NATIONAL ARBITRATION PANEL C # 10004

In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and UNITED STATES POSTAL SERVICE	GRIEVANT: B. Pugh POST OFFICE: Jacksonville, Florida CASE NO.: H4C-3W-C 28547

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Rodney A. Stone
Mr. Robert L. Tunstall

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: June 27, 1989

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not violate the parties' National Agreement when it provided the grievant with an alternate steward rather than the grievant's steward of choice when the regular steward was in overtime status. The grievance is denied. It is so ordered and awarded.

Date of Award:_____

_____
Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
AMERICAN POSTAL WORKERS UNION) ANALYSIS AND AWARD
)
AND) Carlton J. Snow
) Arbitrator
UNITED STATES POSTAL SERVICE)
(B. Pugh Grievance))
(Case No. H4C-3W-C 28547))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from December 24, 1984 to July 20, 1987. A hearing occurred on June 27, 1989 in Room 10841 of the United States Postal Service headquarters located at 475 L'Enfant Plaza in Washington, D.C. Mr. Rodney A. Stone, Labor Relations Executive, and Mr. Charles J. Dudek, Labor Relations Specialist, represented the United States Postal Service. Mr. Robert L. Tunstall, Assistant Director of the Clerk Craft, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. A court reporter for Diversified Reporting Services, Inc., reported the proceeding for the parties and submitted a transcript of sixty-nine pages.

All challenges to jurisdiction having been resolved, there were no further disputes about the substantive or procedural arbitrability of the matter; and the parties agreed that the arbitrator had jurisdiction to proceed to the merits of the case. The parties elected to submit post-hearing briefs, and the arbitrator closed the hearing on August 24, 1989 on receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties authorized the arbitrator to state the issue. It is as follows:

> Did the Employer violate the parties' National Agreement when it provided the grievant with an alternate steward rather than the grievant's steward of choice when the "regular" steward was in overtime status? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure--Steps

Step 1:

The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative.

Step 2:

(c) In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step.

Step 3:

(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee.

(e) If either party's representative maintains that the grievance involves an interpretive issue under the National Agreement, or some supplement thereto which may be of general application, the Union representative shall be entitled to appeal an adverse decision to Step 4 (National level) of the grievance procedure.

Step 4:

(a) The Union representative shall have authority to settle or withdraw the grievance in whole or in part.

ARTICLE 17 - REPRESENTATION

Section 2. Appointment of Stewards

A. Each Union signatory to this Agreement will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of each Union. Stewards will be certified to represent employees in a particular work location(s).

C. To provide steward service to installations with twenty or less craft employees where the Union has not certified a steward, a Union representative certified to the Employer in writing and compensated by the Union may perform the duties of a steward.

Section 3. Rights of Stewards

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

Section 4. Payment of Stewards

Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is a part of the employee's or steward's (only as provided for under the formula in Section 2.A) regular work day.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged the Employer's decision to provide the grievant with access to an alternate shop steward instead of to a steward who ordinarily handled disputes in the grievant's work area. The shop steward desired by the grievant was in an overtime status on his non-scheduled day. The grievant has maintained that management should have provided him access to the "regular" steward since he was on the clock and available.

The grievant maintained that he should not be compelled to present his complaint through the services of the alternate steward and filed this grievance in order to challenge the Employer's decision that denied the grievant access to

the steward who was working in an overtime status when the grievant desired his services as a shop steward.

On March 15, 1986, the grievant filed a Step 1 grievance, and the matter initially came for hearing as a National Arbitration on January 15, 1987. There was a challenge to the arbitrability of the dispute, and the arbitrator ruled on March 29, 1989 that there was jurisdiction for the arbitrator to proceed to the merits of the case. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that the Employer has violated the parties' agreement by denying an employe access to a "regular" shop steward and that such a contractual violation permits management to "shop" for a steward of its choice. It is the belief of the Union that, by denying the grievant access to the "regular" shop steward on the day the incident happened and waiting until the alternate shop steward could act in place of the regular shop steward,"the USPS is in effect 'shopping.'" (See, Union's Post-hearing Brief, p. 5). According to the Union, Article XVII of the parties' National Agreement has been designed specifically to prevent both parties from "shopping" for particular stewards to process

a grievance. The Union argues that, if the "regular" steward is available, a grievant has the right to the services of that individual.

