EMPLOYEE RIGHT TO REPRESENTATION IN EMPLOYER INTERVIEWS: *WEINGARTEN* AND PROGENY

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I. INTRODUCTION

Although endeavoring in large part to ensure a smooth and uncomplicated system of industrial relations, the Supreme Court in *NLRB v. Weingarten*[1] failed to adequately protect the rights of the working force.[2] The shortcomings of *Weingarten* have been compounded over the years by decisions of the National Labor Relations Board (NLRB or Board) and the courts.[3] While these bodies generally purport to balance employer and employee rights,[4] their efforts have, in fact, significantly limited the effectiveness of the employee's right to union representation at employer-employee interviews.

The employee's guarantee of a union representative's assistance during an interview which the employee reasonably believes will result in disciplinary action[5] is undermined by the fact that the guarantee does not apply where a pre-determined decision to discipline the employee is made and the interview is simply used to announce that fact.[6] Additionally, if the employee chooses to exercise his or her

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[1] 420 U.S. 251 (1975).

[2] Six months after *Weingarten*, Professor Wallace Nelson expressed the same concern postulating that the *Weingarten* decision may represent only a Pyrrhic victory. *See* Nelson, *Epilog: The Right to Union Representation During Management Investigation of Alleged Rule Infraction*, 26 LAB. L.J. 594 (1973); text accompanying notes 22-24 *infra*.

[3] *See, e.g.*, Prudential Ins. Co. v. NLRB, 661 F.2d 398 (5th Cir. 1981) (union may waive employee's *Weingarten* rights in collective bargaining contract); AAA Equipment Serv. Co. v. NLRB, 598 F.2d 1145 (8th Cir. 1979) (no right to assistance of union representative where mere threat of discipline); Mount Vernon Tanker Co. v. NLRB, 549 F.2d 571 (9th Cir. 1977) (ship captain's insistence upon seaman's attendance at logging without presence of union representative not unfair labor practice); Stewart-Warner Corp., 253 N.L.R.B. No. 16 (1980) (employer not guilty of unfair labor practice by refusing to allow employee union representation in meeting with supervisors since reasonable person would have viewed meeting as effort to clarify employee duties); Meharry Medical College, 236 N.L.R.B. 1396 (1978) (telephonic advice from union's attorney amounted to adequate representation). *See* discussion in Part III *infra*.

[4] *See Weingarten*, 420 U.S. at 261-62; section 1 of the National Labor Relations Act, 29 U.S.C. § 151 (1976).

[5] 420 U.S. at 256-60; *see* notes 8-10 *infra* and accompanying text.

[6] *See* Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 411 (9th Cir. 1978); Baton Rouge Water Works Co., 246 N.L.R.B. No. 161 slip op. at 7 (Dec. 14, 1979); text accompanying notes

Weingarten right to union representation, the employer may refuse to conduct the interview altogether, thereby denying the employee the right to be heard during an investigation which may result in disciplinary action.[7]

This Article will comment on these and other contradictions and inadequacies of the so-called "representation right"—a right which our decision-making bodies have only haphazardly endeavored to afford the members of the labor force.

II. *NLRB v. Weingarten*

The seminal case in the area of employee representation rights during meetings with employers is *Weingarten*.[8] In that case, the Supreme Court held that section 7 of the National Labor Relations Act[9] grants an employee the right to the assistance of a union representative during an investigatory interview which the employee reasonably believes may result in disciplinary action.[10] In reaching its conclusion, the Court found that this right of representation was inherent within section 7's guarantee of employee freedom to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[11]

Extending section 7 to the interview context not only guarded the individual employee's job interests in the potentially coercive setting of a one-on-one employer interview,[12] but also protected the entire

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29-34 *infra*. *See generally* Brodie, *Union Representation and the Disciplinary Interview*, 15 B.C. Indus. & Com. L. Rev. 1 (1973).

[7] 420 U.S. at 258; *see* text accompanying notes 22-24 *infra*.

[8] In *Weingarten*, the employer operated a chain of retail stores. The employee, Laura Collins, worked at a lunch counter located within one of the stores. Acting upon a security investigator's report that Collins was stealing money from the cash register, the store manager summoned Collins to an interview. Several times during questioning, Collins "asked the store manager to call the union shop steward or some other representative to the interview." 420 U.S. at 254. Her requests, however, were denied. No disciplinary action was ever taken against Collins by management; yet after the shop steward learned of the incident, an unfair labor practice proceeding was commenced by Collins' union. *Id.* at 254-56.

