

**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	*
	*

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
PUBLICATION OF THE SUMMARY ORDER**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

On November 16, 2016, a panel of this Court (Chief Judge Katzmann, and Circuit Judges Wesley and Carney) issued an unpublished summary order in the above-captioned case. The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby moves for publication of that summary order, and shows:

1. The Court’s summary order upheld the Board’s decision and order against Manhattan Beer Distributors, LLC issued in *Manhattan Beer Distributors, LLC*, 362 NLRB No. 192 (Aug. 27, 2015). In doing so, the Court enforced the Board’s findings that Manhattan Beer violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)). Specifically, the Court concluded

Manhattan Beer committed an unfair labor practice when it discharged employee Joe Garcia Diaz for refusing to take a drug test without union representation.

2. The Court has encouraged federal administrative agencies, such as the Board, to request publication of an unpublished summary order when the agency views publication to be “in the public interest.” *Continental Stock Transfer and Trust Co. v. SEC*, 566 F.2d 373, 374 n.1 (2d Cir. 1977). The Court gives special weight to the agency’s request because the “administrative agency . . . is charged by law with certain responsibilities under the federal . . . laws and [its] interpretation [of those laws] . . . is entitled to great deference by the courts.” *Id.* Accordingly, the Court will publish a previously unpublished summary order when the agency “has moved for publication of the order so that it could be cited in the future,” *Notaro v. Luther*, 800 F.2d 290, 290 n.* (2d Cir. 1986), and the Court is “persuaded that th[e] decision may have some precedential value.” *Guan v. Board of Immigration Appeals*, 345 F.3d 47, 48 n.1 (2d Cir. 2003). *See Nicole Rose Corp. v. Commissioner of Internal Revenue*, 320 F.3d 282, 283 n.2 (2d Cir. 2003); *Patrick v. SEC*, 19 F.3d 66, 67 n.1 (2d Cir. 1994).

3. The Board requests that the Court publish its summary order in this case because publication is in the public interest and the order has precedential value. The Court’s order provides an important interpretation of the Supreme Court’s decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), by

clarifying the representational rights that employees' have when ordered to submit to an investigatory drug test. Specifically, the Court held that the employee "had the right to the physical presence of a union representative before consenting to take a drug test in the context of an investigation that he reasonably believed would result in discipline." Moreover, the order contains important analysis of the Board's remedial authority, holding that Diaz was entitled to reinstatement and backpay because "the Board reasonably determined that Manhattan Beer's discharge of Diaz resulted from Diaz's assertion of his *Weingarten* rights."

To date, this Court has not published any opinions under the NLRA regarding the contours of employee representation during drug tests. Indeed, the Court has not published any opinions substantively analyzing the *Weingarten* right under the NLRA in over thirty-five years, shortly after *Weingarten* was first decided. *See Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980). Accordingly, the Court's summary order will provide guidance to the public, labor community, and future litigants, and is of precedential value regarding employee rights.

4. The Court's publication of the summary order will also minimize the likelihood of the Board having to expend additional resources in defending against the same or similar arguments raised in subsequent cases.

WHEREFORE, the National Labor Relations Board respectfully requests that the Court publish the summary order issued in this case.

/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 12th day of December 2016

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2845; 15-3099 Caption [use short title] _____

Motion for: Publication of the Summary Order Manhattan Beer Distributors, LLC

_____ v. _____

_____ National Labor Relations Board

Set forth below precise, complete statement of relief sought:

On November 16, 2016, a panel of this Court
issued an unpublished summary order
in the above-captioned case. The Board hereby
seeks publication of that Order.

MOVING PARTY: National Labor Relations Board

OPPOSING PARTY: Manhattan Beer Distributors, LLC

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Linda Dreeben

OPPOSING ATTORNEY: Allen B. Roberts

[name of attorney, with firm, address, phone number and e-mail]

National Labor Relations Board

Epstein, Becker, & Green

1015 Half Street, SE

250 Park Ave.

Washington, DC 20570

New York, NY 10177

Court-Judge/Agency appealed from: National Labor Relations Board

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Requested return date and explanation of emergency: _____

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: Argument was already held

Signature of Moving Attorney: /Linda Dreeben Date: 12/12/2016

Service by: CM/ECF Other [Attach proof of service]

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, I electronically filed the foregoing 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 the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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

Dated at Washington, DC
This 12th day of December, 2016