The Union also maintains that a number of Step 4 settlements have resolved this particular dispute and have created binding precedents which deny management the right to limit access to a steward because he or she is in overtime status. According to the Union, Step 4 settlements in New York, Arizona, and California specifically have addressed the issue in dispute between the parties and have resolved it in the Union's favor. Accordingly, those decisions ought to provide the appropriate guidelines in this particular case, in the Union's view.

Nor, according to the Union, is there any basis for arguing that prohibitive business conditions justify denying a grievant access to his or her "regular" shop steward. The Union maintains that being in overtime status is simply a "way of life" in the Postal Service and that, absent an emergency, it does not provide a compelling reason for denying a grievant access to a "regular" steward.

B. The Employer

The Employer argues that management did not violate the parties' agreement when it gave the grievant access to the designated alternate steward at a time when his steward of choice was in an overtime status. It is the contention of the Employer that no language in the parties' agreement permits a grievant to "pick and choose his preferred steward." (See, Employer's Post-hearing Brief, p. 4). The Employer's contractual obligation, according to management's theory of the case, is to make available to a grievant the designated steward or alternate steward and that management complied with its obligation in this case. Since the designated steward was unavailable, the alternate steward became the "designated steward" for the particular tour in question, according to the Employer. The Employer argues that the grievant had access to a steward who had been selected by the Union and that it was appropriate for management to conclude that the alternate steward was competent to process grievances. According to the Employer, the fundamental issue is not the fact that the "regular" steward was in an overtime status but, rather, whether or not the Employer's decision to direct the grievant to the alternate steward was reasonable.

It also is the position of the Employer that the Union is attempting to obtain through arbitration what it has been unable to gain at the bargaining table. According to the Employer, the Union has sought a contractual provision that would permit shop stewards to be released for union activity

"while in an overtime situation and be paid for this activity at the applicable overtime rate." (See, Employer's Post-hearing Brief, p. 9). It is the contention of the Employer that the parties' collective bargaining agreement calls for shop stewards to be compensated at the applicable straight time rate and that if the "regular" steward had been assigned to confer with the grievant in this case, he would not have qualified for compensation for the time spent processing the grievance. To require the Employer to pay the steward at an overtime rate for conducting union business would engage the arbitrator in "contract making," according to the Employer. Management contends that this is an appropriate role for the parties in labor negotiations and not for an arbitrator.

VI. ANALYSIS

A. Is There a Right to Select a Steward of One's Choice?

It is a well-established principle of contract interpretation that, if language of a collective bargaining agreement is clear, an arbitrator, in the absence of countervailing evidence, should accept the standard meaning of the words in the parties' agreement. This is a rule in aid of contract interpretation that is deeply ingrained in Anglo-American law. As the highly respected Restatement (Second) of Contracts has expressed it:

> Unless a different intention is manifested, where language has a generally prevailing meaning, it is

interpreted in accordance with that meaning. (See, § 202(3)(a), 86 (1981)).

In the absence of contrary evidence, it is logical for an arbitrator to construe contractual words as having a meaning that is consistent with general usage. This rule of construction, of course, can be overcome by countervailing evidence about the actual intent of the parties. The general rule is one with deep roots in arbitration. (See, e.g., Phelps Dodge Cooper Products Corp., 16 LA 229 (1951); Ohio Chemical and Surgical Equipment Co., 49 LA 377 (1967); and Safeway Stores, 85 LA 472 (1985)).

The language in dispute between the parties in this case does not give a grievant a right to select a particular steward to represent him or her in a grievance. Article 15.2, Step 1(a) states that an employe "may be accompanied and represented by the employee's steward or a Union representative." (See, Joint Exhibit No. 1, p. 58). There is no indication that an employe may select a particular steward. Article 15.2, Step 2(c) provides that "the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step." (See, Joint Exhibit No. 1, p. 60). The qualifying language in this provision describing the steward relates to his or her authority to settle or withdraw a grievance and not to any right of steward selection by the grievant.

Article 15.2, Step 3(b) states that a "grievant shall be represented at the Employer's Regional Level by a Union

Regional representative or designee." (See, Joint Exhibit No. 1, p. 61). This provision does not include a shop steward as part of the process except, perhaps, as a "designee." Article 15.2, Step 4(a) makes clear that a "Union representative" shall have authority to settle or withdraw the grievance "in whole or in part." (See, Joint Exhibit No. 1, p. 63). This language is far removed from the level of a shop steward. The point is that none of the language describing a grievant's representation gives him or her the right to select a particular steward.

