LABOR LAW—SECTION 7 RIGHTS—EMPLOYER MUST ALLOW UNION STEWARD'S PRESENCE AT INTERVIEW WHERE EMPLOYEE HAS REASONABLE FEAR OF DISCIPLINE—*NLRB v. J. Weingarten, Inc.*, 95 S. Ct. 959 (1975); *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*, 95 S. Ct. 972 (1975).

Catherine King, a long-time employee of Quality Manufacturing Company, raised a commotion on her work floor one afternoon because she felt that her work quota was unreasonable.[1] When directed to report to the office of the firm's president to discuss the disturbance, she complied, but insisted that she be accompanied by a union representative at the interview.[2] In response, the president demanded that she meet with him alone, as the management " 'didn't consider it a union matter.' "[3] This impasse culminated in the discharge of King and of the two union representatives who had attempted to accompany her.[4]

A complaint based, *inter alia*, on these discharges came before the National Labor Relations Board.[5] The Board, in *Quality Manufacturing Co.*,[6] ruled that the employer's actions constituted an unfair labor practice in violation of section 8(a)(1) of the National Labor Relations Act.[7] In so holding, the Board established, as "the only course consistent with all of the provisions of [the] Act,"[8] that

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[1] Quality Mfg. Co., 195 N.L.R.B. 197, 205 (1972) (Trial Examiner's opinion).

[2] *Id.* at 203.

[3] *Id.* at 205.

[4] *Id.* at 203-04. King was originally accompanied by her union "Chairlady," then, on another day, by the assistant chairlady. While all three were suspended, only King and the chairlady were discharged for the attempted representation. The assistant chairlady was discharged for attempting to grieve the firing of the other two—clearly a violation of section 8(a)(3). *See id.* at 203-04, 208. For the provisions of section 8(a)(3) see note 39 *infra*.

[5] The other subjects of the complaint, dismissed by the Trial Examiner, related to discriminatory threats and layoffs. Quality Mfg. Co., 195 N.L.R.B. at 202, 210-11 (1972).

[6] 195 N.L.R.B. 197 (1972).

[7] *Id.* at 199. For the provisions of this section see text accompanying note 38 *infra*. The Act dates back to 1935. Act of July 5, 1935, ch. 372, 49 Stat. 449. The Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, incorporated major revisions to expand the original Act's coverage to organized labor unions as well as employers. The Act was further amended by Law of Oct. 22, 1951, ch. 534, 65 Stat. 601; Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519; and Law of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. The amended National Labor Relations Act [hereinafter cited as N.L.R.A.] is codified at 29 U.S.C. § 151 *et seq.* (1970), *as amended*, 29 U.S.C.A. § 151 *et seq.* (Supp. 1975).

[8] 195 N.L.R.B. at 198 (Board's opinion). Unfortunately for the Board's position upon subsequent judicial review, this statement constituted the only indication of the Board's statutory reliance in its opinion. *See* note 97 *infra*.

where an employer wishes to conduct an investigatory interview with an employee, then—as a right under section 7 of the Act[9]—

> if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence.[10]

Since the employees were fired for trying to exercise this statutory right, the Board ordered Quality to cease such practices and reinstate the discharged employees.[11] When the Board tried to enforce this decision in the court of appeals for the Fourth Circuit, however, enforcement was denied.[12] The Fourth Circuit held that this new rule could be supported neither by the Act nor by the Board's prior decisions.[13]

A similar unfair labor practice case involved Leura Collins, an employee of J. Weingarten, Inc., a Texas retail chain store.[14] When suspicion arose as to her honesty, she was interrogated privately by the store manager and a security agent.[15] Throughout the interview she asked that some union representative be present, but these requests were refused on the ground that "this was a private matter between her and the Company."[16] Although the questioning eventually exonerated her from a charge of stealing, at the end of the interview she immediately broke into tears, complaining "that the only thing she had ever gotten from the store without paying for it was her free lunch."[17] This remark led the manager to reopen the interview.[18] While other stores in the chain did have a free lunch policy for employees, and Collins had once worked in such a store, no such policy was authorized in his store.[19] After

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[9] For the provisions of section 7 see text accompanying note 37 *infra*.

[10] 195 N.L.R.B. at 198-99 (footnote omitted).

[11] *Id.* at 199-200; *see id.* at 211-12 (Trial Examiner's order).

[12] NLRB v. Quality Mfg. Co., 481 F.2d 1018, 1021 (4th Cir. 1973). Only that portion of the Board's order pertaining to the assistant chairlady's discharge for attempting to file grievances was enforced. *Id.* For the facts of this discharge see note 4 *supra*.

[13] NLRB v. Quality Mfg. Co., 481 F.2d 1018, 1023-25 (4th Cir. 1973). For an analysis of the Fourth Circuit's reasoning on this point see note 97 *infra*.

[14] J. Weingarten, Inc., 202 N.L.R.B. 446, 446 (1973) (Administrative Law Judge's opinion).

[15] *Id.* at 448. Around the middle of June 1972, Don Hardy, employed by Weingarten as a "Loss Prevention Specialist," was investigating a complaint that Collins was removing cash from her register. After two days of observation, however, Hardy found nothing to corroborate this charge, and so informed Store Manager York. *Id.*

[16] *Id.; see id.* at 446 n.1 (Board's opinion).

[17] *Id.* at 448 (Administrative Law Judge's opinion).

[18] *Id.*

[19] *Id.* at 447. "[M]ost if not all" of the workers in Collins' department, including the

Collins revealed that many employees regularly took free lunches, steps were taken to halt the practice, but no disciplinary action was taken against her.[20]

The Board, sitting en banc, adopted the findings of the Administrative Law Judge[21] that this interrogation constituted an unfair labor practice according to the rule established in *Quality*.[22] The Fifth Circuit, adopting the reasoning of the Fourth Circuit on this issue, denied enforcement of the Board's ruling.[23]

The United States Supreme Court granted certiorari in both these cases and set them for argument in tandem.[24] In *NLRB v. J. Weingarten, Inc.*,[25] Justice Brennan, speaking for the majority, reversed the circuit court and held that an employee does have a statutory right to decline to submit to an interview which reasonably could result in disciplinary action, unless his employer allows him to be accompanied by a union representative. This right would be recognized even if no disciplinary action were subsequently taken.[26] While the National Labor Relations Act does not explicitly grant workers this right, it was held to be inherent in the section 7 right " 'to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' "[27] Since the Board had not exceeded its powers to " 'appl[y] the general provisions of the Act to the complexities of industrial life,' "[28] the case was remanded to the Fifth

department manager, invariably took lunch without paying. *Id.* Collins' revelation of the free lunch practice understandably astonished her manager. He and Hardy therefore reopened the interview. *Id.* at 448. Because of Collins' insistence that her free lunches were a legitimate fringe benefit, Hardy called his superior, a company vice-president, to obtain confirmation. While this call was being made, Collins again requested of York that her union steward be present, and again this was refused. Hardy's telephone call proved inconclusive, so the interview was finally terminated. *Id.*

[20] *Id.* at 448-49. Although no discipline seems to have been imposed on Collins, Hardy had calculated that Collins would have owed the company upwards of $160 for the lunches she had taken, and prepared a statement to that effect. Collins refused to sign this. *Id.* at 448.

[21] *Id.* at 446 (Board's opinion). As of August 19, 1972, the title of "Trial Examiner" had been changed to that of "Administrative Law Judge." *See, e.g.*, Globe-Union, Inc., 199 N.L.R.B. 80, 80 n.1 (1972).

[22] J. Weingarten, Inc., 202 N.L.R.B. 446, 449 (1973) (Administrative Law Judge's opinion) (relying on Mobil Oil Corp., 196 N.L.R.B. 1052, 1052 (1972), and Quality Mfg. Co., 195 N.L.R.B. 197, 198-99 (1972)).

