Anheuser-Busch, Inc. *and* Brewers and Maltsters, Local Union No. 6, affiliated with International Brotherhood of Teamsters. Case 14–CA–25299

September 29, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

On July 22, 2004, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it found, among other things, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice to and bargain with the Union prior to the installation and use of hidden surveillance cameras. The Board, in fashioning its remedial Order, denied a make-whole remedy to the 16 employees whom the Respondent discharged or suspended for misconduct detected through the use of the cameras. Subsequently, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Board's Order, the General Counsel cross-petitioned for enforcement of the Order, and the Union cross-petitioned to review the Order. On July 5, 2005, the court issued a decision affirming the Board's decision that the Respondent violated Section 8(a)(5) and (1). However, the court granted the Union's petition for review of the remedial issue. The court remanded the case for the Board to further address whether the appropriate remedy for the violation should include make-whole relief for employees whom the Respondent disciplined for misconduct detected through use of the hidden cameras.[2]

On January 3, 2006, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. The General Counsel, the Respondent, and the Union filed statements of position.

Background

The issue on remand is whether the Board should grant a make-whole remedy to 16 employees disciplined by the Respondent for misconduct observed by means of cameras installed without prior bargaining with the Union. The relevant facts follow.

The Respondent operates a brewery in St. Louis. The Union has represented the brewery employees for many years. In March 1998,[3] the Respondent, while conducting a routine inspection of the facilities, uncovered evidence that employees were engaging in misconduct, including possible use of illegal drugs, in informal break areas on the roof of a building. The Respondent installed a hidden surveillance camera on the roof and another camera inside an elevator motor room. The use of hidden surveillance cameras was a change in the Respondent's operations. The Respondent did not notify the Union of its decision to install the cameras.

The Respondent operated the cameras from mid-May through June 30, and during that time observed 16 employees engaging in misconduct. On July 1, after discontinuing the surveillance, the Respondent notified the Union that it had been using the cameras. The Union protested the Respondent's failure to provide notice and an opportunity to bargain over the installation of the cameras.

The Respondent interviewed each of the 16 employees. Before each interview, the Union advised the employee that the Respondent had videotaped the employee's conduct; each employee then admitted engaging in the observed misconduct.

The Respondent discharged 5 of the 16 employees. Each of the discharged employees had violated the Respondent's rules by, inter alia, using illegal drugs (marijuana) at work. The Respondent suspended the remaining 11 employees, and issued "last chance" agreements to 7 of them. All of the suspended employees had violated Respondent's rules by entering a restricted area and by being away from an assigned work location for an extended time period. Some of the suspended employees had also violated the Respondent's rules by sleeping on duty or by urinating on the roof.

In its initial decision, the Board found that the Respondent violated Section 8(a)(5) by failing to give the Union notice and an opportunity to bargain before installing the hidden surveillance cameras. 342 NLRB at 560–561.[4] The Board's remedial Order directed the Respondent to cease and desist from the violations found and to post an appropriate notice. Id. at 561–562, 569. However, the Board denied a make-whole remedy to the 16 disciplined employees. Id. at 562.

The Board, noting that the employees' conduct violated plant rules and that the Respondent's discipline was based on their misconduct, concluded that it would be "inconsistent with the policies of the Act, and public policy generally, to reward parties who engaged in unprotected conduct." Ibid. In support of this conclusion, the Board cited *Taracorp Industries.*[5] Ibid. In that case, the

[1] 342 NLRB 560 (2004).

[2] *Brewers & Maltsters Local 6 v. NLR*B, 414 F.3d 36 (D.C. Cir. 2005).

[3] All dates are in 1998, unless otherwise indicated.

[4] The court affirmed this finding. 414 F.3d at 42–45. The Board also found that the Respondent violated Sec. 8(a)(5) by failing fully to respond to a union request for information. 342 NLRB at 560, 567–568. The court affirmed this finding also. 414 F.3d at 45–46. These issues are not before the Board in this proceeding.

[5] 273 NLRB 221 (1984).

employer discharged an employee for misconduct based on information obtained during an investigatory interview in which the employer unlawfully denied the employee's request for union assistance. The Board's Order in *Taracorp* nevertheless denied a make-whole remedy to the discharged employee. In its initial decision here, the Board found *Taracorp* instructive, explaining: "The Board [in *Taracorp*] reasoned that there was an insufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." Ibid.

In further support of its conclusion in the instant case, the Board relied on a provision in Section 10(c) of the Act that prohibits the Board from granting a make-whole remedy to employees who are disciplined "for cause."[6] The Board explained that "[t]he principle that an employee discharged or disciplined for misconduct is not entitled to reinstatement and backpay even though the misconduct is uncovered in an unlawful way, is embodied in the remedial restrictions in Section 10(c) of the Act." Id.[7]

The D.C. Circuit affirmed the Board's unfair labor practice findings, but remanded the make-whole remedy issue to the Board. With regard to this issue, the court noted that although it "gives great deference" to the Board's choice of remedy, the Board was required to "distinguish adequately its applicable precedent." 414 F.3d at 46. With regard to the Board's reliance on Section 10(c), the court observed that Section 10(c) did not "expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but-for its own unlawful action," and that the Board, accordingly, could "fill [the statutory] interstices with a reasoned approach." Id. at 47. The court found, however, that because the Board had "failed to distinguish adequately its prior decisions," it had not adopted the requisite reasoned approach. Ibid.

In analyzing the relevant Board precedent, the court noted that in *Tocco, Inc.,* 323 NLRB 480 (1997), the Board ordered make-whole relief for employees discharged for drug use after the employer unlawfully changed its drug-testing policy. The court rejected the Board's explanation that *Tocco* was distinguishable from the instant case because it involved a unilateral change "to the very policy under which the employees were discharged." Instead, the court reasoned that the employer in *Tocco* did not alter its underlying drug policy, but rather, changed its method of detecting which employees violated that policy. The court found that "[s]imilarly, in the instant case, the [Respondent] did not alter its underlying conduct rules, but instead unilaterally instituted a new means for detecting violations of a preexisting standard." 414 F.3d at 47. Further, the court noted, the Board granted a make-whole remedy in *Great Western Produce, Inc.,* 299 NLRB 1004 (1990), where the employer unlawfully changed its method for recording misconduct and then relied on misconduct documented through that new system to discharge employees. Id. at 48. The court concluded that the Board's granting of make-whole remedies in *Tocco* and *Great Western* could not be reconciled with its denial of a make-whole remedy in the instant case, as each involved situations in which the employees' misconduct would not have been detected absent the Respondent's unlawful change in detection methods. Id. at 47–48. The court also addressed *Taracorp*, supra, where the Board denied a make-whole remedy to an employee discharged following an unlawful interview. The court noted that the *Taracorp* employer, unlike the Respondent here, had an independent source of knowledge of the employee's misconduct untainted by the employer's unlawful conduct. Id. at 48.