It is Article 17 in the parties' collective bargaining agreement that deals directly with the issue of "representation." No language in Article 17 gives a grievant a right to select a particular steward. Article 17.2(A) states that:

> A. Each Union signatory to this Agreement will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of each Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided that no more than one steward may be certified to represent employees in a particular work location(s). (See, Joint Exhibit No. 1, p. 73, emphasis added).

The language in Article 17.2(A) covers the appointment and certification of not only stewards but also alternate stewards. There, however, is no indication in the language that a grievant has been given a right to select a particular steward or alternate steward.

Article 17.3 of the National Agreement states that:

> When it is necessary for a steward to leave **his/** her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor; and such request shall not be unreasonably denied. (See, Joint Exhibit No. 1, p. 74).

The import of this provision is to establish a "reasonableness" standard in granting requests of stewards to perform union business.

Article 17.3 also states that:

> If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. (See, Joint Exhibit No. 1, p. 74).

What this language accomplishes is to incorporate into the parties' agreement what has come to be characterized as Weingarten rights. There will be a discussion of Weingarten rights later in this report. The important point at this juncture is that Article 17.3 does not give a grievant a right to select a particular shop steward even in the circumstance of an interrogation by a representative of the Inspection Service. It is important to note that, when the parties desired to specify a "particular" work location, they did so with drafting precision in Article 17.2(A). One court has observed that, "where the bargain is the result of elaborate negotiations in which the parties are aided by counsel, in such circumstances it is easier to assume that a failure to make provision in the agreement resulted not from ignorance of the problem, but from an agreement not to require it." (See, HML Corp. v. General Foods Corp., 365 F.2d 77, 80 (1966)). It, accordingly, is logical to conclude that a

reference in Article 17.3 to an employe requesting "a steward" does not establish a right of a worker to request "a particular" steward.

Article 17.4 of the National Agreement focuses on payment of stewards. It states:

> Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is part of the employee's or steward's (only as provided for under the formula in Section 2.A) regular work day. (See, Joint "Exhibit No. 1, p. 75, emphasis added.)

The language of Article 17.4 clearly states that the Employer will allow payment for authorized union duties of a shop steward only at "the applicable straight time rate" as part of a steward's regular work day. During negotiations between the parties in 1978, the Union proposed that:

> Time which is compensable pursuant to 4.B (contract administration and grievance processing) shall be considered as "work" required by the Employer for the purposes of payment. Such compensation shall be paid at the applicable straight-time rate if the time spent is part of the employee's regular tour of duty and shall be paid at the overtime rate if such time is not part of the employee's regular tour of duty. (See, Employer's Exhibit No. 4, p. 5, emphasis added.)

This proposal by the Union did not become part of the 1978 collective bargaining agreement between the parties.

During the negotiations of 1981, the Union returned to

this subject. The Union proposed that:

> Employer authorized payment as outlined above (contract administration and grievance processing) will be granted at the applicable straight-time rate, or applicable overtime rate providing the time spent is part of the employee's or steward's (only as provided for under the formula in Section 2A) work day. (See, Employer's Exhibit No. 5, p. 4, emphasis in the original).

This proposal in 1981 did not become a part of the 1981-84 collective bargaining agreement between the parties. The language of Article 17.4 is identical in the labor agreements between the parties for 1978, 1981, and 1984.

An arbitrator is as bound by the bargain of the parties expressed in their collective bargaining agreement as are they, and the parties in this case have been clear about the fact that "in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator." (See, Joint Exhibit No. 1, p. 65). Where the parties have been clear about their contractual obligations, it becomes a private law binding on the parties and arbitrator alike. As one scholar has observed:

> Parties agree to words that will control the resolution of later-arising disputes, but the words they select are given meaning by the context within which they are negotiated. The parties are bargaining out a collective agreement. By virtue of entering into the enterprise of ordering the workplace, they reasonably can be seen as adopting as an implied textual gloss the normal way the words they select have been interpreted in prior circumstances. By negotiating a collective agreement, the parties adopt this 'common law' gloss for the later interpretation of their agreement by an arbitrator. (See, "The Nature of the Arbitral Process, 14 Univ. of California (Davis) L.R., 551, 565 (1981)).