[9] 29 U.S.C. § 157 (1976).

[10] 420 U.S. at 256-60. This right had previously been recognized by the NLRB, but the United States courts of appeals had refused to enforce the Board's implementation orders. *See*, 1973). The right was finally recognized by the Supreme Court in *Weingarten* and its companion case, Garment Workers v. Quality Mfg. Co., 420 U.S. 296 (1975). In *Weingarten*, the Court found that because the employer interfered with the employee's section 7 rights, a section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), violation was perpetrated. 420 U.S. at 264; *see* note 22 *infra*.

[11] 420 U.S. at 260 (citing 29 U.S.C. § 157 (1976)).

[12] *Id.* at 260, 262. As the Court stated:

[t]he [National Labor Relations Act] is designed to eliminate the "inequality of

bargaining unit from the imposition of unjust punishment by an employer.[13] Moreover, in the case of a "fearful and inarticulate" employee, the presence of a "knowledgeable union representative" could save the employer production time by facilitating the disclosure of facts relevant to the "incident occasioning the interview."[14]

The Court did, however, recognize that this right was subject to certain limitations previously defined by the NLRB.[15] First, the right only arises in situations where the employee requests representation.[16] "In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."[17] Second, the employee may only demand union representation as a condition of participation in an interview "where the employee reasonably believes the investigation will result in disciplinary action."[18] Third, the "exercise of the right may not interfere with legitimate employer prerogatives."[19] Thus, the employer is not obligated to conduct the interview after the employee requests union representation.[20] Finally, the employer is not required "to bargain with any union representative . . . attending the investigatory interview."[21]

The third limitation imposed on the representation right is the most disturbing. While it is clear from *Weingarten* that an employer is guilty of an unfair labor practice[22] if he denies the employee's request for union representation and proceeds with the interview,[23] no violation will be found if the employer honors the request but then

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> bargaining power between employees . . . and employers." Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

Id. at 262 (citations omitted); *see* Note, *Union Representation at Investigatory Interviews: The Subsequent Development of* Weingarten, 28 CLEV. ST. L. REV. 127, 128 (1979).

[13] 420 U.S. at 260-61.

[14] *Id.* at 263.

[15] *Id.* at 256 (citing Quality Mfg. Co., 195 N.L.R.B. 197 (1972), and Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).

[16] *Id.* at 257.

[17] *Id.*

[18] *Id.* (footnote omitted).

[19] *Id.* at 258.

[20] *Id.* at 258-59.

[21] *Id.* at 259.

[22] Section 8(a)(1) of the National Labor Relations Act 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." 29 U.S.C. § 158(a)(1) (1976); *see* note 10 *supra*.

[23] 420 U.S. at 258; *see* text accompanying note 19 *supra*.

refuses to interview the employee on the basis of "employer prerogatives."[24] This limitation could arguably be used by the employer as a means of forcing the employee to choose between seeking union representation and thus foregoing any benefits that might derive from an interview or waiving his request for representation and proceeding to the interview without union assistance. In the first instance, the employer would be free to make his own investigation based on potentially erroneous secondhand facts and hearsay; in the latter case, the employee would be subjected to the same pressures which *Weingarten* attempted to remedy. The net result then tends to detract from the effectiveness of the very right secured by *Weingarten*.

III. POST-*WEINGARTEN* DEVELOPMENTS

A. Baton Rouge Water Works: *Disciplinary v. Investigatory Meetings*

The *Weingarten* decision appears only to have addressed the issue whether section 7 granted a right of union representation in the context of investigatory interviews.[25] In *Certified Grocers of California, Ltd.*,[26] the Board extended *Weingarten* to include disciplinary interviews, finding that there is the same necessity for representation at an interview held merely to inform the employee of a pre-determined disciplinary decision as there is at an interview conducted to elicit facts pertaining to the employee's conduct.[27] The Board indicated that what it deemed important was whether the employee reasonably believed that the interview might result in disciplinary action, not whether the interview was labelled disciplinary or investigatory.[28]

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[24] 420 U.S. at 258. In an apparent attempt to explain this anomaly, the Court in *Weingarten* deferred to the Board's finding that:

> 'This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment . . . , he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts, as might have been gleaned through the interview.'