For these reasons, the court remanded the case for the Board "to address the appropriate remedial order for the disciplined employees" because "it remains for the Board to determine, based on policies consistent with the Act, whether reinstatement is not appropriate here because an exclusionary rule would improperly reward [employees] who engage[d] in unprotected conduct." Id. at 48–49 (internal quotation omitted). The court found a remand necessary "so the Board can apply, distinguish adequately, or overrule" its *Tocco* and *Great Western* decisions. Id. at 48.[8]

Analysis

Having accepted the court's remand, we now respond to the court's directives. As explained below, we conclude that Section 10(c) precludes the Board from granting a make-whole remedy on the facts of this case. Also, as explained below, we overrule *Tocco* and *Great Western* to the extent that they hold that an employer may not discipline employees for uncontested misconduct if that misconduct is detected through unilaterally and unlawfully implemented means.

[6] Sec. 10(c) provides, in pertinent part, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

[7] Member Walsh dissented from the Board's denial of a make-whole remedy for the 16 disciplined employees. Id. at 562–564.

[8] Judge Sentelle dissented from the remand, finding that the "plain language" of the statute precludes an award of backpay to employees discharged for cause. Id. at 49–50.

A. The Appropriate Remedial Order

Section 10(c) provides, in pertinent part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Section 10(c) thus prohibits a make-whole remedy where discipline is "for cause." In its initial decision in this case, the Board cited Section 10(c) as support for its denial of a make-whole remedy. However, as the court observed, Section 10(c) does not "expressly address" the circumstances in the instant case—that is, "where an employer would not have discovered its employees' misconduct but-for its own unlawful action." 414 F.3d at 47. The court was not persuaded by the Board's reliance on Section 10(c). We now articulate the rationale that the court found missing in our earlier decision.

1. The *Weingarten* cases

This not the first time that the Board and the courts have addressed the issue of whether Section 10(c) prohibits a make-whole remedy where the employer uses unlawful methods to detect employee misconduct. Under *Weingarten*,[9] an employer violates the Act if it conducts an investigatory interview after denying the interviewed employee's request for the assistance of a union representative. Notwithstanding that fact, both the Board and reviewing courts consistently have held that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview. See *Taracorp Industries*, 273 NLRB 221 (1984); *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134, 137–138 (9th Cir. 1983); G*eneral Motors Corp. v. NLRB*, 674 F.2d 576, 577–578 (6th Cir. 1982); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981); *NLRB v. Potter Electric Signal Co*., 600 F.2d 120, 123-124 (8th Cir. 1979). Indeed, every circuit court that has decided the issue has affirmed this conclusion.[10]

The dissent asserts that the Board's reliance on Section 10(c) in *Taracorp* is specific to *Weingarten* cases. We disagree. Because Section 10(c) precludes a make-whole remedy where the employer learns of employee misconduct through an unlawful investigatory interview, it follows that Section 10(c) also precludes such a remedy where, as here, the Respondent learns of the misconduct through unlawfully installed hidden surveillance cameras. In each situation, the employer acquires facts relating to the misconduct through unlawful means. In each situation, the reason for the discipline is not that the employee engaged in union or other protected concerted activities. Rather, in each situation, the employee is disciplined for actions the employer considers to be misconduct, i.e., the discharge or suspension is "for cause."[11] Therefore, under the plain language of Section 10(c), the Board may not require the reinstatement of or award backpay to such employees.

We recognize that the Board, in its initial decision herein, cited *Taracorp* in support of its denial of a make-whole remedy (342 NLRB at 561), and that the court distinguished *Taracorp* on the basis that the employer in that case had a separate and untainted source of information regarding the employee's misconduct. 414 F.3d at 48. The dissent contends that *Taracorp* and other *Weingarten* cases are distinguishable from the instant case because in those cases, the employer suspected the employee's misconduct prior to conducting the disciplinary interview. However, the *Taracorp* Board's holding did not turn on the presence of an untainted source. Indeed, the *Taracorp* decision does not even refer to the untainted information source, and instead relies heavily on Section 10(c)'s prohibition against making whole employees who have been discharged for cause. Similarly, although the Sixth Circuit's *General Motors* decision cited above notes the presence of an untainted information source, the Eighth and Ninth Circuit decisions cited above do not, and instead rely solely on Section 10(c) in denying a make-whole remedy. Furthermore, in other *Weingarten* Board decisions issued shortly after *Taracorp*, the Board relied on Section 10(c) in denying a make-whole remedy even though the employer would not have discharged the employee absent the information obtained through the unlawful interview. See *Illinois Bell Telephone Co*., 275 NLRB 148 (1985), enfd. 784 F.2d 847 (7th Cir. 1986); *Montgomery Ward & Co*., 273

[9] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[10] The Seventh Circuit in *Communication Workers Local 5008 v. NLRB*, 784 F.2d 847 (7th Cir. 1986), observed that it was "not so sure as the Board" that Sec. 10(c) precluded a make-whole remedy for *Weingarten* violations (id. at 850), but explicitly declined to decide the issue and instead found that the Board properly exercised its remedial discretion in denying a make-whole remedy for *Weingarten* violations. Id. at 851–853.

[11] The Eighth Circuit's observation in *Montgomery Ward & Co.*, supra, is apropos here. The court, confronted with the claim that the discharge of employees for theft stemmed from the employer's denial of their *Weingarten* rights, replied: "[T]he employees effected their own discharge for stealing and the [*Weingarten*] violation was simply incidental to the investigation which preceded the firing." So too, the employees here effected their own discharge and discipline by using illegal drugs on the Respondent's premises and engaging in other misconduct in clear violation of established work rules.