Both parties have recognized that the collective bargaining agreement is designed to prevent steward "shopping." (See, Union's Post-hearing Brief, pp. 5-6; and Employer's Post-hearing Brief, p. 4). Article 17.2(A) of the parties' agreement requires the Union to certify shop stewards and alternates. It is the duty of the Union to be certain that both stewards and alternates are adequately trained to assist employes with their grievances. As one author has observed:

> The shop steward plays an important role in the grievance-arbitration process. He is a critical factor in labor-management relations. What he says and does and how he handles situations will often determine whether a formal grievance will be filed. Many international unions conduct special training programs for shop stewards <u>because they recognize the fact that a shop steward needs special skills to perform his duties</u>. Merely because an employee is interested in union affairs does not qualify him to be an effective shop steward. (See, Trotta, <u>Handling Grievances</u>, 38 (1976)).

As another author has observed:

> As a union official, the employee has an added set of rights arising from the authority to represent the employees in the collective bargaining relationship. That right brings with it, as a function of this representational role, the opportunity for communication with representatives of management. The shop steward has a right beyond that of the individual employee to seek to persuade the supervisor to the union's point of view. In many cases, that effort results in animated exchanges and provocative language. (See, Zack, <u>Grievance Arbitration</u>, 37 (1989)).

It is for the union to select qualified individuals who can handle such provocative situations or train them to do so, and selecting a steward or an alternate steward in the order of priority listed by the union is not steward "shopping" on the part of the employer.

B. The Grievant is Demanding the "Best" Representation

In seeking the best representation he can obtain from the Union, the grievant was asking for more than the United States Supreme Court requires in a criminal prosecution. In arguing against steward "shopping" by either party, the Union has taken the position that alternate stewards are "usually not as competent as the regular stewards." (See, Tr. 64). The implication of this argument is that the grievant claims a right to the best representation.

Some years ago, the United States Supreme Court had occasion to discuss the issue of competent representation in a criminal trial when it decided McMann v. Richardson. (See, 397 U.S. 759 (1970)). In this case, the Court set as an appropriate standard for a criminal defendant that his or her counsel had acted as "a reasonably competent attorney." (See, 397 U.S. 759 (1970)). The U.S. Supreme Court has not given a broad reading to the McMann principle when testing "ineffective assistance" claims.

In a later decision, the United States Supreme Court has been clear about the fact that there are no mechanical rules to be applied in determining whether or not a criminal defendant has received ineffective assistance from his or her attorney. (See, Strickland v. Washington, 466 U.S. 668 (1984)). There are some basic duties of an attorney toward his or her client in a criminal setting. There is a duty to avoid conflicts of interest. There also is a duty to advocate the defendant's cause, including an obligation to consult with a

defendant on important decisions and keep the individual informed of important developments. Likewise, there is a duty to exercise such skill and knowledge as will render the legal proceeding a reliable testing process of the facts. The Court has also imposed on criminal attorneys a duty to make reasonable investigations or to make reasonable decisions that avoid the necessity of an investigation. Since only reasonably competent representation is required in a criminal prosecution where an individual's freedom or life may be at stake, it is not reasonable to apply an even stricter standard in a negotiated grievance procedure by requiring the "best" representation available in a grievance setting. The standard of adequacy of a shop steward is for him or her to exercise the customary skill and knowledge which normally prevail at the time and place.

C. Weingarten Rights

In 1975, the United States Supreme Court affirmed a decision of the National Labor Relations Board that employes, unless they are allowed union representation, have a right to refuse to submit to investigatory interviews in circumstances where they reasonably expect that the interview will resolve in discipline. (See, NLRB v. J. Weingarten, Inc., 420 U.S. 276 (1975)). The Weingarten decision does not directly apply in this particular dispute because there was no investigatory

interview involved. Yet, some cases that have applied the Weingarten standards will provide guidance in a dispute where there has been a request for a particular shop steward.

The United States Supreme Court based its decision in Weingarten on an interpretation of Sections 7 and 8(a)(1) of the National Labor Relations Act. Section 7 of the NLRA states:

> 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)). (See, 29 U.S.C. § 158).

Then, Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees to the exercise of the rights guaranteed in Section 7." (See, 29 U.S.C. § 159). The United State Supreme Court in Weingarten decided that an employer committed an unfair labor practice in violation of Section 8(a)(1) of the NLRA by interfering with rights of an employe protected by Section 7 of the Act. The employer did so by denying an employe her request for union representation at an investigatory interview at a time when the employe reasonably believed disciplinary action might result.

