diaz’s phone conversation with union steward Gonzalez did not satisfy his right to union representation under *Weingarten* and thereby entitle it to continue the interview and require the drug test. *Weingarten* contemplates the “presence” of a union representative at an investigatory interview. *Weingarten*, 420 U.S. at 261-62; *Washoe Med. Ctr., Inc.*, 348 NLRB 361 (2006) (where a *Weingarten* request is granted “the union representative is entitled not only to attend the investigatory interview, but to provide ‘advice and active assistance’ to the employee”) (quoting *Barnard College*, 340 NLRB 934, 935 (2003)). This right cannot be limited to a brief conversation before the interview, particularly in circumstances where the representative could provide tangible assistance if present. The representative’s

presence ensures a witness to the interaction to “confirm what actually transpires between the employee and employer during the confrontation.” *NLRB v. Columbia Univ.*, 541 F.2d 922, 930 (2d Cir. 1976); *see also ITT Lighting Fixtures*, 719 F.2d 856. It also safeguards the right to active assistance during the interview and “a full and cogent presentation of the employee’s view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors.” *U.S. Postal Serv. v. NLRB*, 969 F.2d 1064, 1071 (D.C. Cir. 1992).

The Board reasonably found (D&O 2) that here the physical presence of a union representative was necessary to provide “active assistance” to Diaz. The presence of a union representative would have allowed the representative to independently observe Diaz’s condition and potentially contest the grounds for Small’s and Wetherell’s suspicions, which were based on a sensory view of Diaz. (D&O 2.) Over the phone, Gonzalez was incapable of observing Diaz’s appearance and therefore could not adequately advise Diaz. Nor could he effectively dispute the Company’s suspicions, provide alternative explanations, or serve as a witness to the encounter. *See Pac. Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983) (the union representative must be permitted to “effectively to give the aid and protection sought by the employee”); *Weingarten*, 420 U.S. at 261 (noting representative’s role in assisting with investigation); *ITT Lighting Fixtures*, 719 F.2d at 856 (representative may serve as witness to interaction

between employer and employee). So too, the representative might have provided the new collective-bargaining agreement, as Diaz requested while trying to secure representation, and ensured that contractual agreements regarding testing, including any necessary protocols, were followed. (SPA 2; JA 77.) Gonzalez did not even have access to the new collective bargaining agreement, which was necessary to advise Diaz on the proper testing protocol. This is precisely the type of “active assistance” protected by the *Weingarten* right. *Howard Indus., Inc.*, 362 NLRB No. 35, 2015 WL 1308545 at *2 (Mar. 23, 2015) (internal citations omitted); *U.S. Postal Serv.*, 969 F.2d at 1071; *NLRB v. Texaco, Inc.*, 659 F.2d 124, 126 (9th Cir. 1981) (recognizing a *Weingarten* “representative should be able to take an active role in assisting the employee to present the facts”). In these circumstances, the phone conversation did not satisfy Diaz’s *Weingarten* rights.⁴

⁴ The Board’s factual findings in this regard amply distinguish the instant case from *Meharry Med. College*, 236 NLRB 1396 (1978), cited by the Company (Br. 18). In that case, the Board expressed confusion regarding the General Counsel’s theory of the case and assumed *arguendo* that the investigation constituted an investigation that warranted *Weingarten* representation, and that the employee had requested union representation. It found, in the circumstances presented, that the employee’s discussion with the union’s attorney over the phone satisfied the employee’s *Weingarten* rights. Here, in sharp contrast, the Board expressly found the union representative’s physical presence was required to provide meaningful assistance to Diaz. The Company’s further suggestion (Br. 18) that the Board approved that consultation by phone satisfied *Weingarten* rights in *Ralphs Grocery* is utterly devoid of merit. In *Ralphs Grocery*, a case the Board expressly found remarkably similar to this case, the employee attempted, unsuccessfully, to contact his union representative by phone, and the Board determined that the employee was unlawfully discharged for refusing to take a drug test without union

Further, Wetherell's comment that he and Diaz would "finish talking" at the drug testing site is an indication that the investigatory questioning would continue at the drug test location. (SPA 2, 11; JA 77.) Diaz maintained a right to representation during this continued interrogation, as it amounted to precisely the type of employer questioning discussed in *Weingarten*. As the Board found, "Wetherell thus clearly indicated that the interview—even apart from the drug test itself—would continue" (SPA 2.) This further demonstrates that the brief phone call with Gonzalez was not sufficient to satisfy Diaz's representation right because Gonzalez could not advise Diaz on questioning that had yet to take place.