NLRB 1226, 1227 (1984), enfd. mem. 785 F.2d 316 (9th Cir. 1986).[12]

In sum, the employees in all of the foregoing *Weingarten* cases were disciplined "for cause." Neither the Board nor the reviewing courts interpreted Section 10(c) as restricting the Board's remedial authority only where the facts supporting the "for cause" discipline derived from an independent and untainted source. Rather, the Board and the courts applied Section 10(c) according to its literal terms, regardless of whether the misconduct that formed the basis of the discharge was uncovered through an unlawful means. Therefore, our conclusion in the instant case that Section 10(c) precludes the granting of a make-whole remedy is strongly supported by extant precedent.

2. Statutory analysis

In the *Weingarten* decisions cited above, the Board explicitly relied on Section 10(c) in denying a make-whole remedy. However, in so doing, the Board may not have fully explained its resolution of the core issue—that is, why Section 10(c)'s prohibition of a make-whole remedy, where discipline is "for cause," should be interpreted as including the situation where the misconduct in question is uncovered through unilaterally and unlawfully implemented means. We now accept the court's invitation to "fill [Section 10(c)'s] interstices with a reasoned approach" and explain why we find that Congress intended Section 10(c)'s prohibition of a make-whole remedy to apply in such cases.

Congress did not explicitly define the term "for cause." However, the Board has explained that in the context of the Act, the term was intended to refer to discipline that is not imposed for a reason that is prohibited by the Act. As the Board stated in *Taracorp*:

> Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act: "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids."

273 NLRB at 222 fn. 8 (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)). Since the discipline imposed here was not imposed for a prohibited reason, it was "for cause." Accordingly, Section 10(c) precludes the Board from granting a make-whole remedy to the disciplined employees in the instant case.[13]

This meaning of the phrase "for cause" does not include an inquiry into the source of the employer's knowledge of the misconduct. Although that may be relevant to an arbitration, it is not relevant under the Act. Indeed the Board has made clear that "[i]t is important to distinguish between the term 'cause' as it appears in Section 10(c) and the term 'just cause' . . . . Just cause encompasses principles such as the law of the shop, fundamental fairness, and related arbitral doctrines. Cause, in the context of Section 10(c), effectively means the absence of a prohibited reason." *Taracorp Industries*, 273 NLRB at 222 fn. 8; accord: Elkouri & Elkouri, *How Arbitration Works* 974 (6th ed. 2003) ("'[c]ause' as used in Section 10(c), should not be confused with 'just cause' as that term is used by arbitrators").[14]

Moreover, the legislative history of Section 10(c) shows that Congress' purpose in enacting Section 10(c) was to insure that an employee who engaged in misconduct was subject to discipline for that misconduct. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ("[t]he legislative history of [Section 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct"). The Supreme Court in *Fibreboard* quoted at length from that legislative history (id. at 217 fn. 11):

> The House Report states that [Section 10(c)] was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong.,

[12] The dissent suggests that, in *Illinois Bell* and *Montgomery Ward*, the employers "already suspected" the employees' misconduct before the unlawful interviews. However, in each case the employee confessed to the misconduct during the interview, and the employer did not discharge the employee until after the interview. Neither decision indicates that the employer would have discharged the employee absent the confession obtained during the interview. More importantly, neither decision indicates that the Board's denial of a make-whole remedy depended in any way on the suspicions, if any, that the employer harbored before the interview.

[13] In an arbitral context, the term "for cause" refers to discipline that, according to the arbitrator, is permissible under the parties' contract.

[14] Moreover, even if Congress, in enacting the 10(c) "for cause" provision in 1947, wished to reflect the arbitral "just cause" concept, that concept did not then commonly include inquiry regarding due process issues such as the fairness of the employer's investigation methods. See McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process,* 38 Lab. L. J. 387, 390 (1987); Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 Stanford L. Rev. 235 (1961). The inclusion of due process issues in the arbitral "just cause" inquiry was still controversial 20 years later. See Edwards, *Due Process Considerations in Labor Arbitrations*, 25 Arb. J. 141, 159–163 (1970) (unclear whether employers may properly rely upon unlawfully obtained evidence of employee misconduct).

> 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Conversely, Section 10(c)'s legislative history does not reflect Congressional concern regarding the employer's method for detecting the employee's misconduct. The legislative history is silent regarding this issue. The legislative history quoted above affirmatively shows that the impetus for Section 10(c)'s prohibition on making whole employees disciplined for cause was Congress' belief that the Board had overstepped its authority and interfered with legitimate management disciplinary prerogatives. If the Board in the instant case were to grant a make-whole remedy to the 16 disciplined employees, the Board would be overturning discipline for serious, admitted violations of lawfully established work rules.[15]

A termination of employment that is motivated by protected activity is unlawful under Section 8(a)(1) and/or (3), and is not "for cause." The termination is unlawful, and the Board can order reinstatement and backpay. Similarly, a termination of employment that is accomplished without bargaining with the representative union is unlawful under Section 8(a)(5) and is not "for cause."[16] Thus, when an employer has unilaterally subcontracted unit work and laid off unit employees, those actions are unlawful, and the Board can order reinstatement and backpay.

The *Weingarten* cases are consistent with this statutory analysis. In those cases, the employers unlawfully denied employee requests for union representation during investigatory interviews and discharged the employees based on information obtained during the interviews. The discharged employees in those cases engaged in misconduct for which they were discharged. The discharges accordingly were "for cause" within the meaning of Section 10(c), and the Board was precluded from granting make-whole remedies.

In the instant case, the 16 disciplined employees each engaged in misconduct warranting the discipline. Therefore, under the teaching of *Fibreboard* and the *Weingarten* cases, Section 10(c) applies to preclude a make-whole remedy for the discipline.

We are not unmindful, of course, that the misconduct was discovered by virtue of the unlawfully installed surveillance cameras. However, our Order provides a proper remedy for that violation. We have ordered the Respondent to cease and desist from its unlawful conduct and to bargain with the Union, and the court has upheld that Order. This Order stands to bar future unilateral action by the Respondent. Should the Respondent fail to adhere to this Order, as enforced, it is subject to contempt proceedings. *Communication Workers Local 5008 v. NLRB*, supra, 784 F.2d at 852.

For all these reasons, we conclude that Section 10(c) precludes the Board from granting a make-whole remedy for the disciplined employees.