In its Weingarten decision, the U.S. Supreme Court made clear that the right to union representation in such an investigatory interview arises only if an employe requests such

representation. The right to request representation arises only when an employe reasonably believes that the investigation will result in disciplinary action. Nor may exercising the Weingarten right interfere with legitimate employer prerogatives. In other words, an employer may refuse a request for union representation and require an employe to choose between undergoing an interview without a union representative or having no interview and, then, foregoing any benefits that might result from such an interview. Nor does an employer have a duty to bargain with a union representative who attends an investigatory interview.

In Lennox Industries, Inc., the National Labor Relations Board listed three options available to an employer once a request for union representation has been made. (See, 244 NLRB, 607, 610 (1979)). The employer must (1) grant the request; (2) discontinue the interview; or (3) offer the employe a choice between continuing the interview unaccompanied by a union representative or avoiding any interview altogether. As previously mentioned, the parties to this agreement have absorbed the Weingarten right into their collective bargaining agreement and have made it a contractual right as well. (See, Joint Exhibit No. 1, p. 58).

With the passage of the Civil Service Reform Act of 1978, Congress provided Weingarten protection to employes in the federal sector. (See, 5 U.S.C. § 7114(a)(2)(B)). Congress provided that:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be

represented at
(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if
(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
(ii) the employee requests representation.
(See, 5 U.S.C. § 7114(a)(2)(B).

In the private sector, the "investigatory interview" qualification of the right to union representation has been administratively created and affirmed by the Court, but Congress has created this limitation by statute in the federal sector.

Another difference between the private and federal sectors with regard to Weingarten rights is that the Federal Service Labor-Management Relations Act expressly provides that:

> Each agency shall annually inform its employees of their Weingarten rights. No comparable statutory or administratively created duty exists for employers in the private sector. Indeed, the Court emphasized in Weingarten that the right to representation arises only in situations where the employee requests representation. Neither the Supreme Court nor any circuit court, has suggested that an employer has an obligation to notify an employee who has a qualified right to request union representation at an investigatory interview, absent a collectively bargained contract obligation to do so. (See, Campbell, "Weingarten in the Federal Sector," 40 U. Pitt L.R. 169, 182-83 (1981)).

The point of this recitation is to make clear that, while there are differences between the federal and the private sectors with regard to Weingarten rights, both sectors apply the Weingarten protection only to investigatory interviews. It is reasonable that in an investigatory interview where discipline may result, more stringent rules would apply than in a noninvestigatory interview. No judicial decision

or decision of the National Labor Relations Board has held that an employe has a right to a union representative of his or her choice in an investigatory interview. It would not be logical to apply a more stringent requirement and to allow an employe to select the union representative of his or her choice in a noninvestigatory interview.

There now exists in the United States a body of established arbitral principles and labor law decisions. The parties have not negotiated their collective bargaining agreement in a vacuum, and it is reasonable to assume, absent contrary contractual instructions, that the parties have brought their agreement to life within the context of relevant principles. As the eminent David Feller has observed, "There is a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer which an arbitrator assumes to exist." (See, Feller, "Arbitration," 2 Ind. Rel. L.J. 97, 104 (1977)). Judicial and administrative case law have been the most prolific producers of decisions with regard to boundaries of rights involving shop stewards. The parties are presumed to have known about these developments and to have expected an arbitrator to explicate their contractual rights within the context of developing case law in this area.

In Coca Cola Bottling Co. of Los Angeles, an administrative law judge described contours of a shop steward's rights. The judge stated:

> Nothing in the Supreme Court's opinion in Weingarten [indicated] that an employer must postpone interviews

> with its employees because a particular union representative, here the shop steward, is unavailable, either for personal or other reasons for which the employer is not responsible, where another representative is available whose presence could have been requested by the employee in the absent representative's place. Indeed, the Supreme Court was careful to point out that the exercise by employees of the right of representation at an interview may not interfere with legitimate employer prerogatives. Certainly, the right to hold interviews of this type without delay is a legitimate employer prerogative. (See, 227 N.L.R.B. 1276 (1977), emphasis added).

In Coca Cola, the shop steward was on vacation at the time of the investigatory interview, and there was no official alternate steward. The NLRB, however, concluded that, under the circumstances, the grievant should have asked for the Business Agent of the union to serve as a representative in the investigatory interview. The NLRB stated that "we see nothing in Weingarten which implies that it is the employer's obligation to suggest and/or secure alternative representation where the representative originally requested by the employee is unavailable." (See, 227 N.L.R.B. 1276 (1977)). There, of course, was no contractual design for alternate stewards in that case, as there is in this one.