420 U.S. at 259 (quoting Quality Mfg. Co., 195 N.L.R.B. 197, 198-99 (1972)).

[25] *See* 420 U.S. at 252, 262, 264, 267; note 8 *supra*.

[26] 227 N.L.R.B. 1211 (1977), *enforcement denied*, 587 F.2d 449 (9th Cir. 1978).

[27] *Id.* at 1214.

[28] *Id.*

The Court of Appeals for the Ninth Circuit denied enforcement of the Board's decision in *Certified Grocers*,[29] citing its earlier decision in *Alfred M. Lewis, Inc. v. NLRB*.[30] The *Lewis* case provided that *Weingarten* should not be read to require a right of representation when the interview is simply to inform the employee that he is being disciplined.[31] According to the court, that right does not arise unless one purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.[32]

The position of the Ninth Circuit Court of Appeals was recently adopted by the Board in *Baton Rouge Water Works*,[33] which expressly overruled *Certified Grocers* to the extent that the Board now holds:

> [U]nder the Supreme Court's decision in *Weingarten* an employee has no section 7 right to the presence of his union representative at a meeting with the employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.[34]

While the Board made clear that its holding was to apply only in instances where the employer had reached a "final" disciplinary decision "prior to the interview,"[35] this qualification adds little protection to employee rights in view of the problems posed by the Board's position. Most troublesome is the fact that denial of an employee's

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[29] 587 F.2d 449 (9th Cir. 1978).

[30] 587 F.2d 403 (9th Cir. 1978).

[31] *Id.* at 411.

[32] *Id.* at 410.

[33] 246 N.L.R.B. No. 161 (Dec. 14, 1979).

[34] *Id.*, slip op. at 7.

[35] *Id.* at 8. From a practical standpoint the distinction between disciplinary and investigatory interviews may be difficult to sustain. *See* Spitzer, *Labor Relations Law*, 22 B.C. L. REV. 53, 60 (1980). It is unrealistic to assume that a purely disciplinary interview will always remain so. Normally, an employee faced with the threat of disciplinary action will attempt to defend his actions. The employer, seeking to further investigate the facts of the incident, may respond with specific inquiries. At some point this exchange of dialogue will take on the character of an investigatory meeting. In this instance, the same problems sought to be alleviated by *Weingarten* could re-emerge.

While it has been held that an employee's right to representation in a disciplinary meeting re-attaches where the employer initiates a critique of the employee's work, see Texaco, Inc., 246 N.L.R.B. No. 164 (1977), it is questionable whether most employees will be aware of this right. Moreover, even assuming that a representative is requested, if the employer refuses and later maintains that the employee never made the request, there will be no one to corroborate the employee's version of the incident. Once again, the employee's job interests may not be fairly represented. To avoid arbitrary distinctions and evidentiary problems, it has been suggested that the courts return to the question raised in *Weingarten*: "Is this meeting one that the employee reasonably believes could result in discipline?" Comment, *The Repercussions of* Weingarten: *An Employee's Right to Representation at Investigatory Interviews*, 64 MARQ. L. REV. 173, 181-82 (1980).

right to union representation at purely disciplinary meetings curtails the bargaining unit's section 7 right to engage in "concerted activity" for "mutual aid and protection."[36] The presence of a union representative at a disciplinary interview provides insight into management policies and allows the bargaining unit to remain apprised of employer expectations.[37] If the union is unable to educate itself as to management attitudes, reasons for discipline may not be accurately assessed and further disciplinary action may be taken, thereby jeopardizing job security.[38]

The Supreme Court in *Weingarten* did not intend to restrict an employee's right to union representation at disciplinary interviews. Rather, the Court's goal was to extend the representation right to all interviews which the employee reasonably fears will result in disciplinary action. Board decisions prior to *Weingarten* had clearly established the right to union representation during disciplinary meetings.[39] The majority opinion in *Weingarten* specifically referred to these decisions as "imposing a mandatory affirmative obligation to meet with the union representative . . . in the case of the disciplinary interview."[40] Indeed, as Member Penello suggested in a vigorous

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[36] *See* note 9 *supra*.

[37] *See* Spitzer, *supra* note 35, at 59.