The dissent contends that the D.C. Circuit, in its remand decision, held that Section 10(c) does not preclude the Board from granting a make-whole remedy on the facts presented here. In support of this contention, the dissent notes the court's statement that Section 10(c) "does not expressly address" the issue of whether the Board may grant a make-whole remedy on these facts. However, a statute may require or prohibit an action without "expressly" requiring or prohibiting the action. For example, although Section 10(c) "does not expressly address" the issue of whether the Board may grant a make-whole remedy where a union supporter is discharged for misconduct warranting discharge, Section 10(c)'s no-make-whole prohibition clearly prohibits a make-whole remedy on those facts. Section 10(c) "does not expressly address" the issue presented here because it would have been impossible for Congress to envision all of the conceivable fact patterns in which suspensions or discharges for cause might arise in cases that could be brought before the Board. Rather, Congress left to the Board the task of interpreting and applying statutory language to a myriad of factual patterns. This is the very task the Court left to the Board in relation to the facts in this case. In the Court's words, the Board is to "fill [the

[15] Noting that the legislative history of Sec. 10(c) decried the Board's decisions overturning justifiable discharges of union activists for various mischiefs and strikers for picket-line misconduct, the dissent deduces by negative implication a Congressional intent to allow the Board to overturn justifiable discipline in all other contexts. The *statute* is to the contrary. Sec. 10(c) is broadly written to apply to "any individual," not just union supporters or strikers, and to suspension or discharge "for cause" without limitation. Thus, nothing in the terms of Sec. 10(c) suggests that it is limited to a particular type of discipline recipient or a particular species of cause. Moreover, a fair reading of the legislative history suggests that Congress' principal concern was to protect an employer's right to impose justifiable discipline rather than to limit the Board's remedial power in any particular subset of situations. In other words, the legislative history cites Board decisions overturning justifiable discipline in union-supporter and strike misconduct situations by way of illustration, not limitation.

[16] See *Fibreboard Paper Products Corp. v. NLRB*, supra.

statutory] interstices with a reasoned approach." 414 F.3d at 47.[17]

The dissent cites several situations where the Board has granted a make-whole remedy to employees who have committed arguably wrongful actions.[18] These cases are distinguishable because it is not clear whether the employees' actions would have been wrongful or would have merited the discipline imposed—that is, whether the employees' actions would have constituted "cause" for discipline—if the employer had not committed the unfair labor practices. By contrast, in the instant case, it is clear that the employees' actions were wrongful and would have merited the discipline imposed—that is, the employees' actions constituted cause for discipline—regardless of whether the Respondent had unlawfully implemented the hidden camera surveillance.

In addition to finding that Section 10(c) precludes the Board from granting a make-whole remedy, we also find that, even if the Board had authority to grant a make-whole remedy, compelling policy considerations would persuade us, in the exercise of remedial discretion, to deny a make-whole remedy. Those policy considerations are strongly evidenced by Section 10(c) and its legislative history. We find particularly compelling the policy consideration that employees who engage in misconduct, and who receive the appropriate discipline for that misconduct, should not benefit from their misconduct through a windfall award of reinstatement and backpay.[19]

[17] Judge Sentelle, dissenting in part from the D.C. Circuit's remand decision, found that Sec. 10(c) "plainly" precluded the Board from granting a make-whole remedy here. 414 F.3d at 49. The majority did not respond to Judge Sentelle's dissent. Rather than decide whether Sec. 10(c) precluded a make-whole remedy, the majority remanded that issue to the Board for further exploration.

[18] *Consec Security*, 328 NLRB 1201 (1999) (discipline for employee action that would have been acceptable action absent the employer's unlawful unilateral change in conduct rules); *Business Products–Division of Kidde, Inc.*, 294 NLRB 840, 840 fn. 3, 852 (1989) (discipline for employee action that the employer did not find worthy of investigation until employees began union activities and the employer responded with unlawfully motivated examinations); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–851 (2001) (discipline for employee actions that were provoked by the employer's unfair labor practices).

[19] We also note that the Board's Order—by requiring the Respondent to cease and desist from the unfair labor practice found and to bargain with the Union regarding the installation and use of hidden surveillance cameras—restores the Union to the status quo ante the Respondent's unfair labor practice.

We reject the dissent's claim that denying a make-whole remedy would somehow damage the Union's status as bargaining representative. Reasonable employees would not be surprised if coworkers were discharged or suspended for using illegal drugs at work, sleeping on duty or urinating off of their employer's roof, and could hardly fault their union if such discipline occurred.

B. Tocco and *Great Western*

The Board's decisions in *Tocco*[20] and *Great Western*[21] stand in contrast to the cases discussed above. In *Tocco*, the employer unlawfully failed to bargain with the union before changing its drug-testing program. The change involved expanding the program from testing only employees identified as potential drug users to random testing of all employees. The employer did not change the penalty—discharge—for a positive drug test. Two randomly-tested employees tested positive and were discharged. The Board granted a make-whole remedy to the two employees, reasoning that the discharge was the result of the unlawful policy change.

In *Great Western*, the employer unilaterally changed some rules governing employee conduct; the employer also began recording misconduct violations in employees' personnel files, thereby unilaterally changing its misconduct-recording policy. The employer discharged four employees, relying on violations of the unilaterally-changed conduct rules and on the employer's knowledge of violations it had obtained as a result of the unilaterally-changed misconduct-recording policy. The Board granted a make-whole remedy to these four employees.[22]

In its initial decision here, the Board sought to distinguish its granting of a make-whole remedy in *Tocco* and *Great Western* from its denial of a make-whole remedy in the instant case. The Board found that the unlawful unilateral changes in *Tocco* and *Great Western* were changes in the employers' misconduct standards themselves, whereas the unlawful unilateral change in the instant case was a change in the Respondent's method for detecting misconduct. 342 NLRB at 561. Therefore, the Board reasoned, as in *Taracorp*, supra, there was "an insufficient nexus between the unfair labor practice and the employee discipline to justify revoking the discipline as a means to remedy the unfair labor practice." Ibid.

On appeal, however, the court rejected the Board's findings regarding the nature of the unlawful changes in *Tocco* and *Great Western*. The court found, contrary to the Board, that the unlawful changes in *Tocco* and *Great Western*, like the unlawful change in the instant case, did not involve changes in the employers' misconduct standards but rather involved changes in the employers' methods for detecting misconduct. The court accordingly rejected the Board's basis for distinguishing *Tocco* and *Great Western* from the instant case. 414 F.3d at 47–48. We accept, as the law of the case, the court's

[20] *Tocco Inc.*, 323 NLRB 480 (1997).