[23] NLRB v. J. Weingarten, Inc., 485 F.2d 1135, 1137-38 (5th Cir. 1973). For a more extensive discussion of the Fifth Circuit's reasoning in this decision see note 98 *infra*.

[24] 416 U.S. 969 (1974); 416 U.S. 968 (1974).

[25] 95 S. Ct. 959 (1975).

[26] *Id.* at 965-67.

[27] *Id.* at 965 (quoting from N.L.R.A. § 7, 29 U.S.C. § 157 (1970)).

[28] 95 S. Ct. at 968 (quoting from NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)).

Circuit with directions to enforce the Board's order.[29] On the strength of this holding, the same majority, in *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*,[30] similarly reversed the Fourth Circuit's decision and ordered that the Board's holding be enforced. Justice Powell, joined by Justice Stewart, dissented in both cases.[31] He could not envision the Board's rule as being within the scope of protection intended to be afforded employees by the Act,[32] and would have affirmed the courts of appeal. Chief Justice Burger also filed a dissent in both cases.[33] He agreed that the Board had the discretionary power to create such a new rule, but felt the cases should have been remanded to the Board for a more extensive explication of the reasons for its "major change in policy."[34]

The express policy of the National Labor Relations Act is to promote

> the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . and by restoring equality of bargaining power between employers and employees.[35]

This restoration was effected through federal protection of collective bargaining, thus putting labor on an equal footing with organized management; industrial peace would best result from negotiations between equals. The keystone, then, of this congressional labor policy is the Act's guarantee of employees' associational economic rights,[36] set out in section 7:

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[29] 95 S. Ct. at 969.

[30] 95 S. Ct. 972, 975 (1975).

[31] 95 S. Ct. at 969; 95 S. Ct. at 975.

[32] 95 S. Ct. at 972. Justice Powell's basic position was that an employer's disciplinary procedures should be determined solely through the collective bargaining process because what the Act was designed to protect was this process and not its subject matter. *Id.* at 970-72.

[33] *Id.* at 976. This dissent spoke to both *Weingarten* and *Quality*. *Id.*

[34] *Id.*

[35] N.L.R.A. § 1, 29 U.S.C. § 151 (1970). The driving force behind this legislation was Senator Wagner of New York, who introduced the original bill. F. WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 205-06 (1951). *See* 79 CONG. REC. 2368-72 (1935). The bill's passage was spurred in large measure by the collapse of the then-existent national labor relations administrative scheme (the National Industrial Recovery Act) brought on by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). F. WITNEY, *supra* at 206. For a concise description of the NLRA and the *Schechter* decision see 1 J. JENKINS, LABOR LAW § 2.1 (1968). *See generally* Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 571-73 (1967).

[36] *See* N.L.R.A. § 1, 29 U.S.C. § 151 (1970):

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . .

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .[37]

These rights are given effect by section 8 of the Act. Section 8(a)(1) provides that

> [i]t shall be an unfair labor practice for an employer—
> . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .[38]

Specific employer unfair labor practices are elaborated in sections 8(a)(2)-(5).[39] Because of the breadth of section 8(a)(1), a violation of any of these other sections will also constitute a "derivative" violation of 8(a)(1).[40] Interference with section 7 rights not covered by these subsequent specifications is said to be an "independent" violation of 8(a)(1).[41] Such "independent" violations have traditionally embraced employer interference with employee activities of an organizational nature such as coercive promises or threats designed to discourage union membership, election, or other activities; coercive interrogation of employees about their union involvement; or spying on union meetings.[42]

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . .
> . . . .
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[37] *Id.* § 7, 29 U.S.C. § 157.

[38] *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1).

[39] *Id.* § 8(a)(2), 29 U.S.C. § 158(a)(2), prohibits employer domination of unions; *id.* § 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits "discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organizations"; *id.* § 8(a)(4), 29 U.S.C. § 158(a)(4), prohibits discrimination against employees who file unfair labor charges with the Board; and *id.* § 8(a)(5), 29 U.S.C. § 158(a)(5), prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees."

[40] ABA SECTION OF LABOR RELATIONS LAW, THE DEVELOPING LABOR LAW 65-66 (C. Morris ed. 1971) [hereinafter cited as Morris]; 1 J. JENKINS, LABOR LAW § 2.22 (1968). This concept was accepted by the Board almost from its inception. Morris, *supra* at 66; *see* 3 NLRB ANN. REP. 52 (1939).

[41] 2 J. JENKINS, LABOR LAW § 5.2 (1969); Morris, *supra* note 40, at 66.

[42] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 608 (1969) (threats); NLRB v.

Employees have continually asserted a right to union representation during an employer's investigatory interview.[43] The Board, however, has been slow to find a coherent statutory basis for such a right even though it has broad powers to investigate, determine, and prevent unfair labor practices.[44]

The first case in which this issue came before the Board was *Ross Gear & Tool Co.*,[45] decided in 1945. There an employee was discharged for insubordination because she refused to meet with the firm's labor relations supervisor unless the union bargaining committee, of which she was a member, were present. Although the supervisor had not revealed beforehand the purpose of the interview, the Board found that it was about a matter concerning the employee's actions partly "in her individual capacity" and "partly as a member of the union committee."[46] Since the company had previously acknowledged the interest of the union by dealing with the union committee on this matter, the employee had a right to require that the company continue to deal with the committee as a whole.[47] Therefore, the Board concluded, the discharge based on the exercise of this right was a discriminatory interference with union activities in violation of sections 8(a)(1) and 8(a)(3)—pertaining to discrimination to discourage union membership.[48]

Exchange Parts Co., 375 U.S. 405, 409-10 (1964) (proffer of benefits to influence union vote); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 104-05 & n.7 (5th Cir. 1963) (surveillance of union meeting); NLRB v. Bendix Corp. (Research Laboratories Div.), 299 F.2d 308, 309 (6th Cir.), *cert. denied*, 371 U.S. 827 (1962) (interrogation as to union sympathies).

[43] *See, e.g.*, Diamond Reo Trucks, Inc., 212 N.L.R.B. No. 97, 87 L.R.R.M. 1189, 1190 (1974); Service Technology Corp., 196 N.L.R.B. 845, 846 (1972); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594, 596-97 (1968); Ross Gear & Tool Co., 63 N.L.R.B. 1012, 1024-25 (1945).

[44] *See* N.L.R.A. § 10, 29 U.S.C. § 160 (1970). While the Board has investigatory and fact-finding powers, its unfair-labor-practice determinations and orders may be enforced only through suit in the federal courts. *Id.* §§ 10(b)-(m), 29 U.S.C. §§ 160(b)-(m).

[45] 63 N.L.R.B. 1012 (1945).

[46] *Id.* at 1033-34 (Board's opinion); *see id.* at 1028-29 & n.22. As a union committee member, Mae Ford had been instrumental in extending smoking privileges in the plant to women, an accomplishment which gained her the enmity of some of her non-union female coworkers. *Id.* at 1021-23. When called in by a supervisor to explain this discord, she demanded that the entire committee attend the session. *Id.* at 1028.

[47] *Id.* at 1033-34. In light of the Board's approach to the case, the general question of employee representation was passed over:

> Assuming, *without deciding*, that an individual employee is not entitled to insist upon union representation whenever he or she may be called in by management to be admonished, in the instant case Ford was being called in . . . about a matter concerning which the respondent had already dealt with [the union] committee as the *exclusive* bargaining representative.

Id. (emphasis added).

[48] *Id.* at 1034. For the provisions of these sections see notes 38-39 *supra* and accompanying text.