The parties in this case have bargained for the availability of alternate stewards. An alternate steward was available in this case to handle the noninvestigatory interview. It arguably is a legitimate employer prerogative to require an alternate steward to process a complaint, rather than to pay a regular steward at an overtime rate. This construction is made more reasonable by the fact that the alternate steward, like the regular steward, is selected by the union.

Some have cited the Crown Zellerbach case for the proposition that an employer has a legal right not to provide a worker with "the best representative possible." (See, 239 N.L.R.B. 1124 (1978)). This decision must be understood within its context. The National Labor Relations Board upheld an administrative law judge's decision that, when an union representative was not available, the appointment of a fellow union member satisfied the worker's right to representation. In the case, a union representative had not been available because the company and the union had not negotiated a labor agreement at the time of the investigatory interview. The fellow union member to whom management referred the worker was a person whom the grievant found to be agreeable and who was a leading union advocate in the plant. The union member participated in the investigatory interview and did not act merely as a witness.

In Crown Zellerbach, the administrative law judge recognized that the Supreme Court had not defined with precision characteristics that an employe representative must possess. "The Board has made it clear that there are no magic words to describe those characteristics." (See, 239 N.L.R.B. 1124, 1127 (1978)). It was at this juncture that the administrative law judge cited the Chrysler Corporation case for the proposition that "it is not necessary that the employer provide for the employee the best representative possible." (See, 228 N.L.R.B. 1446 (1977), and 239 N.L.R.B. 1124, 1127 (1978)).

The administrative law judge in Crown Zellerbach stressed the fact that the policy reason for the Weingarten rule is to prevent an employer from dominating an "alone employee" in a disciplinary meeting. As the administrative law judge stated:

> Neither Weingarten nor any later Board case states that, in the absence of any union representative, as herein, an employee can insist that a union representative, as opposed to a third party, be present. (See, 239 N.L.R.B. 1124, 1127 (1978), emphasis in the original).

The point is that, if an employe cannot insist that a union representative be present at an investigatory interview when a fellow union member is qualified and available, then it is logical to conclude that an employe cannot insist on the presence of a regular steward at a noninvestigatory interview when an alternate steward, approved and appointed by the union, is available to perform the service.

The fundamental test is one of competence. In describing what a fellow union member accomplished at an investigatory interview in Crown Zellerbach and in concluding that a union official such as a shop steward could have done no more, the administrative law judge suggested that the validity of a fellow union member's appointment as a union representative in the absence of a regular union representative rested on the competence of the union member who acted as the worker's official representative. As previously suggested, in this present dispute the alternate stewards are presumed to be competent to act as official union shop stewards because they have been approved and appointed by the Union. If the alternate stewards are not competent to perform tasks associated

with grievance processing and contract administration, it, then, is the Union's duty to train or replace them.

In Roadway Express Co., the case involved an alternate union representative. (See, 246 N.L.R.B. 1127 (1979)). The regular committeeman in this case had left the work site earlier in the evening, and the employe was aware of this fact when he requested union representation. Three alternate committeemen had been appointed by the union several days before the investigatory interview. The Employer suggested the name of one of the alternates to the employe. He rejected the suggestion. There was some factual dispute about whether or not management had notified the employe about the alternate appointments, but a majority on the Board concluded that the employe had been apprised of the presence of a union official. (See, 26 N.L.R.B. 1127, 1130 fn. 14).

In Roadway Express, the Board made clear that there is no right to a specific union representative. The Board stated that:

> Nowhere in Weingarten does the Court state or suggest that an employee's interest can only be safeguarded by the presence of a specific representative sought by the employee, as opposed to being accompanied by any union representative. While we are sensitive to an employee's right to have a union representative present during an investigatory interview which the employee reasonably believes portends discipline, we also recognize that the exercise of that rise is not without limitation. (See, 246 N.L.R.B. 1127, 1129 (1979), emphasis in the original).

The Board rejected the administrative law judge's finding that there had been a violation of Section 8(a)(1) of the Act in

the case. The decision in Roadway Express made clear that an employe does not have a right to insist on a specific union representative in an investigatory interview. It is logical to conclude that the grievant in this case likewise does not have such a right because the dispute here represents a less compelling need in the sense that it related to a noninvestigatory interview.

Considerable guidance in this case is to be taken from the Pacific Gas & Electric Co. decision. (See, 253 N.L.R.B. 1143 (1981)). In this case, the National Labor Relations Board concluded that:

> [An employee may not] refuse the assistance of a union representative already on the premises and insist on the presence of someone else who is not readily available and who does not normally represent employees at that location.