[38] As one commentator pointed out:

> [A]n employee who is being disciplined might not understand fully the evaluation of his work that takes place at the disciplinary meeting. When he resumes work he might be subjected to additional discipline simply because he has not understood completely the employer's evaluation. The presence of a union representative at a disciplinary meeting where the employee's work is discussed could help all the employees better understand why the discipline is being imposed.

Id.. While the employee could still avail himself of union representation during a post-interview grievance procedure, such a course would be both costly and time consuming. *See* Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 344 (1974). Moreover, the grievance procedure would not necessarily provide the same insight into employer expectations as would the "informal exchange between employer and employee" during the disciplinary meeting. *See* Spitzer, *supra* note 35, at 59.

It should also be noted that under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), either party to a collective bargaining agreement can bring suit in federal district court for breach of contract. As a prerequisite to such action, however, it is generally required that a party exhaust contractual remedies under the collective bargaining agreement. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel v. Maddox, 379 U.S. 650 (1965). In most cases, resort must first be made to the grievance procedure, a traditional avenue of relief normally provided for in collective bargaining agreements. *See generally* Gemrich, *The Grievance Procedure in the Administration of Collective Bargaining Agreements*, in SYMPOSIUM ON LABOR RELATIONS 293, 301 (R. Slevenko ed. 1961).

[39] *See, e.g.*, Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967).

[40] 420 U.S. at 260 (citing Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361 (1967)).

dissent in *Baton Rouge*, the pre-existing right to union representation at disciplinary meetings "formed the foundation for the section 7 rights established by the Supreme Court's decision in *Weingarten*."[41]

The NLRB, by adopting the view held by the Ninth Circuit Court of Appeals in *Lewis*, has misconstrued the Court's holding in *Weingarten*. An employee who is summoned by an employer for the express purpose of being disciplined, nevertheless may have a reasonable fear prior to the actual interview that this interview will result in disciplinary action. Accordingly, upon learning that his fear has been confirmed, the employee should be granted a union representative if so desired. To allow otherwise contradicts *Weingarten* and prior decisions, and undermines employees' section 7 rights.

B. Amax, Inc.: *Pre-interview Consultations*

In *Amax, Inc. (Climax Molybdenum Co.)*,[42] the NLRB was faced with the issue whether *Weingarten* also grants employees a right to consult with a union representative prior to the interview.[43] The *Amax* Board found that an employer did in fact interfere with an employee's section 7 rights by preventing a union representative from consulting with two employees before an investigatory interview which the employees believed would result in disciplinary action.[44]

In support of its position, the Board determined that under the *Weingarten* rationale if a union representative is to be an effective advocate for a "fearful or inarticulate" employee and "is to be 'knowledgeable' so that he can 'assist the employer by eliciting . . . facts,' " he should be allowed "to consult beforehand with the employee to

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[41] 246 N.L.R.B. No. 161 at 20.

[42] 227 N.L.R.B. 1189 (1977), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978).

[43] *Id.* at 1190. The Board and the Court of Appeals for Tenth Circuit took different views of the salient issue in the case. The Board perceived the question to be whether the *employee* had the right "to confer with the union representative before the interview." *Id.* On the other hand, the Tenth Circuit articulated the issue as whether a *union representative* has a right to meet with employees prior to the "initial investigatory meeting." Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 362 (10th Cir. 1978).

The difference in view is attributable to the factual setting of the case. Two Climax employees had been involved in "an altercation" during working hours. When their supervisor learned of the incident, he advised them 17 1/2 hours in advance that an investigatory meeting would be held. The employees' union was also informed by the supervisor. *Id.* at 361. Neither employee requested union assistance for the interview. Prior to the meeting, a union representative requested that he be permitted to meet with the employees "on company time prior to the interview." *Id.* The request was denied by management. *Id.*

No disciplinary action was ever taken against either employee. An unfair labor practice action was nonetheless brought by the employees' union "charging that Climax had unlawfully threatened [the employees] with reprisals because of their involvement in protected concerted activity." *Id.* at 362.

[44] 227 N.L.R.B. at 1190.

learn his version of the events and to gain a familiarity with the facts."[45] To preclude "such advance discussion" would place "blinders" on the representative during the interview since there would be no opportunity to become adequately familiar with the subject matter of the interview.[46] As such, the Board was convinced that "[t]he right to representation clearly embrace[d] the right to prior consultation."[47]

The Court of Appeals for the Tenth Circuit[48] was less certain of this "embraced" right of prior consultation and, consequently, denied enforcement of the Board's decision in *Amax*.[49] In the court's view, *Weingarten* did not mandate an absolute right to prior consultations; rather, it only required that an employee be afforded an "adequate opportunity" to meet with his representative before the interview.[50] The court did not, however, provide any guidelines for determining what constituted an "adequate opportunity."[51] More importantly, in refusing to read *Weingarten* as requiring a right to prior consultation, the Tenth Circuit Court of Appeals failed to recognize specific goals which formed the basis of *Weingarten*.