The Company's blatant disregard for Diaz's representation rights is made all the more apparent by the fact that there was no countervailing need to immediately administer the drug test. Small's unchallenged testimony was that marijuana remains in a person's system for approximately three months, allowing for testing at a later date. (SPA 3; JA 189). Small knew this on June 8, but needlessly insisted that Diaz submit to the drug test immediately. A slight delay in testing may have allowed Diaz to locate Assistant Shop Steward Henry or allowed for another steward to be present later or the following day. *See Ralphs Grocery*, 2014 WL 3778350 at *2 (delaying testing may be required to respect employee's

representation. 2014 WL 3778350 at *1. The Board did not hold that a phone conversation alone would have satisfied the employee's *Weingarten* rights.

Weingarten right). Instead, the Company insisted that Diaz make up his mind unrepresented, in violation of *Weingarten*.

C. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(A)(1) of the Act By Firing Diaz Because He Asserted His Right to Union Representation

An employer violates Section 8(a)(1) of the Act by discharging or taking adverse action against an employee because of the employee's protected concerted activities, *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 88 (2d Cir. 1990), including discharging an employee for exercising his *Weingarten* rights. *Ardsley Bus Corp., Inc.*, 357 NLRB No. 85, 2011 WL 4830121 (Aug. 31, 2011); *Salt River Valley Water Users' Ass'n*, 262 NLRB 970 (1982). Where an employer discharges an employee for refusing to take an employer-ordered investigatory drug test without representation, the discharge is "inextricably linked" to the employee's assertion of *Weingarten* rights. *Ralphs Grocery*, 2014 WL 3778350 at *1. Accordingly, discharging the employee, or presuming a positive test result because he refuses to submit to the test unrepresented, equates to discharging the employee for asserting his *Weingarten* rights. *Ralphs Grocery*, 2014 WL 3778350 at *1.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by discharging Diaz because he asserted his *Weingarten* rights. Diaz made it abundantly clear that he was willing to take the drug test if he was granted his representation rights. (SPA 1, 11; JA 79-80.) The Company ignored

Diaz's pleas and refused to give him time to obtain representation. It insisted, in violation of his *Weingarten* rights, that Diaz decide immediately whether to submit to the test and warned him that failure to take the test would equate to a positive test result that could result in his termination. Thereafter, it discharged Diaz solely for his refusal to take the test without representation, which the Board reasonably concluded was "inextricably linked to his assertion of *Weingarten* rights."

(SPA 4.) Similar to *Ralphs Grocery*, 2014 WL 3778350 at *1, the Board found that the Company violated the Act by "penalize[ing Diaz] for refusing to waive his right to representation, irrespective of whether it considered his refusal to be . . . automatic positive test result."⁵

The Company heavily relies (Br. 16, 28) on *Weingarten*'s holding that an employer may lawfully discharge an employee without any interview based on other information, and argues that it discharged Diaz based on reasonable suspicion of marijuana use, not for asserting his representation request. That

⁵ The Company incorrectly suggests (Br. 27) that the Board's reasoning contradicts the test for assessing motive under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). The Board did not reject the judge's factual finding that Diaz's refusal to take the drug test was a motivating factor in the Company's decision to discharge him. Here, as in *Ralphs*, the Board reasonably determined, as a matter of law, that an employee's refusal to take a drug test without the benefit of union representation cannot be artificially severed from his assertion of *Weingarten* rights. Accordingly, when an employer discharges such an employee for refusing to take a drug test unrepresented, its motivation cannot be disentangled from the employee's underlying assertion of his *Weingarten* right.

argument ignores undisputed record evidence establishing that the Company, consistent with its own policies, had made no determination respecting Diaz's future employment prior to ordering the drug test. It also disregards the Company's own documentation of the reason for Diaz's discharge. (SPA 1, 12; JA 264, 312.)

Small and Wetherell ordered the drug test specifically because, despite their reasonable suspicion of drug use, they lacked sufficient proof that Diaz was unfit for duty, and required further evidence to impose discipline. The Company points to no evidence demonstrating that it would have discharged Diaz solely for the initial observations made by Small and Wetherell. In fact, as the Company's Director of Operations testified, it is the Company's policy not to discharge employees based on mere reasonable suspicion; it will do so only after confirmation of the suspicion by a positive drug test or a presumption of such a result based on an employee's refusal to submit to a test. (SPA 10; JA 124-25.) It is disingenuous for the Company to now assert that it would have discharged Diaz for suspicion of drug use alone, contrary to its actions on the day in question and pre-existing policies. In truth, it was only after Diaz asserted his right to representation that the Company discharged him—relying specifically on his refusal to submit to the test as reason for his discharge—while ignoring that he offered to take the test if the Company would provide him with representation.

