

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HPC INDUSTRIAL GROUP, LLC
FORMERLY KNOWN AS HYDROCHEM
INDUSTRIAL CLEANING, LLC

And

Case No. 07-CA-308650

MARLON HEMMINGWAY,
An Individual

Amanda Flores and Patricia Fedewa, Esqs.
for the General Counsel.

Jennifer G. Betts, (Ogletree, Deakins, Nash, Smoak & Stewart, PC, Pittsburgh, Pennsylvania)
for the Respondent.

DECISION

STATEMENT OF THE CASE/STATEMENT OF FACTS¹

Arthur J. Amchan, Administrative Law Judge. This case was tried in Detroit, Michigan on April 15, 2026. Marlon Hemmingway filed the charge giving rise to this case on December 7, 2022. The General Counsel issued the complaint on April 20, 2025. This case involves Respondent's termination of Charging Party Hemmingway on August 3, 2022.

Respondent HPC has headquarters in Norwell, Massachusetts. It is a contractor at the Ford Motor Company Stamping facility in Dearborn, Michigan². During the year 2024, Respondent performed services valued in excess of \$50,000 in States other than Massachusetts. It is an employer engaged in commerce within the meaning of Section 2 of the Act.

Respondent's employees perform various janitorial duties at the Ford Dearborn, Michigan facility. Charging Party Marlon Hemmingway worked for HPC at the Ford Stamping Plant from 2008 to August 3, 2022, when Respondent terminated his employment. During his employment at HPC, Hemmingway was part of a 200-person bargaining unit represented by the United Auto Workers Local Union 600.

¹ I have read and considered the briefs and supplemental briefs filed by the parties.

² Ford has 9 distinct facilities at Dearborn, stamping is one of them.

On August 2-3, 2022, Marlon Hemmingway worked a shift that started at 6:00 p.m. and ended at 4:30 a.m. One of his tasks that night was to empty scrap bins with a Hi/Lo (aka a forklift). HPC's forklift in his department was not operative. Hemmingway borrowed a forklift from Ford which was about 1/4 inch taller than the HPC forklift. Apparently, HPC employees are not allowed to do this. Hemmingway should have looked for another HPC forklift elsewhere at the plant.

Between about 12:30 and 1:00 a.m., while traveling through the plant, Hemmingway struck an overhead horizontal beam. Nobody was injured; the beam was not damaged and the only damage to the forklift was that a fog light was knocked out of place. John Barnes, a Ford employee who witnessed the accident, wrote in a report that Hemmingway was travelling too fast, did not fully stop at a stop sign and was not wearing a seat belt. Barnes also noted, "the driver was not impaired," R. Exh. 3 at 69.

Hemmingway went to the team room, where HPC supervisors were present. He completed an accident report. According to Hemmingway the only HPC supervisor present was his immediate supervisor, Neida Martinez.³ Another supervisor, Ed Lowery,⁴ came to the team room later. Then, Hemmingway testified that he went back to work.

Shift Manager Gina Shea testified that she was in the team room at 1:00 a.m. She also testified that shift manager Ed Lowrey participated in a conversation with Hemmingway via speakerphone. Shea testified further that she went to the restroom and that when she returned Hemmingway was gone. Shea testified that Lowery and Martinez went looking for Hemmingway and could not find him.

I accord no weight to the hearsay evidence in Shea's email, R. Exh. 7, as to Hemmingway's whereabouts. Hemmingway's testimony about his activities between 1 and 3 a.m. is uncontradicted by any non-hearsay, credible evidence. Hemmingway testified that he got the fog light on the Hi/Lo fixed, then was filling the Hi/Lo with propane and then proceeded to do other tasks. There is insufficient evidence as to whether that explains the length of time during which Respondent could not locate him.

One to Two hours later, at about 3:00 a.m., Hemmingway returned to the team room. Tr. 42-43, 103. Shift Manager Shea told Hemmingway to go to the plant's clinic for a drug and alcohol test. Hemmingway replied that he wanted his union steward/chairman William Montanez to accompany him as his *Weingarten* representative.⁵ Shea told him he did not need a union steward to go to the clinic. Hemmingway refused to go to the clinic without a union representative. Shea called William Mauzy, HPC's branch manager for the Ford plant. She told Mauzy that Hemmingway refused to go to the clinic and that he had disappeared for an hour or two. Mauzy agreed with Shea that Hemmingway was not entitled to a union representative to go

³ Martinez no longer works for HPC and did not testify in this proceeding.