In establishing a right to representation during employer interviews, the Supreme Court found that both employer and employee could derive some benefit from such a right. An employee subjected to employer interrogation "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise

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[45] *Id.*; *see* notes 12-14 *supra* and accompanying text.

[46] 227 N.L.R.B. at 1190.

[47] *Id.*

[48] Climax Molybdenum Co. v. NLRB, 584 F.2d 360 (10th Cir. 1978). Taking part in the decision were Circuit Judges McWilliams, Barrett and McKay.

[49] *Id.* at 365.

[50] *Id.* Specifically, the court held:

> The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that *Weingarten* requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.

Id. The court announced this holding at the end of the case. Earlier, however, the court had stated that *Weingarten* cannot be interpreted "so broadly" as to include "pre-interview situations." *Id.* at 363. Apparently, the court meant to say that there was no violation of *Weingarten* rights in this case since the employees had not actually requested union assistance. *Id.* at 363.

[51] In the court's view, the 17 1/2 hour time lapse between the time the employees were notified of the meeting and the time it took place was "adequate opportunity" to consult with their union representative "on their own time." *Id.*

extenuating factors."[52] Only if the representative is sufficiently apprised of the "incident" and "extenuating factors" will the "fearful or inarticulate" employee's job interests be effectively protected.[53] Without prior disclosure of relevant information the representative's role will be significantly reduced.

As the Supreme Court noted in *Weingarten*, the presence of a "knowledgeable" union representative can also assist the employer in "getting to the bottom of the incident occasioning the interview."[54] If an employee has not consulted with his representative and is personally unable to convey the circumstances surrounding the incident, the interview will be of little value to the employer. On the other hand, if the employee has previously consulted with his union representative, the representative may help to expedite the interview process either by providing actual information or by lending a sense of security to the employee. In this way, the employer will not be subjected to unnecessary inconvenience and delay and the stated goals of *Weingarten* will be furthered.

C. Roadway Express, Inc.: *Accrual of the Right*

Another recent decision addressing the question of when an employee's right to representation accrues is *Roadway Express, Inc.*[55] In that case, a dock employee accused of having advanced threats against his supervisor was requested by the supervisor to accompany him to an office in the dock area.[56] The employee refused, insisting that he would only submit to an interview if he could be accompanied by his shop steward who was due to arrive in four hours.[57] The supervisor left the dock area but later returned and repeated his request that the employee meet with him in his office.[58] When the employee again refused, he was ordered to leave the dock. In addition to this "part-day suspension," the employee received a written warning for "flagrant disobeying of orders."[59]

An unfair labor practice charge was subsequently filed against the employer alleging that the employee had been disciplined for

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[52] 420 U.S. at 263; *see* notes 12-14 *supra* and accompanying text.

[53] *See Amax, Inc.*, 227 N.L.R.B. at 1190.

[54] 420 U.S. at 263.

[55] 246 N.L.R.B. 1127 (1979).

[56] *Id.*

[57] *Id.* The employee, Drake, was a member of the night shift. The shop steward was due to arrive "at the commencement of the day shift." *Id.*

[58] *Id.*

[59] *Id.*

invoking his *Weingarten* rights.[60] As a preliminary matter, the Board held that an employee's *Weingarten* rights mature "at the commencement of the interview," whether that interview commences "on the production floor or in a supervisor's office."[61] Additionally, the Board found that the employee had properly invoked these rights when initially confronted by his supervisor.[62] Curiously, however, the Board determined that the supervisor was not guilty of an unfair labor practice when he suspended the employee for four hours following his second request that the employee submit to an interview.[63] Although the employee had a right to refuse to participate in the interview absent union assistance, he had no right to ignore the supervisor's order to accompany him to a nearby office.[64]

The Board's conclusion in *Roadway Express* is confusing and leaves room for varying interpretations. The Board's finding that the employee had properly invoked his *Weingarten* rights on the dock suggests that the interview had begun at that point.[65] Nonetheless, it was determined that the employee acted at "his or her peril" in refusing to agree to leave the dock and accompany the supervisor to his office.[66]

In justification of its position, the Board found that *Weingarten* cannot be read to "undermine" an employer's "right to maintain discipline and order."[67] The facts of the case, however, did not clearly establish that the employee's presence on the dock area posed a

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[60] *Id.*

[61] *Id.* at 1128.