(SPA 1 n.4; JA 264, 313.) Moreover, as the Board noted (SPA 4 n.15), the Company's documentation and the decisionmaker's testimony corroborate that the discharge decision was based on that refusal. Because the refusal, in turn, was "inextricably linked" to Diaz's assertion of *Weingarten* rights, his termination violated Section 8(a)(1) of the Act. (SPA 4.)

The Company's reliance (Br. 16) on *YRC Freight*, 360 NLRB No. 90, 2014 WL 1715123 (Apr. 30, 2014), is misplaced. There, the Board found no *Weingarten* violation because the employer terminated the interview once the employee requested representation. *Id.* at *3. Further, the employer based its discipline determination on facts already known to it prior to the interview, namely the employee's tardiness (a dischargeable offense). *Id.* at *4. The employer did not base its decision on the employee's representation request, which came after the employer had already observed the employee arrive to work late. *Id.* at *6. In contrast, here, the Company did not stop the interview after the request for representation, but instead insisted that it continue. Further, the Company did not rely on Diaz's suspected drug use for the discharge, because the Company's own policies did not permit discharge for suspected drug use without a confirmatory drug test. (SPA 10; JA 124, 147-48.) The Company instead relied specifically on Diaz's refusal to take the test without representation, and in doing so punished him for exercising his rights under the Act.

Based on its finding that the Company violated Section 8(a)(1) by discharging Diaz, the Board properly exercised its “broad” remedial powers in awarding Diaz backpay and reinstatement. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969) (“In fashioning its remedies under the broad provisions of § 10(c) of the [Act, 29 U.S.C. § 160(c)], the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.”) An award of reinstatement with backpay is the normal remedy awarded to victims of discrimination, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941), and a finding that an employer took a discriminatory employment action on the basis of an employee’s protected activities “is presumptive proof that some backpay is owed.” *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965). Where an employer discharges an employee for asserting his *Weingarten* right to representation, backpay and reinstatement are appropriate remedies. *Taracorp Inc.*, 273 NLRB 221, 224 n.12 (1984); *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 277 (1975). Accordingly, based on its finding that the Company unlawfully discharged Diaz for asserting his right to representation, the Board properly awarded Diaz backpay and reinstatement.

The Company challenges the Board's remedial finding by disputing that Diaz was discharged for protected activity and arguing he was discharge for cause. (Br. 25, 28.) It relies heavily (Br. 26) on *Taracorp Inc.*, 273 NLRB 221 (1984), wherein the Board held that make whole relief is not available in *Weingarten* cases if the employee was discharged for cause. But, as explained above, the Company did not discharge Diaz for cause. It discharged him specifically for refusing to submit to a drug test without access to representation, a direct violation of *Weingarten*. *Ralphs Grocery*, 2014 WL 3778350 at *1. In contrast, in *Taracorp*, the employee refused to obey a supervisor's command. 273 NLRB at 221. He then attended an investigatory interview, where he was unlawfully denied his *Weingarten* rights. *Id.* at 221. The employer thereafter discharged the employee for refusing the earlier supervisory command. *Id.* 221. The Board found no connection between the discharge and the assertion of the *Weingarten* rights—since the discharge was for the separate act of insubordination. *Id.* at 223-24. In contrast, Diaz was discharged not for the underlying “reasonable suspicion” of drug use, but for refusing to take that a drug test without *Weingarten* representation. The Company therefore fails to satisfy its heavy burden in challenging the Board's ordered remedy. *NLRB v. Fugazy Cont'l Corp.*, 817 F.2d 979, 982 (2d Cir. 1987); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174, 176-77 (2d Cir. 1965).

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

s/ Michael Ellement
MICHAEL ELLEMENT
Attorney

National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570
(202) 273-2949
(202) 273-3847

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
April 13, 2016

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MANHATTAN BEER DISTRIBUTORS LLC	*
	*
Petitioner, Cross-Respondent	* Nos. 15-2845,
	* 15-3099
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 29-CA-115694
	*
Respondent, Cross-Petitioner	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,471 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of April, 2016

**UNITED STATES COURT OF APPEALS
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	*
Respondent, Cross-Petitioner	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Allen B. Roberts, Esq.,
Epstein Becker & Green, P.C.
250 Park Avenue
New York, NY 10177

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of April, 2016