In the Pacific Gas & Electric case, there were two facilities approximately twenty minutes apart. There existed an established practice of having the on site shop stewards handle grievances of "on site" employees, and the off site shop stewards handled grievances of "off site" employes. Mr. Green was an on site employe and requested representation at an investigatory interview. The employer provided him with the assistance of on site shop steward, Mr. Sell. The union had appointed two stewards at each site. The stewards at the on site facility were Messrs. Green and Sell. Mr. Green objected to Mr. Sell as his shop steward because Mr. Sell was friendly with the supervisor and also under consideration for a promotion. Mr. Green, in his capacity as a potential grievant, insisted on the presence of Mr. Lees, a

shop steward at the off site facility.

In response to this dispute, the National Labor Relations Board stated:

> The Supreme Court in Weingarten neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a specific representative sought by the employee. To the contrary, the focus of the decision [in Weingarten] is on the employee's right to the presence of a union representative designated by the union to represent all employees. (See, 253 N.L.R.B. 1143 (1981) emphasis added).

The NLRB stressed the fact that, since the union had appointed Mr. Sell as a shop steward, the employer acted reasonably in providing him to represent Mr. Green. The Board also concluded that the union had reaffirmed its support for Mr. Sell at a subsequent meeting with the union business representative, along with Messrs. Sell and Green. It was significant to the NLRB that seven months after Mr. Green's investigatory interview, Mr. Sell was still one of the on site shop stewards and had not been replaced by the union. The Board observed that:

> Our interpretation of Weingarten must be tempered by a sense of industrial reality. We do not advance to the effectuation of employee rights, or contribute to the stability of industrial relations, if we complicate the already complex scheme of Weingarten by introducing the notion that an employee may request this union representative instead of that one, perhaps from a far corner of the plant, and perhaps, in certain instances, contrary to the union's wishes. In the instant case, a duly designated union representative was ready, willing, able, and present. We would require no further. (See, 253 N.L.R.B. 1143, 1144 (1981) emphasis added.)

It is clear in the Pacific Gas & Electric case that the Employer could have made the steward of choice available to

the worker. The NLRB, however, stressed the fact that the time and expense of finding the off site steward and transporting him to the on site facility was an important consideration. According to the Board, such expense was not necessary in view of the fact that another union-appointed steward was available. The present arbitration case presents a similar situation in which the regular shop steward in overtime status could have been made available but at extra expense. It is not reasonable to require such extra expense in a noninvestigatory interview when such an added expense has not been required in an investigatory interview. In both Pacific Gas & Electric as well as the present arbitration case, union-appointed alternate stewards were available who would not have cost the employer additional expense.

Special circumstances might influence the right of an employe to select a shop steward of choice. In Illinois Bell Telephone Co., the NLRB held that an employe, Ms. Hatfield, could select the union member of her choice to represent her in an investigatory interview. (See, 1980 CCH NLRB 17389). In Illinois Bell, no union representative was available on Ms. Hatfield's shift. The union member that the employe requested was an employe and a former union officer. This individual was available to serve as the worker's representative. The NLRB stated that:

> The instant record presents no conflict between the employee's Section 7 right to a representative and the union's status as the employee's exclusive bargaining representative, since: (1) no officially designated union representative was available at the time of the interview; (2) Hatfield's union

steward had instructed her several days before the interview that, if called into an investigatory interview, Hatfield could select any union member as her union representative; (3) the supervisor stated that he would talk with Ms. Hatfield in the presence of her shop steward but no one else, and he made no effort to locate a shop steward; nor did he offer to delay the interview until a steward was available; and (4) the parties have not negotiated a procedure for investigatory interviews. (See, 1980 CCH NLRB 17389).

The present arbitration case is clearly distinguishable from Illinois Bell Telephone Co. This dispute did not involve an investigatory interview, and a union-designated alternate shop steward was available. But there was no union representative available on Ms. Hatfield's shift.

In summary, the cases previously discussed make clear that an employe does not have a right to select a union representative of his or her choice in an investigatory interview when an officially designated union representative is available. The Employer's needs and prerogatives are factors to be considered in deciding the limits of an employe's Weingarten rights. An assignment of overtime clearly constitutes an employer's prerogative. In the present arbitration case, the circumstances did not involve an investigatory interview; and extra overtime costs would have been incurred by supplying the worker with a regular shop steward while he was in overtime status. There was an officially designated alternate shop steward available in regular-time pay status. In light of the guidance to be drawn from these cases, it is not reasonable to require the Employer to provide the grievant with the regular steward when he or she is in overtime status and a union-appointed alternate shop steward is available.