[62] *Id.* As such, the majority found that the supervisor could not have required the employee to proceed with the interview in the absence of a union representative's assistance. *Id.* at 1129.

[63] *Id.* at 1128.

[64] *Id.* at 1129. Specifically, the Board stated:

> If the employer . . . asks the employee to leave the production area and go to an office or some other location where further discussion is contemplated, then the employee acts at his or her peril if he or she declines to do so. Accordingly, we find that while Drake was entitled to refuse to participate in an investigatory interview in the absence of the requested representative, he was not privileged to ignore Respondent's order to leave the dock area.

Id. at 1128-29. This would seem to suggest that an employee must first honor an employer's order to move to another location before invoking his *Weingarten* rights. Yet, the Board specifically held that "an employee's *Weingarten* rights . . . mature at the commencement of the interview, be it on the production floor or in a supervisor's office." *Id.* at 1128. More importantly, it was found that in *Roadway Express* the employee had "properly invoked his *Weingarten* rights" when first confronted by his supervisor on the dock. Why, then, would the employee be required to go to his supervisor's office to re-invoke those rights?

[65] *See* note 64 *supra*.

[66] 246 N.L.R.B. at 1128.

[67] *Id.*

threat to the employer's business. To the contrary, the employee had apparently resumed his duties after initially refusing to submit to the interview.[68] If the employee's presence on the dock did in fact pose a threat to the employer's business, it is curious that the supervisor did not order the employee off the dock immediately after his refusal to submit to an interview. Instead, he did so only upon returning and making a second request. The clear inference is that the supervisor was really punishing the employee for refusing to be questioned without the presence of his union steward. As Chairman Fanning pointed out in his dissent, the supervisor "admitted [the employee] was ordered off the premises . . . because he disobeyed [his supervisor's] order to go with him to the office."[69] Consequently, disciplinary action was taken "*precisely because* he refused to submit to the interview in the absence of the requested assistance."[70]

The Board has previously held that once a valid request for representation is made, "the burden is on the employer to either (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all."[71] The Board's ruling in *Roadway Express* entirely ignores this precedent and in so doing provides a mechanism whereby employers can sanction non-consenting employees under the guise of "maintaining discipline and order," when, as in *Roadway Express*, the threat to business is tenuous.[72]

D. Pacific Gas & Electric Co.: *Choosing a Representative*

The NLRB has adopted a seemingly inflexible rule regarding the right of employees to choose their own representatives for employer-employee interviews. Stated in its simplest form, an employee has a right to the presence of a union representative but has no right to request a specific individual.[73] It is the manner in which this rule has been applied and not the rule itself which is most troublesome.

The Board's position that an employer does not interfere with section 7 rights by conducting an employee interview in the presence

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[68] *Id.* at 1131 (Fanning, Chairman, & Jenkins, Member, dissenting).

[69] *Id.* (emphasis omitted).

[70] *Id.* at 1132 (Fanning, Chairman, & Jenkins, Member, dissenting) (emphasis in original). Indeed, the Administrative Law Judge had made a similar finding. *Id.*

[71] General Electric Co., 240 N.L.R.B. 479, 481 (1979).

[72] *But see* note 38 *supra*.

[73] *See* Coca-Cola Bottling Co., 227 N.L.R.B. 1276 (1977); THE BUREAU OF NATIONAL AFFAIRS, THE DEVELOPING LABOR LAW 5 (Supp. 1976).

of a non-requested union representative is admittedly sensible in the context of facts similar to those in *Coca-Cola Bottling Co.*[74] In that case, the requested representative could not be available for at least three days.[75] To decide the case otherwise would afford employees an undue advantage. They could regularly request the assistance of unavailable union representatives thereby postponing their interviews and interfering with "legitimate employer prerogatives."[76] The potential for abuse is so great that the Board's narrow reading of the *Weingarten* decision in that context is easily justifiable.