[21] *Great Western Produce, Inc.*, 299 NLRB 1004 (1990).

[22] The Board denied a make-whole remedy for a fifth discharged employee who would have been discharged under the previous rules and policy.

interpretation of those cases. As so interpreted, they are inconsistent with our interpretation and application of Section 10(c) here, and thus we overrule them.

As explained above, we interpret Section 10(c) to preclude the Board from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means. As is clear from our discussion, we decline to import the criminal law notion of the "exclusionary rule" into remedial decisions under Section 10(c). The exclusionary rule acts as a deterrent to government conduct that undermines 4th and 14th Amendment strictures. Similarly, it could be argued that a make-whole remedy here would deter employers from engaging in unilateral action. However, we conclude that Section 10(c) bars that remedy. In addition, we have provided a remedy for the Respondent's failure to bargain that should preclude a recurrence of the unlawful behavior. But since the employees engaged in conduct that clearly violated preexisting rules, and thus were discharged or disciplined for cause, we decline to order the Respondent to rescind such actions. Accordingly, we now overrule our decisions in *Tocco* and *Great Western* to the extent that those decisions hold that Section 10(c) does not limit the Board's authority to grant a make-whole remedy where an employer disciplines an employee for cause, but the cause is uncovered through unilaterally and unlawfully implemented means.

ORDER[23]

The National Labor Relations Board orders that the Respondent, Anheuser-Busch, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Brewers and Maltsters, Local Union No. 6, affiliated with the International Brotherhood of Teamsters (the Union) with respect to the installation and use of hidden surveillance cameras and other mandatory subjects of bargaining.

(b) Failing and refusing to respond in a timely fashion to requests for information respecting matters relevant to unit employees.

(c) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with the Union as the exclusive bargaining representative of the Respondent's employees with respect to the installation and use of hidden surveillance cameras and other mandatory subjects of bargaining.

(b) On request, bargain collectively with the Union by timely furnishing it with the information it requests respecting matters relevant to unit employees.

(c) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix A."[24] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at the facility at any time since May 17, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBERS LIEBMAN and WALSH, dissenting.

Today, the majority overrules Board precedent and holds that an employer that disciplines employees based solely on information obtained in violation of Section 8(a)(5) need not make those employees whole. The majority reaches that conclusion by: (1) relying on a reading of Section 10(c) that a reviewing court has rejected as a matter of law, (2) advancing policy arguments at odds with the Act, and (3) relying on a line of cases that has no appropriate application here. We dissent. The employees here, whom the Respondent disciplined based solely on its unquestionably unlawful use of hidden surveillance cameras, are entitled to make-whole relief.

I. FACTS AND PRIOR PROCEEDINGS

The Union represents about 500 employees at the Respondent's brewery in St. Louis, Missouri. In spring 1998, during an inspection of the facility, the Respondent

[23] Pursuant to the court's direction (414 F.3d at 49), we correct our Order by substituting "hidden surveillance cameras" for "surveillance cameras."

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

found foam pads, pieces of cardboard, and a table and chairs in the elevator motor room on the roof of one of the buildings. None of those objects belonged there, although the Respondent was aware that employees used the roof for breaks, to escape the extreme heat of the work area.

The Respondent had no idea who had placed the items in the room, but it suspected that the room was being used for impermissible purposes, possibly including use of drugs. It decided to install a hidden video surveillance camera on the roof. The Respondent did not notify the Union of the inspection, the discovery of the items, the suspicion of drug use, or the decision to install and use the camera, which it began using in mid-May.

After a few weeks, the Respondent reviewed the video footage and determined that unauthorized individuals were entering the motor room. It then decided to install a second videocamera in the room itself. The Respondent operated both cameras continuously through June 30.

On July 1, after it had removed the cameras, the Respondent notified the Union for the first time that it had installed and used them. The Respondent also informed the Union that it had reviewed the videotape and observed a number of employees engaging in misconduct.

Solely on the basis of information it obtained from reviewing the surveillance tapes, the Respondent separately interviewed 18 employees. Prior to the interviews, the Union advised all of them that they had been observed on tape and should be truthful when interviewed. In each interview, the Respondent confronted the employee with videotape evidence against him. Ultimately, the Respondent disciplined 16 employees: 5 were discharged, 4 were suspended, and 7 were both suspended and given last-chance agreements. It is undisputed that the Respondent would not have disciplined those employees without the evidence from the cameras.

The Board held that the Respondent's installation and use of hidden surveillance cameras was a mandatory subject of bargaining, and that the Respondent therefore violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain prior to their installation. See *Anheuser-Busch, Inc.*, 342 NLRB 560, 561 (2004). But, although the employees had been disciplined based on misconduct discovered solely through the use of the unlawfully installed cameras, the Board, by a vote of 2 to 1, declined to issue a standard order rescinding the discipline and restoring the status quo. Rather, the majority ordered the Respondent only to cease and desist from refusing to bargain and, affirmatively, to bargain with the Union regarding the cameras and other mandatory subjects of bargaining. Id. at 562. The majority held that a make-whole remedy (here, rescission of the discipline) was barred by the express language of Section 10(c) of the Act.[1] The majority also relied on *Taracorp*, 273 NLRB 221 (1984), which denied make-whole relief for discipline following a *Weingarten* violation,[2] and distinguished *Tocco, Inc.*, 323 NLRB 480 (1997), and *Great Western Produce*, 299 NLRB 1004 (1990)), cases in which the Board granted make-whole relief where the employer based discipline upon information obtained as a result of an unlawful unilateral change.

The Union sought review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit. The Board cross-applied for enforcement of its order against the Respondent. The court affirmed the Board's finding of an 8(a)(5) violation, but it remanded to the Board the issue of make-whole relief. *Brewers and Maltster, Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005). The court rejected the Board's determination that Section 10(c), by its terms, bars make-whole relief in these circumstances:

> Section 10(c) does not expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but for its own unlawful action. As the Seventh Circuit has observed, "[Section] 10(c)] does not prevent the Board from insisting that the employer [prove 'cause'] without using the 'fruit' of the violation . . . . Section 10(c) does not speak to burdens of persuasion, fruits of violations, exclusionary rules, and the other paraphernalia of trials and inferences."