That the company considered the discharge to be grounded on "insubordination" was held to be "immaterial."[49]

The Seventh Circuit, however, denied enforcement.[50] The court held that the Board's decision was "without substantial support."[51] Its own review of the facts led it to conclude that no union activities were relevant for the proposed interview, and that the charge of insubordination was essentially admitted both by the employee and by union officials.[52] The court further voiced a policy argument which would be repeated in later employee-representation cases:

> A decision of this issue favorable to the Board would mean that any employee could with impunity refuse to comply with a direction by management and in effect abrogate a [discharge-for-insubordination] rule such as the one here involved.[53]

The issue did not come before the Board again until *Dobbs Houses, Inc.*[54] was decided nearly twenty years later. In *Dobbs*, after deciding that the employee's discharge was not motivated by anti-union discrimination, the Trial Examiner reviewed the Board's holding in *Ross Gear*. Noting that the Board had there failed to reach the question of denial of representation in the absence of discrimination, he refused to expand the Board's policy.[55] The

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[49] 63 N.L.R.B. at 1034 (Board's opinion). Insubordination can easily be used as a pretext for discharge in employee-representation cases. *See, e.g.*, Quality Mfg. Co., 195 N.L.R.B. 197, 209 (1972) (Trial Examiner's opinion). Insubordination—by definition—is "disobedience to constituted authority." BLACK'S LAW DICTIONARY 942 (4th ed. 1951).

[50] NLRB v. Ross Gear & Tool Co., 158 F.2d 607, 614 (7th Cir. 1947).

[51] *Id.* at 613. The standard of support "by substantial evidence on the record considered as a whole" is the proper standard of judicial review of Board decisions. N.L.R.A. § 10(e), 29 U.S.C. § 160(e) (1970).

[52] 158 F.2d at 613-14. The court concentrated its gaze on the departmental discord which occasioned the Ford interview without looking to its causal background. *Id.* at 612. This analysis gave no weight to Ford's activities *in her capacity as union committeewoman*. It was these activities which gave rise to the smoking controversy.

[53] *Id.* at 613 (quoted in NLRB v. Quality Mfg. Co., 481 F.2d 1018, 1021 (4th Cir. 1973)). *See also, e.g.*, NLRB v. J. Weingarten, Inc., 95 S. Ct. 959, 971 (1975) (Powell, J., dissenting) ("The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management."); Dobbs Houses, Inc., 145 N.L.R.B. 1565, 1571 (1964) (Trial Examiner's opinion) ("An employer undoubtedly has the right to maintain day-to-day discipline . . . and . . . only exceptional circumstances should warrant any interference with this right.").

[54] 145 N.L.R.B. 1565 (1964). A major factor in the lack of Board consideration of the issue in this interim was the failure of the Board's General Counsel to issue complaints. *See* Administrative Rulings of NLRB General Counsel, Case No. SR-2382, 52 L.R.R.M. 1181 (1962); Case No. SR-2245, 52 L.R.R.M. 1083 (1962); Case No. K-71, 37 L.R.R.M. 1076 (1955); Case No. 289, 29 L.R.R.M. 1454 (1952). Arnold Ordman, the General Counsel in *Dobbs*, was appointed in 1963. *See* 142 N.L.R.B. III n.1 (1964).

[55] 145 N.L.R.B. at 1570-71.

Board adopted his opinion without comment and dismissed the complaint.[56]

But the Board could not avoid this recurring issue for long and in the mid-1960's began to formulate a new method of treatment to replace the narrow 8(a)(3) theory of *Ross Gear*. Since the subject of an employee's discharge could often form the basis for a subsequently filed formal grievance,[57] and since section 9(a) of the Act gave unions the right to participate in a hearing on such a grievance,[58] it would be possible to extend this statutory right to a pre-discharge investigatory hearing.[59] Since this right would belong to the union rather than to an individual employee, the abrogation of it would be primarily a refusal to bargain with the representative, a violation of section 8(a)(5) and only derivatively a violation of the employee's right.[60] In contrast to the *Ross Gear* rationale, this theory would obviate the necessity for considering whether the cause for discipline was a union-related activity.

At first, the General Counsel and the Board had kept a sharp distinction between pre-discipline and post-discipline rights, but a subsequent General Counsel began to argue a new theory:[61] When a fact-finding interrogation involved "the *possibility* of disciplinary action," representation should be required under the Act "because an 'inchoate' grievance was in the making."[62] In 1967, a three-member panel of the Board adopted a modified version of this rationale in *Texaco, Inc., Houston Producing Division.*[63]

In that case, Gilberto Alaniz, a Texaco employee, was observed by his foreman to be taking home a can of kerosene and was immediately suspended pending investigation. Although both Alaniz and his bargaining representative requested that he be afforded union representation at the investigatory interview, Texaco denied this request. Prior to the questioning, however, the com-

[56] *Id.* at 1565.

[57] *See, e.g.*, S. SLICHTER, J. HEALEY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 651-52 (1960) [hereinafter cited as SLICHTER].

[58] N.L.R.A. § 9(a), 29 U.S.C. § 159(a) (1970), allows employees access to their bargained-for grievance mechanism without using their bargaining representative, but requires that such a representative must have been allowed an "opportunity to be present at [the] adjustment" of the grievance. This right may, however, be waived by the union. *See* Globe-Union, Inc., 97 N.L.R.B. 1026, 1042 (1952).

[59] *Cf.* Bethlehem Steel Co., 89 N.L.R.B. 341, 343 (1950) (Board's opinion) (union's right to attend employee's "adjustment" of grievance with foreman).

[60] *See* Chevron Oil Co., 168 N.L.R.B. 574, 578 (1967) (Trial Examiner's opinion).

[61] *See* note 54 *supra*.

[62] Chevron Oil Co., 168 N.L.R.B. 574, 578 (1967) (Trial Examiner's opinion) (emphasis in original).

[63] 168 N.L.R.B. 361 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969).

pany representatives told Alaniz that if he were unwilling to proceed without representation, the meeting would be called off; but Alaniz remained, answered questions, and eventually signed an admission. As a result of this admission, he was suspended without pay for nearly a month.[64]

Since no grievance had been filed, the Trial Examiner had dismissed both 8(a)(5) and 8(a)(1) complaints.[65] The Board termed this approach "too narrow."[66] Reasoning that the meeting was not merely part of a fact-finding investigation but an attempt by the company "to provide a 'record' to support [its] disciplinary action,"[67] the panel held that Texaco's exclusion of union representation constituted a refusal to bargain, in violation of section 8(a)(5).[68] Since Alaniz had specifically asked that this union right be enforced, Texaco had violated section 8(a)(1).[69]

Upon appeal, however, the Fifth Circuit denied enforcement.[70] Reviewing the record as a whole, the court found the evidence "overwhelming" that the questioning was merely investigative and hence should not call for a bargaining representative.[71]

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[64] Texaco Inc., Houston Producing Div. v. NLRB, 408 F.2d 142, 143-44 (5th Cir. 1969); 168 N.L.R.B. at 361 (Board's opinion).

[65] 168 N.L.R.B. at 361-62 (Board's opinion).

[66] *Id.* at 362.

[67] *Id. Cf.* SLICHTER, *supra* note 57, at 625:

> The prospect of grievance review of a disciplinary action puts the employer on notice that he must have evidence to support his charge against an employee.

[68] 168 N.L.R.B. at 362. For the provisions of section 8(a)(5) see note 39 *supra*.

[69] 168 N.L.R.B. at 362. The Board explained:

> [I]t is clear that . . . the Company sought to deal directly with Alaniz concerning matters affecting his terms and conditions of employment. Yet, as noted, the employees . . . had selected the Union to deal with the Respondent on such matters and there is no evidence that either Alaniz—assuming he could have done so—or the Union had waived to any extent the right of representation . . . .

Id.

[70] Texaco Inc., Houston Producing Div. v. NLRB, 408 F.2d 142, 146 (5th Cir. 1969).