Unfortunately, the Board's recent holding in *Pacific Gas & Electric Co.*,[77] is not as easily justified. While in *Coca-Cola Bottling* it was clear that the requested representative could not be available for at least three days, in *Pacific Gas* the representative could have been present within twenty to sixty minutes.[78] In *Pacific Gas*, the employer operated two facilities within twenty minutes of each other and the union had assigned two stewards to each location.[79] The Board held that where union representation is available at a given location, the employer does not violate an employee's section 7 rights by denying a request for a specific union representative at a different location.[80]

The Board arrived at its conclusion despite the protestations of dissenting Member Jenkins who pointed out that:

> Sell [the shop steward] was a personal friend of the management personnel involved in the dispute, was under consideration for a management position with Respondent, and several days earlier had told Green [the affected employee] that because he [Sell] was being considered for that position, he "did not want to get involved in a controversial issue."[81]

Contrary to the majority's assertion that a duly designated union representative was ready, willing, able, and present,[82] it would appear that the representative was neither willing nor able. According to testimony, the shop steward had indicated an unwillingness to involve himself in "a controversial issue."[83] Although it is under-

[74] 227 N.L.R.B. 1276 (1977).
[75] *Id.* at 1276.
[76] *See Weingarten*, 420 U.S. at 258.
[77] 253 N.L.R.B. No. 154 (1981).
[78] *Id.* at 1143.
[79] *Id.*
[80] *Id.* at 1144.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1145.

standable that the Board would be hesitant to "complicate the already complex scheme" of representation at investigatory interviews,[84] individual employee rights to fair and adequate representation ought not be sacrificed for the sake of administrative simplicity.[85] The effect of the Board's holding in *Pacific Gas* was to force the employee to choose between accepting a purportedly disinterested representative, proceeding to the interview alone, or foregoing the interview entirely.

On facts such as those presented in *Pacific Gas*, where a union representative is incapable of providing able assistance, an employee should have the right to choose another representative. The Board need not overrule its decision in *Coca-Cola;* rather, it should limit the holding to situations such as that which arose in *Coca-Cola*. Employees ought not have the right to unduly delay interview proceedings, but they must, if *Weingarten* is to retain any viability, have the right to competent, unbiased, willing representation where such representation is reasonably accessible.

E. Materials Research Corp: *Employees as Representatives*

A rather complex question flowing from the issue of employee choice of representation is whether an employee, in the absence of union representation, may request that another employee be present at the employer interview. This issue is presently pending before the NLRB on an appeal from a decision of an Administrative Law Judge (ALJ) who held that *Weingarten* ought not be read to require an employer to grant requests for non-union representation.[86]

Materials Research Corp.[87] involved a situation in which an employee in a non-unionized plant was trying to organize a group meeting to protest a unilateral change in working hours.[88] He was subjected to questioning and given a warning by his employer for his organizational activities.[89] During the investigatory interview the

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[84] *Id.* at 1144.

[85] The duty of fair representation proscribes union conduct which is "arbitrary, discriminatory, or in bad faith." *See* Hiner v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967).

[86] Materials Research Corp., No. 2-CA-16385 (Washington, March 10, 1980) (Morton, A.L.J.).

[87] No. 2-CA-16385 (Washington, March 10, 1980) (Morton, A.L.J.).

[88] *Id.*, slip op. at 3. The employees in *Materials Research* worked in the precious metals department of employer's plant. Each day they were given certain quantities of precious metals to work with. At the end of the work day, these metals had to be returned to the custodian. In order to save production time which was being lost as a result of the employees standing in line to receive and later check the precious metals, the department supervisor instituted a new schedule which staggered employee hours. *Id.*

[89] *Id.*, slip op. at 4. The warning was given for violating company rules by failing "to follow the company grievance procedure and for organizing that group meeting" on company time. *Id.*

employee requested the assistance of a fellow employee. His request was denied.