D. The Matter of Collateral Estoppel

The concept of collateral estoppel or, as it is now called, issue preclusion, occasionally surfaces in arbitration. The basic idea is that, once a party has had an opportunity to resolve a matter definitively, there should be no further opportunity at a later time to engage in another dispute about the matter. Assuming the same parties who stood in an adversarial relationship to each other asserted a claim and had it resolved, the doctrine of collateral estoppel should prevent reassertion of the same claim at a later time. While the notion that a determination in one forum should prevent reassertion of a similar claim in another forum occasionally arises in arbitration, it customarily involves collateral civil proceedings and not the same arbitral system. (See, e.g., Kaiser Cement, 70-2 ARB 8531 (1970); Reynolds Metals Co., 59 LA 64 (1972); and Victor Metal Products Corp., 66 LA 333 (1976)).

The Union has argued that the doctrine of collateral estoppel should be applied in this case to prevent the Employer from pursuing its theory of the case. According to the Union, three Step 4 grievance settlements have decided the ultimate issue in this case. (See, Union's Post-hearing Brief, pp. 6-7). The Union has argued that, since these Step 4 grievance settlements determined that shop stewards could not be prevented from processing grievances solely because the shop stewards were in an overtime status, the Employer must now be prevented from relying on such a contrary contention in

arbitration. This is basically a collateral estoppel or issue preclusion argument.

It is logical to impose on the party asserting the benefit of the doctrine of issue preclusion the burden of introducing at least a preponderance of the evidence to show that the dispute in this case was the same as the dispute in a former proceeding. Since the Union has claimed that the issue presented already has been decided in prior Step 4 grievance settlements, the burden must be allocated to the Union to prove that claim. The Union has not carried its burden on this point.

The arbitrator simply has not received enough information to support the Union's assertion of issue preclusion. In a settlement agreement signed by Mr. James Facciola for the Employer and Mr. Kenneth D. Wilson for the Union, the arbitrator received a one page document setting forth a settlement in Inglewood, California. (See, Union's Exhibit No. 3, Case No. A8-W-0280/W8C-5B-C 3600). It is recognized that this settlement stated:

> A steward's request to investigate a grievance should not be denied solely because the steward is in an overtime status. (See, Union's Exhibit No. 3).

The arbitrator has received nothing beyond this bare statement of the parties' conclusion. Nothing has been provided about the facts of the case or the issues presented in the Step 4 grievance.

In a settlement agreement that emerged from a dispute in Albany, New York, the parties again concluded that "a steward's

request to investigate a grievance should not be denied solely because the steward is in an overtime status." (See, Union's Exhibit No. 1, Case No. H1C-1Q-C 30527). In this settlement agreement, the parties provided copies of the union and management positions in the Step 2 and Step 3 levels of the grievance. Yet, the arbitrator received only a copy of the Step 4 grievance settlement without any explication of the facts and issues presented there. Likewise, the parties provided some background material with regard to a settlement agreement arising from a dispute in Phoenix, Arizona. (See, Union's Exhibit No. 2, Case No. H4C-5K-C 7100). The settlement agreement, however, seemed to limit the issue in dispute to fact-finding or investigatory interviews.

At least one arbitrator has concluded that settlement agreements, in order to have precedential effect, must reveal not only the result of a negotiated settlement, but the facts and issues involved in the dispute as well. (See, Federal Aviation Administration, 68 LA 1213 (1977)). The arbitrator in Federal Aviation Administration concluded that "it would be necessary to analyze the totality of circumstances before one could gain a perspective" with regard to the precedential value of a negotiated settlement. (See, 68 LA 1213, 1217 (1977)). In this particular arbitration case, the Union has presented little or no record of the Step 4 settlement conferences in order to prove the issue preclusion for which the settlement agreements allegedly stand. The arbitrator simply has insufficient information to understand the nature of those

negotiated settlements in terms of their impact on this particular case. Nor did either party explore the impact of a Step 4 settlement agreement on clear and unambiguous language in the parties' collective bargaining agreement. (See, e.g., Lukens Steel Co., 35 LA 246 (1960)).

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not violate the parties' National Agreement when it provided the grievant with an alternate steward rather than the grievant's steward of choice when the regular steward was in overtime status. The grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 1-8-90