[71] *Id.* at 144. The essence of the court's rationale was succinctly stated: "The function of the interview was to question Alaniz, not to bargain with him." *Id.* (footnote omitted).

The court viewed the panoply of section 7 rights as restricted to "the right to bargain collectively through . . . chosen representatives," not looking to the "other mutual aid or protection" clause. *Id.; cf.* notes 104-05 *infra*. The Board had apparently viewed section 7 and section 8(a)(5) as having equal weight in its decision. *See* 168 N.L.R.B. at 362. The court's restricted view of section 7 would comport with a conceptual tying of the section 7 right to the 8(a)(5) duty. Thus, the Board's position, as presented to the court in *Texaco*, seems to have been that the 8(a)(1) violation it had found was derivative, not independent. This being so, any employee's right to representation would have to hinge on the existence of a bargaining situation. While such a reading is not obvious from the Board's *Texaco* opinion, it was the interpretation presented on petition for enforcement. *See* 408 F.2d at 144-45. And it was the interpretation the Board subsequently adopted. *See* Quality Mfg. Co., 195 N.L.R.B. 197, 198 (1972).

Even if the company had committed itself before the interview to some form of disciplinary action, the court envisioned no reason for requiring the incidents of collective bargaining prior to the filing of a grievance.[72]

In reaching this conclusion, the court relied on two cases which had been subsequently decided by the Board in which the complaints of denial of representation had been dismissed. In *Chevron Oil Co.*,[73] the Board adopted without comment the ruling of the Trial Examiner, whose decision had been issued prior to the Board's *Texaco* opinion. The Trial Examiner reasoned that since Chevron had made no decision on the need for discipline before the challenged interviews had taken place, no grounds for a grievance existed at that time. Until management had determined that discipline would be in order—at which time an "inchoate" grievance would come into being—the right to representation could not arise.[74] Similarly, in *Jacobe-Pearson Ford, Inc.*,[75] the Board overruled the Trial Examiner and dismissed the representation complaint. Since the fact-finding interview had been scheduled to take place prior to any management commitment to pursue disciplinary sanctions,[76] the Board followed *Chevron* and distinguished *Texaco* on its facts.[77]

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[72] 408 F.2d at 145. In Chevron Oil Co., 168 N.L.R.B. 574, 578 (1967) (Trial Examiner's opinion) (cited with approval by the *Texaco* court, 408 F.2d at 144-45), the Board adopted for the first time the disciplinary-investigatory distinction. This distinction was reinforced in the Board's decision in Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594, 594-95 (1968) (Board's opinion, reversing Trial Examiner's decision on this issue) (cited with approval by the *Texaco* court, 408 F.2d at 145).

[73] 168 N.L.R.B. 574 (1967).

[74] *Id.* at 578-79 (Trial Examiner's opinion). To the General Counsel's contention that an "inchoate" grievance existed, the Trial Examiner countered:

> [A] grievance in the statutory sense does not arise unless and until a management decision has been formulated to affect adversely an employee's wages, hours, or other terms and conditions of employment, and the decision is on the brink of implementation.

Id. at 578. Since the *Chevron* fact situation indicated that the interviewer had no power to discipline the employees involved, the Trial Examiner concluded that no imminent threat of change—and hence no duty to bargain—could have existed at the interviews. *Id.*

[75] 172 N.L.R.B. 594, 594-95 (1968) (Board's opinion).

[76] *Id.* When called into the office for questioning about his previous day's work refusal, the employee, a union member, demanded to be accompanied by a union representative. *Id.* at 596 (Trial Examiner's opinion). The company's refusal resulted in an impasse which culminated in a strike by all department employees, and the scheduled interview never took place. *Id.* at 598.

The company maintained that no decision to impose discipline had been reached, but the Trial Examiner found strong evidence to the contrary. *Id.* at 600.

It is noteworthy that the employee's coworkers were so apprehensive about the proposed interview that they unanimously voted to strike in support of his position. *Id.* at 598.

[77] *Id.* at 594-95 & n.5. The Board, as in *Chevron*, noted that the proposed interviewer

Approving of the Board's modified rule in *Chevron* and *Jacobe-Pearson*, the Fifth Circuit saw no reason to distinguish *Texaco*, and concluded:

> [S]ince the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining.[78]

While the Board did not, in subsequent cases, acquiesce in the Fifth Circuit's refusal to distinguish *Texaco* from *Jacobe-Pearson*, its decisions in all these cases—prior to its application of the *Quality* rule—reached the same result: dismissal of the denial-of-representation complaints.[79] Moreover, the right promised in *Texaco* became more and more circumscribed.[80]

Then, in *Quality*, the Board broached a new method of analysis. Even though the Trial Examiner specifically found that there had been no refusal to bargain with the union—and hence no 8(a)(5) violation—King's discharge represented the denial of her section 7 "right to engage in a protected activity."[81] This was thus an independent, non-derivative violation of section 8(a)(1).[82]

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was not authorized to discharge employees, *id.* at 594 n.4, and concluded: "The 'potential' for disciplinary action was remote and the purpose of the meeting essentially for the gathering of information." *Id.* at 595.

[78] 408 F.2d at 145 (footnote omitted).

[79] *See* cases cited note 80 *infra*. *But see* Emerson Elec. Co., U.S. Elec. Motors Div., 185 N.L.R.B. 346, 348 (1970) (Member Jenkins, concurring).

[80] It was established in later Board decisions that (1) the employee must have "reasonable grounds for believing" that discipline "was imminent or . . . probable," Dayton Typographic Serv., Inc., 176 N.L.R.B. 357, 361 (1969); *see, e.g.*, Southwestern Pipe, Inc., 179 N.L.R.B. 364, 380 (1969); (2) the employee—not his union—must request representation, *see* Lafayette Radio Electronics Corp., 194 N.L.R.B. 491, 492 (1971) (applied to 8(a)(1) but not 8(a)(5) violation); (3) no representation was needed for "every routine interview," Wald Mfg. Co., 176 N.L.R.B. 839, 846 (1969), *enforced on other grounds*, 426 F.2d 1328 (6th Cir. 1970); *see* Texaco, Inc., Los Angeles Sales Terminal, 179 N.L.R.B. 976, 983-84 (1969); (4) insubordinate insistence on representation would go unprotected, *see, e.g.*, American Beef Packers, Inc., 196 N.L.R.B. 875, 882-83 (1972); (5) company policy of conducting interrogations by persons not empowered to impose discipline or of withholding decisions until after interviews would foreclose the application of *Texaco, see, e.g.*, Illinois Bell Tel. Co., 192 N.L.R.B. 834, 836 (1971) (no authority to discipline); Wald Mfg. Co., *supra* at 846 (decision after interview); (6) an employee may be denied the representation of a union steward who is also the subject of the investigation, *see, e.g.*, Service Technology Corp., 196 N.L.R.B. 845, 845 n.1 (1972); (7) a disciplinary interrogation will be classed as "investigatory" if there is an underlying purpose of further fact-finding, for example, the location of valuable stolen merchandise, Lafayette Radio Electronics Corp., *supra* at 493-94; and (8) because an employer has reasonable doubt as to the union's majority status, the *Texaco* rule will not be applied, *see* United Aircraft Corp., 179 N.L.R.B. 935, 937-38 (1969), *enforced*, 440 F.2d 85, 100 (2d Cir. 1971).

[81] Quality Mfg. Co., 195 N.L.R.B. 197, 210 (1972) (Trial Examiner's opinion).

[82] For a discussion of the independent-derivative distinction see text accompanying notes 40-42 *supra*.