⁴ Lowery did not testify in this proceeding. There is no evidence as to whether or not he still works for HPC.

⁵ An employee has a right to union representation for an investigatory interview under *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975).

to the clinic. Mauzy instructed Shea to ask for Hemmingway's ID badge and call a security guard to walk Hemmingway out of the plant.

The record is clear that Respondent terminated Hemmingway in part because he refused to go to the clinic for a drug/alcohol screen without a union representative. Even after Respondent was aware Hemmingway had an accident with a forklift belonging to Ford, it insisted he go to the clinic. When he refused, William Mauzy decided to terminate him.

Union steward Montanez worked the day shift. No other union steward was available to Hemmingway on the night shift. Hemmingway tried to contact Montanez at about 3:45 a.m. from the Plant parking lot. Montanez did not answer. Hemmingway spoke with Montanez at about 7:00 a.m. on August 3.

While all the reasons for which HPC terminated Hemmingway are not clear, his refusal to go to the clinic without a union representative was a material factor in his discharge. From Hemmingway's testimony, I glean that relations between Hemmingway and Mauzy were strained. While Mauzy may have viewed the August 3 incident to be an opportunity to fire Hemmingway, he would not have been able to do so on August 3, barring Hemmingway's refusal to take the drug/alcohol screen in the absence of a union representative.

Facts relevant to the waiver issue

The Union filed a grievance on Hemmingway's behalf on August 4, 2022. The grievance form, Exh. R-3 at page 64, does not mention denial of Hemmingway's *Weingarten* rights as a basis for the grievance. It relates that Hemmingway was terminated for not going to the clinic after an accident. On September 19, 2022, at step 3 of the grievance procedure, the Union accepted HPC's decision to terminate Hemmingway, R. Exh. 4.⁶

There is no evidence as to why the Union did not pursue Hemmingway's discharge further. Similarly, there is no evidence that the Union ever argued that represented employees had a right to a *Weingarten* representative for post-accident testing in the grievance or any other context, Tr. 111. Hemmingway alleged a violation of his *Weingarten* rights in the charge that he, rather than the Union, filed on December 7, 2022.

The collective bargaining agreement between Respondent and UAW Local 600 does not address the issues in this case, including Respondent's drug and alcohol policy. That is addressed in an unpublished side agreement or Memorandum of Understanding (MOU), R. Exh. 2, pages 57-58, agreed upon on June 22, 2021, a year prior to Marlon Hemmingway's discharge.

In their side agreement, the Union and HPC have agreed that employees involved in a workplace accident will be sent for drug/alcohol testing, R. Exh. 2.

They also agreed that there would be a three-person panel comprised of two members of management and one Union representative to evaluate an employee that has shown reasonable

⁶ Almost 2 months before Hemmingway filed the initial charge in this matter.

suspicion of being under the influence of drugs or alcohol based upon the employee's behavior which includes slurred speech, smell and or erratic/reckless behavior.

If 2 of the 3 members deem the employee to be under the influence, the employee will be sent to the clinic immediately. Once management contacts the Union, the union representative has 2 hours to arrive at the facility to participate in the evaluation process. After two hours have elapsed, management may unilaterally decide whether the employee is under the influence. The side agreement does not address whether an employee sent to the clinic may insist on a union representative to accompany them.

Employees involved in a workplace accident or injury or are off work for any reason for 30 days or more will be sent for a drug/alcohol test.

Respondent may test bargaining unit members if it has a reasonable suspicion that an employee is under the influence of alcohol or drugs.

The right of an employee to have a Weingarten representative present at the clinic for a drug/alcohol test is not specifically addressed in the side agreement either in the case of a post-accident drug test or a "reasonable suspicion" drug/alcohol test.