Id. at 47 (quoting *Communications Workers v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986)).

The court also rejected the Board majority's attempts to distinguish *Tocco,* supra*,* and *Great Western Produce*, supra, 414 F.3d at 47–48, and the court reasoned that *Taracorp*, supra, upon which the Board majority had relied, was distinguishable. In *Taracorp*, the court observed, the employer had knowledge of the employee misconduct independent of and prior to the unlawful interview. 414 F.3d at 48. Here, however, the Respondent had no such knowledge independent of the unlawful use of the hidden cameras.

On remand from the court, the current majority reaches the same result. It again concludes that Section 10(c)

[1] The majority relied on the portion of Sec. 10(c) stating as follows:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Sec. 10(c), including this language, is discussed in detail in secs. II and III of this opinion.

[2] See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

bars a make-whole remedy and, in addition, it now overrules *Tocco* and *Great Western*. In so doing, it ignores both the plain language of the D.C. Circuit's opinion and the applicable policies of the Act.

II.

First, it is clear that, prior to this decision, the Board granted make-whole relief when an unlawful unilateral change directly resulted in discipline, and that it did so consistent with the Act. Section 10(c), of which the "for cause" language cited by the majority is only a small part, grants the Board authority to devise remedies—including reinstatement and backpay—to "effectuate the policies of this Act . . . ." It is well settled that the Board's authority under Section 10(c) is broad and discretionary. See *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346 (1953). In exercising its authority, the Board is guided by the principle that remedial orders should "restor[e] the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Die Supply Corp.,* 160 NLRB 1326, 1344 (1966) (quoting *Royal Plating and Polishing Co.,* 148 NLRB 545, 548–549 (1964), supplemented 152 NLRB 619 (1965)); accord: *Planned Bldg. Services*, 347 NLRB 670, 674 (2006); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). "Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violations.'" *International Union of Electrical Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970), cert. denied 400 U.S. 950 (1970).

Consistent with the foregoing principles, when an employer violates Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment, the Board restores the status quo ante. See, e.g., *Detroit News, Inc.*, 319 NLRB 262 fn. 1 (1995) ("it is customary to order restoration of the status quo to the extent feasible"); *Martin Marietta Energy Systems*, 316 NLRB 868 fn. 5 (1995) (Board's "traditional remedial requirements" include making employees whole for losses resulting from respondent's unlawful unilateral changes). Employees who have been discharged or disciplined as a direct result of an unlawful unilateral change are entitled to have the discipline rescinded and to be reinstated and made whole.[3]

Until the present case, the Board has never drawn a distinction between employees disciplined as a result of a unilateral change and those disciplined as a result of a unilateral change in "detection methods." Rather, as the court stated, the Board has ordered employees made whole in both types of cases. In *Great Western*, supra, for example, the employer violated Section 8(a)(5) by unilaterally implementing certain work rules, including a recordkeeping system that tracked employee infractions. The Board ordered discharged employees reinstated and made whole because the new recordkeeping system was the source of management's knowledge of their rule infractions. Id. at 1006, 1007. The Board observed that the employer did "not assert any basis [for the termination] independent of the unlawfully imposed employee warning reports." Id. at 1007 fn. 13. The Board, however, also stated that "a respondent employer may avoid having to reinstate and pay backpay to an employee discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employee even absent that rule or policy." Id. at 1006. Applying that principle, the Board declined to order reinstatement and backpay for one employee whose misconduct the employer knew of independent of the unlawful recordkeeping system. Id. at 1007.

In *Tocco, Inc.*, the employer had previously maintained a drug policy that allowed it to test employees for "cause." 323 NLRB at 484. But in violation of Section 8(a)(5), the employer unilaterally changed its definition of "cause," from evidence of drug possession or use by a specific employee to a concern that the plant's overall safety, efficiency, and production were declining. Applying that new definition, the employer tested employees it previously would not have tested, and then discharged three employees who tested positive. The Board ordered the employer to rescind the unilaterally implemented policy, restore the old policy, and reinstate the discharged employees and make them whole. See id. at 481 fn. 1.

In sum, Board precedent, consistent with the Board's remedial authority, plainly supports a make-whole remedy for the 16 employees in the present case, whose conduct was discovered only through the unlawful use of the surveillance cameras.

III.

Having previously tried unsuccessfully to distinguish *Great Western* and *Tocco*, the majority now overrules them as inconsistent with Section 10(c). The majority's conclusion that 10(c) bars a make-whole remedy is both flatly contrary to the law of the case and wrong on the merits.

A.

Judicial review of the Board's construction of the Act is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984), which states:

[3] See, e.g., *Delta Tube & Fabricating Corp.*, 323 NLRB 856, 863 (1997); *Storer Communications*, 297 NLRB 296, 299 (1989).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The "precise question at issue" here is whether a make-whole remedy is appropriate for employees who are disciplined or discharged for misconduct discovered solely through an unlawful unilateral change. The court's answer to the first question under *Chevron*—whether Congress has "directly spoken" to the issue here—was a resounding no. The court stated that Section 10(c) "does not expressly address" that issue. 414 F.3d at 47. The court emphasized that Section 10(c) "does not speak to burdens of persuasion, fruits of violations, [or] exclusionary rules," and "*does not prevent* the Board from insisting that the employer [prove 'cause'] without using the 'fruit' of the violation." 414 F.3d at 47 (quoting *Communication Workers*, supra at 851) (emphasis supplied). Thus, the law of the case is that Section 10(c) does *not* resolve the issue here.

Under the second step of *Chevron,* the Board is free to set forth a "permissible construction" of the Act that resolves the issue in a manner consistent with the Act's policies. Accordingly, the court in the present case stated that the Board may "fill interstices [in the Act] with a reasoned approach" and may "determine, based on policies consistent with the Act," whether a make-whole remedy is appropriate here. See 414 F.3d at 47, 48. What the majority has done instead, however, is to take the remand as an opportunity to reiterate, albeit in greater detail, the very position the court rejected: that Section 10(c) *precludes* a make-whole remedy. The majority's 10(c) analysis is therefore contrary to the law of the case.

B.