Accompanying this shift in concentration from the union's rights to the individual employee's rights was a change in the test for when this section 7 right would arise: An employee's statutory right should not depend on management's subjective intentions.[83] Instead, an objective test was formulated: reasonable fear by the employee that the interview could adversely result in discipline.[84] Since this is the employee's right, it would be under his control. The right could only come into being at his request and would be waived if he raised no timely objection at the interview.[85] While the Board's new test made reference to an employee's fear of a change in "working conditions," a clarification properly narrowed the scope of the rule's intent:

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview . . . .[86]

The objective standard of "reasonableness" was the foundation of the Board's new test; thus the disciplinary-investigatory dichotomy was not relevant to the determination of this independent 8(a)(1) violation.[87]

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[83] The Board and the courts have in the past rejected tests based on *employees'* subjective motivations or fears. *See, e.g.,* NLRB v. Gissel Packing Co., 395 U.S. 575, 608 (1969); B.M.C. Mfg. Corp., 113 N.L.R.B. 823, 825 n.8 (1955) (Board's opinion).

[84] Quality Mfg. Co., 195 N.L.R.B. 197, 198-99 (1972) (Board's opinion). *Cf.* Dayton Typographic Serv., Inc., 176 N.L.R.B. 357, 361 (1969) (Trial Examiner's opinion) (quoted in note 80 *supra*). The objective nature of such a test has been strongly questioned by Board Member Kennedy. *See, e.g.,* Mobil Oil Corp., 196 N.L.R.B. 1052, 1053-56 (1972) (dissenting opinion); Quality Mfg. Co., *supra* at 200-01 (dissenting opinion). *But see id.* at 198 n.3 (majority opinion), where the majority of the Board panel explained: " 'Reasonable ground' will of course be measured . . . by *objective* standards under all the circumstances of the case." (Emphasis added.) In point of fact, the National Labor Relations Act itself, to choose but one facet of law, mandates "reasonable grounds" tests. *See* N.L.R.A. §§ 8(a)(3)(A), (B), 10(*l*), 29 U.S.C. §§ 158(a)(3)(A), (B), 160(*l*) (1970).

[85] *See* 195 N.L.R.B. at 198-99. The Board did not hold that there was an absolute right to representation, but merely that no discipline could be threatened or imposed for requesting such representation. That the employee must exercise this right only by making his request before or during the interview was clarified in a later case. *See* Mobil Oil Corp., 196 N.L.R.B. 1052, 1052 n.2 (1972).

On the other hand, if the employer refused to allow union representation at an investigatory interview, he would have to end the interview immediately and could proceed to act on information otherwise obtained. 195 N.L.R.B. at 199.

[86] 195 N.L.R.B. at 199.

[87] The Board's opinion in *Quality* made no such distinction and indeed couched its reasoning specifically within the context of the hitherto untouchable investigatory interview. *See* 195 N.L.R.B. at 198; *cf.* Chevron Oil Co., 168 N.L.R.B. 574, 578 (1967) (Trial Examiner's opinion). *But see, e.g.,* Western Elec. Co., 205 N.L.R.B. No. 46, 84 L.R.R.M. 1041, 1042

The power of the *Quality* test was soon demonstrated in *Mobil Oil Corp.*,[88] where the Board reversed the Trial Examiner's pre-*Quality* dismissal of the denial-of-representation complaint.[89] Likewise, in *National Can Corp.*,[90] a Board panel affirmed the Trial Examiner's finding of an 8(a)(1) violation under the *Quality* rule.[91] Then, *Weingarten* extended the rationale of *Quality* to a situation where no disciplinary measures were taken against the interviewed employee,[92] a result impossible under the *Texaco* rule. The employer's continuation of questioning after denying the employee's request for representation alone violated the Act.[93] Had the company's refusal of a representative been immediately followed by termination of the interview without discipline, its actions would have met with Board approval.[94] On the other hand,

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(1973) (Member Penello, concurring) (disciplinary-investigatory distinction should be maintained).

[88] 196 N.L.R.B. 1052 (1972) (three-member panel). This case concerned a company investigation into employee theft, which eventually resulted in the suspension or discharge of six employees and the exoneration of two. *Id.* at 1057-59 (Trial Examiner's opinion).

[89] *Id.* at 1052. The Trial Examiner reasoned that while union representation had been denied at employee interrogations, the company had made no decision as to discipline prior to the interviews, and, in addition, the questioning was conducted by security agents who had no disciplinary powers. *Id.* at 1060 (Trial Examiner's opinion). The Board panel, to the contrary, noted that two of the questioned employees had asked for union representation as soon as they had discovered the nature of Mobil's investigation. Therefore, citing *Quality*, the panel found an 8(a)(1) violation. *Id.* at 1052 & n.3 (Board's opinion).

This decision went further than *Quality* inasmuch as in *Mobil*, the discharges complained of were not grounded upon the employees' insistence on union representation as in *Quality*, but were clearly for cause. *Compare id.* at 1059 & n.4 (Trial Examiner's opinion) *with* Quality Mfg. Co., 195 N.L.R.B. 197, 198 (1972) (Board's opinion). The Board explained its decision with the following rationale:

> [I]t is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

196 N.L.R.B. at 1052.

[90] 200 N.L.R.B. 1116 (1972) (three-member panel). In this case a union shop steward was discharged because he insisted on representing a coworker at a disciplinary meeting. *Id.* at 1118 (Trial Examiner's opinion).

[91] *Id.* at 1116 (Board's opinion). The Trial Examiner had found an 8(a)(1) violation, under *Quality* and, in addition, an 8(a)(3) violation, since the discharged employee was acting in his capacity as a union steward. *Id.* at 1123 (Trial Examiner's opinion).

[92] J. Weingarten, Inc., 202 N.L.R.B. 446, 449 (1973) (Administrative Law Judge's opinion); *see* note 20 *supra* and accompanying text. In so doing, the Administrative Law Judge relied on the rationale expressed in the *Mobil Oil* case and quoted in note 89 *supra*. 202 N.L.R.B. at 449.

[93] *See* 202 N.L.R.B. at 449 (Administrative Law Judge's opinion).

[94] *See, e.g.*, Western Elec. Co., 205 N.L.R.B. 1153 (1973) (Board's opinion) (no violations because interviews were terminated upon employees' requests for union representation).

a threat of disciplinary reprisals used to enforce an employee's attendance at a non-represented interview would not be approved.[95]

In establishing the existence and scope of this new section 7 right in these cases, however, the Board offered little explanation of or reasoning for its departure from the *Texaco* rule.[96] It is not surprising, then, that the circuit court opinions denying enforcement to *Quality*[97] and *Weingarten*[98] made no clear distinction between the incidents of the *Texaco* rule and the requirements of the *Quality* rule. Although the Seventh Circuit in *Mobil Oil Corp. v. NLRB*[99] did recognize that the Board had made such a distinction, it maintained that the new rule proposed by the Board was outside of the "historical context and the central purpose" of section 7.[100]

With this the *Weingarten* Court disagreed:

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[95] *See, e.g.*, New York Tel. Co., 203 N.L.R.B. No. 180, 83 L.R.R.M. 1353 (1973).

[96] NLRB v. J. Weingarten, Inc., 95 S. Ct. 959, 976 (1975) (Burger, C.J., dissenting); NLRB v. Quality Mfg. Co., 481 F.2d 1018, 1025 (4th Cir. 1973); Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 333 (1974).

In addition, the Board developed a split of opinion over the *Quality* rule. *See, e.g.*, J. Weingarten, Inc., 202 N.L.R.B. 446, 446 n.2 (1973). Board Member Kennedy initially dissented from the Board's ruling in Quality Mfg. Co., 195 N.L.R.B. 197, 200 (1972). He has since steadfastly maintained his position. *See, e.g.*, Diamond Reo Trucks, Inc., 212 N.L.R.B. No. 97, 87 L.R.R.M. 1189, 1190 (1974) (three-member panel, concurring opinion); Mobil Oil Corp., 196 N.L.R.B. 1052, 1053-56 (1972) (three-member panel, dissenting opinion).