The Union had never asked Respondent to allow a Weingarten representative to accompany an employee going to the clinic for a post-accident drug/alcohol test prior to Hemmingway's discharge. There is no evidence that any employee, other than Hemmingway, has asked for a union representative to accompany them to the clinic for a post-accident test. For the *Weingarten* right to be triggered, the involved employee must initiate the request for representation, *Appalachian Power Co.*, 253 NLRB 931, 933 (1980) enfd. mem. 660 F. 2d 488 (4th Cir. 1981).

Analysis

Applicable case law

The General Counsel met its initial burden of proving that Respondent terminated Marlon Hemmingway for his refusal to submit to a drug/alcohol test without the presence of a union representative. Respondent has not met its burden of proving that it would have discharged Hemmingway in the absence of this refusal, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line*, 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981).

Respondent's other defenses

Respondent's contention that Hemmingway was not entitled to a Weingarten representative because he was not being required to attend an investigatory interview

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In *Safeway Stores*, 303 NLRB 987, 992 (1991), the Board declined to decide whether every drug/alcohol test constituted an investigatory interview for which an employee has a right to union representation under *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975).

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Respondent submits that an automatic post-accident test does not constitute an investigatory interview subject to the *Weingarten* requirement. Given the absence of binding precedent, I decline to reach such a conclusion. There may be various reasons for an automatic post-accident test, such as to ensure that an accident does not become the basis for a fraudulent workers compensation claim, or products liability lawsuit. However, even though the test may not be the result of a reasonable suspicion of drug or alcohol use, the test could reveal such use. Also, there may be legitimate concerns as to how the test is conducted and specimens are handled. If specimens are mishandled or mislabeled, an employee might be terminated on the basis of another employee's sample.

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The General Counsel relies on *Manhattan Beer Distributors*, 362 NLRB 1731 (2015) and cases cited therein. In that case, the Board found that the employer violated Section 8(a)(1) by denying an employee his right to union representation at a drug test. The Board further concluded that the employer violated the Act by discharging the employee for refusing to take the drug test in the absence of a union representative.

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Further, the Board held that where an employee requests union representation before participating in a disciplinary investigation, the employer has 3 choices: 1. Grant the employee's request for union representation; 2. Give the employee the option of proceeding without representation, or 3. Discontinue the interview and make a disciplinary decision based on other information it has available. Thus, Respondent in this case could have disciplined or discharged Hemmingway on the basis of other information it had in its possession. However, this record does not establish that Respondent would have discharged Hemmingway had he not refused to take a drug and alcohol test without a union representative present.

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Unlike Hemmingway, the employee in *Mountain Beer Distributors* reeked of the smell of marijuana when ordered to go for a drug test. Therefore, he had more reason to fear discipline after the drug test than Hemmingway. On the other hand, there appears less of a reason for Respondent to insist that Hemmingway take a drug or alcohol test without a union representative.

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Member Johnson dissented in *Mountain Beer Distributors*. He relied in part on the fact that the employer had a reasonable suspicion of drug use. Member Johnson noted that it was settled Board law that an employee has the right to consult with a union representative before responding to the employer's request that the employee submit to a drug or alcohol test.⁷

⁷ *Safeway Stores*, 303 NLRB 989 (1991); *System 99*, 289 723, 725 (1988); *Ralph's Grocery Co.*, 361 NLRB 80 (2014).

Member Johnson distinguished *Manhattan Beer Distributors* from *Ralph's Grocery Co.* by the fact that the employer in *Manhattan Beer Distributors* gave the employee the opportunity to consult with his union representative before deciding whether to take the drug test and that the employee did so. Member Johnson opined that an employer should not have to delay a drug or alcohol test in the event that no union representative is available. The need to conduct a test immediately in this case appears to be less obvious than under the circumstances in *Manhattan Beer Distributors*, since there was no indication that Hemmingway was impaired from alcohol or drugs.

Waiver

The Board's traditional waiver analysis seeks to determine whether some combination of contractual language, bargaining history and past practice establishes that the union waived its right to bargain. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 2 fn. 14 (2024).

Respondent cites to Judge Anzalone's January 6, 2026 decision in *Exxon Mobil Corporation*, JD (SF)-091-26 in support of its contention that the Union waived Marlon Hemmingway's right to a Weingarten representative. It also contends that the decision supports its position that the Union waived unit members' rights to a union representative whenever they are required to take a post-accident drug/alcohol test.⁸ Although I am not bound by her decision, it is at least instructive.