Even if the court had not already rejected the argument that Section 10(c) bars a make-whole remedy, the majority's 10(c) argument would not withstand scrutiny. The majority contends that the legislative history of Section 10(c) shows an intent to insure that employees who engaged in misconduct would be subject to discipline for it. That is true, insofar as it involves 8(a)(1) and (3) cases in which the Board must determine whether an employee was disciplined *because of Section 7 activity*. But the legislative history gives no indication that it was intended to preclude make-whole relief in the circumstances present here, where the discipline was the direct result of a 8(a)(5) violation without which the employer would have had no grounds for discipline.

The "for cause" language in Section 10(c) was added to the Act as part of the 1947 Taft-Hartley amendments. The Supreme Court has explained the purpose of the language as follows:

> The amendment was sparked by a concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of anti-union animus even though the worker had been guilty of gross misconduct.
>
> . . . "In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was *the* reason for his discharge." H.R.Rep. No. 245, 80th Cong., 1st Sess., at 42 (April 11, 1947) (emphasis added).
>
> The proviso was thus a reaction to the Board's readiness to infer anti-union animus from the fact that the discharged person was active in the union, and thus has little to do with the situation in which the Board has soundly concluded that the employer had an anti-union animus and that such feelings played a role in a worker's discharge.

NLRB v. Transportation Management Corp., 462 U.S. 393, 403 fn. 6 (1983). The legislative history also reflects a concern that the Act not be interpreted to immunize strike misconduct or other concerted activity that exceeds the bounds of Section 7. See, e.g., H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted in 1 Legislative History of the Labor-Management Relations Act, 1947, at 542–544. In short, the "for cause" language was intended to clarify that employees are not immunized from discharge simply because they support a union or engage in concerted activity.[4]

Here, those concerns do not apply. The Respondent's unfair labor practice does not stem from antiunion animus, nor does it involve Section 7 activity. Rather, the violation was a unilateral change in working conditions that led directly to discipline and discharge. There is no

[4] The absence of any legislative history concerning unilateral changes in "detection methods" is therefore understandable. Rather than showing that 10(c) precludes relief in such cases, the silence supports the opposite conclusion.

indication that the "for cause" proviso was intended to bar relief under those circumstances.[5]

C.

Absent any legislative history indicating that the "for cause" language was intended to apply here, the majority is left only with the Board's application of Section 10(c) in 8(a)(1) *Weingarten* cases such as *Taracorp Industries*, 273 NLRB 221 (1984). As the D.C. Circuit held in this proceeding,[6] however, *Taracorp* is distinguishable: it represents a narrow exception, inapplicable here, to the Board's standard make-whole remedial policy.[7]

In *Taracorp*, the employer learned of an employee's misconduct and summoned the employee for an interview. The employee requested, and was refused, union representation during the interview. After the interview, the employee was discharged for the misconduct. The Board held that the employer violated Section 8(a)(1) by denying the employee's request for union representation. The Board, however, found that a make-whole remedy "in the context of a *Weingarten* violation" was contrary to Section 10(c). 273 NLRB at 221. The Board reasoned that in *Weingarten* cases, there is "not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." Id. at 223.

In the present case, the majority finds that the reason for the discipline, as in *Taracorp*, was misconduct, and that Section 10(c) therefore bars a make-whole remedy. The majority's application of *Taracorp* is erroneous for three reasons.

First, the Board's language in *Taracorp* is specific to *Weingarten* cases, and the decision gives no indication that the Board intended its holding to apply outside that context—nor has the Board ever done so.

Second, in cases since *Taracorp*, the Board has addressed the precise issue presented here: whether make-whole relief is appropriate when an employee is disciplined for misconduct discovered solely through an unlawful unilateral change. See *Tocco* and *Great Western*, supra. Unlike the majority, we would not overrule those cases in favor of applying a rule developed for a different type of violation under a different section of the Act.

Third, even assuming that a *Taracorp* analysis would otherwise be appropriate, here there is a stronger nexus between the unlawful unilateral change and the discipline imposed on the employees. In *Taracorp*, as in the typical *Weingarten* case, the employer had knowledge or suspicion of the employee's wrongdoing before conducting the disciplinary interview at which the *Weingarten* violation occurred. Although the majority asserts that the *Taracorp* cases do not rely on that distinction, the Board in *Taracorp* did, in fact, focus on whether there was a "sufficient nexus" between the unfair labor practice and the reason for the discharge. 273 NLRB at 223. Logically, in cases like the present one, and unlike *Taracorp*, the absence of *any* source of knowledge or suspicion of the misconduct aside from the unfair labor practice itself establishes such a nexus. For here, absent the unlawful installation and use of the cameras, the Respondent had no reason to focus its inquiry on those 16 employees, let alone to discipline them. The nexus is reinforced by the fact that the Respondent confronted the employees with the videotaped evidence during their interviews. In the *Weingarten* cases, in contrast, it cannot be said that the employer learned of the misconduct solely through the unlawful conduct.[8] In short, *Taracorp* is distinguishable, and the majority's expansion of it is unjustified.

[5] See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) ("There is no indication . . . that [10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice . . . .").

Citing *Taracorp*, the majority defines "cause" as "the absence of a prohibited reason." But that begs the question of when a reason that is valid in the abstract—such as misconduct—becomes "prohibited." The mere existence of "cause" is not enough; the discipline must also be "for" cause. *Communication Workers Local 5008 v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986). "Few subjects are as debated and difficult as determining what things 'cause' what other things." Id. at 851. That determination requires the Board to examine the role the employer's unfair labor practice played in the discipline. As discussed in Sec. III,C, below, that role may have been insufficient to warrant make-whole relief in *Taracorp*, but it is not insufficient here.

Nor has it been deemed insufficient in other contexts in which the employee's conduct, viewed in a vacuum, would constitute "cause," but in which make-whole relief is appropriate under Sec. 10(c). For example, in 8(a)(5) cases where an employer unilaterally changes a substantive rule of conduct and disciplines the employee for violating the rule, the Board will make affected employees whole. See, e.g., *Consec Security*, 328 NLRB 1201 (1999). In 8(a)(3) cases, the Board will make employees whole if they are disciplined for misconduct discovered during an investigation that was unlawfully motivated. *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989). The Board also orders employees made whole where an employer's unfair labor practice provokes the employee into engaging in misconduct. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–850, 851 (2001).

[6] See 414 F.3d at 48.

[7] We need not pass on whether *Taracorp* was correctly decided. Assuming that it was, it still does not bar make-whole relief here.