Similarly, Member Penello, since his appointment, has also adhered to the modified *Texaco* rule. *See, e.g.*, Diamond Reo Trucks, Inc., 212 N.L.R.B. No. 97, 87 L.R.R.M. 1189, 1190 (concurring opinion); Western Elec. Co., 205 N.L.R.B. No. 46, 84 L.R.R.M. 1041, 1042 (1973) (three-member panel, concurring opinion).

See also Western Elec. Co., 198 N.L.R.B. No. 82, 80 L.R.R.M. 1705, 1707 (1972) (Members Kennedy & Penello constitute majority of three-member panel).

[97] NLRB v. Quality Mfg. Co., 481 F.2d 1018, 1025 (4th Cir. 1973), *enforcing in part and denying enforcement in part to* 195 N.L.R.B. 197 (1972). The Fourth Circuit enforced only that part of the Board's decision which found illegal the discharge of the assistant chairlady for attempting to file grievances. 481 F.2d at 1021. For the facts of this case see note 4 *supra*.

In denying enforcement to the balance of the Board's *Quality* decision, the court held impermissible the Board's distinguishing of the *Texaco*-rule cases and noted the paucity of explanations in the Board's opinion. 481 F.2d at 1024-25. It concluded by branding the Board's decision an attempt "to alter or rearrange employer-employee relations to suit its every whim." *Id.* at 1025.

[98] NLRB v. J. Weingarten, Inc., 485 F.2d 1135, 1138 (5th Cir.), *denying enforcement to* 202 N.L.R.B. 446 (1973). The Fifth Circuit, which had previously denied enforcement in *Texaco*, specifically described that decision as "binding precedent." 485 F.2d at 1137. It noted the denial of enforcement of the other *Quality*-rule cases, and proceeded to determine that

> [w]hile a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, *such a need does not arise at an investigatory interview.*

Id. at 1138 (emphasis added). This statement was later criticized by the Supreme Court. *See* note 113 *infra* and accompanying text.

[99] 482 F.2d 842, 844-46 (7th Cir. 1973), *denying enforcement to* 196 N.L.R.B. 1052 (1972).

[100] 482 F.2d at 846. While the court did allow that the language of section 7 was broad on its face, it felt that the circuit court decisions of *Ross Gear* and *Texaco*, the strong

> The Board's holding is a permissible construction of "concerted activities . . . for mutual aid of [*sic*] protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.[101]

After reviewing the scope of the *Quality* rule,[102] the Court pointed out that the rule comported with the Act "even though the employee alone may have an immediate stake in the outcome" of the investigation.[103] The presence of a union representative at an investigatory interview constitutes "an assurance to other employees . . . that they too can obtain his aid and protection if called upon to attend a like interview,"[104] and was analogized to a

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collective-bargaining emphasis of section 7, and "history" belied the contention that any authority other than that of the Board could support the *Quality* rule. *Id.* at 846-48. For this reason, it held the Board's rulings to be impermissible statutory constructions; for

> [i]f the Board's interpretation of §§ 7 and 8(a)(1) correctly reflected the will of Congress, we are persuaded that this interpretation would have been recognized many years ago.

Id. at 848. Yet, in denying the Act's protection to a right which admittedly came within the literal wording of section 7, the Seventh Circuit classed an employee's right to representation at an interview by which he may well be fired with

> such unprotected activity as mutiny (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942)), participation in a violent sitdown strike (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)), engagement in a breach-of-contract strike (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939)), and disparagement of the employer's product in circumstances akin to physical sabotage (*N.L.R.B.* v. *Local No. 1229, I.B.E.W.*, 346 U.S. 464 (1953)) . . . .

Brief for Petitioner at 22, Ladies' Garment Workers' Union v. Quality Mfg. Co., 95 S. Ct. 972 (1975) (citing Mobil Oil Corp. v. NLRB, 482 F.2d 842, 846 n.11 (7th Cir. 1973)) (citation omitted).

[101] NLRB v. J. Weingarten, Inc., 95 S. Ct. 959, 965 (1975) (quoting from N.L.R.A. § 7, 29 U.S.C. § 157 (1970)).

[102] 95 S. Ct. at 963-65. One of the aspects of the Court's review is derived from none of the Board's decisions:

> [T]he employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. . . . The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview.

Id. at 965. This point was established only by the General Counsel for the Board in his brief. Brief for NLRB at 22, NLRB v. J. Weingarten, Inc., 95 S. Ct. 959 (1975) (quoted in 95 S. Ct. at 965). *See also* note 129 *infra*.

[103] 95 S. Ct. at 965.

[104] *Id.* The Court noted that the union representative would play a major role in overseeing disciplinary procedures to prevent the accretive growth of arbitrariness in managerial disciplinary decisions. *Id.* & n.6. One commentator has argued that since "[a] slow accretion of custom and practice may come to control the handling of disciplinary disputes"—certainly a subject of collective bargaining—the bargaining representative has a central interest, if not a duty, to exercise vigilance. Comment, *supra* note 96, at 338. Such oversight becomes crucial in the light of possible future arbitration:

> Evidence of custom and past practice may be introduced [in an arbitration hearing] to support allegations that clear language of the written contract has been amended . . . .

F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 389 (3d ed. 1973).

spontaneous walkout of employees to protest the treatment of one of their fellows.[105] The union steward's presence at such an interview is thus a direct representation of the interests of all employees; a demand for his assistance is a demand for collective assistance. Furthermore, since the underlying purpose of the Act was "to eliminate the 'inequality of bargaining power between employees . . . and employers,' "[106] to rule otherwise would be to perpetuate rather than " 'to redress the perceived imbalance of economic power between labor and management.' "[107] The worker who is interrogated by organized management—particularly without the emotional support of his fellows—"may be too fearful or inarticulate to relate accurately the incident being investigated, or

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Thus, it has been argued, an investigatory interview is an appropriate forum for invoking the theory of "constructive concerted activities." Comment, *supra* note 96, at 336-38. Under this doctrine, concerted activity—required under section 7—may be discerned even in the actions of a single employee, "even when acting solely for his personal benefit, if he is attempting to implement [contractual] rights collectively formulated." Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152, 158 (1972) (footnote omitted); *see, e.g.*, NLRB v. Northern Metal Co., 440 F.2d 881, 887-88 (3d Cir. 1971) (dissenting opinion); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967); Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962) (Board's opinion).

This doctrine, however, presupposes a contested interpretation of a specific contract term. *See* Comment, *supra* note 96, at 337. If, for example, the meaning of the contract as to interview situations has been well established to the effect that representation may be denied, the employee will not benefit from this theory. *Cf.* Illinois Bell Tel. Co., 63 Lab. Arb. 968, 981 (1974).

[105] 95 S. Ct. at 965 (citing NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942)). In *Peter Cailler Kohler*, Judge Learned Hand presented this classic analysis:

> When all the other workmen in a shop make common cause with a fellow workman . . . and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

130 F.2d at 505-06. *But cf.* Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968) (discussed at note 76 *supra* and accompanying text). "Solidarity" implies concertedness, and is of direct interest to all employees who may ever be subject to managerial discipline. The union steward's presence at the interview is representative, then, of not only the interviewee but all his coworkers as well, and "he fulfills the same role that the employees themselves fulfill in a walkout or other protest." Comment, *supra* note 96, at 340.

Even though the analogy is not perfect in that representation occurs prior to the action—imposition of discipline—which would precipitate a walkout, representation "is correspondingly less disruptive than the latter forms of concerted activity." *Id.* In this sense, an employer's grant of union representation at an investigatory interview could forestall such work stoppages and thus redound to his own benefit. *Id.*

[106] 95 S. Ct. at 966 (quoting from N.L.R.A. § 1, 29 U.S.C. § 151 (1970)).