The ALJ refused to read *Weingarten* as guaranteeing an employee's right to the presence of a non-union representative.[90] Relying upon part of the rationale of *Weingarten*, he determined that the co-worker could neither represent the interests of the employee being disciplined nor the interests of "other unit employees."[91] In the case of the individual employee, the co-worker "could not help protect any rights in an established grievance machinery" since the non-union employee "had no such rights."[92] Furthermore, he could not represent the interests of other employees since the employees had expressed an interest to remain unrepresented by their failure to elect union representation.[93] In short,

> [N]o useful function is fulfilled by requiring an employer, where its plant is unrepresented, to have two employees present in an investigation when, in the end, the employer is free to do whatever it chooses to do and is in no way answerable to a third party [such as] an arbitrator.[94]

The ALJ's decision[95] should be reversed by the Board because it entirely ignores precedent expanding *Weingarten* to include unorganized employees. For example, in *Illinois Bell Telephone Co.*,[96] an employee who worked in a unionized plant requested "that a fellow employee sit with her during a disciplinary interview."[97] The Board found that the employer interfered with the employee's section 7 rights by refusing the employee's request and proceeding with the interview.[98] In reaching its conclusion, the Board determined that

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[90] *Id.*, slip op. at 13. Although the Administrative Law Judge did not believe *Weingarten* was applicable to an unrepresented unit, he nonetheless found that the employer was guilty of a section 8(a)(1) violation, 29 U.S.C. § 158 (a)(1) (1976), by conducting coercive interrogation of employees "as to how and why the organized a group meeting," and by disciplining one employee "for his activities in organizing and participating in the group meeting." No. 2-CA-16385, slip op. at 13.

[91] No. 2-CA-16385, slip op. at 11.

[92] *Id.*

[93] *Id.* The ALJ believed that to permit the co-worker to attend the meeting and thus represent the interests of the other employees, "would go directly contrary to their expressed desire not to be represented." *Id.*

[94] No. 2-CA-16385, slip op. at 12.

[95] An ALJ's decision is often referred to as an "intermediate report." This report contains "findings of fact, conclusions of law and a recommended disposition or order." The Board will endorse the ALJ's intermediate report "as a matter of course" unless exceptions are filed by either party. R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATIONS AND COLLECTIVE BARGAINING 8 (1976).

[96] 251 N.L.R.B. No. 128 (1980).

[97] *Id.* slip op. at 932.

[98] *Id.* at 934.

the emphasis of section 7 and *Weingarten* was upon the employee's "right to act concertedly for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective bargaining representative."[99]

Similarly, in *Anchortank, Inc.*,[100] the NLRB determined that the representative right existed where a union had been elected but not yet certified.[101] In the Board's view, the Supreme Court's "primary concern" in *Weingarten* was to secure employees "some measure of protection" when faced with the threat of disciplinary action stemming from a confrontation with an employer.[102] As such, "the status of the requested representative, whether it be that of union not yet certified or simply that of fellow employee, does not operate to deprive employees of rights [secured] in section 7."[103]

The ALJ's analysis in *Materials Research* overlooks the fact that a fellow employee may still provide "aid or protection" to the "fearful and inarticulate employee." Moreover, the presence of another employee may create a valuable link between employers and employees. As previously discussed, the presence of a union representative serves the important purpose of keeping the bargaining unit educated as to management policies.[104] The lone employee faced with the threat of disciplinary action may fail to adequately understand the reasons for the employer's actions.[105] The fellow employee, whether or not union affiliated, may nonetheless be in a position to provide the employees with information important to job interests. More harmonious labor relations will be advanced since employees will understand what is expected of them.

IV. CONCLUSION

The section 7 right of employees to the assistance of a representative at employer-employee interviews is central to our system of industrial discipline. It was precisely that right which formed the

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[99] *Id.* at 933. The Board also noted that its holding would prescribe "no conflict" between the section 7 right to representation and the union's status as exclusive bargaining unit since "no officially designated union representative was available at the time of the interview and there was no agreement otherwise establishing "a procedure for representation at investigatory interviews." *Id.* at 934.

[100] 239 N.L.R.B. 430 (1978).

[101] *Id.* at 431.

[102] *Id.*

[103] *Id.*

[104] *See* notes 36-38 *supra* and accompanying text.

[105] *See* note 38 *supra* and accompanying text.

basis for the Supreme Court's decision in *Weingarten*. If that right is to retain any meaning whatsoever, then it must not be further limited by the Board or the courts.

Employees should have a right to the assistance of a representative at all employer interviews where it is reasonable to fear resultant discipline. Without such protection, important employee interests are undermined. In addition, employees should be permitted where practicable to choose their own representatives, union or nonunion, and they should be permitted prior consultation with those representatives. Only when the Board and the courts begin to so read *Weingarten* will employees fully enjoy the protective benefits intended by the Supreme Court.