[8] Indeed, in affirming a denial of make-whole relief in a *Weingarten* case, one court found the existence of independent evidence of misconduct critical to the 10(c) analysis. See *General Motors Corp. v. NLRB*, 674 F.2d 576 (6th Cir. 1982) (finding that Sec. 10(c) barred a make-whole remedy "because there exists evidence, completely independent of [the employer's] technical violation, upon which [the employee's] discharge may be grounded).

The majority contends that in two of the *Weingarten* cases, the employer did not have sufficient evidence to discharge the employee prior to the interview. See *Illinois Bell Telephone*, 275 NLRB 148 (1985),

IV.

Finally, the majority decision is contrary to the Act's policies. Restoring the status quo—which would be accomplished here by reinstatement and backpay—is the Board's standard remedy for an 8(a)(5) unilateral change. See section II, supra. Discipline imposed pursuant to an unlawful unilateral change is doubly destructive: it damages both the affected employees and the union's status as bargaining representative. The union's status "is further damaged with each application of the unlawfully changed term or condition of employment. No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative. . . ." *Great Western*, supra at 1005. Here, it is unlikely that the Union's status will be repaired in the eyes of the unit employees unless the affected employees are made whole for losses resulting from the Respondent's unlawful conduct. In practical terms, the employees will see that their employer has engaged in spying on their activities that violated the National Labor Relations Act, but that their bargaining representative was incapable of either preventing it or effectively remedying the harm that flowed from it. By overruling *Tocco* and *Great Western*, the majority ensures that in this and future cases, the Board will not fully eliminate the effects of the type of 8(a)(5) violation involved here.[9]

Furthermore, by prohibiting a make-whole remedy, the majority decision allows the Respondent to retain the benefits of its unlawful action, while at the same time removing the most effective deterrent to future unilateral changes. "If a party who unlawfully refuses to bargain is permitted to retain the fruits of unlawful action, the Act is rendered meaningless, and defiance of the board's orders is encouraged." *NLRB v. Warehousemen's Local 17*, 451 F.2d 1240, 1243 (9th Cir. 1971), enfg. 182 NLRB 781 (1970); accord: *Southwest Forest Industries v. NLRB*, 841 F.2d 270, 275 (9th Cir. 1988), enfg. 278 NLRB 228 (1986).

Finally, we do not condone the employees' conduct here, and we are mindful of the principle that Board remedies should not grant the employees a "windfall." But there is no windfall under the *Tocco* and *Great Western* approach. An employee will not be made whole if the evidence shows that he would have been disciplined even absent the unlawful unilateral change. See *Great Western*, supra at 1007. Thus, in cases like *Great Western* and this one, a make-whole remedy would not leave employees any better off than they would have been absent the employer's violation.[10]

V.

Here, without the unlawful camera use, the Respondent would not have known of the employees' conduct and they would not have been disciplined. A make-whole remedy is therefore appropriate and consistent with Board precedent. Contrary to the majority, we would not revisit a 10(c) analysis that was rejected by the court, nor would we overrule applicable 8(a)(5) precedent in favor of the approach in 8(a)(1) *Weingarten* cases that have no appropriate application here. Accordingly, we dissent from the majority's change in the law and from its decision to deny make-whole relief to the 16 employees who were disciplined as a direct result of the Respondent's unlawful conduct.

enfd. 784 F.2d 847 (7th Cir. 1986); *Montgomery Ward*, 273 NLRB 1226 (1984), enfd. mem. 785 F.2d 316 (9th Cir. 1986). In *Montgomery Ward*, it is not clear what evidence the employer had before interviewing the employee. The employer, however, apparently already suspected the employee, because the interview involved "repeated accusations of [the employee] having stolen things." 273 NLRB at 1228. It is true that in *Illinois Bell*, the judge found no "probative, credible, independent" evidence of the misconduct outside of the unlawful interview. 275 NLRB at 148. However, the employer already "suspected" the particular employee (see 784 F.2d at 848), which is presumably why the employer chose to interview her in the first place. The same would be true in the typical *Weingarten* case. Regardless of whether the employer has enough evidence to impose discipline before the interview, the employer will have some basis to believe that the particular employee engaged in misconduct. Indeed, *Weingarten* does not even apply unless the employee would have a reasonable belief that the interview might result in discipline. See 420 U.S. at 257. This basic distinction between *Weingarten* and the present case further demonstrates why the *Weingarten* cases should not be applied wholesale here.

Furthermore, although the court in *Illinois Bell* affirmed a denial of make-whole relief under *Taracorp*, the court expressed "misgivings about the construction of Section 10(c) in *Taracorp*." *Communication Workers Local 5008 v. NLRB*, 784 F.2d 847, 849 (7th Cir. 1986). The court stated: "We are not so sure as the Board that the proviso to Section 10(c) precludes reinstatement." Id. at 850. The court found that there was a "strong argument that the Board has discretion to . . . apply an exclusionary rule. . . ." Id. at 851. The court declined to hold that Sec. 10(c) barred relief, and instead affirmed the Board's remedy by finding that the Board had discretion to deny make-whole relief in *Weingarten* cases, based in part on policy considerations specific to *Weingarten* cases. Id. at 851–852.

[9] The majority's claim that "[r]easonable employees would not be surprised if coworkers were discharged" for committing offenses misses the point. The question before us is whether a cease-and-desist order is sufficient to remedy the consequences of the Respondent's unlawful spying activity. And that question, in turn, requires us to consider the employees' entitlement to effective representation from their bargaining representative. It is highly unlikely that the employees here will be comforted or feel vindicated by an order that does no more than direct their employer to behave, the next time.

[10] For the foregoing reasons, we disagree with the majority's alternative rationale that, even independent of Sec. 10(c), policy considerations weigh against a make-whole remedy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVE YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Brewers and Maltsters, Local Union No. 6, affiliated with the International Brotherhood of Teamsters over the installation and use of hidden surveillance cameras within our facility and other mandatory subjects of bargaining.

WE WILL NOT refuse to respond in a timely fashion to requests for information respecting matters relevant to unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive bargaining representative of our employees with respect to the installation and use of hidden surveillance cameras within our facility and other mandatory subjects of bargaining.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of our employees by timely providing the Union with information relevant to unit employees.

ANHEUSER-BUSCH, INC.