[107] 95 S. Ct. at 966 (quoting from American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).

too ignorant to raise extenuating factors."[108] A chosen representative would presumably have the understanding and power of articulation not only to bring out relevant facts and extenuating circumstances on behalf of the employee, but also to aid the employer by clarifying the issues involved.[109] Deferring this needed representation until after an employee has suffered the " 'economic capital punishment' "[110] of discharge would overly burden the employee's case.[111] Moreover, the Court took notice of recent developments in industrial surveillance techniques. Faced with management's increased powers in this regard, the employee's " 'need for experienced assistance' " would only increase.[112] Since the Board, with its "cumulative experience in dealing with labor-management relations"—and not a reviewing court—is best qualified to determine the extent of an employee's need for representation, the Board has the power to devise a balanced remedy which is not in conflict with the Act.[113] Finally, argued the Court, the right to representation conferred by *Quality* "is in full harmony with actual industrial practice"[114] as exemplified by current trends in collective bargaining. Recently, contract provisions[115] as well as arbitration decisions[116] have recognized a right to representation.

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[108] 95 S. Ct. at 966.

[109] *Id.* & n.7.

[110] O. PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM 28 (1959). Because not only immediate income but sometimes substantial accrued benefits, such as seniority, sick leave, or vacation time, may be involved, discharge is the heaviest industrial penalty an employee is subject to. *See, e.g.*, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 621 (3d ed. 1973).

[111] 95 S. Ct. at 966-67. The Court explained:

> At that point . . . it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

Id. at 967.

[112] *Id.* at 967 n.10 (quoting from Brief for NLRB at 27 n.22, NLRB v. J. Weingarten, Inc., 95 S. Ct. 959 (1975)).

[113] 95 S. Ct. at 968. Justice Brennan sharply criticized the Fifth Circuit's decision below:

> The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists . . . .

Id. For the Fifth Circuit's ruling on this point see note 98 *supra.*

[114] 95 S. Ct. at 968.

[115] *See, e.g.*, 1 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 21:22 (General Motors Corp. and Auto Workers, ¶ 76a); 1 *id.* 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, art. V(5)).

[116] *See, e.g.*, Universal Oil Prods. Co., 60 Lab. Arb. 832, 836 (1973) (past practice); Chevron Chem. Co., 60 Lab. Arb. 1066, 1071 (1973) ("a well-established current of arbitral

In sum, then, since the Board's construction of section 7 as propounded in *Quality* and expanded in *Weingarten* was a reasonable accommodation to employees' needs as intensified by recent industrial practice, and since this construction was not prohibited by "the language or tenor of the Act,"[117] it would easily pass the test of " 'limited judicial review.' "[118]

Chief Justice Burger disagreed. Pointing out that the Board had not explained the rationale for its new interpretation in its decisions but had left that task to the General Counsel on appeal, he would have sent both cases back to the Board for further explanation "so that it may enlighten us as to the reasons for this marked change in policy."[119] Although he agreed that the Board could exercise discretion in evolving new policy, he felt that the record gave insufficient indication of whether that discretion had been abused, and thus accused the majority of rubberstamping administrative decisions.[120]

Even stronger objections were voiced by Justices Powell and Stewart. They would hold that the Board exceeded its discretion. Failing to perceive the Board's arrival at the *Quality* rule as embodying "a logical 'evolutionary approach,' "[121] Justice Powell accused the Board of "turn[ing] its back on" its own precedent and the intent of Congress.[122] Section 7, he suggested, was "for the most part" aimed only at ensuring the strength of the collective

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authority"); Thrifty Drug Stores Co., 50 Lab. Arb. 1253, 1260-62 (1968) (interview results unreliable, analogy drawn to Miranda v. Arizona, 384 U.S. 436 (1966)); Arcrods Co., 39 Lab. Arb. 784, 788 (1962) (reasonable grounds to fear discipline); Braniff Airways, Inc., 27 Lab. Arb. 892, 899-900 (1957) (alternative holding) (grievance existed because "discipline might result").

Contra, e.g., Illinois Bell Tel. Co., 63 Lab. Arb. 968, 981 (1974) (union failed to achieve inclusion of representation clause in collective bargaining agreement); E.I. du Pont de Nemours & Co., 29 Lab. Arb. 646, 651 (1957) (contracted right of representation to arise only upon filing of written grievance).

[117] 95 S. Ct. at 968. Had this not been the case, explained the Court, it would be improper judicial review for any court " 'to stand aside and rubber stamp' " such a decision. *Id.* (quoting from NLRB v. Brown, 380 U.S. 278, 291 (1965)). The majority opinion justified its support of the Board's new ruling in *Quality* on the grounds that (a) the Act's language did not prohibit such a construction and (b) the primary responsibility for balancing such policy questions is the Board's. 95 S. Ct. at 968; *see, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

[118] 95 S. Ct. at 968 (quoting from NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957)).

[119] 95 S. Ct. at 976 (Burger, C.J., dissenting).

[120] *Id.* (citing NLRB v. Metropolitan Ins. Co., 380 U.S. 438, 443-44 (1965)). *Cf.* note 117 *supra.*

[121] 95 S. Ct. at 970 (Powell, J., dissenting) (quoting from *id.* at 967 (majority opinion)).

[122] *Id.* at 970.

bargaining process.[123] Failing a specific statutory command to the contrary, management's "free[dom] to discharge employees at will" should be subject only to limitations arrived at through this collective bargaining process.[124] The fact that employee representation is often—as the majority had noted—the subject of contractual or arbitral agreement, he concluded, was only a further suggestion "that union representation at investigatory interviews is a matter that Congress left to the bargaining process."[125]

The Court, in *Weingarten* and *Quality*, has taken a great stride in recognizing a statutory right of an employee to have a union representative[126] in an interview which could result in discipline.[127] And yet a discrepancy exists in the Court's decision; what is given—in dictum—with one hand is taken away—likewise in dictum—by the other. In justifying the Board's new construction of section 7, the Court conducted a lengthy exegesis into the crucial

[123] *Id.* at 971. The dissenting Justices took note of the recent decision of Emporium Capwell Co. v. Western Addition Community Organization, 95 S. Ct. 977 (1975), wherein the Court thus described employees' section 7 rights:

> These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining."

Id. at 984 (quoting from N.L.R.A. § 1, 29 U.S.C. § 151 (1970)).

[124] 95 S. Ct. at 971.

[125] *Id.* at 972. The dissenters explained:

> [T]he nature and amount of information required [by any given employer] for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. . . .
>
> This variety and complexity necessarily calls for flexible and creative adjustment.

Id. at 971. Such a field of variation among employers with differing needs, they believed, should call for individually bargained-for responses—not a nationwide federal rule. *Id.* at 971-72.

[126] All of the Board's decisions to date in this field have involved circumstances where there was a union present to provide representation. Justice Powell, at least, has contended in *Weingarten* that the *Quality* rule should allow for representation by any other employee of the interviewee's choice in the absence of a recognized bargaining agent. *Id.* at 969 & n.1. One commentator on this question, following the analogy to representation in the grievance mechanism, points out the possibility of allowing any desired person to provide representation as long as he were not also a representative of a "rival union." Brodie, *Union Representation and the Disciplinary Interview,* 15 B.C. IND. & COM. L. REV. 1, 46-47 (1973). *See also id.* at 10.

[127] It could be argued that the Court has not overstepped established caselaw in upholding the Board's new section 7 interpretation. *Cf.* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (spontaneous walkout of nonunionized employees to protest lack of heat held protected); NLRB v. Century Broadcasting Corp., 419 F.2d 771, 780 (8th Cir. 1969) (actions of sole union member at company held protected concerted activity); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir.), *cert. denied,* 335 U.S. 845 (1948) (insurance salesmen on individual contracts who drafted letter to company suggesting an appointment for supervisory vacancy held protected).

role such a representative should fill.[128] On the other hand, the majority opinion stated that " '[t]he employer . . . is free to insist that he is only interested . . . in hearing the employee's own account of the matter under investigation.' "[129] Such dicta led Justice Powell to observe that this limited the protection of *Quality* to "the privilege to insist on the mute and inactive presence of a fellow employee."[130] Such a result was contemplated by neither the Court nor the Board.