In that case, Judge Anzalone dismissed an allegation that *Exxon* violated Section 8(a)(5) in relaxing its requirement that all employees be clean shaven based on the bargaining history of the parties and their collective bargaining agreements. The shaving policy was one of the requirements in SSS 3030, Exxon's Respirator Protection Program. SSS 3030 was one of numerous Exxon's "Site Safety Standards." Judge Anzalone found that prior to October 2021, when Exxon relaxed its clean shave policy, Respondent revised SSS 3030 on 26 occasions without action by the Union.

Should the complaint be dismissed pursuant to the "contract coverage" doctrine

Board law on when to apply the "contract coverage" doctrine as opposed to the "clear and unmistakable" waiver standard has oscillated. The current state of the law is that expressed in *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024), which overruled *M.V. Transportation Inc.* 368 NLRB No. 66 (2019). *M.V. Transportation* was a departure from long-standing Board law on these issues. The standard at present is "clear and unmistakable" waiver.

As a general proposition, the Board decided to apply *Endurance Environmental Solutions* retroactively. However, it left application in a particular case unresolved. Judge Anzalone applied the "clear and unmistakable" standard in the *Exxon Mobil* case. As stated in *MJ Transportation* at page 12, "the Board will apply a new rule to the parties in the case in which

⁸ As opposed to a test required due to Respondent's suspicion that an employee is under the influence of drugs or alcohol at work.

the new rule is announced and to parties in other cases pending at the time so long as ...retroactivity does not work a manifest injustice. In determining whether retroactive application will work a manifest injustice, the Board will consider the reliance of the parties on proceeding law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from the retroactive application.”

MV Transportation was the controlling Board precedent at the time Respondent’s collective bargaining agreement and MOU (drug and alcohol policy) with the Union were negotiated. However, there is no indication that Respondent relied on *MV Transportation* with regard to any of its decisions in this case, I deem retroactive application appropriate. Similarly, given that no employee had previously demanded union representation for an after-accident drug/alcohol test, I find that the Union did not waive Hemmingway’s right to a Weingarten representative based on the parties’ bargaining history. What remains is the issue of whether it did so by accepting Hemmingway’s termination in the grievance process.

Did the Union waive Marlon Hemmingway’s right to a Weingarten representative by accepting Hemmingway’s termination at step 3 of the grievance process?

The Board held in *Prudential Insurance Co.*, 275 NLRB 208 (1985)⁹ that a union can waive a bargaining unit member’s statutory rights, including the right to a *Weingarten* representative in an investigatory interview. At the time of the *Prudential* decision, the Board standard for waiver was the “clear and unmistakable” standard.

The Union did not contend that Respondent violated Hemmingway’s *Weingarten* right in the grievance it filed on his behalf, or at any other point in the grievance process. As a result, I conclude that the Union under the “clear and unmistakable” standard, waived Hemmingway’s right to have a union representative accompany him to the clinic for a drug and alcohol test. I also find that the Union’s failure to file an unfair labor practice charge on Hemmingway’s behalf supports a “clear and unmistakable” waiver. The Union did nothing to support Hemmingway’s charge either.

As the General Counsel points out, unions possess a wide range of discretion in processing grievances. In this case, the Union either got something, short-term or long-term, in return for accepting Hemmingway’s termination, or it did not. In either case, I find it waived Hemmingway’s *Weingarten* rights. The Union was aware that one of the reasons for Hemmingway’s termination was “failure or refusal to follow the instructions of supervisor,” Exh. R-3. In this record, the only such failure or refusal on Hemmingway’s part was refusing to go to the clinic without a union representative. The Union, therefore, made a conscious decision not to pursue Hemmingway’s *Weingarten* rights in the grievance process.

⁹ The Board overruled a prior decision concerning a different employee of Prudential, at 251 NLRB 1591 (1980).

Conclusions of law

Respondent did not violate Section 8(a)(3) and (1) by terminating Marlon Hemmingway on August 3, 2022.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

Order

The complaint is dismissed.

Dated, Washington, D.C., June 18, 2026



Arthur J. Amchan
Administrative Law Judge

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.