What the Board did in *Quality*, in contrast to its prior decisions in such cases as *Ross Gear* and *Texaco*, was to apply a new method of analysis based on section 7 rights. Whereas earlier tests concentrated on organizational rights—the employee's union activities in *Ross Gear* and the union's role in adjusting grievances in *Texaco*—the *Quality* analysis looked directly to the concerted interests of the

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[128] 95 S. Ct. at 965-66 & n.7. The representative furnishes "aid and protection" to the interviewee. *Id.* at 965. Although "his presence need not transform the interview into an adversary contest," *id.* at 966, he would be able

> "to clarify the issues . . . to bring out the facts and the policies concerned . . . to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent."

Id. n.7 (quoting from Independent Lock Co., 30 Lab. Arb. 744, 746 (1958)). The Court went on to indicate that the steward will use discretion more appropriate to his capacity as a union official than as a mere coworker:

> "The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. . . . The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and presuasion [*sic*] . . . . It is entirely logical that the steward will employ his office . . . so as to limit formal grievances to those which involve differences of substantial merit."

95 S. Ct. at 966 n.7 (quoting from Caterpillar Tractor Co., 44 Lab. Arb. 647, 651 (undated)).

[129] 95 S. Ct. at 965 (quoting from Brief for NLRB at 22, NLRB v. J. Weingarten, Inc., 95 S. Ct. 959 (1975)). This argument was accepted by the Court to emphasize the fact that the type of interview covered by the *Quality* rule was not a bargaining situation as found in *Texaco*. *See* note 102 *supra*. As support for this contention, the General Counsel relied upon the following passage from the Board's opinion in *Mobil:*

> [W]e are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations.

196 N.L.R.B. at 1052 n.3 (quoted in Brief for NLRB, *supra* at 22).

Such a reading of *Mobil's* dicta is questionable. There, the Board had proceeded to clarify its quoted statement:

> The Employer is still free to impose disciplinary suspension or discharge without the presence of the Union *if such disciplinary actions are made without a prior discussion or consultation with the affected employee.*

196 N.L.R.B. at 1052 n.3 (emphasis added). Thus the contention raised by the General Counsel, relying on a quotation out of context, lacks support from any decision of the Board.

[130] 95 S. Ct. at 971 n.5.

interviewee and his coworkers. In so doing, a new definition was formulated for a "disciplinary interview": not when a grievable decision was made, but when an employee needed the help of his fellows. A reasonable fear of discipline was sufficient to trigger the Act's protection; thus the *Quality* test is far broader than that of *Texaco*. But under *Texaco*, the union's duty was clear: a duty to bargain over a grievance. Under the *Quality* rule, however, neither the Board nor the Court has spelled out the rights or duties of the union at such an interview. The lack of clear guidelines can only lead to confusion and discord between union and management.[131]

Aside from the argument that section 9(a) of the Act allows the right of active union participation at the interview,[132] the union representative has the duty—not merely the right—to participate actively, grounded on the union's "duty to provide assistance to an employee who has invoked his section 7 rights."[133] This duty is part of a union's general duty of fair representation, which itself is derived from section 7.[134] Such "assistance" would clearly comport with the description of the representative's role given by the Court in *Weingarten*. Until the Board further clarifies the statutory authorization for the employee representative's active participation, the Court's decision in *Weingarten* can only be viewed as "of limited value to the employee or to the stabilization of labor relations generally."[135]

On the other hand, certain criticisms of the *Quality* rule seem largely ill-founded. The mere fact that the Board has arrived at a reasonable rule after pursuing a convoluted decisional history should not detract from that rule's validity; as Justice Frankfurter

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[131] For example, under the Court's opinion, an employer could justifiably discharge a union steward for attempting to speak for an employee under investigation. On the other hand, a steward could be fired for acting as if the interview were a grievance-adjustment session. With hindsight as the only rule, no prospective guide to action may be formulated. Labor relations discord would necessarily result.

[132] *See, e.g.*, Comment, *supra* note 96, at 340-43, 348-49. This argument looks to subsequent grievance of any discipline imposed. Even if grievance rights do not accrue to the union during the meeting in question, the union, it is contended, should have access to the factual background of the employer's actions which it may later be called upon to grieve. Such access is needed to build an effective case. *See id.* at 341.

[133] *Id.* at 348.

[134] *See id.* at 347-48. The modern duty of fair representation is based on the union's duty to refrain from "restrain[ing] or coerc[ing] . . . employees in the exercise of the rights guaranteed in section 7," outlined in N.L.R.A. § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970). *See* Miranda Fuel Co., 140 N.L.R.B. 181, 184-86 (1962), *enforcement denied*, 326 F.2d 172, 180 (2d Cir. 1963). *See also* Crenshaw v. Allied Chem. Corp., 387 F. Supp. 594, 598-600 (E.D. Va. 1975); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

[135] 95 S. Ct. at 971 n.5 (Powell, J., dissenting).

so aptly noted: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[136]

The Board's interpretation of the *Quality* rule, as expanded in *Weingarten*, clearly comes within the language of section 7: "concerted activities for the purpose of collective bargaining *or other mutual aid or protection*."[137] The language of the clause itself further indicates that while Congress may have intended primarily to protect labor unions and the collective bargaining process,[138] other means of allowing for the exercise of "mutual protection" were not to be foreclosed by the Act. That the *Quality* rule appears in bargained contracts or arbitral decisions should not detract from its status as a statutory right. Other rights clearly granted by the Act are also embraced by contract.[139]

The "genius" of the National Labor Relations Act, one commentator has noted, "lay in its scope and generality,"[140] yet labor law is a field peopled with individuals. One of Congress' foremost objectives in passing the Act—to strengthen "[t]he relative weakness of the isolated wage earner caught in the complex of modern industrialism"[141]—is, as the Court in *Weingarten* and *Quality* recognizes, peculiarly applicable to the case of the lone interviewee faced with serious economic reprisal.

Paul H. Ambos

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[136] Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (dissenting opinion).

[137] N.L.R.A. § 7, 29 U.S.C. § 157 (1970) (emphasis added).

[138] *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Organization, 95 S. Ct. 977, 984 (1975); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937); N.L.R.A. § 1, 29 U.S.C. § 151 (1970); S. REP. No. 573, 74th Cong., 1st Sess. 2-4, 8 (1935).

[139] *See generally* Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 68-80 (1957). The rationale of such a practice was thus explained to the Supreme Court:

> The substance of the statutory right may be enhanced by particularized contractual definition of its scope . . . and incorporation of the statutory right into the contract performs the important function of eliminating debate as to its existence by the people on the factory floor who know their contract if not the law. . . . Thus, discrimination because of union membership or nonmembership is prohibited by 40 percent of contracts, but it can hardly be suggested that the right which the contract protects is therefore not statutory.

Brief for Petitioner at 27, Ladies' Garment Workers' Union v. Quality Mfg. Co., 95 S. Ct. 972 (1975) (footnotes omitted).

[140] 2 J. JENKINS, LABOR LAW § 4.8 (1969).

[141] S. REP. No. 573, 74th Cong., 1st Sess. 3 (1935). This purpose could well be even stronger in today's industrial life:

> In our increasingly dependent society, in the context of an employment situation in which collective action is the norm, it seems to be an anomaly to see the individual not merely standing alone, but being forced to stand alone on matters intimately related to his or her economic existence.

Brodie, *supra* note 126, at 49.